CONST/7/2018

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the Matter Between:-

TEBOHO MOJAPELA	**APPLICANT**
AND	
PRIME MINISTER OF THE KINGDOM OF LESOTHO	**1ST RESPONDENT**
MINISTER OF LAW, CONSTITUTIONAL AFFAIRS AND HUMAN RIGHTS	**2ND RESPONDENT**
POLICEMAN BELEME LEBAJOA	**3RD RESPONDENT**
THE DIRECTOR OF PUBLIC PROSECUTIONS	**4TH RESPONDENT**
THE ATTORNEY-GENERAL	**5TH RESPONDENT**

JUDGMENT

CORAM	**:**	**HON. ACTING JUSTICE M. MOKHESI**
DATE OF HEARING	**:**	**12 FEBRUARY 2019**
DATE OF JUDGMENT	**:**	**18 APRIL 2019**

Summary: *Constitutional law----Applicant applying for a declaration that utterances by the Prime Minister that the police should whip suspects when out public glare, unconstitutional--- the applicant having failed to satisfy the jurisdictional requirements of s.22 of the Constitution, the application dismissed with costs, on account of his conduct.*

Annotations **:**

STATUTES :1993 Constitution of Lesotho

Cases :

Lawyers for Human Rights v Minister in the Presidency [2016] ZACC 45

The President of the Court of Appeal v The Prime Minister and Others (C of A (CIV) No.62/2013 [2014] LSCA 1

Affordable Medicines Trust v Minister of Health and Another (cct27/04 [2005] ZACC 3

Mofomobe and Another v Minister of Finance and Another v The Prime Minister and Others C of A (CIV) 15/ 2017 CONST. 7/ 2017 C of A (civ) no.17/2017 [2017] LSCA 8 (12 March 2017)

Biowatch Trust v Registrar, Genetic Resources [2009] ZACC 14

PER MOKHESI AJ

[1] The applicant is a leader of a political party by the name of Socialist Revolutionaries Party. It would appear that he had publicly accused the First Lady of the Kingdom of Lesotho of hiring an assassin to kill him. She apparently reported the matter to the police. Consequent to her reportage to the police, the applicant was summoned by the police for questioning. But before everything else, earlier in 2017 the Prime Minister, Dr. Motsoahae Thabane had publicly, during a pitso at Ha-Matala and during one Parliamentary session, said that the police should whip the suspects when they are out of public glare. When summoned for questioning, the applicant did not oblige, but, in view out of what he alleges was his fear that he would be brutalized by the police on the strength of the Prime Minister's utterances, launched this application in an attempt to forestall his anticipated questioning. The applicant avers that the police were going to charge him with *crimen injuria* as contained in the **Penal Code Act No. 6 of 2010**. The applicant's case, in a nutshell, is aptly captured in his founding affidavit where he says (at para. 16):

> "I submit that the crime of *crimen injuria* is unconstitutional as it undermines my right to freedom of speech in the circumstances of this case. It comes as a result of the fact that I have publicly said that the first lady of Lesotho had employed an assassin to kill me. I submit that the first lady of Lesotho has a remedy in law of suing for defamation instead of using the state machinery of criminal justice if at all she feels that her dignity has been imported (sic) by my utterance."

[2] With the above context in mind, the applicant faced with the prospect of appearing before the police investigators for interrogation launched this application for relief in the following terms:

> "A rule *nisi* issued returnable on a date and time determinable by this Honourable Court calling upon the respondents to show cause, if any, why the following prayers shall not be made absolute:-
>
> a) The rules of court on modes and periods of service of process shall not be dispensed with on account of urgency herein.

b) That this Honourable Courts directs parties herein as to the filing periods and further conduct of the case.

c) That it is hereby declared that the crime of *crimen injuria* is unconstitutional and it is hereto expunged from the statute books of Lesotho as offence for which a citizen can be tried with before a criminal court.

d) That the publication by the Honourable Prime Minister of Lesotho that the police should whip a suspect while in private and not within the vicinity of the public be declared as unconstitutional and having no place in modern democratic society such as the kingdom of Lesotho.

e) That the Honourable Prime Minister of Lesotho should be ordered to make a public apology for having published a statement that the police whip a suspect while in private and not within the vicinity of the public.

f) That the government of Lesotho be ordered to give the applicant security whenever he is within the borders of Lesotho from the time of launching of the political party he leads, Socialists Revolutionaries (SR), on the 4th March 2018 until the next six (6) calendar months from the said date.

g) That policeman Beleme Lebajoa be interdicted from calling the applicant and requesting him to appear before him in relation to discussing the issue of impending charges for *crimen injuria* concerning or alleged against the First Lady of Lesotho pending finalization of this application.

h) That the respondents be interdicted from interfering with the applicant's right to participate in the official launch of the legal registered political party by the name of Socialist Revolutionaries which he leads pending finalization of this application.

i) That the respondents be ordered not to interfere with the applicant's fundamental freedoms especially those of association, movement, speech and related rights save by due process of law."

[3] On the 18th October 2018 when Mr. Molati was before us he conceded that prayers 1(a), (b) and (h) have been overtaken by developments and were accordingly withdrawn.

[4] A discussion thereafter ensued between the Bench and Mr. Molati on the issue of this court's jurisdiction in relation to prayer 1(c) which seeks a declarator that the crime of *crimen injuria* is unconstitutional and that it be expunged from the statute books of Lesotho as an offence." The issue centered on whether in view of the fact that the applicant has not been charged with this crime, and that sections 101 – 104 of the **Penal Code Act No. 10 of 2010** do not provide for *crimen injuria* but instead criminal defamation, and that the latter had already been declared unconstitutional in ***Peta v The Minister of Law and Constitutional Affairs [2018] LSHC 3 (18 May 2018)*****,** whether in view of this, he would wish to re-consider whether or not to proceed with the matter. Mr. Molati informed the court that he had already discussed the matter with the applicant and had advised him against proceeding with the matter. Mr Molati made it plain to this court that since the applicant would not share his stance, he was going to withdraw as counsel of record. On 13 October 2018 Mr. Molati had withdrawn as counsel for the applicant, but despite being given several chances, the latter failed either to attend in person or to secure legal representative to replace Mr. Molati. Now that a challenge to sections 101 – 104 of the **Penal Code** has fallen off, the only remaining prayers are 1(d) and (h).

(i) The publication by the Honourable Prime Minister that suspects be whipped, be declared unconstitutional.

[5] Before I deal with the above issue the first hurdle must be cleared by the applicant, and that is section 22 of the Constitution. The reason why resort must be had to the provisions of s.22 is that, it is the source of any applicant's standing requirements in rights-based review by this court. The said s.22 of the **Constitution of Lesotho 1993** provide (in relevant parts):

> "22(1) If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this ***Constitution has been, is being or is likely to be contravened in relation to him*** (or, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress…"
> (emphasis provided)

[6] It should be made plain from the outset that the decision of this court does not turn on whether the Prime Minister was right or wrong in uttering the alleged words, but rather on a threshold question of the applicant's *locus standi* in terms of section.22 of the Constitution as already said. The standing requirements in terms of section 20 of the Constitution is quite narrow or restrictive, in the sense that applicant(s) who approach this court for constitutional relief has to demonstrate a sufficient interest of their own. The applicant has to demonstrate that his or her rights under sections 4 – 21 of the Constitution have been, are being, or are likely to be contravened in relation to him as an individual (**see*: Mofomobe and Another v Minister of Finance and Another v the RT Honourable the Prime Minister and Others (C of A (CIV) 15/2017 CONST. 7/2017 C of A (CIV) No. 17/2017 [2017] LSCA 8 (12 May 2017)***.

[7] In *casu*, the words allegedly uttered by the Prime Minister were not directed at the applicant *per se*, but were generally made in relation to how the police should treat suspects upon arrest. When the words were uttered the applicant had not as yet been summoned to the police station for questioning; the words were uttered in 2017; while the words which the applicant uttered to render him the subject of police interest were uttered on 17th February 2018. The applicant in my judgment has failed to show that the impugned words were uttered in relation to him. It therefore, follows that the applicant has failed to demonstrate a sufficient interest of his own deserving of protection by this court.

[8] Costs:

Mr. Setlojoane, for the respondents, argued that despite this being a constitutional matter, in the event this court dismissing the application, costs order should be made against the applicant on the scale as between attorney and client. The basis for this submission is that the applicant is being frivolous and vexatious in his conduct of these proceedings regard being had to what Adv. Molati told the court. Adv. Molati informed this court that he advised the applicant about withdrawing the matter in view of the ***Peta*** decision, but this notwithstanding, the applicant insisted on proceeding with the matter. Despite displaying steadfastness in proceeding with this matter, the applicant did not appear in person or appoint a new legal representative to prosecute this matter. It is in view of these factual circumstances that Mr. Setlojoane urged this court to award punitive costs against the applicant.

[9] As a general rule, in constitutional litigation, an unsuccessful party against the state is not mulcted with costs. The reasons why this is so were authoritatively stated in the leading case of ***Biowatch Trust v Registrar, Genetic Resources [2009] ZACC 14*** This decision has been followed religiously in this jurisdiction.(see*:* ***The President of the Court of Appeal v The Prime Minister and Others (C of A (civ) No. 62/2013) [2014] LSCA 1*** at para. 27). The reason for this cautious approach is to avoid engendering 'chilling' effects which costs orders may have on litigants wishing to enforce their constitutional rights. This rule, however does not grant a blank cheque to litigants to institute frivolous and vexatious proceedings against

the state. However, there may be special circumstances where conduct of the litigant cries out for censure by way of a costs order, and this court will not hesitate to respond commensurately notwithstanding that a matter is a constitutional one. This is clearly a departure from the general rule, and was stated thus, in ***Affordable Medicines Trust v Minister of Health and Another (CCT27/2004) [2005] ZACC 3 at para. 138:***

> "There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the court which influence the court to order an unsuccessful litigant to pay costs."

[10] The concepts of frivolous and vexatious were defined in the ***Lawyers for Human Rights v Minister in the Presidency [2016] ZACC 45*** **at para. [19]** thus,

> "What is 'vexatious'? In *Bisset* the court said this was litigation that was; 'frivolous improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'. And a frivolous complaint? That is one with no serious purpose or value. Vexations litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious."

[11] In the present matter, can it be said that the conduct of the applicant deserves censure on the score that this litigation was frivolous and vexatious? When the applicant instituted these proceedings I have no doubt that he genuinely believed that his rights were adversely affected, albeit mistakenly, in the case of a challenge to sections 101 – 104 of the ***Penal Code 2010***. I am convinced even in respect of a challenge to the utterances of the Prime Minister that the applicant was not acting frivolously or vexatiously. The only problem I have is with his conduct. As a *dominus litis* he failed to appoint counsel to prosecute his case as he no doubt strongly believed in it, despite advice to the contrary, thereby wasting this court's time on several occasions while waiting for him to appoint new counsel. He failed to even appear in person to address this court despite knowing about the dates of hearing. The returns of service evinces this fact. This conduct is unacceptable especially

coming from a person who is *dominus litis*. Constitutional cases are accorded a certain status in this jurisdiction, that is why three judges are designated as a matter of practice, to hear a case, and for a person who is *dominus litis* to waste three judges's time at any given time without any reasonable justification should be frowned upon by this court, and be sternly discouraged with an appropriate costs order.

[12] In the result the following order is made:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of this application.

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M. MOKHESI AJ (MR)

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I agree **L. A. MOLETE J (MR)**

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I agree **E. F. M. MAKARA J (MR)**

FOR APPLICANT : NO APPEARANCE

FOR RESPONDENTS: ADV. R. SETLOJOANE (MR)