

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 45/99

HELD AT MASERU

IN THE MATTER OF:

LESOTHO COMMERCIAL CATERING FOOD AND ALLIED WORKERS  
UNION APPLICANT

AND

M.K.M BURIAL SOCIETY	1 <sup>ST</sup>	RESPONDENT
SIMON THEBE-EA-KHALE	2 <sup>ND</sup>	RESPONDENT

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**RULING**

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**This is a ruling on the objection to the respondent's representation in these proceeding by a legal practitioner. The union is represented by Mr. Ts'osane who is an official of the union and the respondents are represented by advocate Mohau. Mr. Ts'osane objected to Mr. Mohau's representation on the basis of section 28(1) (b) of the Labour Code Order 1992 (the Code) which provides that;**

- “(1) At any hearing before the Court, any party may appear in person or be represented:-***
- “(a) .....***
- “(b) by a legal practitioner, but only when all parties other than the Government, are represented by legal practitioners.”***

**Mr. Mohau for the respondents strongly argued that Section 28(1)(b) is contrary to Section 4(1)(h) and (0) of the constitution of Lesotho in that it denies the respondents their right to fair trial and to fair determination of their civil rights and obligations. He further contended that to the extent that the section gives an employee the right to dictate to an employer that he requires or does not require legal representation, it is denying respondents equality of treatment and equal protection of the law to which they are entitled under section 4(1)(0) of the**

constitution.

Mr. Mohau referred us to General Comment No. 13 (21) of the United Nations Human Rights Committee adopted at its 516<sup>th</sup> meeting held on 12<sup>th</sup> April, 1984. The comment relates to Article 14 of the International Covenant on Civil and Political Rights which deals inter-alia with the right to a fair hearing. In paragraph 2 of the comment the Committee notes that states parties which submitted reports in terms of the covenant “*failed to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law.*” This much is recognized by the Lesotho Constitution which states under Section 4 (1) (h) that every person is entitled to “*the right to a fair trial of criminal charges against him and to a fair determination of his civil rights and obligations.*” (emphasis added). Accordingly we are in agreement that in proceedings before this Court a party is entitled to a right to fair trial as espoused in the International Covenant on Civil and Political Rights and the constitution of Lesotho. The next issue is what does the right to a fair trial entail?

Not much jurisprudence emanating from our own case law seems to be available on the subject. However, in paragraph 9 of the Human Rights Committee’s General comment on article 14, the Committee observes that;

*“subparagraph 3(b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is “adequate time” depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer.”*

As we now know, even though there is frequent reference to an accused person, the comment applies with equal force to procedures to determine a person’s civil rights and obligations as is the case in casu. It goes without saying therefore, that according to the foregoing quotation, the right to legal representation is an integral part of a right to a fair trial.

We also share Mr. Mohau’s observation that in as much as Section 28(1)(b) seeks to give the employee an unfettered right to determine whether in any proceedings parties shall be represented by counsel or not, it is denying the other side namely, respondent employer the right to equality before the law and equal protection of the law. We find this to be so because in the majority of cases it is an employee who initiates the proceedings. It is therefore, that party who from the onset dictates whether the parties will be represented by counsel, because once the employee initiates the proceedings without the assistance of a lawyer the employer must

follow suit. Similarly, even if the employer initiates the proceedings it is the employee who will determine whether lawyers will be engaged or not by answering the applicant's case in person or through the assistance of an attorney as the case may be. Accordingly even if the employer might have initiated the proceedings with the help of counsel the moment the employee does not engage one, the employer's lawyer is bound to withdraw so that the parties can face each other in person before the Court.

Nothing could demonstrate inequality of treatment like the picture we have just painted. It cannot therefore, be possible that the legislature intended that situation, without a clear and unequivocal expression of an intention to mete out unequal treatment between the two classes of people. We are supported in this view by the general presumption of interpretation of statutes that the legislature intends to treat all persons affected by its laws on the basis of equality, unless parliament's intention is unmistakably clear, in which case the courts have no alternative but to implement the law, repugnant as it may be.

A question was put by a member of the court to Mr. Mohau whether this court has the power to pronounce on the constitutionality of Section 28(1)(b) of the Code. Mr. Mohau answered, correctly that it does not, but hastened to point out that that is not what this court is being called upon to do. He argued that the issue before this court is an incidental one to the question whether Section 28 is constitutional and that is, whether the section as it stands does not deny the respondents the right to a fair trial. Relying on the decision of Ramodibedi J in *Khalaki Sello .V. Pitso Pitso and Another* 1991 – 96 (2) LLR 1423 he argued that this court does have the jurisdiction to decide the incidental issue.

In the Sello case supra, the appellant had sought an eviction of the first respondent from the appellant's business site situated at Cathedral Area in Maseru Urban Area. The second respondent had applied for joinder alleging that the site was hers and that the first respondent was occupying the site with her permission. She annexed a copy of her lease to the application for joinder. In his judgment the trial Magistrate declined jurisdiction on the ground that if he ordered the eviction of the first respondent he would in fact be nullifying the lease of the second respondent which only the High Court could do. In dismissing the learned Magistrate's line of reasoning Mr. Justice Ramodibedi stated in his judgment that;

*“The real issue was not whether the court should cancel the second respondent's lease but whether her alleged allocation of the disputed site as evidenced by the said lease was lawful or not.”*

We find no justifiable reason why we should depart from this ratio decidendi.

It is however, the duty of the courts to give effect to the intention of the legislature. It seems to this court that in the case of the Code the intention of the legislature

was infact to take away the right to legal representation in certain circumstances. Devenish on Interpretation of Statutes 1992 Juta & Co. at P. 173 quotes Marais J in Libala .V. Jones No. & the state 1988(1) SA600 where the learned judge stated that;

*“the right to legal representation in any enquiry which could have as its consequences the deprivation of personal liberty is a fundamental common law right of the highest importance.”*

We have already seen that in terms of section 4(1)(h) of the constitution this extends to determination of civil rights and obligations. Maxwell on the interpretation of Statutes compliments Marais J by submitting that;

*“Statutes which encroach on rights of the subject whether as regards persons or property are subject to a strict construction .... It is a recognized rule that they should be interpreted if possible, so as to respect such rights.”*

At P. 160 of his book Supra Devenish submits that;

*“Statutes should as far as possible, be construed in conformity with the common law rather than against it and it cannot be assumed that merely because the statute creates a new obligation and prescribes a means of enforcing that obligation the ordinary remedies are excluded. However, if it is categorically clear from both the language and the import of the statute that it is designed to alter the common law then full effect must be given to this object. Alteration to the common law or the inference must be such that we can come to no other conclusion.”*

It is common cause that in 1992 when the code was enacted there was in place a bill of rights contained in an Act of Parliament which did not profess to be the supreme law. (The Human Rights Act No. 24 of 1983) However, subsequent to 1992 a constitution was enacted in 1993 which provides in Section 2 that;

*“This constitution is the supreme law of Lesotho and if any other law is inconsistent with this constitution, that other law shall, to the extent of the inconsistency be void.”*

There is no doubt in our minds that the constitution has an overriding effect over any other law, the Code included. Accordingly, the constitution having restated the common law position of the fundamental right to legal representation, it is our view that if the Code wished to alter it, it should have expressly stated that it is an exception to the general rule. Moreover the constitution being a latter statute more clearly spells the intention of the legislature and that intention is to uphold the common law right to legal representation. Furthermore, we can conceive of no dual

situation where the constitution on the one hand upholds the common law and the Code on the other hand seeks to alter it. The irresistible conclusion and only inference that we can draw is that the legislative intention is to ensure fair trial by among others upholding the right to legal representation. In the premises the objection to Mr. Mohau's representation of the respondent is dismissed with costs.

**THUS DONE AT MASERU THIS 4<sup>TH</sup> DAY OF JULY 2000.**

**L.A. LETHOBANE**  
**PRESIDENT**

**M.S. MAKHASANE**  
**MEMBER**

**I AGREE**

**C.T. POOPA**  
**MEMBER**

**I AGREE**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MR. TS'OSANE**  
**MR. MOHAU**