

CRI/T/95/02
IN THE HIGH COURT OF LESOTHO

In the matter of:-
MOAFRIKA NEWSPAPER

RE: RULE NISI (SUB-JUDICE MATTER)
(In Rex vs Mokhantso and Others)

JUDGMENT

CORAM : JUSTICE S.N. PEETE
DATE : 17th FEBRUARY, 2003

Headnote

Freedom of Expression - Section 14 of Lesotho Constitution -The scope of the Subjudice Rule- Limitations of

Where during pending criminal proceedings a publication in a newspaper to the effect that "the killers of the deceased have not been arrested and prosecuted", this per se does not violate the sub-judice Rule, because it is in the interests of justice that all suspects be brought to justice. This should not prejudice a judicial mind over the innocence or guilt of the accused presently before court. Since they have already pleaded their innocence or guilt will be determined at the end of the criminal proceedings.

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The subjudice rule places a temporary limitation upon freedom of expression regarding a comment that creates a real and substantial risk of prejudice to the fair determination of the proceeding pending in court.

Some time after the commencement of proceedings in this criminal trial, a certain caption in the Moafrika Newspaper came to the attention of the court. It reads :-

"Ntsu Mokhehle and P.B. Mosisili, who assassinated S.M. Baholo, 434 weeks ago, on April 14, 1994? The assassins of Selometsi Baholo have not yet been arrested and charged."

This caption having come to my notice, I suo motu called upon the Editor of Moafrika Newspaper, Mr Ratabane Ramainoane to show cause why-

"On November 18, 2002 the caption appearing on the right upper corner of Moafrika Newspaper of September 20, 2002 should not be declared by this Court as being,

prejudicial to the proceedings, subjudice to Criminal Trial 95/02, and why the said caption should not be ordered to be removed from further publication of Moafrika Newspaper, until the determination of these proceedings."

My concerns were originally not ill-founded in the least as I held an honest view that once the trial over Mr Selometsi Baholo's death had begun in earnest, the caption in question had equivocal meanings or innuendos because it was - I must say - ambiguous and also inelegant and that it could likely prejudice these pending proceedings.

See Attorney General vs Mthembu - 1981 (2) LLR 527 where Cotran CJ held that the courts of law can protect their integrity and independence suo motu whenever or wherever contempt becomes known to the court.

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It is not uncommon or is it improper for a judicial officer to buy and read a newspaper. My concerns were kindled by reference to the circumstances over the death of Selometsi Baholo - a deceased in a criminal trial over which I happen to be presiding. As Humphreys J. in *Delbert Evans vs Davies and Watson* [1945] 2 All E.R. 167 commented-

"I think it is a fallacy to say or assume that the presiding judge is a person who cannot be affected by outside information. He is a human being and while I am not saying for a moment that it is likely that any Judge would give a decision which he would not have given but for information which had been improperly conveyed to him, it is embarrassing to the judge that he should be told matter that he would rather not hear and which makes it much more difficult for him to do what is his duty."
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A trained judicial mind is however capable and indeed able to dismiss or ignore any offending matter and decide the matter impartially upon the facts adduced and law applicable.

My concerns were however raised because the accused before this court are presently charged with having allegedly killed Mr Selometsi Baholo on the 14th April 1994, and the caption poses a question even to the now deceased Ntsu Mokhehle and to P.B. Mosisili. It ask pensively-

"who assassinated S.M. Baholo 434 weeks ago on April 14, 1994? The assassins of Selometsi Baholo have not been arrested and charged."

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It was not in dispute that even though the late Baholo had lost his life on the morning of the 14 April 1994, some five years passed before anyone was arrested or charged in connection thereto despite the fact that Lesotho soldiers were seen by all and sundry at the scene that morning. I am drawing no conclusions over the inaction that prevailed throughout.

The arrest and charging of offenders in Lesotho are the primary functions of the police; their ultimate prosecution rests with the Director of Public Prosecutions. See generally our

Criminal Procedure and Evidence Act of 1981. It is important to note here that prosecution of offenders is under the discretion of the Director of Public Prosecutions who however cannot prosecute if the police have not investigated the case, arrested and charged the suspects.

It is common cause that the investigation of this case took some five years to complete before suspects - if one can call them such - were arrested charged and remanded. The sloth or the lull and prevarication in this matter seems to have raised the concerns of the Moafrika Newspaper - hence the corner caption. I am informed that it began to be printed even much earlier before the arrests and indeed the commencement of these criminal proceedings; and the editor has continued to permit its printing thereafter - presumably even till today.

It is common cause that the Moafrika is a weekly newspaper that receives a wide circulation in Lesotho and the caption in question which is conspicuously printed at the right upper corner of the paper is seen by many

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a people quite often. But as Georges C.J. in S.v. Hartman - 1984 (1) SA 305 stated -

"It seems to me not a proper approach to determine whether there is a real risk that a publication will interfere with the due administration of justice by attempting to forecast the responses it could provoke from other persons" -page 313 (B-C)

It must therefore be noted that the test to be applied is not whether the average person (or potential witness) is likely to be affected by the caption. The main purpose of the common law subjudice rule is to protect the fair administration of justice against any statement that has the substantial effect of prejudicing the impartiality, dignity or authority of the court which is seized with the pending court proceedings.

As Mr Mda correctly pointed, the sub-judice rule constitutes a common law's long standing and recognized limitation upon the constitutional freedom of expression. It is contravened by publication of any material which objectively interferes, influences or prejudices the conduct of pending legal proceedings or, as Mr Mda put it, prejudices the issue at stake in those proceedings. He quoted in support thereof S. v Hartman and Another -1984 (1) SA 305 (ZSC) where the then Chief Justice Georges of Zimbabwe Supreme Court had this to say:

"It is permissible therefore to make an inroad into the protected right of freedom of speech in order to maintain the authority and independence of the courts but that inroad should not be wider or deeper than is required for the achievement of the declared objective". Page 310 C-D.

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The learned Chief Justice of Zimbabwe went further to hold that the test as laid down in S v Van Niekerk 1972 (3) SA 711 (tendency to prejudice or interfere with administration of justice in pending proceedings) would make

"too great in inroad into the right of freedom of expression set out in the Declaration of Rights" (of the Zimbabwean Constitution (section 20) "Courts of justice can certainly be credited with being somewhat more critical than to accept as true whatever may appear in periodical publications " ~ page 311 at A-B.

Professor Dugard has this to say:

"The objection to this test (van Niekerk) is that it fails to take into account the fact that the judges by training are unlikely to be influenced by most comments on pending proceedings ... " South African Law Journal 1972 (89) page 278.

The legal position

Since 1993, Lesotho has enjoyed a democratic dispensation hitherto unknown. With it, came the fundamental rights and freedoms which are the replicas of the fundamental pillars in the legal orders of all civilized nations of the world. Under chapter two of our Lesotho Constitution are enshrined and entrenched the Fundamental Human Rights and Freedoms one of which is the "Freedom of Expression." The section 14 of the Constitution reads thus:

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14.1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

1. in the interests of defence, public safety, public order, public morality or public health; or
2. for the purpose of protecting the reputations rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining of authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or
3. for the purpose of imposing restrictions upon public officers.

(3) A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the freedom guaranteed by

subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters

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specified in subsection (2) (a) or for any of the purposes specified in subsection (2) (b) or (c).

(4) Any person who feels aggrieved by statements or ideas disseminated to the public in general by a medium of communication has the right to reply or to require a correction to be made using the same medium, under such conditions as the law may establish.

About the freedom of expression and of the media there are a plethora of authorities and learned statements from the Supreme Courts and jurists in many democratic nations like United States of America, England, India and recently, South Africa. A dynamic and living jurisprudence characterised by a marked philosophy has been heralded into existence and it is now internationally recognized that a free press is a fundamental pillar of a free society. Without a free media there is no free society. A free media is the bulwark and watchdog of the public interest. A free media is a means of mass communication and if responsibility characterizes it, it becomes a reliable barometer or litmus of public opinion.

In a democratic society, a free media must also be investigative and stand ready to expose any bureaucratic secrecy, underhand dealings or corruption. It must call all the state institutions to account.

Administration of criminal justice starts where investigation begins or ought to begin and traverses all stages of an open public trial till the end. It is in the interests of justice that all persons who commit offences- regardless of rank - must be brought to book.

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As guardians of the Constitution (sections 2 and 22) and of the fundamental freedoms guaranteed under Chapter II, the High Court and Court of Appeal of Lesotho are usually disinclined to be seen to gag or muzzle the media. See also *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA). Justice - as we know it - is a "public affair" which must be seen to be administered or dispensed without bias, fear or favour. It has been said that justice must be subjected to scrutiny - but not ridicule.

I am the firm holder of a view - a view no one can move me from - that the freedom of press as a guaranteed right under our Constitution must be held in high regard and esteem moreso by the courts of law themselves. This will serve to show that the courts do not exist in "an ivory tower" and are not unassailable or their decisions unimpugnable and above criticism.

In the case of *Ambard v Attorney General of Trinidad and Tobago*- 1936 (1) All E.R. 704 (Privy Council) it was held by Lord Atkin that -

"But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: She must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men " - page 709.

The Chief Justice Bhagwati of India has recently opined that -

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"It is essential in a country governed by the rule of law that every decision must be made under the rule of law and not under pressure of one group or another or under a threat of adverse criticism by irresponsible journalists or ill - intentioned politicians and if a judge is to be in fear of personal criticism by political or pressure groups or journalists while deciding a case, it would most certainly undermine the independence of the Judiciary as is happening in some countries and those who indulge in such improper or intemperate and even sometimes vitriolic criticism or attacks on judges little realize what incalculable damage they are doing to the institution of the judiciary." - "Independence of the Judiciary in a Democracy -1997 Human Rights Solidarity (AHRC Newsletter) vol.7 no.2 at page 34.

I treasure this statement of wisdom.

This caption that has currently appeared in the Moafrika Newspaper, in my view, is qualifies as a public comment over the tragic events of April 14th, 1994 which resulted in the death of the then Deputy Prime Minister. It however raised some concerns to me as presiding judge in this case in which the indictments allege that some or all of the accused participated directly or indirectly in the said killing. The caption raises a unique question whether true perpetrators have not been brought before the court. It may convey a meaning that this trial is on a "wild goose chase" or this court is "barking at the wrong tree" - namely that these accused before court are being wrongly charged and prosecuted. I will however not allow myself to wander into the murky realms of speculation!

All accused who now happen to be facing the charges as preferred by the prosecution, enjoy in this Court the presumption that they are innocent until their criminal complicity has been proven beyond the reasonable doubt by

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the crown. This court will do nothing to tarnish or prejudice that hallowed presumption even if that may have the effect of limiting the sub-judice rule.

I am sitting unfortunately without the usual assistance of assessors and this has indeed placed a great burden upon me to assess alone both the law and fact in this case. Without any judicious self-glorification or flattery, I should state that I have had some legal

experience ranging from 1972 (some good 30 years); I have also taken a solemn judicial oath of office five years ago. Fear, favour or bias, regardless of the source, are completely distasteful to me. I am of the view that despite multitudinous misgivings which formerly crossed my mind when I first read the caption after this trial had began, there now appears to me no real possibility or risk of my being consciously or subconsciously influenced by this extra-curial caption because as a judge -now sitting alone- I am imbued (or supposed to be) "with basic impartiality, legal training and capacity for objective and unemotional thought" - Re Chinamasa - No SC 113/2000 (Zimbabwe Supreme Court); 2000 BHRC 519.

I do not think that the caption in the Moafrika Newspaper has any obvious effect of scandalizing or prejudicing these criminal proceedings or labelling them "a sham". If there are some people who are not in the dock before this court today and but are indeed criminally liable to the charge or charges as preferred, that is not for the court to determine at this stage and indeed, as it is always said, "the arm of the law is very long, their time for reckoning is coming". If Moafrika Newspaper has sources which can lead to the ultimate arrests and prosecution of these "assassins of Selometsi Baholo", so

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be it. It should not be gagged in that regard. The comments made by Gubbay C.J. in Re Chinamasa (supra) are indeed worth quoting: -

"This court has held that the provision (section 20 of the Constitution) is to be given a benevolent and purposive interpretation. It has repeatedly declared the vital and fundamental importance of the freedom of expression to the Zimbabwean democracy.

... The most significant (objective) is ... "it assists in the discovery of the truth. The 'search for truth' rationale has been articulated in terms of the famous "market-place of ideas" concept This holds that truth will emerge out of the competition of ideas" - page 532 (g-h).

"It is difficult to imagine a more crucial protection to democratic society than that of freedom of expression. Without the freedom to express, interchange and communicate new ideas and advance critical opinions about public institutions, a democracy could not survive." Page 533 (a-b) - see also Chavunduka vs Minister of Home Affairs, Zimbabwe - 2000 (4) SA 1 at 9E-G.

Consequently, I am of the view that statement made in the Moafrika on a matter of public interest such as the one in casu even though seemingly outrageous, offensive or intemperately worded, still comes within the protection of section 14 of the Constitution of Lesotho. This should not be taken to offer a carte blanche to the press to invade or abuse the subjudice rule without good cause and a true sense of responsibility.

I have already held that the High Court is the bulwark of the essential freedoms of our newly acquired democratic dispensation. I should hasten to add without any equivocation that whilst the freedom of expression (media) may be limited by a salutary principle such as the time-honoured sub-judice Rule - the latter must always be narrowly interpreted and "necessity for any

restrictions must be convincingly established" - *The Observer v U.K.* [1991] ECHR 13585/88 at para 59. It has also been held by the European Commission for Human Rights that freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive but also extends to those that offend, shock or disturb! Such are the demands of that pluralism, tolerance, broadmindedness without which there is no democratic society - *Jersild v Denmark* - 1994 ECHR 15890/89. We live - whether we like it or not - in an egalitarian, pluralistic and global society which is or ought to be characterized by tolerance and broadmindedness. In all democratic societies, the press plays an essential role in that although it should not overstep certain bounds, in particular in respects of the reputation and rights of others, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information, comments and ideas on all matters of public concern and interest. Modern journalistic freedom today even enjoys some limited degree of exaggeration or even provocativeness!

I do not honestly at all think that the caption - as it stands - unduly impugns upon the authority or dignity of this court. It may have some unfortunate inelegance or a ring of mischief about it; it may even sound offensive to some people. I have carefully considered all possible meanings and innuendos capable of being imputed to this caption and any likely prejudice they may have on the judicial course of these proceedings and I have found that whereas the caption looks or sounds unfortunate or mischievous, there is no real likelihood that it may prejudice the fairness in these proceedings. The crown in my view still bears throughout the onus of linking all the accused

to the offences charged - and this principally involves important matters of law and fact.

I should say therefore it is better wisdom to ignore this caption when considering the important determinations and indeed grave deliberations yet to be made in this case. Whether wrong people have been arraigned and the true culprits still at large, is a matter to be determined at the end of the day. I am not moved at all by Mr Mda's eloquent demagoguery that a removal order of the caption will create a perception that the accused are being identified as the assassins who have now been arrested and are being prosecuted. My serene judicial mind is unlikely to be influenced either by the caption content or its removal. I choose to ignore it completely and effectively.

I therefore hold that the rule nisi be discharged forthwith.

I should take this opportunity to thank Mr Z, Mda, the incumbent President of the Law Society of Lesotho, to have taken this matter up pro deo at rather short notice and to have made brilliant researches which this court found very helpful indeed. For all his pains, I hope he will be reasonably rewarded pro deo by the office of the Registrar.

I would be failing my duty if I were to conclude this judgment without a note of caution. The subjudice rule is an important and useful process whereby the proper administration of justice is protected against extra-curial statements which have a substantial risk of

prejudicing or interfering with the pending court proceedings. Modern courts today should interpret this

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limitation on the freedom of expression restrictively safe in case where real and substantial risk exists. When publishing critical comments over pending proceedings the media should do so advisedly and with a full sense of responsibility without creating any risk or prejudice to those pending court proceedings.

S.N. PEETE
JUDGE

For Moafrika Newspaper: Mr Z. Mda