

16

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 27 of 1969

ON APPEAL
FROM THE LESOTHO COURT OF APPEAL

BETWEEN :

JOSEPH SALLIE POONYANE MOLEFI

Petitioner-
Appellant

- and -

THE PRINCIPAL LEGAL ADVISER

First
Respondent

THE PRIME MINISTER

Second
Respondent

THE COMMISSIONER OF POLICE

Third
Respondent

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
6 - DEC 1971
25 RUSSELL SQUARE
LONDON W 1

BIRKBECK, MONTAGU'S & CO.,
7 & 9 St. Bride Street,
London, E.C.4.
Solicitors for the
Appellant.

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook, London, E.C.4.
Solicitors for the
Respondents.

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
6 - DEC 1971
25 RUSSELL SQUARE
LONDON W.C.1

O N A P P E A L
FROM THE LESOTHO COURT OF APPEAL

B E T W E E N :

JOSEPH SALLIE POONYANE MOLEFI

Petitioner-
Appellant

- and -

THE PRINCIPAL LEGAL ADVISER

First
Respondent

THE PRIME MINISTER

Second
Respondent

THE COMMISSIONER OF POLICE

Third
Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Document	Date	Page
	<u>IN THE HIGH COURT OF LESOTHO</u>		
1.	Petition	12th October 1968	1-9
2.	Affidavit of Petitioner-Appellant in support of Petition	12th October 1968	9
	<u>Supplemental Documents filed in support of Petition (Annexures "A" to "J") (Nos. 3 to 12) as follows:-</u>		
3.	Letter from Deputy Chief Aliens Control Officer to Petitioner- Appellant (Annexure "A")	13th September 1968	10
4.	Letter from Minister of State (S.M. Letsie) to Petitioner-Appellant (Annexure "B")	6th September 1968	10-11

(ii)

No.	Description of Document	Date	Page
5.	Letter from Petitioner-Appellant to Minister of State (S.M.Letsie) (Annexure "C")	Undated	11-12
6.	Letter from Permanent Secretary to the Second Respondent (J.Mapetla) to Petitioner-Appellant (Annexure "D")	24th September 1968	13
7.	Letter from the Second Respondent to H.E. the Secretary-General of the United Nations (Annexure "E")	22nd March 1967	14-15
8.	Booklet being a Convention relating to the status of refugees recording a final Act of the United Nations Conference on the Status of Refugees (Annexure "F") (Separately reproduced)	-	-
9.	Letter from M.L. Rosin, Rosin & Partners to United Nations High Commissioner for Refugees (Annexure "G")	10th September 1968	16-17
10.	Cablegram from United Nations High Commissioner for Refugees to M.L. Rosin, Rosin & Partners (Annexure "H")	25th September 1968	18
11.	Letter from United Nations High Commissioner for Refugees (Legal Division) to M.L. Rosin, Rosin & Partners (Annexure "I")	25th September 1968	19-20
12.	Newspaper cutting from "The Friend" being Petitioner-Appellant's dispatch to newspaper (Annexure "J")	27th July 1968	21
13.	Order of Court granting a Rule Nisi	12th October 1968	22-23
14.	Affidavit of Petitioner-Appellant in support of Petition	6th November 1968	23-25
15.	Affidavit of Petitioner-Appellant's Attorney	5th November 1968	25-26

(iii)

No.	Description of Document	Date	Page
16.	Affidavit of First-Respondent in reply to Petition and Petitioner-Appellant's Affidavit of 6th November 1968	19th November 1968	26-32
	<u>Supplemental Documents (Nos. 17 to 20) filed in support of Affidavit of First-Respondent (Annexures "K" to "N") as follows:</u>		
17.	Affidavit of E.M. Makhaba (Electoral Officer) (Annexure "K")	21st October 1968	33-34
18.	Affidavit of B.K. Taoana (District Administrator's Secretary for the Maseru District) (Annexure "L")	19th November 1968	34-35
19.	Affidavit of L.M. Blom-Jones (Acting Principal Assistant Secretary, Department of Defence, Internal Security, Lesotho) (Annexure "M")	22nd November 1968	36
20.	Affidavit of J.H.J. Kennedy (Detective Warrant Officer, South African Police) (Annexure "N")	18th November 1968	37-38
	<u>Supplemental Documents (Nos. 21 and 22) filed in support of Affidavit of J.H.J. Kennedy (Charge Sheet and Annexure "O") as follows:</u>		
21.	Charges preferred against Petitioner-Appellant by South African Police	Undated	38-40
22.	Affidavit of M. Majara (Minister of Agriculture, Government of Lesotho) (Annexure "O")	19th November 1968	41
23.	Affidavit of Second Respondent praying for dismissal of Petition and discharge of Rule Nisi	19th November 1968	42-43

No.	Description of Document	Date	Page
24.	Affidavit of the Third Respondent	22nd November 1968	44
25.	Letter from First Respondent to Petitioner-Appellant's Attorney	25th November 1968	45
26.	Expulsion Order signed by Second Respondent addressed to Third Respondent	11th October 1968	46
27.	Further Supplementary Affidavit of Petitioner Appellant <u>Supplemental Document (No. 28)</u> <u>filed in support of Further</u> <u>Supplementary Affidavit of</u> <u>Petitioner-Appellant (No. 27) as</u> <u>follows:</u>	28th November 1968	47-70
28.	Letter Deputy Director Legal Division United Nations Office of the High Commissioner of Refugees to M.L. Rosin, Rosin & Partners (Annexure "A")	25th September 1968	71-72
29.	Affidavit of First Respondent answering Petitioner-Appellant's Further Supplementary Affidavit of 28th November 1968	30th November 1968	73-75
30.	Affidavit of Third Respondent answering Petitioner-Appellant's Further Supplementary Affidavit of 28th November 1968	3rd December 1968	76
31.	Affidavit of Second Respondent answering Petitioner-Appellant's Further Supplementary Affidavit of 28th November 1968	3rd December 1968	77
32.	Affidavit of Petitioner-Appellant in reply to Affidavits of First, Second and Third Respondents of 30th November 1968, 3rd December 1968 and 3rd December 1968	5th December 1968	78-79

No.	Description of Document	Date	Page
33.	Supplementary Replying Affidavit of Petitioner-Appellant	12th December 1968	80-81
34.	Affidavit of Dr. E. Jahn, Deputy Minister of the Legal Division Office of the United Nations High Commissioner for Refugees, Geneva	26th November 1968	81-82
	<u>Supplemental Documents (Nos. 35, 36 and 37) filed in support of Dr. Jahn's Affidavit (Annexures "A", "B" and "C") as follows:</u>		
35.	Statute of the Office of the United Nations High Commissioner for Refugees (Annexure "A") <u>(Separately reproduced)</u>		
36.	United Nations Convention relating to the Status of Refugees (Annexure "B") - Extension by United Kingdom of Gt. Britain and N.I. to the territories of Basutoland, Bechuanaland Protectorate and Swaziland.		83-84
37.	Letter from Legal Counsel of United Nations, New York to United Nations High Commissioner for Refugees, Geneva (Annexure "C")	15th December 1960	84-85
38.	Affidavit of L. Underwood, Second Secretary at British High Commission in Maseru	11th December 1968	86-87
39.	Judgment of Trial Judge	17th January 1969	88-99
	<u>IN THE COURT OF APPEAL OF LESOTHO</u>		
40.	Notice of Appeal	17th January 1969	100-102
41.	Petitioner-Appellant's Main Heads of Argument	17th February 1969	103-107
42.	Respondents' Heads of Argument	12th February 1969	107-111
43.	Instructions by the Judges of Appeal to the parties	25th February 1969	112

No.	Description of Document	Date	Page
44.	Written submissions by Respondents on points raised by the Judges of Appeal and Extract from Basutoland (Constitution) Order in Council 1959 (Annexure "A")	18th March 1969	113-118
45.	Petitioner-Appellant's Further Written Argument	27th March 1969	119-139
46.	Judgment of Lesotho Court of Appeal	30th May 1969	140-176
47.	Order Granting Final Leave to Appeal to the Judicial Committee of the Privy Council	28th October 1969	177-178

DOCUMENTS TRANSMITTED TO PRIVY COUNCIL
BUT NOT REPRODUCED

No.	Description of Document	Date
A.	Notice of Motion for postponement and for extension of Rule Nisi	27th November 1968
B.	Affidavit of Petitioner-Appellant in support of Motion <u>Supplemental Document filed in support of Affidavit of Petitioner-Appellant (Annexure "A") as follows:</u>	27th November 1968
C.	Affidavit of K. Sello (Annexure "A") <u>Supplemental Documents filed in support of Affidavit of K. Sello (Annexures "A" and "B") as follows:</u>	27th November 1968
D.	Letter from K. Sello to L. Underwood Second Secretary, British High Commission, Maseru) (Annexure "A")	26th November 1968

No.	Description of Document	Date
E.	Letter from L. Underwood to K.Sello (Annexure "B")	26th November 1968
F.	Supplementary Affidavit of Petitioner-Appellant in Support of Motion <u>Supplemental Document filed in support of Supplementary Affidavit of Petitioner-Appellant (Annexure "C") as follows:</u>	27th November 1968
G.	Affidavit of R. Zokelelo (Annexure "C")	27th November 1968
H.	Further Affidavit of K. Sello	28th November 1968
I.	Letter from First Respondent to Petitioner-Appellant's Attorney	28th November 1968
J.	Affidavit of G. Josman as to South African Law	25th November 1968
K.	Addendum to Petitioner-Appellants Further Written Argument	
L.	Order Granting Leave to Appeal to the Judicial Committee of the Privy Council	30th May 1969
M.	Notice of Motion for Leave to Appeal to the Judicial Committee of the Privy Council	2nd October 1969
N.	Affirmation of R.J. Tucker in support	2nd October 1969
O.	Addendum to Appellant's Further Written Argument	28th March 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 27 of 1969

O N A P P E A L
FROM THE LESOTHO COURT OF APPEAL

B E T W E E N :

JOSEPH SALLIE POONYANE MOLEFI Petitioner-
Appellant

- and -

THE PRINCIPAL LEGAL ADVISER First
THE PRIME MINISTER Respondent
Second
THE COMMISSIONER OF POLICE Respondent
Third
Respondent

10

RECORD OF PROCEEDINGS

No. 1

PETITION

In the High
Court of
Lesotho

IN THE HIGH COURT OF LESOTHO

No.1

Held at Maseru.

CIV/APN/31/68

Petition.

20 In the matter between:

12th October
1968.

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

THE PRINCIPAL LEGAL ADVISER First
THE PRIME MINISTER Respondent
Second
THE COMMISSIONER OF POLICE Respondent
Third
Respondent

30

TO: THE HONOURABLE THE CHIEF JUSTICE OF LESOTHO AND
THE OTHER THE HONOURABLE JUDGES OF THIS
HONOURABLE COURT

In the High
Court of
Lesotho

P E T I T I O N

THE PETITION OF

JOSEPH SALLIE POONYANE MOLEFI humbly
sheweth that:

No.1
Petition.

12th October
1968
(continued)

1. Your Petitioner is JOSEPH SALLIE POONYANE MOLEFI, a journalist, presently residing at Ha Thamae, Maseru district, Lesotho.
2. The First Respondent is THE PRINCIPAL LEGAL ADVISER of care of The Law Office, Maseru, who is cited as the nominal Respondent in these proceedings, as representing the Government of Lesotho. 10
3. The Second Respondent is LEABUA JONATHAN who is cited in his capacity as PRIME MINISTER in the Government of Lesotho of care of the Prime Minister's Office, Maseru.
4. The Third Respondent is THE COMMISSIONER OF POLICE, who is cited in his capacity as such, of Police Headquarters, Maseru.
5. (a) At about 12.00 mid-day on the 11th October, 1968 and at my office, at Kingsway, Maseru, a certain Mr. Roche, an officer in the Lesotho Mounted Police showed me a document dated the 11th October, 1968 and addressed to the Commissioner of the Lesotho Mounted Police. To the best of my recollection the said document was to the effect that I, being an alien under the Aliens Control Act, must leave Lesotho because my presence in Lesotho is unlawful. It also directed the Commissioner of Police to keep me in custody while being conveyed to the place of departure. 20
 (b) The said Mr. Roche did not give me a copy of the said document stating as his reason that once he gave me a copy of the document he would have to act on it there and then. 30
 (c) The said Mr. Roche also warned me to prepare to leave Lesotho by 9.00 a.m. on the 12th October, 1968 failing which he would take me into custody. 40

(d) I humbly submit that the order served upon me is not in accordance with law and that I am entitled to a temporary interdict restraining the Second and Third Respondents from acting in terms of the order pending the decision of this matter.

In the High
Court of
Lesotho

No.1

(e) I humbly refer this Honourable Court to what is said hereafter in regard to the irreparable harm I shall suffer if such interim relief is not now granted to me.

Petition.

12th October
1968
(continued)

10

6. (a) In terms of the Basutoland Entry and Residence Proclamation No. 13 of 1958 I duly applied for permanent residence in about 1962 or 1963 and paid the sum of R4-00. I only received a reply to this application on or about 13th September, 1968 after the Minister of State in the Lesotho Government had attempted to expel me from Lesotho. I append hereunto a copy of this letter as Annexure "A".

20

(b) In terms of the said Proclamation I also applied for a temporary permit and this was issued to me as No. 1809, the original of which will be produced to this Honourable Court at the hearing of this matter.

30

(c) The Temporary permit was extended from time to time until the 31st March, 1967. It was not renewed thereafter and the reason given to me was that renewals were no longer necessary because Parliament had passed the Aliens Control Act. The person who told me this is Mr. Makhaba of the District Commissioner's office, Maseru.

7. (a) On the 25th January, 1968 I attended at the office of the District Commissioner and completed and signed a form which, as far as I can remember, gave my name, my residential address and place of employment. I am not certain if the form corresponded with the second Schedule to the Aliens Control Act.

40 \

(b) Having signed this form I was under the impression that in due course I would receive permission to reside in Lesotho either on a temporary permit that would be renewed from time to time, or on an indefinite permit.

In the High
Court of
Lesotho

No.1

Petition.

12th October
1968
(continued)

(c) I was confirmed in this belief by reason of the fact that on the 20th April, 1966 a residential site had been granted to me in terms of the Certificate which will be produced to this Honourable Court at the hearing of this matter.

(d) I have paid my taxes in Lesotho regularly since about 1962 in the belief that in due course my residence in Lesotho would be permitted on a permanent basis. 10

(e) It was only on about the 13th September when I received the letter Annexure "A" that I knew that the Government had no intention of granting me rights of permanent residence in Lesotho.

8. (a) Notwithstanding my receipt of Exh. "A" subsequent developments, which I recite hereunder, again gave me to believe that I may yet be allowed to remain in Lesotho.

(b) On or about the 27th August, 1968 I was served with an order of the Minister of State directing me to leave Lesotho by the 30th August, 1968. 20

(c) On or about the 6th September, 1968, after I had successfully applied to this Honourable Court for an interim interdict restraining the Minister from carrying out this order, I received a letter from the said Minister of State whereby he withdrew his expulsion order. I append hereunto a copy of this letter as Annexure "B". 30

(d) I duly replied to this letter stating the difficulties in the way of my departing from Lesotho on my own. I have to date received no reply to this letter, a copy of which I append hereunto as Annexure "C".

(e) On or about the 20th September I wrote another letter to the Prime Minister in which I made representations to continue living in Lesotho. To this letter I received no reply. 40

(f) On or about the 26th September, 1968 I

received a circular letter from the Permanent Secretary to the Prime Minister a copy of which I append hereunto as Annexure "D".

In the High
Court of
Lesotho

(g) In terms of this letter I was, inter alia, free to make representations to the government of Lesotho for permission to continue to reside in this country.

No.1

Petition

(h) On or about the 27th September, 1968 I duly presented myself at the office of the Prime Minister to make representations for my continued stay in Lesotho, whereupon I was told by one Mr. Mosala, the Principal Assistant Secretary in the Prime Minister's Office, that it was not necessary for me to make further representations as I had already done so in my letter of the 20th September, 1968.

12th October
1968
(continued)

(i) I have not yet been informed of the results of my representations.

9. (a) I was born in Winburg, Orange Free State, South Africa and I lived in that country until my arrival in Basutoland in October, 1961.

(b) I came to Basutoland as a refugee. I had been charged in the regional Court, Johannesburg with being a member of an unlawful organisation, namely the Pan Africanist Congress, and with furthering its aims. I fled South Africa before the conclusion of the trial and sought refuge in Maseru.

(c) If I am returned to South Africa this trial will no doubt proceed, and if I am found guilty, I may be sentenced to a long term of imprisonment for these political offences. Further, I believe from newspaper reports that I have read, that I am banned in terms of certain provisions of the Suppression of Communism Act of the Republic of South Africa. If I am returned to the Republic of South Africa pursuant to the expulsion order I shall suffer the disabilities imposed by that Act upon a banned person, these including confinement to an area and a prohibition against publication of anything I write. As I earn my living as a journalist this will gravely handicap me, more especially as I have a wife and two young children to support.

In the High
Court of
Lesotho

No.1

Petition

12th October
1968
(continued)

10. (a) I humbly refer this Honourable Court to Section 38(1) of the Aliens Control Act, in terms whereof an Alien who is a refugee shall, subject to certain conditions, not be expelled from Lesotho in terms of the Act. One of such conditions is the existence of an international convention relating to refugees that has been acceded to by the Government of Lesotho.
- (b) There is attached to this Petition as Annexure "E" a copy of a letter dated the 22nd March, 1967 addressed by the Honourable the Prime Minister to His Excellency the Secretary General of the United Nations, and this Honourable Court is humbly referred to such letter. The letter states in effect that the Government of Lesotho will adhere to bilateral treaties validly concluded on its behalf by the Government of the United Kingdom for a period ending on the 4th of October, 1968. As regards multilateral treaties it is stated that they will be reviewed and during such review may be relied on as against Lesotho on a basis of reciprocity. 10
- (c) To the original of this Petition there is attached a booklet, being Annexure "F", to which this Honourable Court is respectfully referred. The Booklet is a convention relating to the status of refugees and records a final Act of the United Nations conference on the status of refugees. At page 15 of the booklet reference is made to earlier conventions that define a refugee. 30
- (d) My legal advisers have made enquiries as to whether or not I am a refugee within the meaning of such convention and whether the Government of Lesotho has acceded to such convention.
- (e) I humbly refer this Honourable Court to Annexure "G" attached to this Petition which is a copy of a letter of enquiry by my legal representative as to the accession by the Government of Lesotho to the convention aforesaid. 40
- (f) I humbly refer this Honourable Court also

to annexures "H" and "I" attached to this Petition being the replies to the enquiry referred to above, from which it appears that Lesotho is bound by this treaty.

In the High
Court of
Lesotho

No.1

Petition

12th October
1968
(continued)

10

(g) I humbly submit that by reason of the foregoing this Honourable Court should interdict the Second and Third Respondents from acting in terms of the expulsion order, more especially because there is a possibility that when the matter is fully examined and all the information is placed before this Honourable Court, I may be found to enjoy the protection of Section 38(1) of the Aliens Control Act.

20

(h) I respectfully draw the Honourable Court's attention to the fact that if I should be a refugee in terms of the said Section I may apply, in terms of the 4th Schedule to the Act for a grant of special privileges of sojourn in Lesotho. The Application is required to be in the prescribed form. I have been informed by my legal representatives that no such form has been prescribed.

(i) I humbly submit that by reason of this fact this Honourable Court should interdict the operation of the expulsion order until such time as such prescribed form has been provided for by regulations in terms of Section 36 of the Act.

30

11. (a) On the 27th of July, 1968 as a correspondent for the Friend newspaper I despatched a message to the effect that the Prime Minister of Lesotho and certain of his Cabinet Ministers had had civil proceedings instituted against them in the High Court of Lesotho for payment of the sum of over R10,000 for goods sold and delivered to them in their capacity as Executive Committee members of the ruling Basuto National Party. I respectfully refer this Honourable Court to Annexure "J" being the newspaper cutting of the said dispatch.

40

(b) During August, 1968 I was interviewed by the Minister of Agriculture, Chief Majara who is the National Chairman of the Basuto National Party. He asked if I was responsible for the article and when I said that I was he informed

In the High
Court of
Lesotho

No.1

Petition

12th October
1968
(continued)

me that it was intended to take action against me.

(c) By reason of these facts I humbly submit that a probability exists that the Second Respondent has not exercised a proper discretion in exercising his powers under Section 25 of the Aliens Control Act, but has acted in expelling me through an improper motive, namely the desire to punish me because of the article that I sent to the Friend newspaper. 10

(d) I humbly submit that this is a further reason for interdicting the operation of the expulsion order pending a full investigation of the reasons for its having been made by the Second Respondent, and pending an examination of its validity.

(e) I further humbly submit that prima facie I am not affected by such expulsion order and in terms of Clause 7 of the Constitution of Lesotho I am entitled to reside in Lesotho. 20

WHEREFORE I Humbly pray that it may please this Honourable Court to grant -

1. A rule calling upon the First and the Second and the third Respondents to show cause on a date to be determined by this Honourable Court why the Government of Lesotho or any of its servants and in particular the Second Respondent and the Third Respondent should not be interdicted from expelling me from Lesotho either in terms of the expulsion order shown to me or at all; and why the First Respondent and the Second Respondent should not be ordered to pay the costs of this Petition; and why the Third Respondent should not pay such costs jointly and severally with the First and Second Respondent but only if he oppose this application. 30

2. An order that such rule serve as an interim interdict restraining the Government of Lesotho or any of its servants and in particular the Second Respondent and the Third Respondent from expelling me from Lesotho or keeping me in custody for the purposes of such expulsion 40

9.

pending the final determination of the issues raised in these proceedings.

AND YOUR PETITIONER AS IN DUTY BOUND WILL EVER HUMBLY PRAY.

J.S.P. Molefi.

PETITIONER.

In the High Court of Lesotho

No.1

Petition

12th October 1968 (continued)

No. 2

AFFIDAVIT OF PETITIONER-APPELLANT
IN SUPPORT OF PETITION

No.2

Affidavit of Petitioner-Appellant in support of Petition.

10 I, the undersigned, JOSEPH SALLIE POONYANE MOLEFI, do hereby make oath and say:-

1. That I am the Petitioner in the foregoing Petition.
2. That all the facts and allegations contained therein are to the best of my knowledge and belief true and correct.

12th October 1969

J.S.P. Molefi

20 SIGNED and SWORN to before me at Maseru on this 12th October 1968 by the deponent who has acknowledged that he knows and understands the contents of this affidavit.

E. Masia

COMMISSIONER OF OATHS

Senior Post master

10.

In the High
Court of
Lesotho

No. 3

LETTER FROM DEPUTY CHIEF ALIENS CONTROL OFFICER
TO PETITIONER-APPELLANT (ANNEXURE "A")

No.3

Aliens Office,
P.O. Box 363,
MASERU.

Letter from
Deputy Chief
Aliens Control
Officer to
Petitioner-
Appellant
(Annexure "A")

BY REGISTERED POST.

Ref. ALNS/S/PE/1
LMJ/SG

13th September, 1968

Dear Sir,

10

13th September
1968

I have been instructed by the Minister of
Defence and Internal Security to inform you with
regret that your application for an indefinite
permit has been unsuccessful.

Yours faithfully,

(Sgd.) L.M. Jonathan

Deputy Chief Aliens Control Officer

Mr. J.S.P. Molefi,
P.O. Box 29,
MASERU.

No.4

No. 4

20

Letter from
Minister of
State (S.M.
Letsie) to
Petitioner-
Appellant
(Annexure "B")

LETTER FROM MINISTER OF STATE (S.M. LETSIE)
TO PETITIONER-APPELLANT (ANNEXURE "B")

Ministry of Defence
and Internal Security,
Maseru.

6th September
1968

6th September, '68.

Mr. J.S.P. Molefi,
C/o Mr. T. Mohaleroe,
Mohakare Chambers,
Maseru.

30

Dear Sir,

Re: Expulsion Order dated 27/8/68

In his policy speech at Maseru on the 31st

11.

August, 1968, the Honourable the Prime Minister called upon all persons claiming to be refugees to leave this country on or before the 30th September, 1968.

In the High
Court of
Lesotho

No.4

10 The latter date has been set in order to allow the persons concerned to make their own arrangements for departure from Lesotho and since I do not wish to discriminate against you in this respect I have decided to afford you the same opportunity of making such arrangements for your departure as you may think fit.

Letter from
Minister of
State (S.M.
Letsie) to
Petitioner-
Appellant
(Annexure "B")

In these circumstances I have therefore decided to withdraw the expulsion order made in respect of yourself but it must be clearly understood that Government reserves the right to take such action as circumstances may demand, should you fail to leave Lesotho.

6th September
1968
(continued)

Yours faithfully,

(Sgd.) S.M. Letsie
MINISTER OF STATE.

20

No. 5

LETTER FROM PETITIONER-APPELLANT TO MINISTER
OF STATE (S.M. LETSIE) (ANNEXURE "C")

P.O. Box 29,
MASERU.

Chief Setho M. Letsie,
The Honourable the Minister of State,
c/o Ministry of Defence and Internal Security,
MASERU.

No.5

Letter from
Petitioner-
Appellant to
Minister of
State (S.M.
Letsie)
(Annexure "C")

Undated

30 Dear Sir,

re: J.S.P. MOLEFI vs. PRINCIPAL LEGAL ADVISER
AND OTHERS

I refer to your letter of the 6th September, 1968 in which you state that you have decided to allow me to make my own arrangements for departure from Lesotho on or before the 30th September, 1968.

In the High
Court of
Lesotho

No.5

Letter from
Petitioner-
Appellant to
Minister of
State (S.M.
Letsie)
(Annexure "C")

Undated
(continued)

Could you kindly let me know what assistance, if any, Government will provide to enable me to overcome the following difficulties if I were to arrange to leave Lesotho.

1. I possess no passport nor travel document of any type.
2. I would need to be guaranteed the right of transit through the Republic of South Africa to my destination.
3. I do not know and am not in a position to ascertain which countries would be prepared to grant me rights of residence as a refugee. 10
4. I am not in a position to afford, financially, the expenses of any trip outside Lesotho, beyond the borders of the Republic of South Africa.
5. I have established myself at great expense, as a resident in Lesotho and my removal would involve me in heavy financial loss.
6. It is not clear from your letter what choice, if any, is available to me should I prefer to continue to live in Lesotho. 20

I shall be obliged to receive your reply soon.

Yours faithfully,

J.S.P. Molefi

13.

No. 6

LETTER FROM THE PERMANENT SECRETARY TO THE
SECOND RESPONDENT TO PETITIONER-
APPELLANT (ANNEXURE "D")

In the High
Court of
Lesotho

No.6

The Cabinet Office,
P.O. Box 527,
Maseru.

Letter from
the Permanent
Secretary to
the Second
Respondent
to Petitioner-
Appellant
(Annexure "D")

CAB/S/ALN/12

24th September, 1968.

24th September
1968

Dear Sir,

10

I am instructed by the Honourable the Prime Minister to inform you that in pursuance of his announcement on the 30th August, 1968, which he reaffirmed on the 11th September, 1968, you are required to ensure that at the appropriate time you will have completed your own personal arrangements for departure from Lesotho.

20

Should you experience difficulties in completing such arrangements, you are requested to approach the Government for assistance in order to enable you to leave the country.

I should also make it clear that this does not preclude you from making any representations you may wish to make touching on your continued stay in Lesotho. These the Government will consider on individual merits.

Your full co-operation in this matter is requested.

Yours faithfully,

J. Mapetla

30

PERMANENT SECRETARY TO THE PRIME
MINISTER

Joseph S.P. Molefi, Esq.,
P.O. Box 29,
Maseru.

In the High
Court of
Lesotho

No. 7

LETTER FROM THE SECOND RESPONDENT TO H.E. THE
SECRETARY GENERAL OF THE UNITED NATIONS
(ANNEXURE "E")

No.7

Letter from the
Second Respon-
dent to H.E.
the Secretary
General of
the United
Nations
(Annexure "E")

22nd March
1967

OFFICE OF THE PRIME MINISTER
MASERU.
LESOTHO.

22nd March, 1967.

E.X. 13

Your Excellency,

10

The Government of the Kingdom of Lesotho is mindful of the desirability of maintenance, to the fullest extent competible with the emergence into full independence of the Kingdom of Lesotho, legal continuity between Lesotho and the several States with which, through the action of the Government of the United Kingdom the country formerly known as Basutoland enjoyed treaty relations. Accordingly, the Government of the Kingdom of Lesotho takes the present opportunity of making the following declarations.

20

2. As regards bilateral treaties validly concluded by the Government of the United Kingdom on behalf of the country formerly known as Basutoland, or validly applied or extended by the said Government to the country formerly known as Basutoland, the Government of the Kingdom of Lesotho is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of twenty four months from the date of independence (i.e. until October 4, 1968) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of the Kingdom of Lesotho will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

30

3. It is the earnest hope of the Government of the Kingdom of Lesotho that during the aforementioned period of twenty four months, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon

40

No. 9

In the High
Court of
Lesotho

LETTER FROM M.L. ROSIN, ROSIN & PARTNERS TO
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
(ANNEXURE "G")

No.9

MR. R.J. TUCKER,

10th September, 1968.

Letter from
M.L. Rosin,
Rosin & Part-
ners to United
Nations High
Commissioner
for Refugees
(Annexure "G")

RJT/IS

The United Nations High Commissioner
for Refugees,
UNHCR Headquarters,
Palais des Nations,
GENEVA
Switzerland.

10

10th September
1968

AIRMAIL

Dear Sir,

We act on behalf of certain Joseph Molifi, a
refugee presently in the Kingdom of Lesotho.

Our client was recently served with an order
of deportation from Lesotho and applied to the High
Court of that country for an injunction against
such deportation. The Government of Lesotho has
acknowledged that the order of deportation was
invalid but has indicated that our client and all
other political refugees from the Republic of
South Africa are required to leave from Lesotho by
the 30th September, 1968. We attach hereto a
copy of a letter sent to our client by the Minister
of State to the foregoing effect.

20

Our client and the refugees concerned have a
real fear of arrest and persecution if they are
returned to the Republic of South Africa and are
seeking to apply to Court to restrain any attempt
by the Lesotho Government to effect any expulsion.

30

Prima facie the only basis for such application
is in Section 38(1) of the Aliens Control Act No. 16
of 1966 (Lesotho) which provides for the protection
of Refugees in certain circumstances "if any
international treaty or convention relating to
refugees is or has been acceded to by or on behalf
of the Government of Lesotho".

It is in connection with such convention that we address this enquiry to you.

In the High
Court of
Lesotho

We have been placed in possession of the "Magna Carta for Refugees" and the Text of the Convention on the Status of Refugees published by the United Nations Department of Public Information. We also have the pamphlet published in October, 1966 entitled "UNHCR what it is what it does". This latter pamphlet indicates that efforts have been made to extend the operations of the conventions to persons who have been refugees after 1st January, 1951.

No.9

Letter from
M.L. Rosin,
Rosin & Part-
ners to United
Nations High
Commissioner
for Refugees
(Annexure "G")

We accordingly need to know as a matter of grave urgency:

10th September
1968
(continued)

1. Has the operation of the convention in fact been extended, and if so when? If it has been extended, please send us full particulars of such extension and its operative date.
2. Was the convention acceded to Great Britain before Basutoland became independent? We understand that it did accede to the convention on 11th July, 1960 but cannot obtain confirmation. If it did so accede, which declaration under Article B(1) of chapter 1 was made?
3. Was the convention acceded to by the Government of Lesotho since independence, or any prior accession ratified? If such accession or ratification took place, on what date did it take place?
4. The particulars of the Constitution of the International Refugee Organisation referred to in Article A(1) of chapter 1 of the Convention. Please also send us by airmail a copy of this Constitution as we have not been able to obtain a copy in Johannesburg. If you cannot send us this Constitution immediately, please advise us how this Constitution defines "refugee".

You will appreciate that with the short time available it is extremely important that we receive the information as soon as possible and it would therefore be greatly appreciated if you would give this request your very kind and urgent consideration and attention.

Yours faithfully,

M.L. ROSIN, ROSIN & PARTNERS

per:

In the High
Court of
Lesotho

No. 10

CABLEGRAM FROM UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES TO M.L. ROSIN, ROSIN & PARTNERS
(ANNEXURE "H")

No. 10

Cablegram from
United Nations
High Commis-
sioner for
Refugees to
M.L. Rosin,
Rosin &
Partners
(Annexure "H")

25th September
1968

ZCZC TAS168 VIY0119
Z- X 2709

1968 IX 25 01:27

JERUSALEMISR 88/87 24 2141 PNCTNCNTD

LTF
FRIENDLY JOHANNESBURG

(MESSRS. ROSIN ROSIN AND PARTNERS)

10

HCR 1413 RE YOUR LETTER 10 SEPTEMBER UK ACCEDED
1951 CONVENTION MARCH 1954 EXTENDED APPLICATION
BASUTOLAND 11 NOVEMBER 1960. LESOTHO MADE DECLARA-
TION TO SECRETARY GENERAL UNITED NATIONS 22 MARCH
1967 THAT IT WOULD REVIEW INDIVIDUALLY EACH MULTI-
LATERAL INTERNATIONAL TREATY EXTENDED TO ITS
TERRITORY PRIOR TO INDEPENDENCE BUT IN MEANTIME
WOULD ACCEPT RESPONSIBILITY UNDER THESE TREATIES.
DATELINE CONTAINED IN ARTICLE 1 OF CONVENTION WOULD
NOT EXCLUDE YOUR CLIENT. IRO CONSTITUTION AND
PROTOCOL NOT RELEVANT. WRITING

20

UNHCR GENEVA

COL 1413 10 1951 1954 1960. 22 1967. 1 . .

No. 11

LETTER FROM UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES TO M.L. ROSIN, ROSIN & PARTNERS
(ANNEXURE "I")

In the High
Court of
Lesotho

No. 11

The United Nations Office of the High Commissioner
for Refugees,
Geneva.

Letter from
United Nations
High Commis-
sioner for
Refugees
to M.L. Rosin,
Rosin &
Partners
(Annexure "I")

25th September, 1968

25th September
1968

Dear Sir,

10 We are in receipt of your letter of 10th
September regarding the position of Joseph Molefi
who is at present a refugee in the Kingdom of
Lesotho. With reference to the questions raised
in the above mentioned letter the position is as
follows:-

- 20 1. There is no time limit in the operation of a
convention but the personal scope of the con-
vention is limited to refugees as a result of
events occurring before 1st January, 1951
(Article 1A(2)). The protocol was adopted on
31st January, 1967 which refers to limitation.
Lesotho is not yet a party to this protocol.
A copy of the said protocol is enclosed. In
the case of your client, however, it seems
that he is covered by the terms of the 1951
convention so that the question of the applica-
tion of the protocol of 1967 does not arise.
- 30 2. The convention was acceded to by the United
Kingdom on 11th March, 1954 and it was extended
inter alia to Basutoland (Lesotho) on 11th
November, 1960. The declaration was made
concerning Article B9(1)(b) "Events occurring
in Europe or elsewhere...."
- 40 3. After its independence Lesotho made a general
declaration concerning acceptance for an
interim period of United Nations multilateral
agreements including the 1951 convention.
This declaration was addressed to the Secretary
General of the United Nations on the 22nd March,
1967. No specific declaration on the 1951
convention has been made but it has been

In the High
Court of
Lesotho

understood that the government of Lesotho
considers itself bound by the convention in
view of this general declaration.

No. 11

- 4. We are enclosing a copy of the IRO constitu-
tion herewith requested by you. However that
constitution which was adopted in 1966 is of
no relevance for the new refugee situation in
Africa.

Letter from
United Nations
High Commis-
sioner for
Refugees
to M.L. Rosin,
Rosin &
Partners
(Annexure "I")

Dr. Schlatter, a representative of our office,
has recently been in Lesotho where he has had
discussions with the Government of Lesotho on the
subject of the threatened deportation of refugees.
Dr. Schlatter is at present in Gaborone, Botswana
and his address is: Dr. E. Schlatter, Charge
D'Maison UNHCR in Botswana, c/o UNDP, P.O. Box 54,
Gaborone, perhaps you would like to consult him
on the case of Mr. Joseph Molefi in view of his
recent visit to Lesotho.

10

25th September
1968
(continued)

Yours sincerely,

E. JAHN

20

Deputy Director Legal Division

Addressed to:

Messrs. M.L. Rosin, Rosin and Partners,
206/215 Maritime House,
Lovedale Street,
JOHANNESBURG,
SOUTH AFRICA.

No. 12

NEWSPAPER CUTTING FROM "THE FRIEND" BEING
PETITIONER-APPELLANT'S DISPATCH TO NEWSPAPER
(ANNEXURE "J")

In the High
Court of
Lesotho

No. 12

Cutting from The Friend,
July 27, 1968.

Newspaper cutting from "The Friend" being Petitioner-Appellant's Dispatch to Newspaper (Annexure "J")

S. AFRICA FIRM SUES
CHIEF JONATHAN

The Friend Correspondent

MASERU

27th July 1968

10

THE PRIME MINISTER of Lesotho, Chief Leabua Jonathan, and three of his Cabinet Ministers and Lesotho's roving ambassador for Africa have had civil proceedings instituted against them in the High Court of Lesotho in Maseru for payment of a sum of over R10,000 for goods sold and delivered to them in their capacity as Executive Committee Members of the ruling Basutho National Party.

20

The Ministers are the Deputy Prime Minister and Minister of the Interior, Chief Sekhonyana Maseribane, the Minister of Finance, Chief Peete Peete, and the Minister of Agriculture, Chief Matete Majara.

30

Other defendants - all Executive Committee Members of the ruling Basutho National Party - are Mr. Charles Dube Molapo, secretary-general of the party and at present Lesotho's roving ambassador in Africa; Mr. Everitt Tsepene Tau of Seapoint location, Maseru; Mr. A. Api, Assistant Minister of Finance; Mr. P. Matsinyane, national organiser; Chief Ntseke Molapo, editor of the ruling party's organ; and two members of the National Executive Committee; Chieftainess Agatha Griffith and Miss Makhose Jasing.

40

The South African firm has asked all the defendants to appear in the High Court of Lesotho in Maseru within 14 days to answer a civil action in which the South African firm claims against the defendants jointly and severally payment of the sum of R10,849.05, being the balance owing in respect of goods sold and delivered by the plaintiff to the Basotho National Party during 1966.

In the High
Court of
Lesotho

No. 13

ORDER OF THE COURT GRANTING A RULE NISI

No. 13

IN THE HIGH COURT OF LESOTHO

Order of
Court Grant-
ing a Rule
Nisi

Held at Maseru.

CIV/APPN/31/68

In the matter between:-

12th October
1968

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

THE PRINCIPAL LEGAL ADVISER First Respondent

THE PRIME MINISTER Second Respondent

THE COMMISSIONER OF POLICE Third Respondent

ORDER OF COURT

10

On the 12 October, 1968 before the Chief Justice, the Honourable Mr. Justice H.R. Jacobs -

And the Court having heard Mr. Sello for the Applicant

IT IS ORDERED

1. A Rule nisi is hereby granted calling upon the Respondents to show cause on the 5th November, 1968, why an order should not be granted interdicting the three Respondents from expelling the Applicant from Lesotho in terms of the expulsion order shown to him on the 11th October, 1968 and why the First and Second Respondents should not be ordered to pay the costs of the Applicant's petition and why the Third Respondent should not pay such costs, jointly and severally, with the First and Second Respondents, but only if he should oppose this Application; 20
2. That such Rule serves as an Interim Interdict restraining the Government of Lesotho or any of its servants and in particular the Second Respondent and the Third Respondent from 30

expelling the Applicant from Lesotho or from taking the Applicant into custody for the purpose of expulsion pending the final determination of the issues raised in these proceedings;

In the High Court of Lesotho

No. 13

3. Leave is granted to the Respondents to anticipate the Return date by giving the Applicant herein 48 hours notice of intention so to do

Order of Court Granting a Rule Nisi

10 4. The Answering Affidavits of the Respondents to be filed not later than noon of the 29th October, 1968 and

12th October 1968 (continued)

5. The applicant's replying Affidavits to be filed not later than 9.30 a.m. on the 4th November, 1968.

P. Hurly

REGISTRAR OF THE HIGH COURT

No. 14

No. 14

AFFIDAVIT OF PETITIONER-APPELLANT IN SUPPORT OF PETITION

Affidavit of Petitioner-Appellant in Support of Petition.

20 IN THE HIGH COURT OF LESOTHO
HELD AT MASERU

CIV/APN 31/1968

In the matter between :-

6th November 1968

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

THE PRINCIPAL LEGAL ADVISER First Respondent

THE PRIME MINISTER Second Respondent

THE COMMISSIONER OF POLICE Third Respondent.

A F F I D A V I T

30 I, the undersigned, JOSEPH SALLIE POONYANE MOLEFI of Ha Thamae in the Maseru District hereby make oath and say:

In the High
Court of
Lesotho

No. 14

Affidavit of
Petitioner-
Appellant in
Support of
Petition.

6th November
1968
(continued)

1. I am the Petitioner in the above matter.
2. I beg leave to refer to my petition filed of record and to supplement it by adding the following averments which I inadvertently omitted to include therein.

I pray these averments be accepted by this Honourable Court as if specifically set out in my petition aforesaid.

3. (a) I humbly refer this Honourable Court to Government Notice No. 77/67 which appears at page 478 in the Lesotho Government Gazette extraordinary dated 8th July, 1967. 10
- (b) In terms of the said notice His Majesty the King purports to create the offices of Minister of the Government of Lesotho in the exercise of the powers vested in him by Section 72 of the Constitution.
- (c) From my reading of the Prime Minister's Order of the 11th October, 1968 to the Commissioner of Lesotho Mounted Police referred to in paragraph 5 (a) of my petition the second Respondent purports to exercise his powers as Prime Minister. 20
- (d) I respectfully submit that the Aliens Control Act has to be administered by a Minister of State through a creation of a portfolio, as contemplated by Section 72 (2) of the Constitution until such portfolio is created, no administration of the Aliens Control Act can lawfully take place. 30
- (e) By reason of the foregoing I humbly submit that the second Respondent does not lawfully hold the office of the Minister of State, nor has such office been lawfully created, and in consequence thereof the expulsion order is of no force and effect.

(Signed) J.S.P. Molefi

40

DEPONENT.

SIGNED and SWORN to before me at Maseru on this 6th day of November, 1968 by the deponent who has declared that he knows and understands the contents of this.

In the High Court of Lesotho

(Signed) E. Masia

No. 14

COMMISSIONER OF OATHS
SENIOR POSTMASTER.

Affidavit of Petitioner-Appellant in Support of Petition.

6th November 1968
(continued)

No. 15

No. 15

AFFIDAVIT OF PETITIONER-APPELLANT'S ATTORNEY

10 IN THE HIGH COURT OF LESOTHO

Affidavit of Petitioner-Appellant's Attorney

HELD AT MASERU.

CIV/APN 31/68

In the matter between:-

5th November 1968

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

THE PRINCIPAL LEGAL ADVISER First Respondent

THE PRIME MINISTER Second Respondent

THE COMMISSIONER OF POLICE Third Respondent

A F F I D A V I T

20 I, the undersigned TSEPO MOHALEROE, do hereby make oath and say that:-

1. I am a duly admitted Attorney of this Honourable Court practising as such at Mohokare Chambers, Maseru, Lesotho.
2. I am the Attorney of record for the Petitioner in the above matter.

In the High Court of Lesotho

No. 15

Affidavit of Petitioner-Appellant's Attorney

5th November 1968 (continued)

3. I have made diligent search of the enactments of the Parliament of Lesotho and have been unable to find any enactment whereby Parliament has established offices of Minister of the Government of Lesotho, nor has Parliament made provision for His Majesty the King to establish such offices, as provided by Section 72 (2) of the Constitution of Lesotho.

(Signed) T. Mohaleroe

DEPONENT.

10

SIGNED and SWORN to before me at Maseru on this 5th day of November, 1968 by the deponent who acknowledges that he knows and understands the contents of this affidavit.

(Signed) K.J. MOTLAMELLE

COMMISSIONER OF OATHS. Attorney - Lesotho.

No. 16

Affidavit of First Respondent in reply to Petition and Petitioner-Appellant's Affidavit of 6th November 1968

19th November 1968

No. 16

AFFIDAVIT OF FIRST RESPONDENT IN REPLY TO PETITION AND PETITIONER-APPELLANT'S AFFIDAVIT OF 6th NOVEMBER 1968

20

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN 31/68

In the matter between

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

THE PRINCIPAL LEGAL ADVISER First Respondent
THE PRIME MINISTER Second Respondent
THE COMMISSIONER OF POLICE Third Respondent

TO: THE HONOURABLE THE CHIEF JUSTICE OF LESOTHO AND THE OTHER THE HONOURABLE JUDGES OF THIS HONOURABLE COURT

30

REPLYING AFFIDAVIT

I, Daniel Johannes du Pisani Geldenhuys, in my capacity as Principal Legal Adviser and representing the Government of Lesotho, do hereby make oath and say:-

In the High
Court of
Lesotho

No. 16

I have read the Petition and make reply thereto as follows:

Affidavit of
First Respon-
dent in reply
to Petition and
Petitioner-
Appellant's
Affidavit of
6th November
1968

1. AD PARAGRAPHS 1, 2, 3 and 4:

I admit the allegations of fact contained in paragraphs 1, 2, 3 and 4.

2. AD PARAGRAPH 5:

(a) I admit the allegations of fact contained in sub-paragraphs (a), (b) and (c) of paragraph 5.

(b) I dispute the allegation contained in sub-paragraph (d) of para. 5 to the effect that the order referred to is not in accordance with law.

(c) I dispute the allegation contained in sub-paragraph (e) of paragraph 5 and deny that the Petitioner will suffer irreparable harm.

19th November
1968
(continued)

3. AD PARAGRAPH 6:

(a) I admit the contents of sub-paragraphs (a) and (b) of paragraph 6.

(b) I admit that the temporary permit referred to in sub-paragraph (c) of paragraph 6 was extended from time to time until 31st March, 1967, and that it was not thereafter renewed. I deny that the renewal thereof became unnecessary on the coming into operation of the Aliens Control Act.

(c) I deny that the reason given to Petitioner was that stated in sub-paragraph (c) of Paragraph 6, or that any reason or reasons were given, and in this regard I specially refer this honourable Court to the affidavits of Eugene Matsarankeng Makhaba and

19th November
1968
(continued)

In the High
Court of
Lesotho

Bernard Kokolia Taoana, Annexures "K" and
"L" hereto.

AD PARAGRAPH 7:

No. 16

Affidavit of
First Respon-
dent in reply
to Petition and
Petitioner-
Appellant's
Affidavit of
6th November
1968

19th November
1968
(continued)

I admit that on the 25th January, 1968
Petitioner was required to complete a form
giving his personal particulars, which were
required for record purposes. I respectfully
refer this Honourable Court to the affidavits
of Bernard Kokolia Taoana and Leslie Blome-
Jones, Annexures "L" and "M" hereto. 10
Petitioner was not justified in the belief
that the completion of the form in question
would lead to the issue to him of a temporary
or any other permit. It is not known to me
whether or not Petitioner has paid taxes in
Lesotho but deny that he had any choice in the
matter since he was in any case obliged by law
to do so.

4. AD PARAGRAPH 8:

(a) Whether or not Petitioner believed, as set 20
out in sub-paragraph (a) of paragraph 8,
that he might be allowed to remain in
Lesotho is not known to me but if that
indeed be the case such belief was ill-
founded and is in any event irrelevant.

(b) The allegations contained in sub-para-
graphs (b), (c), (d), (f), (g) and (h)
of paragraph 8 are admitted. As to sub-
paragraphs (e) and (i) of this paragraph 30
it is also admitted that Petitioner wrote
a letter to the Prime Minister on 20th
September in which he made representations
to continue living in Lesotho. Although
Petitioner has not been notified by
letter of the rejection of his applica-
tion, the fact of such rejection has been
clearly signified by the expulsion order
made under the Prime Minister's signature,
and in this connection I refer this
Honourable Court to the affidavit by 40
second respondent.

5. AD PARAGRAPH 9:

(a) I am not in a position to admit or deny

the allegations contained in sub-paragraph (a) of paragraph 9. I deny that Petitioner came to Basutoland as a refugee within the meaning of that word as used in section 38 of the Aliens Control Act.

In the High Court of Lesotho

No. 16

10 (b) As to sub-paragraph (b) of paragraph 9 I deny that Petitioner came to Basutoland as a refugee within the meaning of section 38 of the Aliens Control Act. I admit that Petitioner was charged in the regional Court, Johannesburg and that he fled to Basutoland before the conclusion of the trial. In this respect I refer this Honourable Court to the affidavit (Annexure "N") of John Hunter James Kennedy.

Affidavit of First Respondent in reply to Petition and Petitioner-Appellant's Affidavit of 6th November 1968

19th November 1968
(continued)

20 (c) I am not in a position to admit or deny whether the South African authorities will proceed against the Petitioner should he return to South Africa. Since it is not known to me whether or not the Petitioner was guilty of the offences in respect of which he was charged, I am unable to comment on the possibilities of a conviction or, if he should be convicted, as to the term of imprisonment which might be imposed. I can neither admit nor deny that Petitioner has been "banned" in terms of the South African law relating to the suppression of

30 communism, but I deny that he will be "gravely handicapped" by such banning in the sense that he will be precluded from supporting his wife and children.

6. AD PARAGRAPH 10:

40 (a) I admit the contents of sub-paragraph (a) of paragraph 10 insofar as it purports to set out the contents of section 38 (1) of the Aliens Control Act 1966, but I deny that the Government of Lesotho has acceded to any International Convention such as is referred to in that section, or that it is bound by any such Convention.

(b) I admit the existence and content of the letter referred to in sub-paragraph (b) of paragraph 10.

In the High
Court of
Lesotho

No. 16

Affidavit of
First Respon-
dent in reply
to Petition and
Petitioner-
Appellant's
Affidavit of
6th November
1968

19th November
1968
(continued)

(c) I deny that the Convention referred to in the booklet annexure F to Petitioner's affidavit, is binding on Lesotho.

(d) I have no knowledge of the allegations contained in sub-paragraphs (d) and (e) of paragraph 10.

(e) I have no knowledge as to whether or not Annexures H and I to the Petition, referred to in sub-paragraph (f) of paragraph 10 thereof, are indeed replies to the original of Annexure G referred to in sub-paragraph (e) of paragraph 10 thereof. I respectfully point out that no affidavits have been submitted by the authors of the alleged "replies". Under these circumstances I do not admit that these replies are what they purport to be. I reiterate that Lesotho is not bound by the alleged "Treaty".

10

(f) I dispute the submissions in sub-paragraph (g) of paragraph 10 of the Petition.

20

(g) I once again deny that the Petitioner is a refugee. Even if the Convention contained in annexure "F" should be binding on Lesotho I respectfully submit that the Petitioner is not entitled to any protection under the Convention contained in Annexure "F" as he is not a refugee as defined in Article 1 of Chapter 1 of that Convention, particularly in view of the fact that the Petitioner fled to Lesotho as a result of events which occurred subsequent to the 1st January, 1951. In this regard I respectfully refer the Honourable Court to the affidavit of John Hunter James Kennedy annexed hereto (Annexure "N").

30

(sic)

(c) I dispute the submissions contained in sub-paragraphs (h) and (i) of paragraph 10.

7. AD PARAGRAPH 11:

40

(a) I have no knowledge of Petitioner's activities as a journalist and can neither

admit or deny his authorship of the newspaper article referred to in subparagraph (a) of paragraph 11.

In the High
Court of
Lesotho

No. 16

Affidavit of
First Respon-
dent in reply
to Petition and
Petitioner-
Appellant's
Affidavit of
6th November
1968

19th November
1968
(continued)

(b) I admit that the Petitioner interviewed Chief Majara but deny that any threats were made by the last mentioned in his official capacity. In this regard I attach hereto an affidavit by the said Chief Majara (Annexure "O").

10 (c) I dispute the submission set out in sub-paragraph (c) of paragraph 11 and in this regard I respectfully refer the Honourable Court to the affidavit of the Hon. the Prime Minister, the Second Respondent. I also dispute the submissions contained in sub-paragraphs (d) and (e) of paragraph 11. I deny that Clause 7 of the Constitution entitles Petitioner to reside in Lesotho, and say that Petitioner is not a citizen of Lesotho and is in fact an alien whose presence in Lesotho is unlawful.

20

PETITIONER'S AFFIDAVIT DATED 6/11/68.

8. AD PARAGRAPHS 1 AND 2:

I admit the contents of paragraphs 1 and 2.

9. AD PARAGRAPH 3 (a) and (b):

30 It is presumed that Petitioner has intended to refer this Honourable Court to page 748, and not to page 478, of the Lesotho Government Gazette Extraordinary dated the 8th July, 1967. If this is so, I deny that Government Notice No. 77/67, which there appears, has any relevance to this matter having been superseded in toto by Government Notices Nos. 78, 79 and 82 of 1968, published in Government Gazettes Nos. 31 and 33 of the 19th July, 1968.

10. AD PARAGRAPH 3 (c):

40 I admit that the order of expulsion was signed by the Prime Minister, but respectfully draw the attention of the Honourable Court to

In the High Court of Lesotho

No. 16

Affidavit of First Respondent in reply to Petition and Petitioner-Appellant's Affidavit of 6th November 1968

19th November 1968 (continued)

Government Notices Nos. 78 and 79 of 1968 wherein the offices of Ministers are set out and in terms of which the offices of Prime Minister and Minister of Defence and Internal Security are assigned to the Second Respondent. In this regard I also respectfully refer to the affidavit of the Second Respondent.

11. AD PARAGRAPH 3 (d) and (e):

The Aliens Control Act is administered by the Minister of Defence and Internal Security who is the Second Respondent in this matter. In terms of Government Notice No. 78 of 1968, supra, the Minister of Defence and Internal Security has responsibility for all matters relating to Citizenship, Aliens and Passports. I dispute the validity of the Petitioner's submissions contained in sub-paragraphs (d) and (e) of paragraph 3 and deny that the Second Respondent does not lawfully hold the office of a Minister of the Government of Lesotho or that the expulsion order is of no force and effect either on this or any other ground.

10

20

WHEREFORE I humbly pray that it may please this Honourable Court to dismiss the Petition and discharge the rule nisi which was granted on the 12th October, 1968, with costs.

(Signed) D.J. du P. Geldenhuys
FIRST RESPONDENT.

SIGNED and SWORN to before me at MASERU on this 19th November, 1968 by the deponent who has acknowledged that he knows and understands the contents of this affidavit.

30

(Signed) (Illegible)
COMMISSIONER OF OATHS.



No. 17

AFFIDAVIT OF E.M. MAKHABA (ELECTORAL OFFICER)
(ANNEXURE "K")

In the High
 Court of
 Lesotho

 No. 17

1. I, EUGENE MATSARANKENG MAKHABA, hereby make oath and say:
2. I am a pensioner and at present temporarily employed by the Minister of Interior as an electoral officer. Before my retirement on 22nd April, 1968, I was in Government service in the office of the District Commissioner, Maseru, as a junior executive officer.
3. From about 1961 to about the middle of 1967 my duties included, inter alia, matters relating to aliens and the issue of permits to them. From the middle of 1967 these duties were performed by Mr. Taoana and I dealt with these matters only if he was away from office.
4. Before Mr. Taoana took over these duties the persons calling themselves refugees were on various occasions in my office in connection with their permits, but after Mr. Taoana started dealing with this work I seldom saw any of them. Joseph Sallie Poonyane Molefi was one of the so called refugees.
5. It is correct that a temporary permit was issued to him and extended from time to time and that it finally expired on 31st March, 1967, whereafter it was not again renewed. Before I stopped dealing with aliens J.S.P. Molefi did interview me on occasions. I cannot now remember specific occasions.
6. The contents of paragraph 6 (c) of Mr. Molefi's affidavit has been brought to my notice. Although it is possible that he may have interviewed me after the Aliens Control Act came into force (i.e. on the 1/3/68) I have no recollection of his having done so. In any event I emphatically deny that I told him that a temporary permit was no longer necessary because of the coming into operation of the Aliens Control Act. This Act never exempted him or any of the other aliens going by the

Affidavit of
 E.M. Makhaba
 (Electoral
 Officer)
 (Annexure "K")

21st October
 1968

In the High
Court of
Lesotho

No. 17

Affidavit of
E.M. Makhaba
(Electoral
Officer)
(Annexure "K")

21st October
1968
(continued)

name of refugees from having permits. After the Aliens Control Act came into force however it was Government policy not to renew any of these permits and even if any of them had then applied for extension it would have been refused because already at this time it was contemplated that all the so called refugees would sooner or later have to leave Lesotho.

(Signed) E. Makhaba

SIGNED and SWORN to before me at Maseru on this the 21st day of October, 1968. The deponent has acknowledged that he knows and understands the contents of this affidavit. 10

(Signed) (Illegible)

COMMISSIONER OF OATHS.

No. 18

Affidavit of
B.K. Taoana
(District Ad-
ministrative
Secretary for
the Maseru
District)
(Annexure "L")

19th November
1968

No. 18

AFFIDAVIT OF B.K. TAOANA (DISTRICT ADMINISTRATIVE
SECRETARY FOR THE MASERU DISTRICT)
(ANNEXURE "L")

I, BERNARD KOKOLIA TAOANA hereby make oath and say:- 20

1. I am the District Administrative Secretary for the Maseru District. Formerly this office was that of the District Commissioner. I have occupied this post since March 1967. Until March 1968 my duties included, inter alia, dealing with the control of Aliens and the administration of the laws relating to aliens. I was responsible also for the issue of all temporary and indefinite permits in terms of which aliens were allowed to sojourn in Lesotho. 30
2. The Petitioner, Joseph Molefi, is known to me. It is correct that a temporary permit was issued to him and that it was extended from time to time until the 31st March, 1967.
3. After the 31st March, 1967 it was not again extended because I received instructions from

In the High Court of Lesotho

No. 19

AFFIDAVIT OF L.M. BLOME-JONES (ACTING PRINCIPAL ASSISTANT SECRETARY, DEPARTMENT OF DEFENCE AND INTERNAL SECURITY, LESOTHO (ANNEXURE "M"))

No. 19

Affidavit of L.M. Blome-Jones (Acting Principal Assistant Secretary, Department of Defence and Internal Security, Lesotho) (Annexure "M")

22nd November 1968

I, LESLIE MILBURNE BLOME-JONES do hereby make oath and say -

- 1. During the period from July, 1967 to August 1968 I was Acting Principal Assistant Secretary in the Department of Defence and Internal Security. In this capacity, I was responsible to the Minister and the Secretary to the Cabinet for the ministerial direction of matters related to Aliens in Lesotho. 10
- 2. On the 25th January, 1968, a meeting at which all aliens claiming to be refugees were required to be present was held on the instructions of the Honourable the Prime Minister. The Petitioner, to my knowledge attended this meeting.
- 3. In order to check the accuracy of the current records of persons claiming to be refugees and to bring them up to date where necessary, I took the opportunity of preparing forms which all persons attending the meeting were required to complete. On the day of the meeting the Petitioner completed one of these forms. 20
- 4. There was never any intention that the completing of these forms by the persons concerned would be a step preparatory to allowing any of them to remain in Lesotho either temporarily or indefinitely, nor was it ever suggested that the information called for in the forms was required for this purpose, or in any way connected with this purpose. 30

(Signed) L.M. Blome-Jones

SWORN to and SIGNED before me at Maseru on this 22nd day of November, 1968 by the deponent who has acknowledged that he knows and understands the contents of this affidavit.

(Signed) (Illegible) 40
COMMISSIONER OF OATHS.

No. 20

AFFIDAVIT OF J.H.J. KENNEDY (DETECTIVE WARRANT OFFICER, SOUTH AFRICAN POLICE)
(ANNEXURE "N")

In the High Court of Lesotho

No. 20

I, JOHN HUNTER JAMES KENNEDY, do hereby make oath and say:

Affidavit of J.H.J.Kennedy (Detective Warrant Officer, South African Police) (Annexure "N")

18th November 1968

1. I am a Detective Warrant Officer in the South African Police and have been stationed at Johannesburg since 1941.
- 10 2. I was in charge of the investigations into the case against one Joseph Molefi who is the Petitioner in this matter.
3. The said Joseph Molefi was arrested on the 5th August, 1961 on a charge of contravening various provisions of the Suppression of Communism Act, No. 44 of 1950.
4. On the 28th August, 1961, the said Joseph Molefi appeared in the Regional Court Johannes-
20 burg and he was released on bail in an amount of R100. The hearing of the case against him was postponed to the 26th October, 1961, on which date he failed to put in an appearance. The case was again postponed to the 30th November, 1961. He was again absent and bail was estreated and a warrant issued for his arrest. To date this warrant has not been executed.
5. Attached hereto is a copy of the charges which
30 were preferred against the said Joseph Molefi. The facts alleged in these charges are in accordance with the information obtained by me in the course of my investigations.
6. The events which led up to the arrest and
40 subsequent appearance in Court of the said Joseph Molefi are as set out in the copy of the charge sheet attached hereto and relate to the period 8th April, 1960 to July, 1961. The unlawful organisation referred to in the charge sheet is the Pan Africanist Congress which was founded in 1959 and was declared to be an unlawful organisation on the 8th April, 1960.

In the High Court of Lesotho

No. 20

Affidavit of J.H.J.Kennedy (Detective Warrant Officer, South African Police) (Annexure "N")

18th November 1968 (continued)

Attached hereto is a photostat copy of the Government Gazette in which the declaration was published under Proclamation 119 of the 8th April, 1960. In the same Proclamation the African National Congress was also declared to be an unlawful organisation. Before this date it was not an offence to belong to either organisation.

(Signed) J.H.J. Kennedy.

SIGNED and SWORN to before me at Ladybrand on this the 18th day of November, 1968. I certify that the deponent has acknowledged that he knows and understandsthe contents of this affidavit.

10

(Signed) (Illegible)

COMMISSIONER OF OATHS.

No. 21

Charges preferred against Petitioner-Appellant by South African Police

Undated

No. 21

CHARGES PREFERRED AGAINST PETITIONER-APPELLANT BY SOUTH AFRICAN POLICE

CHARGE SHEET

THAT

20

- 1. JOSEPH MOLEFE and
2. MATHEW NKOANA

(hereinafter called the accused) are guilty of the offence of

1. Contravening Section 11(a) read with Sections 1, 11(i), and 12 of Act 44 of 1950 as amended by Section 8 of Act 50 of 1951 and Section 9 of Act 15 of 1954 and further read with Sections 1 and 2 of Act 34 of 1960 and also read with Proclamations 119 of 1960 promulgated in Government Gazette 6414 of the 8th April, 1960 and 83 of 1961 promulgated in Government Gazette 6653 of the 24th March 1961, as amended.

30

ALTERNATIVELY:

Contravening Section 3 (1) (a) (i) read with Sections 1, 11(1), and 12 of Act 44 of 1950 as amended by Section 8 of Act 50 of 1951 and Section 9 of Act 15 of 1954 and further read with sections 1 and 2 of Act 34 of 1960 and also read with Proclamations 119 of 1960 promulgated in Government Gazette 6414 of the 8th April 1960 and 83 of 1961 promulgated in Government Gazette 6653 of the 24th March 1961, as amended.

10

ALTERNATIVELY:

Contravening Section 3 (1) (a) (iv) read with Sections 1, 11(1) and 12 of Act 44 of 1950 as amended by Section 8 of Act 50 of 1951 and Section 9 of Act 15 of 1954 and further read with Sections 1 and 2 of Act 34 of 1960 and also read with Proclamations 119 of 1960 promulgated in Government Gazette 6414 of the 8th April, 1960 and 83 of 1961 promulgated in Government Gazette 6653 of the 24th March, 1961, as amended.

20

FIRSTLY: IN THAT during the period 8th April, 1960 to July 1961 and at or near Johannesburg in the Regional Division of South Transvaal the accused, the one or other or both of them, did wrongfully and unlawfully perform an act or acts which were calculated to further the achievement of any of the objects of communism.

FIRST ALTERNATIVE:

IN THAT during the period from the 8th April, 1960 to July 1961 and at or near Johannesburg in the Regional Division of South Transvaal the accused, the one or other or both of them, did wrongfully and unlawfully become, continue to be or perform an act or acts as an office-bearer, officer or member of an unlawful organisation.

30

SECOND ALTERNATIVE:

IN THAT during the period in the first alternative count mentioned and at or near Johannesburg in the Regional Division of South Transvaal the accused, the one or other or both of them, did wrongfully and unlawfully take part in an

40

In the High
Court of
Lesotho

—————
No. 21

Charges preferred against
Petitioner-
Appellant by
South African
Police

Undated
(continued)

In the High
Court of
Lesotho

No. 21

activity or activities of an unlawful organisation or carry on in the direct or indirect interest of an unlawful organisation an activity or activities in which it was or could have been engaged at the said date.

1 (d)

PARTICULARS

Charges pre-
ferred against
Petitioner-
Appellant by
South African
Police

Undated
(continued)

1. The reference in the Main Count to "the objects of communism" should be construed solely as meaning the objects of an unlawful organisation, to wit, the Pan Africanist Congress. 10

2. On Counts 1 and 3:

The State alleges that the accused the one or other or both of them did commit one or more of the above offences by inter alia committing the following acts:-

1. Advocating, advising, defending or encouraging the promotion of the purposes of the said Pan Africanist Congress

and/or

2. distributing or assisting in the distribution of certain periodicals publications or documents issued by on behalf or at the instance of the Pan Africanist Congress. 20

(Signed)

REGIONAL COURT PROSECUTOR.

No. 22

AFFIDAVIT OF M. MAJARA (MINISTER OF AGRICULTURE,
GOVERNMENT OF LESOTHO) (ANNEXURE "O")

In the High
Court of
Lesotho

No. 22

I, MATETE MAJARA hereby make oath and say:

Affidavit of
M. Majara
(Minister of
Agriculture,
Government of
Lesotho)
(Annexure "O")

1. I am the Minister of Agriculture in the Government of Lesotho. I am also the national chairman of the Basuto National Party.
2. I have read the allegations made by Petitioner in paragraph 11 of his petition. I admit that I interviewed the Petitioner after reading the newspaper report referred to as Annexure J in the petition. I spoke to him in my private capacity. I enquired from him whether he was responsible for this report and when he confirmed that he was I warned him that I would consider taking action against him for defamation because the report specifically mentioned my name and stated that civil proceedings had been instituted against me and others, whereas no summons or other intimation of such civil action had at that stage reached me.
3. This interview contributed nothing towards the steps which were subsequently taken to expel the Petitioner from Lesotho. The first intimation that I had of the Prime Minister's intention to have the Petitioner removed from Lesotho was when the matter was raised by him at a Cabinet meeting.

19th November
1968

(Signed) M. Majara

SIGNED and SWORN to before me at Maseru on this the 19th November, 1968. The Deponent has acknowledged that he knows and understands the contents of this affidavit.

(Signed) (Illegible)

COMMISSIONER OF OATHS.

In the High
Court of
Lesotho

No. 23

AFFIDAVIT OF SECOND RESPONDENT PRAYING FOR
DISMISSAL OF PETITION AND DISCHARGE OF RULE NISI

No. 23

IN THE HIGH COURT OF LESOTHO

Affidavit of
Second Respon-
dent praying
for dismissal
of petition
and discharge
of Rule Nisi

HELD AT MASERU

CIV/APN 31/68.

In the matter between

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

THE PRINCIPAL LEGAL ADVISER

First Respondent

THE PRIME MINISTER

Second Respondent

THE COMMISSIONER OF POLICE

Third Respondent

10

19th November
1968

TO: THE HONOURABLE THE CHIEF JUSTICE OF LESOTHO
AND THE OTHER THE HONOURABLE JUDGES OF THIS
HONOURABLE COURT

REPLYING AFFIDAVIT

1. I, Leabua Jonathan, Second Respondent in the
above Petition do hereby make oath and say
that I have read the Petition and the First
Respondent's replying affidavit.

2. I agree entirely with the contents of the
said affidavit, to which I wish to add only
the following -

20

(a) The expulsion order in question was
signed by me in my capacity as Prime Minister
and Minister of Defence and Internal Security
after I had considered and rejected the
Petitioner's application to be allowed to
remain in Lesotho;

(b) I deny that, in the exercise of the
powers conferred upon me under Section 25 of
the Aliens Control Act 1966, I was actuated
by any improper motives in ordering the
expulsion of the Petitioner, as averred by
him in sub-paragraph (c) of paragraph 11 of
his Petition;

30

(c) I deny that I was influenced in my decision in any way in consequence of either (i) the newspaper report referred to in the Petition, or (ii) the interview Petitioner had with Chief Majara;

In the High
Court of
Lesotho

No. 23

10 (d) My original decision to expel the Petitioner was taken before both the publication of the newspaper report and the interview Chief Majara had with the Petitioner. It has in fact been my intention for some considerable time to expel from Lesotho all persons claiming to be refugees, other than those whom I consider to be an asset to Lesotho. To this end I gave instructions early in 1968 to the effect that no temporary or indefinite permits should be issued or extended in respect of such persons, so that Lesotho would not be under any obligation towards any of them in terms of which they could claim a legal right to remain in this country. The Petitioner merely happens to be the first of these persons against whom it has been decided to take action.

20

Affidavit of
Second Respon-
dent praying
for dismissal
of petition
and discharge
of Rule Nisi

19th November
1968
(continued)

WHEREFORE I humbly pray that it may please this Honourable Court to dismiss the Petition and discharge the rule nisi which was granted on the 12th October, 1968, with costs.

(Signed) Leabua Jonathan

30 SIGNED and SWORN to before me at MASERU on this 19th November, 1968 by the deponent who has acknowledged that he knows and understands the contents of this affidavit.

(Signed) (Illegible)

COMMISSIONER OF OATHS.

In the High
Court of
Lesotho

No. 24

AFFIDAVIT OF THE THIRD RESPONDENT

No. 24

IN THE HIGH COURT OF LESOTHO

Affidavit of
the Third
Respondent

HELD AT MASERU

CIV/APN 31/68.

22nd November
1968

In the matter between

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

THE PRINCIPAL LEGAL ADVISER	First Respondent	
THE PRIME MINISTER	Second Respondent	
THE COMMISSIONER OF POLICE	Third Respondent	10

TO: THE HONOURABLE THE CHIEF JUSTICE OF LESOTHO
AND THE OTHER THE HONOURABLE JUDGES OF THIS
HONOURABLE COURT

REPLYING AFFIDAVIT

I, JOHN HEDLEY HINDMARSH, Third Respondent in the above Petition hereby make oath and say that I have read the Petition and replying affidavit of the First Respondent, have nothing to add and abide by the decision of this Honourable Court.

(Signed) J.H. Hindmarsh 20
THIRD RESPONDENT

SWORN to and SIGNED before me at Maseru on this 22nd day of November, 1968 by the deponent who has acknowledged that he knows and understands the contents of this affidavit.

(Signed) (Illegible)
COMMISSIONER OF OATHS.

45.

No. 25

LETTER FROM FIRST RESPONDENT TO PETITIONER-
APPELLANT'S ATTORNEY

In the High
Court of
Lesotho

Our Ref: L/PR-OP/4/123

The Law Office,
P.O. Box 33,
Maseru.

No. 25

Letter from
First Respon-
dent to
Petitioner-
Appellant's
Attorney

25th November, 1968

25th November
1968

10 Mr. T.G. Mohaleroe,
Mohokare Chambers,
Maseru.

Dear Sir,

Re: J.S.P. Molefi vs Principal Legal
and Others (Civ. App. 22/1968).

With further reference to the above enclosed
herewith please find a photostatic copy of the
Expulsion Order issued on the 11th October, 1968,
the original whereof will be produced in Court at
the hearing of this matter.

Yours faithfully,

20

(Signed) (Illegible)

PRINCIPAL LEGAL ADVISER.

The Registrar,
High Court,
Maseru.

Copy for your information. Photostat enclosed
for record purposes.

(Signed) (Illegible)

PRINCIPAL LEGAL ADVISER.

In the High
Court of
Lesotho

No. 26

EXPULSION ORDER SIGNED BY SECOND RESPONDENT
ADDRESSED TO THIRD RESPONDENT

No. 26

Expulsion
Order signed
by Second
Respondent
addressed to
Third
Respondent

GOVERNMENT OF LESOTHO.

The Aliens Control Act No. 16 of 1966

Expulsion Order

11th October
1968

TO: Commissioner of Police
Lesotho Mounted Police
Maseru.

WHEREAS JOSEPH SALLIE POONYANE MOLEFI of
Maseru, Lesotho, has rendered himself liable to
expulsion from Lesotho by reason that in terms of
Section 5 and Section 7 of the Aliens Control Act
No. 16 of 1966, the presence within Lesotho of the
said JOSEPH SALLIE POONYANE MOLEFI is unlawful;

10

YOU ARE HEREBY AUTHORISED AND REQUIRED to
cause the said JOSEPH SALLIE POONYANE MOLEFI to be
removed from Lesotho under proper escort subject
to necessary detention in custody as provided
under Section 25 (3) of the said Act, in terms of
which I hereby direct that he be kept in prison or
in police custody while awaiting expulsion and
while being conveyed to the place of departure.

20

Dated at Maseru this 11th day of October,
1968.

(Signed) Leabua Jonathan

PRIME MINISTER

No. 27

FURTHER SUPPLEMENTARY AFFIDAVIT OF
PETITIONER-APPELLANT

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APPN/31/68

In the High Court
of Lesotho

No. 27

Further Supple-
mentary Affidavit
of Petitioner-
Appellant.

28th November 1968

In the matter between :

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

10 THE PRINCIPAL LEGAL ADVISER 1st Respondent

THE PRIME MINISTER 2nd Respondent

THE COMMISSIONER OF POLICE 3rd Respondent

PETITIONER'S FURTHER SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

JOSEPH SALLIE POONYANE MOLEFI

do hereby make oath and say that :-

1. I am the Petitioner in the above matter.

20 2. (a) I humbly pray that this Honourable Court will receive this further Supplementary Affidavit which is submitted after the filing of my Petition by reason of the following facts.

(b) PRIOR to the intimation to me of the intention to deport me which has led to these proceedings, I had been concerned in a similar matter wherein this Honourable Court granted me an interim interdict as a result of which the Respondents withdrew the earlier deportation order.

30 (c) IN the course of the proceedings referred to above and in anticipation of the return day therein, my Attorneys instructed their

In the High Court
of Lesotho

No. 27

Further Supple-
mentary Affidavit
of Petitioner
Appellant.

28th November 1968
(continued)

Johannesburg correspondents, MESSRS.
M. L. ROSIN, ROSIN & PARTNERS, to write to
the United Nations Office of the High
Commissioner for Refugees in Geneva in
order to obtain further information
regarding the Convention relating to the
status of refugees which is referred to
in paragraph 10(c) of my Petition in
this matter and which Convention is
recorded in the booklet Annexure "F" to
the Petition;

10

(d) THE Deputy Director, Legal Division,
of the United Nations Office for the
Commissioner for Refugees replied to my
Attorneys' correspondents by letter dated
25th September, 1968, a copy whereof is
hereunto attached as Annexure "A";

(e) UPON receipt of this letter, the said
firm of M.L. ROSIN, ROSIN & PARTNERS gave
further consideration to the question of
my status as a refugee and further
correspondence followed between the office
of the United Nations High Commissioner
for Refugees in Geneva and the said firm
of Attorneys;

20

(f) ON the 11th October, 1968 when I was
notified of the proposal to deport me and
when I filed my first Supplementary
Affidavit, I was not in a position to place
my contentions in regard to my status as
a refugee before this Honourable Court in
order to avail myself of the protection
afforded to refugees in terms of Section
38(1) of the Aliens Control Act No. 16
of 1966. In this regard, I humbly refer
to paragraph 10 of my Petition;

30

(g) THE facts that I hereinafter adduce,
as, it is submitted, will be apparent,
required research as regards the law of
the Republic of South Africa and this in
turn necessarily required a period of time
for preparation of my Affidavit and the
Supporting Affidavit.

40

(h) I humbly desire to place information
before this Honourable Court in proof of
my submission that I am a refugee entitled

to protection in terms of the Aliens Control Act No. 16 of 1966 and I humbly pray that this Honourable Court will therefore condone the late filing of this Supplementary Affidavit.

In the High Court
of Lesotho

—
No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November 1968
(continued)

10 (i) THIS Honourable Court's attention is respectfully directed to paragraphs 2 and 3 of the said letter being Annexure "A" hereto from which it appears that the Convention was acceded to by the United Kingdom on the 11th March, 1954 and was extended to Basutoland on the 11th November, 1960, a declaration being made in terms of Article B(1)(b) of Article 1 of the Convention that the phrase "events occurring before 1 January, 1951 shall mean 'events occurring in Europe or elsewhere.'" It also appears that the Government of Lesotho considers itself bound by the Convention.

20

3.(a) I humbly refer this Honourable Court to the Affidavit of GERALD JOSMAN, which Affidavit is hereunto attached as Annexure "B". From this Affidavit it appears that MR. JOSMAN is an Advocate of the Supreme Court of South Africa of five and a half years standing and is presently practising as such in Johannesburg and is qualified to make statements as to the provisions of the Statute Law of South Africa and to express opinion as an expert thereon. The said GERALD JOSMAN is also admitted as an Advocate of this Honourable Court. From the said Affidavit the following appears :

30

40 (A) (i) In terms of the South Africa Act, 1909 (9 Edward VII Ch.9) by Section 19 it was provided that the legislative power of the Union of South Africa should be vested in the Parliament of the Union which should consist of the King, a Senate and a House of Assembly;

(ii) By Section 26 of that Act, one of the qualifications of a Senator was inter alia that he had to be a British subject of European descent;

(iii) Ny Section 44 of that Act, one of the

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

qualifications of a Member of the House of Assembly was inter alia that he had to be a British subject of European descent;

- (iv) By Section 36 of that Act it was provided that subject to the provisions of Section 35 of the Act the qualifications of parliamentary voters as existing in the several Colonies at the establishment of the Union should be the qualifications necessary to entitle persons in the corresponding Provinces to vote for the election of Members of the House of Assembly with a proviso excluding members of His Majesty's regular forces on full pay; 10
- (v) By Section 35 of that Act it was provided that Parliament might by law prescribe the qualifications which would be necessary to entitle persons to vote at the election of Members of the House of Assembly, but that no such law should disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, was or might become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting would be taken to have been duly passed by both Houses of Parliament; 20
30
40
- (vi) In terms of Section 8 of the Constitution Ordinance 1853 of the Cape of Good Hope, the qualifications entitling persons to vote in that Colony were briefly that he should be

a male who shall have occupied a house, shop, warehouse or building with any land occupied therewith of the value of £75 for twelve months before the registration of voters or, for the same period, have been in receipt of salary or wages of not less than £50 per year;

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

- 10 (vii) In terms of the Transvaal Constitution Letters Patent of the 6th December, 1906 the qualifications to vote in the Transvaal were that the person should be a white male British subject of the age of twenty-one years and upwards who is not subject to any disqualifications later mentioned in the Letters Patent, excluding certain members of the regular forces;
- 20 (viii) In terms of the Orange River Constitution Letters Patent dated the 5th June, 1905 the same qualifications for voters apply as is recorded above in respect of the Transvaal;
- 30 (ix) In terms of Section 2 of Natal Act No. 8 of 1896 no persons shall be qualified to have their names inserted in any list of electors or in any voters' roll or to vote as electors within the meaning of Section 22 of the Constitution Act of 1893 or of any law relating to elections of the Members of the Legislative Assembly who (not being of European origin) are "Natives" or descendants in the male line of "Natives" of countries which could not have hitherto possessed elective representative institutions founded on the parliamentary franchise unless they shall first obtain an order from the Governor in Council exempting them from the operation of Act No. 8 of 1896. The provisions of Section 2 of the Act were not applicable to persons of the class mentioned in that Section whose names were rightly
- 40

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

contained in any voters' roll in force at the date of promulgation of Act No. 8 of 1896 and who were otherwise competent and qualified as electors;

- (x) In terms of the Electoral Act No.12 of 1918, Section 147, with certain specified exceptions the laws in force prior to that Act in regard to the qualification or disqualification of voters as referred to above were to remain of the same force and effect; 10
- (xi) In terms of the Status of the Union Act No. 69 of 1934, Section 3, certain parts of the Statute of Westminster, 1931 (22 George V, Ch.4) as set forth in the schedule to the said Status of the Union Act were deemed to be an act of the Parliament of the Union of South Africa. In the said schedule which contains the Statute of Westminster, 1931, Section 2 provided that the Colonial Laws Validity Act, 1865, should not apply to any law made by the Parliament of a Dominion (which in terms of Section 1 of the Statute of Westminster meant the Union of South Africa) after the commencement of the Statute of Westminster. Further, no law made after such commencement by the Parliament of the Union of South Africa would be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act. The Powers of the Parliament of the Union of South Africa would include the power to repeal or amend any such Act, Order, rule or regulation insofar as it formed part of the laws of the Union of South Africa; 20
30
40
- (xii) The Representation of Natives Act No.12 of 1936 defined a "Native" generally to

mean any member of any aboriginal race or tribe of Africa other than a race, tribe or ethnic group in the Union representing the remnants of a race or tribe of South Africa which has ceased to exist as a race or tribe. Section 7(4) of that Act provided that the names of all persons which were included in the Cape Native Voters Roll should be removed from every other list of persons qualified to vote at elections of Members of the House of Assembly or of a Provincial Council. Section 44 of that Act amended Section 35 of the South Africa Act by providing in effect that a "Native" might be disqualified as a voter to vote at the election of Members of the House of Assembly otherwise than through the Special Roll created by the Representation of Natives Act, 1936;

- (xiii) All the above Statutes have since been repealed;
- (xiv) In terms of Section 3(1) of the Electoral Consolidation Act No. 46 of 1946, the franchise was given to every white person who was a Union national of or over the age of twenty-one years and was not subject to certain disqualifications mentioned in the Act. Section 4(1) of the said Act prescribed the qualifications of non-Europeans in the Cape Province and provided that a non-European did not include a person who was a "Native" for the purposes of the Representation of Natives Act, 1936. Section 5(1) enacted the qualifications of non-Europeans in Natal and provided that in the case of a "Native" he was required to obtain a certificate under Section 5(5) of Natal Law No.11 of 1865 if he was to be entitled to be registered as a voter;
- (xv) The effect of the enactment of these provisions was that from the establishment of the Union of South Africa

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

until the 31st December, 1950, no member of any aboriginal tribe of Africa, commonly known or referred to in the legislation as a "Native" was eligible to take part in the proceedings of Parliament either as a Senator or as a Member of the House of Assembly. In the Provinces of the Transvaal and the Orange Free State no "Native" was entitled to vote for the election of Members of the House of Assembly; and in Natal "Native" as defined, required an exemption from the Governor in Council in order to vote. In the Cape Province in terms of Sections 6, 7 and 12 of the Representation of Natives Act No. 12 of 1936, three Members of the House of Assembly were elected from a separate Roll by the Natives in that Province. In terms of Sections 2 and 8 of the above Act, four Senators were elected by Natives, one for Natal, one for the Transvaal and Orange Free State, one for the Cape Province and one for the Transkei territories.

10

20

- (B) (i) In terms of Section 28 of the Native Administration Act No. 38 of 1927 of the Union of South Africa the Governor General was given power to create and define by proclamation pass areas within which "Natives" may be required to carry passes and to prescribe regulations for the control and prohibition of the movement of Natives into, within or from any such areas; 30
- (ii) By Proclamation No. 150 of the 17th August, 1934, the Governor General, in Section 12 of that Proclamation, provided that every "Native" who was by law required to carry a pass, should, when within any pass area, produce it if required to do so by any policeman or authorised officer or by the owner or occupier of any property upon which he is found; and Section 11 provided that a person without a pass in a pass 40

area could be arrested and upon conviction for the offence could be fined up to 10/- or sent to prison for fourteen days, if he were a first offender.

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

- 10 (C) In terms of Section 5 of the Native Administration Act No. 38 of 1927, the Governor General of the Union of South Africa was empowered inter alia whenever he deemed it expedient in the general public interest to order the removal of any tribe or portion thereof or any "Native" from any place to any other place or to any province or district within the Union upon such conditions as he may determine, provided that in the case of a tribe objecting to such removal no such order would be given unless a resolution approving of the removal had been adopted by both Houses of Parliament.
- 20 (D) In terms of the Native Urban Areas Act No. 21 of 1923 and then the Native Urban Areas Consolidation Act No. 25 of 1945 which repealed the former Act, the entry of "Natives" into urban areas could be restricted for certain purposes under Section 10. The right to acquire an interest in land in Urban Areas was restricted by Section 6 and the right to reside therein is controlled by Section 2 and the powers under Section 9.
- 30 (E) In terms of the Industrial Conciliation Act No. 11 of 1924 and No. 36 of 1937, an "Employee" was defined so as to exclude a person whose contract of service is regulated by the Native Labour Regulation Act No. 15 of 1911 or the Native Urban Areas Act No. 21 of 1923, as amended. The purpose of this Industrial Conciliation Act was: "To make provision for the registration and regulation of trade unions and employers' organisations for the prevention and settlement of disputes between employers and employees, for the regulation of conditions of employment by agreement and arbitration, for the control of private registry offices and for other incidental matters".
- 40

In the High Court (F) (i)
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

Section 9 of the Suppression of
Communism Act No. 44 of 1950, read
as follows:

"Whenever in the opinion of the
Minister there is reason to believe
that the achievement of any of the
objects of communism would be
furthered -

- (a) By the assembly of a particular
gathering in any place; 10
- or
- (b) if a particular person were to
attend any gathering in any
place,

the Minister may, in the manner
provided in sub-section (1) of section
one of the Riotous Assemblies and
Criminal Law Amendment Act, 1914
(Act No. 27 of 1914), prohibit the
assembly of that gathering in any
place within the Union, or he may
by notice under his hand addressed
and delivered or tendered to that
particular person, prohibit him
from attending any gathering in any
place within an area and during a
period specified in such notice". 20

- (ii) The aforesaid Section 9 has now been
amended and reads as follows :-

"9.(1) Whenever the Minister is 30
satisfied that any person engages in
activities which are furthering or
are calculated to further the
achievement of any of the objects of
communism, he may by notice under his
hand addressed and delivered or
tendered to that person, prohibit him
from attending, except in such cases
as may be specified in the notice or as
the Minister or a magistrate acting 40
in pursuance of his general or
special instructions may at any time
expressly authorise -

- (a) any gathering: or

(b) any particular gathering or any gathering of a particular nature, class or kind, at any place or in any area during any period or on any day or during specified times or periods within any period.

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

10 (2) If any person to whom a notice has been delivered or tendered under sub-section (1) requests the Minister in writing to furnish him with the reasons for such notice and with a statement of the information which induced the Minister to issue such notice, the Minister shall furnish such person with a statement in writing setting forth his reasons for such notice and so much of the information which induced the Minister to issue the notice as can, in his opinion, be disclosed without detriment to public policy.

20 (3) The Minister may in the manner provided in sub-section (2) of section two of the Riotous Assemblies Act, 1956 (Act No. 17 of 1956) prohibit the assembly, except in such cases as he may specify when imposing the prohibition or as may thereafter be expressly authorised by him or a magistrate acting in pursuance of his general or special instructions -

30 (a) of any gathering; or

(b) of any particular gathering or any gathering of a particular nature, class or kind,

40 at any place or in any area during any period or on any day or during specified times or periods within any period, if he deems it to be necessary in order to combat the achievement of any of the objects of communism.

(4) The Minister may, in the manner in which any prohibition under this section was imposed, at any time withdraw or

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

(G) (i)

vary such prohibition."

Section 10 of the Suppression of
Communism Act No. 44 of 1950, read
as follows :-

"10(1) Whenever the Minister is
satisfied that any person is in
any area advocating, advising,
defending or encouraging the
achievement of any of the objects
of communism or any act or omission 10
which is calculated to further the
achievement of any such object, or
is likely in any area to advocate,
advise, defend or encourage the
achievement of any such object or
any such act or omission, he may
by notice under his hand, addressed
and delivered or tendered to such
person, prohibit him, after a period 20
stated in such notice being not less
than seven days from the date of
such delivery or tender, and during
a period likewise stated therein, from
being within any area defined in such
notice: Provided that the Minister
may at any time withdraw or modify
any such notice or grant such person
permission in writing to visit
temporarily any place where he is not 30
permitted to be in terms of such
notice.

(2) Whenever any person who has
received a notice in terms of sub-
section (1) is necessarily put to any
expense in order to comply with such
notice, the Minister may in his
discretion cause such expense, or any
part thereof, to be defrayed out of
moneys appropriated by Parliament
for the purpose and may further in his 40
discretion, cause to be paid out of
such moneys to such person a
reasonable subsistence allowance
during any period whilst such notice
applies to him.

(3) Subject to the proviso to

sub-section (1) any person who contravenes or fails to comply with any notice delivered or tendered to him in terms of sub-section (1) may at any time after the expiration of the period of not less than seven days stated in such notice, in addition to any penalty that may be imposed upon him, be removed by any member of the police force duly authorised thereto in writing by any commissioned police officer from any area wherein he is prohibited to be in terms of such notice."

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant,

28th November
1968 (continued)

10

(ii) The aforesaid Section 10 has now been substituted as follows :-

20

"10.(1)(a) If the name of any person appears on any list in the custody of the officer referred to in section eight or the Minister is satisfied that any person -

30

(i) advocates, advises, defends or encourages the achievement of any of the objects of communism or any act or omission which is calculated to further the achievement of any such objects;
or

(ii) is likely to advocate, advise, defend or encourage the achievement of any such object or any such act or omission;
or

(iii) engages in activities which are furthering or may further the achievement of any such object,

40

the Minister may by notice under his hand addressed and delivered or tendered to any such person and subject to such exceptions as may be specified in the notice or as the Minister or a magistrate acting in pursuance of his general or special instructions may at any time authorise

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

in writing, prohibit him during a period so specified, from being within or absenting himself from any place or area mentioned in such notice or, while the prohibition is in force, communicating with any person or receiving any visitor or performing any act so specified; Provided that no such prohibition shall debar any person from communicating with or receiving as a visitor any advocate or attorney managing his affairs whose name does not appear on any list in the custody of the officer referred to in section eight and in respect of whom no prohibition under this Act by way of a notice addressed and delivered or tendered to him is in force. 10

(a)bis Notwithstanding anything to the contrary in any law contained, the Minister may, if he is satisfied that any person serving any sentence of imprisonment imposed under the provisions of this Act or this Act as applied by any other law or the Public Safety Act, 1953 (Act No. 3 of 1953), or the Criminal Law Amendment Act, 1953 (Act No. 8 of 1953), or the Riotous Assemblies Act, 1956 (Act No. 17 of 1956), or section twenty-one of the General Law Amendment Act, 1962 (Act No. 76 of 1962), is likely to advocate, advise, defend or encourage the achievement of any of the objects of communism, by notice under paragraph (a) prohibit such person from absenting himself, after serving such sentence, from any place or area which is or is within a prison as defined in section one of the Prisons Act, 1959 (Act No. 8 of 1959), and a copy of the notice certified by the Secretary for Justice or any officer acting under his authority to be a true copy shall be deemed to be a warrant referred to in paragraph (e) of sub-section (2) of section twenty-seven of the Prisons Act, 1959, and the person to whom the notice applies shall, subject to such conditions as the Minister may from time to time determine, be detained in custody in such 20 30 40

place or area for such period as the notice may be in force.

In the High Court
of Lesotho

No. 27

(a) ter Subject to the provisions of paragraph (a) quat the provisions of paragraph (a) bis shall lapse on the 30th June, 1966.

Further Supple-
mentary

(a) quat The operation of the provisions of paragraph (a) bis may from time to time by resolution of the Senate and the House of Assembly be extended for a period not exceeding twelve months at a time.

Affidavit of
Petitioner
Appellant.

10

28th November
1968 (continued)

(a) quin A telegram purporting to be from the Secretary for Justice or any officer acting under his authority, stating that a notice has been issued under this section prohibiting a specified person from absenting himself for a specified period from a specified place or area which is or is within a prison, shall have the effect of such notice or a copy thereof certified by the said Secretary or officer to be a true copy; Provided that if any such telegram is used in lieu of the notice or copy thereof concerned, the said Secretary or officer shall as soon as may be forward the notice or copy, as the case may be, to the officer in charge of the prison where the person to whom the notice applies is to be detained under such notice, and the last-mentioned officer shall hand over any such notice received by him to such person at his request.

20

30

(b) The Minister may at any time by like notice withdraw or vary any such notice.

(c) While any notice issued under paragraph (a) or paragraph (a) read with paragraph (a) bis is in force, the period of the prohibition in question specified in such notice may be extended by a notice under the hand of the Minister addressed and delivered or tendered to the person concerned.

40

(1) bis If any person to whom a notice has been delivered or tendered under sub-section (1) requests the Minister in writing to

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.
28th November
1968 (continued)

furnish him with the reasons for such notice, and with a statement of the information which induced the Minister to issue such notice, the Minister shall furnish such person with a statement in writing setting forth his reasons for such notice and so much of the information which induced the Minister to issue the notice as can, in his opinion, be disclosed without detriment to public policy.

10

(i) ter Without prejudice to the provisions of sub-section (1) the Minister may, before deciding to impose any prohibition on any person under the said sub-section, require any magistrate to administer to such person a warning to refrain from engaging in any activities calculated to further the achievement of any of the objects of communism.

20

(2) Whenever any person who has received a notice in terms of sub-section (1) is necessarily put to any expense in order to comply with such notice, the Minister may in his discretion cause such expense, or any part thereof, to be defrayed out of moneys appropriated by Parliament for the purpose and may further in his discretion, cause to be paid out of such moneys to such person a reasonable subsistence allowance during any period whilst such notice applies to him.

30

(3) Any person who has by notice under this section been prohibited from being within or absenting himself from any place or area may, if, at the time the notice is delivered or tendered to him or at any time thereafter, he is at or in or, as the case may be, elsewhere than at or in that place or area, be arrested without warrant by any member of the South African Police and be removed from or to such place or area by that member or any other such member and may pending his removal be detained in custody.

40

- (4) Any person who has by notice under this Section been prohibited from absenting himself from any place or area, shall be deemed to have absented himself from such place or area, if, at any time after the notice has been delivered or tendered to him, he is elsewhere than at such place or in such area."

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

- 10 (II) The extent to which the audi alteran partem rule has been excluded by this Statute and in particular by Sections 9 and 10 quoted in paragraphs (F) and (G) above, was considered in the case of Kloppenburg 1964 (1) S.A.L.R. 813 (D and C.L.D.) the headnote of which case reads as follows :-

28th November
1968 (continued)

20 "Subject to the provisions of sections 9(2) and 10(1) bis of Act 44 of 1950, as amended, a person on whom notices in terms of sections 9(1) and 10(1) have been served is entitled to a fair hearing, after, but not before, the notices have been received by him, to enable him to make representations to the Minister in an endeavour to persuade the Minister to exercise his powers of with-
drawal or modification of the notices. He is entitled to be informed of the Minister's reasons for the notices and to be furnished with a statement of the information which induced him to issue them, but excluding
30 information which, in the opinion of the Minister, could not be disclosed without detriment to public policy and excluding reasons which would involve the disclosure of such information. If the Minister refuses to furnish information because he is of the opinion that its disclosure would be detrimental to public policy, he should give the reasons for his refusal, for
40 otherwise the affected person would not know whether he is obliged to accept the refusal. Similarly, if the Minister declines to give his reasons, or to give sufficiently adequate reasons, he should say why he so declines",

On Appeal which is reported in 1964, volume 4, S.A.L.R. page 31 (N.P.D.) the decision was confirmed. His Lordship, Mr. Justice Fannin stated the following on page 35 G:

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

(sic)

"Parliament has conferred upon the Minister the sole discretion as to whether the disclosure of information will be detrimental to public policy. So long as that decision is made bona fide and in strict accordance with the provisions of the Statute, the courts have no jurisdiction to interfere (see the 1934 Sachs case at p.37)."

10

Both cases place reliance on the Appellate Division decision of Sachs vs. Minister of Justice 1934 A.D. page 11, whether the court held that it was bound to accept the statement of the Minister that disclosure of the information would be detrimental to public policy.

(I) (i) In terms of the Natives (Abolition of passes and Co-ordination of Documents) Act No. 67 of 1952, the system of passes referred to in (B) above was replaced with a system of reference books. Section 15 provided for penalties if a "Native" failed or refused to produce on the demand of an authorised officer, a reference book issued to him;

20

(ii) By Section 30 of the Native Laws Amendment Act No. 36 of 1957, Section 10 of the Native Urban Areas Consolidation Act No. 25 of 1945 was amended so as to make it unlawful for a "Native" to remain for more than seventy-two hours in an urban area unless he had since birth resided in such area; or had worked continuously in such area for one employer for a period of not less than ten years; or had lawfully resided continuously in such area for a period of not less than fifteen years and had thereafter continued to reside in such area and was not employed outside such area and had not during either period or thereafter been sentenced to a fine exceeding £50 or to imprisonment for a period exceeding

30

40

six months; or such "Native" was the wife, unmarried daughter or son under the age at which he would have become liable for payment of general tax of the "Native" entitled to reside in the urban area and such wife, unmarried daughter or son ordinarily reside with that "Native"; or, in effect, permission to remain had been granted by an official designated for the purpose by the local authority concerned.

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant

28th November
1968
(continued)

(sic)

10

(J) (i)

In terms of the Unlawful Organisations Act No. 34 of 1960 the Governor General was given power to declare certain organisations unlawful, among these the Pan Africanist Congress and the African National Congress. The Governor General exercised those powers and declared these two bodies unlawful by his Proclamation No. 119 of 1960 in Government Gazette Extraordinary 6414 of the 8th April, 1964.

20

(b) Thus the body of laws enacted by the Parliament of the Union of South Africa from 1910 to 1950 was made without the active participation of the "Native" population of the Union of South Africa either as members of the Senate or of the House of Assembly or with the exceptions stated, as voters. The legislation referred to in sub-paragraphs B - J was likewise enacted by the Parliament of the Union of South Africa consisting entirely of white Senators and white members of the House of Assembly in whose election the Africans of the Union of South Africa had not participated on a Common Voters' Roll, but, in regard to four Senators and three members of the House of Assembly had participated in the election of these on a separate Roll.

30

40

4. (a) I grew up in the Union of South Africa and at an early age became interested in the

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

conditions of the African people living in
the Union of South Africa;

(b) In particular, I became aware of the impact upon Africans of the laws of that country. It was apparent to me that in every sphere of life, the African was discriminated against whether under the sanction of law or by reason of his treatment at the hands of members of the White population. Thus, for example, although there is no legal prohibition against so doing, White employers do not apprentice Africans. As I have said above, Africans have no place in the legislative machinery. In addition Africans had and have been discriminated against in the sphere of education, whether at primary, secondary or university level and both in regard to the facilities provided for them and the manner of financing such facilities. Insofar as residential facilities are concerned, Africans had, for the most part of the century, lived in the most appalling slums in most urban areas. Whilst many Africans are still living in slum conditions, there has been a general improvement in housing conditions during the last ten - fifteen years, but these conditions are infinitely inferior to those available to the mass of Whites, and the areas in which they reside are situated, in many cases, far from places of employment, thereby causing great inconvenience and hardship. Africans can only occupy areas especially set aside for them and even these they cannot own. The discrimination referred to above extended to the sphere of hospitalisation where the facilities offered to Africans are grossly inadequate especially when compared with those offered to Whites. The same position obtains in the spheres of transport, pension payments unemployment insurance and the use of public facilities. These are only a few examples of this discrimination;

10

20

30

40

(c) I grew to understand that because of the Mining and Industrial Laws and in particular the Industrial Conciliation Act referred to above, Africans could not participate in collective bargaining through trade union representatives with members of employers'

associations in order to arrange the terms of industrial agreements regulating wages and conditions of employment in any particular industry in South Africa. Through this, my people were not able to bargain for the same scale of wages as was enjoyed by whites and in consequence were, as regards the overwhelming majority, extremely poor;

10 (d) The need of Africans to seek work in the towns became more pressing as the years passed - these areas, in contrast to rural areas, being the places where higher wages could be obtained, albeit not in any way commensurate with wages paid to White workers;

(e) Because of the effect of the pass laws and the urban areas act on Africans travelling to and living in towns, vast numbers of arrests took place and many thousands of Africans over the years were sent to prison;

20 (f) In the rural areas tribes were sometimes moved in terms of Section 5 of the Native Administration Act of 1927, and occasionally individual Africans were banished under this Act to areas at a distance from their homes;

30 (g) In 1948 the National Party was elected to power and in all successive elections thereafter has been returned to power. Since 1948, the policy of apartheid has been the basis of a very considerable amount of legislation which has discriminated against the non-white population in general and African people in particular. The administration of laws particularly relating to passes, presence in urban areas and the supply of liquor (until a few years ago when the liquor laws were relaxed) became harsher and from time to time the reaction to these laws and their administration resulted in strong expressions of resentment;

40 (h) For a considerable period of time the only major African political group was the African National Congress and at meetings of this Congress, this resentment was expressed in resolutions criticising the laws that bore so harshly upon the African people. In 1943 the African National Congress declared the pass laws to be Enemy No. 1 of the African

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

In the High Court
of Lesotho

—
No.27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

people. In particular, much resentment was felt because of the fact that these harsh laws had been enacted by White people for operation upon black people and without the consent of the black people, this being the legacy of the South Africa Act and the legislation of the Parliament of the Union of South Africa thereafter;

(i) In about the year 1958 a militant organisation known as the Pan Africanist Congress came into existence as a direct result of the cumulative effect since 1910 of these laws upon the African people. It aimed at "government of the Africans by the Africans with everyone who owes his loyalty to Africa and is prepared to accept the democratic rule of an African majority being regarded as an African.";

10

(j) One of the matters to which the Pan Africanist Congress gave its special attention was the pass laws;

20

(k) In March, 1960, as a consequence of the historical process that I have endeavoured to describe herein, mass demonstrations against the Pass Laws were organised by the Pan Africanist Congress, among such being one at Sharpeville which resulted in the deaths of many African demonstrators;

(l) Thereafter, as has been said above, the Governor General of the Union of South Africa declared the Pan Africanist Congress to be an unlawful organisation;

30

(m) Prior to its declaration as an unlawful organisation I had been a member of the Pan Africanist Congress;

(n) I hereby refer to paragraph 9 of my Petition wherein I refer to my trial in the Regional Court, Johannesburg, on a charge of being a member of an unlawful organisation. I say that when I fled South Africa, as stated in my Petition, I had a fear of being persecuted because of the political opinions that I had entertained as a member of the Pan Africanist Congress prior to its having been declared

40

unlawful. I was aware of the provisions of the Suppression of Communism Act above referred to and I feared that even if I were acquitted of the charge preferred against me, I might nevertheless be prohibited from attending gatherings or be house-arrested in terms of Section 9 or 10 of that Act, or suffer other disabilities under that Act. The Powers under that Act could be exercised without the particular person affected having had a meaningful opportunity of knowing the complaint against him, testing such evidence, rebutting such evidence or exercising the rights otherwise available to him if he had been charged in a court of law;

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

(o) I say that such fears were well founded because at that time many political leaders had been banned from attending gatherings or had been confined to restricted areas in terms of that Act, and it seemed to me that if charges were brought against me under the Unlawful Organisations Act and I was nevertheless acquitted, the Minister of Justice might well exercise his powers against me, more especially as I possessed no rights to defend myself in terms of that Act.

5. (a) I humbly submit by reason of all the foregoing that when I arrived in Lesotho in October, 1961, I was then a Refugee in terms of the United Nations Convention relating to the status of Refugees which had been acceded to by the United Kingdom on behalf of Basutoland on the 11th November, 1960;

(b) I further humbly submit that once having attained such status of refugee I cannot thereafter lose it notwithstanding any possible withdrawal from the Convention by Lesotho;

(c) By reason of this and in terms of Section 38 of the Aliens Control Act No. 16 of 1966 I respectfully request that this Honourable Court declare that I am a Refugee, that the provisions of the United Nations Convention relating to the status of Refugees applies to me and that my expulsion from Lesotho is not permitted by that Convention.

(Signed) J. Molefi.

In the High Court
of Lesotho

No. 27

Further Supple-
mentary
Affidavit of
Petitioner
Appellant.

28th November
1968 (continued)

I hereby certify that the Deponent has
acknowledged that he knows and understands
the contents of this Affidavit which was signed
and sworn to before me at Maseru on this the
28th day of NOVEMBER, 1968.

(signed) E. Masia

COMMISSIONER OF OATHS

Senior Postmaster

71.

No. 28

LETTER DEPUTY DIRECTOR LEGAL DIVISION UNITED
NATIONS OFFICE OF THE HIGH COMMISSIONER OF
REFUGEES TO M.L. ROSIN, ROSIN & PARTNERS
(ANNEXURE "A")

UNITED NATIONS
OFFICE OF THE HIGH COMMISSIONER
FOR REFUGEES

25th September 1968.

10 Dear Sirs,

We are in receipt of your letter of 10
September regarding the position of Joseph
MOLIFI who is at present a refugee in the
Kingdom of Lesotho.

With reference to the questions raised
in the above-mentioned letter, the position is
as follows:

- 20 1) There is no time-limit in the operation
of the Convention, but the personal scope
of the Convention is limited to refugees
as a result of events occurring before
1 January 1951 (Art. 1 A (2)). A
Protocol was adopted on 31 January 1967
which removes this limitation, Lesotho is
not yet a party to this Protocol. A copy
of the said Protocol is enclosed. In the
case of your client however, it seems that
he is covered by the terms of the 1951
Convention so that the question of the
30 application of the Protocol of 1967 does
not arise.
- 2) The Convention was acceded to by the United
Kingdom on 11 March 1954 and it was
extended, inter alia, to Basutoland
(Lesotho) on 11 November 1960. The
Declaration was made concerning Article
B (1) (b) "events occurring in Europe or
elsewhere.....".
- 40 3) After its independence, Lesotho made a
general declaration concerning acceptance
for an interim period of U.N. multi-lateral
agreements, including the 1951 Convention.

In the High Court
of Lesotho

No. 28

Letter Deputy
Director Legal
Division United
Nations Office
of the High
Commissioner of
Refugees to
M.L. Rosin, Rosin
& Partners
(Annexure "A")

25th Sept. 1968.

In the High
Court of Lesotho

No. 28

Letter Deputy
Director Legal
Division United
Nations Office
of the High
Commissioner of
Refugees to
M.L.Rosin, Rosin
& Partners
(Annexure "A")

25th Sept. 1968.
(continued)

This declaration was addressed to the Secretary-General of the U.N. on 22 March 1967. No specific declaration on the 1951 Convention has been made, but it has been understood that the Government of Lesotho considers itself bound by the Convention in view of this general declaration.

- 4) We are enclosing a copy of the IRO Constitution herewith as requested by you. However, that Constitution which was adopted in 1946 is of no relevance for the new refugee situation in Africa.

10

Dr. Schlatter, a representative of our Office, has recently been in Lesotho where he has had discussions with the Government of Lesotho on the subject of the threatened deportation of refugees. Dr. Schlatter is at present in Gaborones, Botswana and his address is:

20

Dr. E. Schlatter
Charge de Mission of
UNHCR in Botswana
c/o UNDP, B.O. Box 54
Gaborones

Perhaps you would like to consult him on the case of Mr. Joseph Molifi in view of his recent visit to Lesotho.

Yours sincerely,

(signed)

30

E. Jahn

Deputy Director, Legal Division

Messrs. M.L. Rosin, Rosin & Partners,
206/215 Maritime House /Gebou
Loveday Street/Straat
Johannesburg
South Africa.

No. 29

In the High Court of Lesotho

AFFIDAVIT OF FIRST RESPONDENT ANSWERING PETITIONER-APPELLANT'S FURTHER SUPPLEMENTARY AFFIDAVIT OF 28th NOVEMBER, 1968.

No. 29

IN THE HIGH COURT OF LESOTHO

Affidavit of First Respondent Answering Petitioner - Appellant's further supplementary Affidavit of 28 November 1968.

HELD AT MASERU

In the matter between

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

30th November 1968

- 10 THE PRINCIPAL LEGAL ADVISER 1st Respondent
- THE PRIME MINISTER 2nd Respondent
- THE COMMISSIONER OF POLICE 3rd Respondent

TO THE HONOURABLE THE CHIEF JUSTICE OF LESOTHO AND THE OTHER THE HONOURABLE JUDGES OF THIS HONOURABLE COURT

ANSWERING AFFIDAVIT TO PETITIONER'S FURTHER SUPPLEMENTARY AFFIDAVIT

20 I, Daniel Johannes du Pisani Geldenhuys, in my capacity as Principal Legal Adviser and representing the Government of Lesotho, do hereby make oath and say:

I have read Petitioner's Further Supplementary affidavit and make reply thereto as follows:

1. AD PARAGRAPH 1:

This is admitted.

2. AD PARAGRAPH 2:

- (a) I have no comments as to the contents of sub-paragraphs (a), (b) and (h).
- 30 (b) I have no knowledge of the allegations contained in paragraphs (c) and (e) and can neither admit nor deny the same.
- (c) I have no knowledge of the allegations contained in paragraphs (d) and (i) and

In the High
Court of Lesotho

No. 29

Affidavit of
First Respondent
Answering
Petitioner-
Appellant's
further
supplementary
Affidavit of
28 November 1968

30th November
1968
(continued)

do not admit that Annexure "A" is what it purports to be. I deny however that it appears from Annexure "A" "that the Government of Lesotho considers itself bound by the Convention".

- (d) Although the application for leave to file the supplementary affidavit has been granted I deny that Petitioner was not in a position to place his contentions in regard to his status as a refugee before the Honourable Court as averred by him in sub-paragraph (f). 10
- (e) Similarly I also deny that the facts adduced in the supplementary affidavit required lengthy research and that this in turn required any extraordinary period of time.

3. AD PARAGRAPH 3:

- (a) I admit that the contents of sub-paragraph (a) are embodied in the affidavit of Gerald Josman but do not concede the correctness of any opinions expressed therein either by the Petitioner or Gerald Josman. I specifically deny that the statutory enactments referred to represent "events occurring before 1 January 1951" for purposes of Article 1 of the Convention. 20
- (b) I do not concede the correctness of the conclusions arrived at in sub-paragraph (b) and say that this is a matter for argument.

4. AD PARAGRAPH 4: 30

It is admitted that Petitioner grew up in South Africa but I have no knowledge of the rest of the allegations made in sub-paragraphs (a) to (c) save that I admit that the Pan Africanist Congress was a militant organisation but say that it was founded in 1959, and declared to be an unlawful organisation in 1960. I deny that Petitioner fled from South Africa to Basutoland as a result of the series of enactments referred to in the supplementary affidavit but maintain that he so fled solely because of his involvement with the unlawful organisation known as the Pan Africanist Congress and the fact that he was 40

arrested and charged in connection therewith.

In the High
Court of Lesotho

5. AD PARAGRAPH 5:

No. 29

(a) I once again deny that Petitioner was a refugee in terms of the Convention relating to the status of refugees when he arrived in Lesotho as he avers in paragraphs (a) and (b)

Affidavit of
First Respondent
Answering
Petitioner-
Appellant's
further
supplementary
Affidavit of
28 November 1968

10

(b) I oppose Petitioner's request to this Honourable Court to declare him to be a refugee or that the provisions of the United Nations Convention relating to the status of refugees applies to him or that his expulsion from Lesotho is not permitted by that Convention.

30th November
1968
(continued)

(c) I request this Honourable Court to dismiss this application and to award costs wasted in consequence of the filing of the Petitioner's supplementary affidavit against Petitioner.

20

(signed) D.J. Geldenhuys

FIRST RESPONDENT

SIGNED AND SWORN to before me at MASERU on this 30th November, 1968, by the deponent who has acknowledged that he knows and understands the contents of this affidavit.

(signed) R H. Parmenter

COMMISSIONER OF OATHS.



In the High Court of Lesotho

No. 30

Affidavit of Third Respondent answering Petitioner-Appellant's further supplementary Affidavit of 28 November 1968

3rd December 1968

AFFIDAVIT OF THIRD RESPONDENT ANSWERING PETITIONER-APPELLANT'S FURTHER SUPPLEMENTARY AFFIDAVIT OF 28th NOVEMBER, 1968.

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

THE PRINCIPAL LEGAL ADVISER 1st Respondent
THE PRIME MINISTER 2nd Respondent
THE COMMISSIONER OF POLICE 3rd Respondent

10

To: THE HONOURABLE THE CHIEF JUSTICE OF LESOTHO AND THE OTHER THE HONOURABLE JUDGES OF THIS HONOURABLE COURT.

ANSWERING AFFIDAVIT TO PETITIONER'S FURTHER SUPPLEMENTARY AFFIDAVIT

1. I, John Hedley Hindmarsh, Third Respondent do hereby make oath and say:

I have read Petitioner's Further Supplementary 20 affidavit and make reply thereto as follows :

2. I agree entirely with the contents of the said answering affidavit to which I have nothing to add save that I abide by the decision of this Honourable Court.

(Signed) J. Hindmarsh
THIRD RESPONDENT

SIGNED and SWORN to before me at Maseru on this 3rd December, 1968 by the deponent who has acknowledged that he knows and understands the contents of this 30 affidavit.

(signed) J.T. Mapetla
COMMISSIONER OF OATHS
Attorney: Lesotho.

No. 31

In the High
Court of Lesotho

AFFIDAVIT OF SECOND RESPONDENT ANSWERING
PETITIONER-APPELLANT'S FURTHER SUPPLEMENTARY
AFFIDAVIT OF 28th NOVEMBER, 1968.

No. 31

Affidavit of
Second Respond-
ent answering
Petitioner-
Appellant's
further
supplementary
Affidavit of
28 November 1968

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

3rd December
1968

10	THE PRINCIPAL LEGAL ADVISER	1st Respondent
	THE PRIME MINISTER	2nd Respondent
	THE COMMISSIONER OF POLICE	3rd Respondent

TO: THE HONOURABLE THE CHIEF JUSTICE OF LESOTHO
AND THE OTHER THE HONOURABLE JUDGES OF THIS
HONOURABLE COURT

ANSWERING AFFIDAVIT TO PETITIONER'S
FURTHER SUPPLEMENTARY AFFIDAVIT

20 1. I, Leabua Jonathan, Second Respondent in
the above Petition do hereby make oath and say
that I have read the Petitioner's Supplementary
affidavit and the First Respondent's answering
affidavit.

2. I agree entirely with the contents of the
said answering affidavit to which I have nothing
to add.

30 3. I once again request that it may please
this Honourable Court to dismiss the Petitioner's
application and to award against him costs wasted
in consequence of the filing of the Supplementary
affidavit referred to above.

(signed) Leabua Jonathan
SECOND RESPONDENT

SIGNED and SWORN to before me at Maseru on this
3rd December, 1968 by the deponent who has
acknowledged that he knows and understands the
contents of this affidavit.

(signed) J.T. Mapetla
COMMISSIONER OF OATHS
Attorney: Lesotho.

In the High Court of Lesotho

No. 32

No. 32

Affidavit of Petitioner-Appellant in reply to Affidavits of First, Second and Third Respondents of 30th November 1968, 3rd December 1968 and 3rd December 1968 5th December 1968

AFFIDAVIT OF PETITIONER-APPELLANT IN REPLY TO AFFIDAVITS OF FIRST, SECOND AND THIRD RESPONDENTS OF 30th NOVEMBER 1968, 3rd DECEMBER 1968 AND 3rd DECEMBER 1968.

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/31/1968

In the matter between:

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

10

THE PRINCIPAL LEGAL ADVISER 1st Respondent

THE PRIME MINISTER 2nd Respondent

THE COMMISSIONER OF POLICE 3rd Respondent

APPLICANT'S REPLYING AFFIDAVIT

I, the undersigned, JOSEPH SALLIE POONYANE MOLEFI, do hereby make oath and say that:

1.

I am the Applicant in this matter.

2.

I have read the Replying Affidavits of the Respondents and I reply as follows:

20

3.

AD PARA. 7 OF FIRST RESPONDENT'S AFFIDAVIT AND ANNEXURE "O" THERETO:

I repeat paragraph 11(b) of my Petition and I deny that the Minister of Agriculture, Matete Majara stated that he would consider taking action against me for defamation.

4.

I beg to inform this Honourable Court that of the approximately 70 (Seventy) refugees in

30

79.

Lesotho I am at the moment the only one upon whom an Expulsion Order has been served. I therefore repeat my submission that the Expulsion Order has been served upon me to punish me for a newspaper report I made.

5.

10 I beg leave to say that I intend filing a Supplementary Replying Affidavit in due course in which Affidavit the contents of the letter from Geneva - Annexure "I" to my Petition will be confirmed.

(signed) J.S.P. Molefi

DEPONENT.

SIGNED and SWORN to before me at Maseru on this 5th day of December, 1968 by the Deponent who has declared that he knows and understands the contents of this Affidavit.

(signed) K.J. Motlamelle

COMMISSIONER OF OATHS

20

Attorney-at-Law.

In the High Court of Lesotho

No. 32

Affidavit of Petitioner-Appellant in reply to Affidavits of First, Second and Third Respondents of 30th November 1968, 3rd December 1968 and 3rd December 1968.

5 December 1968.
(continued)

In the High Court of Lesotho

No. 33

SUPPLEMENTARY REPLYING AFFIDAVIT OF PETITIONER-APPELLANT

Supplementary
Replying
Affidavit of
Petitioner-
Appellant.

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/31/1968

11th December
1968

In the matter between:

JOSEPH SALLIE POONYANE MOLEFI Applicant

and

THE PRINCIPAL LEGAL ADVISER 1st Respondent

THE PRIME MINISTER 2nd Respondent

THE COMMISSIONER OF POLICE 3rd Respondent

10

PETITIONER'S SUPPLEMENTARY REPLYING AFFIDAVIT

I, the undersigned JOSEPH SALLIE POONYANE MOLEFI hereby make oath and say:

1.

I am the Petitioner in the above matter.

2.

I beg leave to refer to my Replying Affidavit herein dated the 5th December, 1968 which affidavit I crave leave to amend as hereunder follows.

20

3.

AD PARA 10 (c) of First Respondent's opposing Affidavit.

I annex hereunto as Annexures "F" and "G" respectively the Affidavits of Dr. Eberhard Jahn, and Leonard Underwood which confirm the contents of Annexure "H" and "I" of my petition.

4.

I say that a copy of the Convention has not been served on the Respondents as this would

30

unnecessarily increase the costs and, in addition, as it is apparent from Respondents' affidavits that they are in possession of the Convention.

(signed) J.S.P. Molefi
Deponent.

SIGNED and SWORN to before me at Maseru on this 11th day of December, 1968, by the Deponent who has acknowledged that he knows and understands the contents of this Affidavit.

(signed) A.J. Hellferscee
COMMISSIONER OF OATHS
Resident Magistrate.

In the High
Court of Lesotho

No. 33

Supplementary
Replying
Affidavit of
Petitioner-
Appellant

11th December
1968
(continued)

10

No. 34

AFFIDAVIT OF DR. E. JAHN DEPUTY MINISTER OF
THE LEGAL DIVISION OFFICE OF THE UNITED
NATIONS HIGH COMMISSIONER FOR REFUGEES, GENEVA.

IN THE HIGH COURT OF LESOTHO

In the matter of an application
by Joseph MOLIFI (alias MOLEFI)

I, Dr. Eberhard JAHN, Deputy Director of the Legal Division, Office of the United Nations High Commissioner for Refugees, Geneva, make oath and say as follows :

1. That under the terms of its Statute (Annex to United Nations General Assembly Resolution No. 428 (V) of 14 December 1950) the Office of the United Nations High Commissioner for Refugees is entrusted, inter alia, with a task of providing international protection to refugees falling within its competence. A copy of the said resolution is annexed hereto and marked "A".

2. That under the terms of Article 35 of the United Nations Convention relating to the Status of Refugees of 28th July 1968, hereinafter referred to as the Convention, the

20

30

No. 34

Affidavit of
Dr.E.Jahn Deputy
Minister of the
Legal Division
Office of the
United Nations
High
Commissioner for
Refugees, Geneva

26th November
1968

In the High
Court of Lesotho

No. 34

Affidavit of
Dr.E.Jahn Deputy
Minister of the
Legal Division
Office of the
United Nations
High
Commissioner for
Refugees, Geneva

26th November
1968
(continued)

High Commissioner is further entrusted with the task of supervising the application of the provisions of the said Convention. A copy of the Convention is annexed hereto and marked "B".

3. That having regard to the tasks specified in paragraphs 1 and 2 above, the Office of the United Nations High Commissioner for Refugees regularly receives notifications from the United Nations Secretary General concerning accessions to the Convention and declarations made by States under Article 40 thereof relating to territorial application of the Convention. 10

4. That by a communication dated 15 December 1960 the Office of the United Nations High Commissioner for Refugees was informed by the Legal Counsel to the United Nations Organization, New York, of the extension by the United Kingdom, on 11 November 1960, of the Convention, under Article 40 thereof inter alia to Basutoland. A photocopy of the said communication is annexed hereto and marked "C". 20

5. I am credibly informed that this affidavit will be used in support of the application by Joseph Molifi in this action.

(signed) Dr. Eberhard Jahn

(signed) M. Munning
BRITISH PRO-CONSUL
26.11.68

Sworn at Geneva
this 26th day of November 1968
at o'clock in the noon.

30

No. 35

STATUTE OF THE OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR REFUGEES

(Annexure "A" to affidavit of Dr.E.Jahn (No.34))

Separately reproduced.

In the High
Court of Lesotho

No. 35

Statute of the
Office of the
United Nations
High
Commissioner for
Refugees
(Annexure "A")

Separately
reproduced.

No. 36

UNITED NATIONS CONVENTION RELATING TO THE
STATUS OF REFUGEES. (Annexure "B")

10

Extension by the United Kingdom of Great
Britain and Northern Ireland to the
territories of Basutoland, Bechuanaland
Protectorate and Swaziland.

TEXT OF RESERVATIONS

20

The Government of the United Kingdom of
Great Britain and Northern Ireland understand
Articles 8 and 9 as not preventing the taking
by the above-mentioned territories, in the time
of war or other grave and exceptional
circumstances, of measures in the interests of
national security in the case of a refugee on
the grounds of his nationality. The provisions
of Article 8 shall not prevent the Government
of the United Kingdom of Great Britain and
Northern Ireland from exercising any rights
over property or interests which they may acquire
or have acquired as an Allied or Associated
Power under a Treaty of Peace or other agree-
ment or arrangement for the restoration of
peace which has been or may be completed as a
result of the Second World War. Furthermore,
the provisions of Article 8 shall not affect the
treatment to be accorded to any property or
interests which, at the date of entry into

30

No. 36

United Nations
Convention
relating to the
Status of
Refugees
(Annexure "B")
- Extension by
the United King-
dom of Gt.
Britain and N.I.
to the terri-
tories of
Basutoland,
Bechuanaland
Protectorate
and Swaziland.

In the High
Court of Lesotho

No. 36

United Nations
Convention
relating to the
Status of
Refugees
(Annexure "B")
- Extension by
the United Kingdom
of Gt. Britain
and N.I. to the
territories of
Basutoland,
Bechuanaland
Protectorate
and Swaziland.

force of the Convention for the above-mentioned territories, are under the control of the Government of the United Kingdom of Great Britain and Northern Ireland by reason of a state of war which exists or existed between them and any other state.

The Government of the United Kingdom of Great Britain and Northern Ireland accept paragraph 2 of Article 17 in its application to the above-mentioned territories with the substitution of "four years" for "three years" in sub-paragraph (a) and with the omission of sub-paragraph (c).

10

The Government of the United Kingdom of Great Britain and Northern Ireland cannot undertake that effect will be given in the above-mentioned territories to paragraphs 1 and 2 of Article 25 and can only undertake that the provisions of paragraph 3 will be applied in the above-mentioned territories so far as the law allows.

20

No. 37

Letter from
Legal Counsel of
United Nations
New York to
United Nations
High Commission-
er for Refugees,
Geneva.
(Annexure "C")

15th December
1960.

No. 37

LETTER FROM LEGAL COUNSEL OF UNITED NATIONS
NEW YORK TO UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES, GENEVA. (Annexure "C")

UNITED NATIONS, NEW YORK

C.N.179.1960TREATIES-5

15 December 1960

CONVENTION RELATING TO THE STATUS OF REFUGEES,
DONE AT GENEVA ON 28 JULY 1951. NOTIFICATION
BY THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND.

30

Sir,

I am directed by the Secretary-General to inform you that, by a communication received on 11 November 1960, the Permanent Representative of the United Kingdom to the United Nations has notified him of the

extension to the territories of Basutoland, Bechuanaland Protectorate and Swaziland of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, in accordance with article 40.

This extension is subject to certain reservations, the text of which is annexed hereto.

10 In accordance with paragraph 2 of article 40, the Convention will take effect for the above-mentioned territories as from the ninetieth day after the date of receipt of the notification by the Secretary-General, that is to say, on 9 February 1961.

Accept, Sir, the assurances of my highest consideration.

(signed) Constantin A. Stavropoulos

Legal Counsel.

20 Office of the United Nations
High Commissioner for Refugees.
Palais des Nations, Geneva,
Switzerland.

In the High
Court of Lesotho

No. 37

Letter from
Legal Counsel of
United Nations
New York to
United Nations
High Commission-
er for Refugees,
Geneva.

(Annexure "C")

15th December
1960

(continued)

In the High Court of Lesotho

No. 38

Affidavit of L. Underwood Second Secretary at British High Commission in Maseru.

11th December 1968

AFFIDAVIT OF L. UNDERWOOD SECOND SECRETARY AT BRITISH HIGH COMMISSION IN MASERU.

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/31/1968

In the matter between:

JOSEPH SALLIE POONYANE MOLEFI . Applicant and

THE PRINCIPAL LEGAL ADVISER 1st Respondent
THE PRIME MINISTER 2nd Respondent
THE COMMISSIONER OF POLICE 3rd Respondent

10

AFFIDAVIT

I, the undersigned, LEONARD UNDERWOOD hereby make oath and say:

1.

I am the Second Secretary at the British High Commission in Maseru.

2.

In my aforesaid capacity I act on behalf of the United Kingdom government in Lesotho.

3.

20

I have been instructed by my government that it is a matter of public record that at the date of the independence of Lesotho the United Kingdom was a party to the United Nations Convention relating to the status of refugees signed at Geneva on 28th July, 1951 and that on signing the Convention the United Kingdom declared that for the purpose of its obligation thereunder the words "events occurring before January, 1 1951" in article I, Section A, shall be understood as referring to events occurring in Europe or elsewhere before January 1 1951.

30

87.

4.

I have also been instructed by my government that under article 40 of the Convention the United Kingdom declared on 11th November, 1960 that the Convention extended to Basutoland.

5.

I have the authority of my government to make this Affidavit.

(signed) L. Underwood

Deponent

SIGNED and SWORN to before me at Maseru on this 11th day of December, 1968 by the Deponent who has acknowledged that he knows and understands the contents of this affidavit.

(signed) I. Molise

COMMISSIONER OF OATHS
Police Sergeant

In the High
Court of Lesotho

No. 38

Affidavit of
L. Underwood
Second Secretary
at British High
Commission in
Maseru.

11th December
1968
(continued)

In the High Court of Lesotho

IN THE HIGH COURT OF LESOTHO

CIV/APPN/31/68.

No. 39

Judgment of Trial Judge

15th January 1969

In the Matter between:

J. S. P. MOLEFI

Applicant

v.

Principal Legal Adviser
Prime Minister
Commissioner of Police

1st Respondent
2nd Respondent
3rd Respondent

JUDGMENT

Delivered by the Chief Justice the Hon. Mr. Justice H.R. Jacobs on the 15th day of January, 1969.

10

The applicant is a citizen of the Republic of South Africa who fled to Lesotho (then Basutoland) in October, 1961. According to the papers before me the applicant was arrested and appeared before the Regional Court in Johannesburg on the 28th August, 1961 on a charge of contravening certain provisions of the South African Suppression of Communism Act No. 44 of 1950. All the charges against the applicant (there were several alternatives) related, and were confined to, his alleged activities during the period 8th April, 1960 to July, 1961 as a member, or participant in the activities, of an organisation called the Pan Africanist Congress which was founded in 1959 and was declared to be an unlawful organisation by the South African Government on the 8th April 1960. On the 28th August, 1961 the hearing of the case against the applicant was postponed to the 26th October, 1961 and he was released on bail in an amount of R100. It is common cause that on the 26th October the applicant, having in the meantime fled to this country, failed to put in an appearance to face the charges against him. The applicant has been in Lesotho ever since.

20

30

It appears that after his arrival in this country the applicant applied for and was issued with a permit for temporary residence and that

40

this permit was extended from time to time until the 31st March, 1967 when the period of its validity finally expired. The applicant had in the meantime applied for a permit for permanent residence but this was refused.

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January 1969
(continued)

10 On the 27th August, 1968 the applicant was served with an order signed by the Minister of State purporting to act under Section 25 of the Aliens Control Act 1966 (No. 16 of 1966) directing the applicant to leave Lesotho on or before the 30th August, 1968. An interim interdict restraining the Minister from carrying out the above order was granted by this Court on the morning of the 30th August and on the 6th September, 1968 the Minister by letter addressed to the applicant withdrew the order and the rule issued by the Court was discharged. The Minister's letter of the 6th September reads as follows :-

20 " Ministry of Defence and
Internal Security,
Maseru

6th September, 1968.

Dear Sir,

Re: Expulsion Order dated 27/8/68.

30 In his policy speech at Maseru on the 31st August, 1968, the Honourable the Prime Minister called upon all persons claiming to be refugees to leave this country on or before the 30th September, 1968.

The latter date has been set in order to allow the persons concerned to make their own arrangements for departure from Lesotho and since I do not wish to discriminate against you in this respect I have decided to afford you the same opportunity of making such arrangements for your departure as you may think fit.

40 In these circumstances I have therefore decided to withdraw the expulsion order made in respect of yourself but it must be clearly understood that Government reserves the right to take such action as circumstances

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January 1969
(continued)

demand, should you fail to leave Lesotho.

Yours faithfully,

(Sgd. S.M. Letsie)

MINISTER OF STATE. "

On the 11th October, 1968 a new expulsion order, signed by the Prime Minister personally, was presented to the applicant. This order, which was addressed to the Commissioner of Police, was in the following terms:-

" WHEREAS JOSEPH SALLIE POONYANE MOLEFI of 10
Maseru, Lesotho, has rendered himself liable
to expulsion from Lesotho by reason that in
terms of Section 5 and Section 7 of the
Aliens Control Act No. 16 of 1966, the
presence within Lesotho of the said JOSEPH
SALLIE POONYANE MOLEFI is unlawful;

YOU ARE HEREBY AUTHORISED AND REQUIRED to
cause the said JOSEPH SALLIE POONYANE
MOLEFI to be removed from Lesotho under
proper escort subject to necessary detention 20
in custody as provided under Section 25(3)
of the said Act, in terms of which I hereby
direct that he be kept in prison or in
police custody while awaiting expulsion
and while being conveyed to the place of
departure."

The applicant thereupon launched the present
application in which he originally merely asked
for an order interdicting the respondents from
expelling him from Lesotho. An interim interdict 30
was granted and a rule nisi issued on the 12th
October, and on the 29th November when the
matter was due to be heard the applicant applied
for leave to hand in an additional affidavit
of approximately 48 pages to supplement his
original petition and further applied that a
new prayer be added in which the Court was asked
for a declaratory order in terms of Section
38(2) of the Aliens Control Act that he, the
applicant, is a refugee to which an international 40
treaty or convention relating to refugees
applies and that under such treaty his expulsion
from Lesotho is not permitted. The applicant

also applied for a postponement to enable him to obtain certain affidavits from the office of United Nations High Commissioner for Refugees in Geneva in support of allegations which had been made in the petition.

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January 1969
(continued)

10 The respondents opposed both application, i.e. the application for a postponement as well as the application to file supplementary affidavits and to amend the prayer but the Court, in the exercise of its discretion and mainly because of the serious implications which this matter holds for the applicant, granted both applications and reserved the question of costs for decision later. The matter finally came before the Court on the 12th and 13th December, 1968.

20 Various grounds were relied upon by the applicant in his petition but Mr. UNTERHALTER, who appeared for him before this Court, advanced only two main arguments, in the alternative. In the first place it was contended that the Aliens Control Act has to be administered by a Minister of State but that no such Portfolio has been created in terms of Section 72(2) of the Constitution. When the second respondent made the expulsion order, so the argument went, he purported to exercise his powers as Prime Minister but as he does not lawfully hold the office of

30 Minister of State the order is of no force and effect. This argument was based on the wording of Section 72(2) of the Constitution which reads as follows :-

40 "There shall be, in addition to the office of Prime Minister, such other offices of Minister of the Government of Lesotho (not being less than seven in number and one of which shall be the office of Deputy Prime Minister) as may be established by Parliament or, subject to any provision made by Parliament, by the King, acting in accordance with the advice of the Prime Minister."

MR. UNTERHALTER contended that the words "subject to any provision made by Parliament" in the above subsection mean that the power to establish offices of Minister vests in

In the High Court of Lesotho

No. 39

Judgment of Trial Judge

15th January 1969 (continued)

Parliament and can only be exercised by the King if Parliament has specifically made provision for His Majesty to exercise such powers: in other words, if Parliament has delegated such powers to the King. This, the argument continued, Parliament has not done and accordingly Government Notice No. 78 of 1968 by which offices of Minister were established by the King acting in accordance with the advice of the Prime Minister, is invalid. I do not think there is any substance in this contention. In my view Section 72(2) simply means that such offices of Minister can be established by the King as Parliament had not provided for. As it was common cause in the present case that Parliament has not established any such offices, it follows that His Majesty could do so and in my view has validly done so under Government Notice No. 78 of 1968 referred to above.

10
20

The second argument was based on the provisions of Section 38(1) of the Aliens Control Act, the relevant provisions of which read as follows :-

"If any international treaty or convention relating to refugees is or has been acceded to by or on behalf of the Government of Lesotho, an alien who is a refugee within the meaning of such a treaty or convention..... shall not be expelled from Lesotho...."

30

It was submitted on behalf of the applicant:

- (a) that there is in existence an international convention relating to the status of refugees namely the one set out in the booklet which forms annexure "F" to the applicant's petition;
- (b) that before Lesotho became an independent State the convention was acceded to by the United Kingdom and extended to the Colony then known as Basutoland;
- (c) that after independence the convention was, by letter dated the 22nd March 1967 from the third respondent to the Secretary

40

(sic)

General of the United Nations, acceded to by or on behalf of the Government of Lesotho; and

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January 1969
(continued)

(d) that the applicant, who admittedly is an alien as defined by the Aliens Control Act, is a refugee in terms of the aforesaid convention and is entitled to the protection of Section 38 of the Act and cannot be expelled.

10 Submissions (a) and (b) above were accepted
by Mr. BLUNDEN who appeared on behalf of the
respondents but he challenged the contentions
under (c) and (d) and these were the main
issues which were canvassed in argument before
me. Before dealing with these, however, I
should perhaps refer to and deal with two
subsidiary arguments of Mr. UNTERHALTER which
were based on the contentions under (a), (b)
20 and (d) only and independent of those under (c)
above, i.e. irrespective of whether there was
any post-independence accession to the
Convention on the Status of Refugees by the
Government of Lesotho. The first of these
arguments was that if the applicant was a
refugee in the terms of the Convention before
Lesotho became an independent Kingdom and had
acquired rights such as the right not to be
expelled from the territory, those rights must
30 be presumed to have been preserved under the
Constitution of Lesotho and the Aliens Control
Act. I am not going to deal in detail with the
arguments advanced by Mr. UNTERHALTER in support
of this contention - he even brought into it
the principles applicable to a contract for
the benefit of a third party - for the matter
is in my opinion effectively answered by
Section 17 of the Lesotho Independence Order
1966 which sets out which rights are preserved
and specifically excludes rights or obliga-
40 tions arising from treaties or conventions.
Mr. UNTERHALTER's second argument was that
although the Aliens Control Act only came into
operation on the 1st March, 1968, it was
actually passed by the Parliament of
Basutoland and assented to on the eve of
independence and by using the words ".....
has been acceded to.....on behalf of the
Government of Lesotho" in Section 38, the
Legislature must have had a past event in mind

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January 1969
(continued)

such as the Convention under consideration which had at that stage been acceded to on behalf of the Government of Basutoland by the United Kingdom. It seems to me, however, that when the Act was passed the Legislature must have known that, if at all, it will only be brought into operation some time after independence and that the words "has been" and "on behalf of" were inserted to cover possible eventualities between independence and the date the Act would be brought into operation. The fact is, that in terms of Section 38 accession has to be "by or on behalf of the Government of Lesotho" which is not the same as and does not mean "by or on behalf of the Government of Basutoland".

10

(sic)

To return then to the applicant's main argument, namely that the Convention has been acceded to by the Government of Lesotho after independence, it was contended by Mr. Unterhalter that the third respondent's letter of the 22nd March 1967 was an instrument of accession such as is contemplated by Article 39 of the Convention and that the applicant is therefore entitled to the protection of Section 38 of the Aliens Control Act. This letter, which as I have said was addressed to the Secretary General of the United Nations, reads as follows:-

20

"Your Excellency,

The Government of the Kingdom of Lesotho is mindful of the desirability of maintenance, to the fullest extent compatible with the emergence into full independence of the Kingdom of Lesotho, legal continuity between Lesotho and the several States with which, through the action of the Government of the United Kingdom the country formerly known as Basutoland enjoyed treaty relations. Accordingly, the Government of the Kingdom of Lesotho takes the present opportunity of making the following declaration:

30

40

2. As regards bilateral treaties validly concluded by the Government of the United Kingdom on behalf of the country formerly known as Basutoland, or validly applied or extended by the said Government to the country

10 formerly known as Basutoland, the Government of the Kingdom of Lesotho is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of twenty four months from the date of independence (i.e. until 4th October, 1968) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of the Kingdom of Lesotho will regard such of those treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

20 3. It is the earnest hope of the Government of the Kingdom of Lesotho that during the aforementioned period of twenty four months, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.

30 4. The Government of the Kingdom of Lesotho is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of the Kingdom of Lesotho proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument - whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which has, prior to independence, been applied or extended to the country formerly known as Basutoland, may, on a basis of reciprocity, rely as against Lesotho on the terms of such treaty.

40

5. It would be appreciated if Your Excellency would arrange for the text of this declaration to be circulated to all Members of the United Nations.

Please accept, Sir, the assurances of my highest consideration,

LEABUA JONATHAN
Prime Minister."

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January 1969
(continued)

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January
1969

(continued)

I shall assume, as was apparently done by both counsel for the purposes of their arguments, that the reference in the letter to treaties was intended also to include conventions although, according to the Shorter Oxford English Dictionary, a convention is supposed to be an agreement of a less formal nature than a treaty and Section 38 of the Aliens Control Act as well as Section 17 of the Lesotho Independence Order 1966 mentions both treaties and conventions which may mean that in international relations and dealings a difference between the two types of agreements is recognised. 10

Mr. BLUNDEN's answer to the contention that the letter constituted an instrument of accession was based on what he called the distinction which the writer drew between bilateral and multilateral treaties. Whereas (so the argument runs) there was an out and out and binding acceptance of bilateral treaties for a period of 24 months a decision on multilateral treaties was deliberately withheld for further consideration. It must of course be borne in mind that in terms of Section 17 of the Lesotho Independence Order 1966 the Kingdom of Lesotho was not bound under these pre-independence treaties so that a postponement of a decision on the steps the Government of Lesotho intended taking in relation to each individual instrument did not in itself constitute an act of accession or mean that the Government was legally bound to apply the terms of any such treaty. The applicant's contention that the letter constituted an instrument of accession to the Convention must therefore stand or fall on the meaning and effect of the words contained in the last sentence of paragraph 4 of the letter. On Mr. UNTERHALTER's argument this sentence contains an interim accession whereas Mr. BLUNDEN argued that it was nothing more than an undertaking that where reciprocal rights and obligations arise under a particular treaty, the Government of Lesotho will honour its terms if the party with whom it was dealing at any particular time was prepared to do the same. 20 30 40

I am of opinion that the construction contended for by Mr. BLUNDEN is correct. The

most that can possibly be said of the sentence in issue is that it contains a promise to accede to or honour a particular treaty if and when the occasion arises but this promise was subject to the qualification of reciprocity and was further qualified by the stipulation that only a party to a particular treaty could, as against Lesotho, rely on the terms of such treaty. In my view the letter cannot be interpreted as an instrument or act of general accession to all multilateral treaties and the Convention in question cannot therefore be regarded as one which has been acceded to by or on behalf of the Government of Lesotho within the meaning of Section 38 of the Aliens Control Act.

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January
1969
(continued)

It follows from what I have said so far that the rule granting a temporary interdict must be discharged and that the application for a declaratory order cannot succeed. But even if I am wrong in my view that the Convention is not one such as is referred to in Section 38 of the Act the applicant still has an additional hurdle to pass. An alien such as the applicant can only claim the protection of Section 38 if he proves, (section 32 places an onus on him) that he is a refugee within the meaning of an international convention relating to refugees. The Convention on which the applicant relies defines a refugee as a person who (I only quote the portion of the definition upon which reliance was placed by Mr. UNTERHALTER):

"As a result of events occurring before 1 January 1951" and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality....."

For the purposes of this case the important words in the definition are no doubt those underlined by me above and the applicant must therefore prove, no doubt on a balance of probabilities only, that events which occurred before 1 January 1951 resulted in or caused his flight from the Republic of South Africa to Lesotho in October 1961. Now if one

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January
1968
(continued)

looks at the original petition, one event and one only is mentioned which could be regarded as a reason for the applicant's arrival in Lesotho (then Basutoland) and that is the then pending charge against him in South Africa. Although in Paragraph 9(b) of the petition the applicant states that he "came to Basutoland as a refugee" he obviously did not have the definition of the term "refugee" contained in the Convention in mind and merely meant that he sought refuge in this country for he goes on to explain that he "had been charged in the regional Court, Johannesburg with being a member of an unlawful organisation, namely the Pan Africanist Congress, and with furthering its aims" and continues "I fled South Africa before the conclusion of the trial and sought refuge in Maseru".

10

I have pointed out earlier that the Pan Africanist Congress was founded in 1959 and was declared an unlawful organisation by the Government of South Africa in 1960. I have also stated that the charge against the applicant was confined to his alleged activities over the period April 1960 to July 1961 so that the only "event" which was in any way connected with the charge which was brought against the applicant and which could be said to have "occurred" before 1 January 1951 was that the Act under which the charge was framed was passed by the Parliament of South Africa in 1950. Now I am prepared to assume that the words "as a result of events" in the Convention do not require a direct and immediate causal connection between the events and the result but that they, i.e. the words, should be construed to have been used in a somewhat broad, practical sense, connoting causal relationship not necessarily as between the result and the cause nearest to that result, but as between a result and a cause not too remote from it or, to use the words of Sir Samuel Evans in H.M.S. London (L.R. 1914 p.72 at p.77), "sufficiently near for the Courts to give effect to it". Employing this "empirical or common sense view of causation" (Lord Wright's words in Smith, Hogg and Co. v. Black Sea and Baltic General Insurance Co. 1940 A.C. at p.1003) I consider that the

20

30

40

enactment of the above piece of legislation by the South African Parliament in 1950 (Act 44 of 1950) may have been a causa sine qua non of the charge against him but that it was the charge itself, based on the applicant's activities long after 1951, which was the causa of his flight from South Africa.

In the High
Court of Lesotho

No. 39

Judgment of
Trial Judge

15th January
1969

(continued)

10

In his somewhat belated supplementary affidavit the applicant really tried to make out a new case. He alleges, if I understand him correctly, that the Pan Africanist Congress came into existence in 1958 or 1959 as a result of the cumulative effect of certain laws passed by the South African Government before 1951 and that he joined this organisation because of his own opposition to those laws. His membership of the organisation, which had in the meantime been declared an unlawful one, eventually led to the charge against him and the laws in question should therefore, for the purposes of the Convention, be regarded as "events occurring before 1 January 1951" as a result of which he fled to Basutoland in 1961. Here again I consider that there is no causal relation between the legislation to which the applicant refers and the charge which was brought against him. In my opinion the various enactments cannot be regarded as anything more than mere incidents which preceded in the history or narrative of events and did not operate as a cause at the time the applicant fled.

20

30

In the result I am of opinion that the applicant has also failed to prove that he is a refugee in terms of the Convention attached to his papers and his application must therefore also fail on that ground.

40

The rule granting a temporary interdict is accordingly discharged and the application for a declaratory order is refused. The applicant must pay the respondents' costs which include the costs of the postponement on the 29th November, 1968.

H. R. JACOBS.

CHIEF JUSTICE.

100.

No. 40

In the High
Court of Lesotho

No. 40

Notice of
Appeal.

17th January
1969

NOTICE OF APPEAL

IN THE COURT OF APPEAL OF LESOTHO

NOTICE OF APPEAL FROM FINAL DECISION OF
HIGH COURT OF LESOTHO IN ITS ORIGINAL
JURISDICTION

Between:

JOSEPH SALLIE POONYANE MOLEFI Appellant

and

THE PRINCIPAL LEGAL ADVISER 1st Respondent 10
THE PRIME MINISTER 2nd Respondent
THE COMMISSIONER OF POLICE 3rd Respondent

(sic) TAKE NOTICE that the Appellant, who was the Applicant in the High Court of Lesotho being dissatisfied with the judgment of the said Court contained in the Order dated the 17th day of January, 1969, doth hereby appeal to the Court of Appeal on the following grounds:-

1.

The learned judge erred in holding that, in the absence of the authority of Parliament, His Majesty had validly created the portfolio of Minister of State. 20

2.

The learned judge erred in holding that the Appellant had not acquired, prior to Lesotho having become an independent Kingdom, rights to protection as a refugee, which rights the Appellant continued to enjoy after independence and at the date of the expulsion order to which this appeal relates. 30

3.

The learned judge erred in holding that the Legislature, in referring to accession to a Convention in regard to refugees in Section 38

101.

of the Aliens Control Act, did not contemplate the Convention to which the United Kingdom had acceded on behalf of Basutoland and to which this Appeal relates.

In the High
Court of Lesotho

No. 40

Notice of
Appeal.

17th January
1969
(continued)

4.

The learned judge erred in holding that the Prime Minister's letter dated 22nd March, 1967 was not an accession to the Convention by the Government of Lesotho.

10

5.

The learned judge erred in not holding that by reason of the Prime Minister's letter the Appellant was protected from expulsion from Lesotho.

6.

The learned judge erred in holding that the Appellant was not a refugee as defined by the Convention.

7.

20 The learned judge misdirected himself in holding that the original Petition disclosed only one event that could be regarded as a reason for the Appellant's arrival in Lesotho, namely the pending charge against him in South Africa.

8.

30 The learned judge misdirected himself in holding that the Appellant did not have in mind the definition of the term "refugee" as defined in the Convention, when drafting the original Petition.

9.

The learned judge erred in holding that the events referred to by the Appellant were not the cause of his flight from South Africa.

10.

The learned judge erred in holding that the

In the High
Court of Lesotho

charge against the Appellant was the sole causa
of Appellant's flight from South Africa.

No. 40

11.

Notice of
Appeal.

The learned judge misdirected himself in
holding that the Appellant tried to make out a
new case in his Supplementary Affidavit.

17th January
1969
(continued)

12.

The learned judge misdirected himself in
holding that the Appellant's membership of the
Pan Africanist Congress eventually led to the
charge against him.

10

13.

The learned judge erred in refusing the Appellant's
application for an interdict and a declaratory
order as claimed in the papers.

14.

The learned judge erred in ordering the
Appellant to pay the costs of the Respondents.

DATED AT MASERU ON THIS 17th DAY OF JANUARY 1969.

(signed) J. Molefi

20

APPELLANT.

To: The Registrar of the Court of Appeal,
MASERU.

And to: The Principal Legal Adviser,
The Prime Minister,
THE COMMISSIONER OF POLICE. (Respondents).

PETITIONER-APPELLANT'S MAIN HEADS OF ARGUMENT.

In the Court of Appeal of Lesotho

No.41

THE LESOTHO COURT OF APPEAL

In the Matter between:-

JOSEPH SALLI POONYANE MOLEFI Appellant

Petitioner-Appellant's Main Heads of Argument.

and

7th February 1969

PRINCIPAL LEGAL ADVISER	1st Respondent
THE PRIME MINISTER	2nd Respondent
THE COMMISSIONER OF POLICE	3rd Respondent

10

APPELLANT'S MAIN HEADS OF ARGUMENT

It is submitted that:-

1. (a) The Convention Relating to the Status of Refugees was part of the municipal law of Basutoland when the Appellant arrived there in October 1961.

Record Page 6 Paragraph 9 (a)
 Pages 130 to 132
 Page 136
 Annexure F. Page 17 (a)

20

Proclamation 14 of 1868 - Laws of Basutoland 1960 Vol. 1 P.18

Halsbury's Laws of England 3rd Edition Vol. 5 P.609 S,1313

The British Protectorates, Protected States and Protected Persons Order 1949 - Laws of Basutoland Vol. 1 P.332.

The Lesotho Independence Order 1966.

30

The Lesotho Independence Act 1966. Ch.24.

Constitutional Law 7th Ed., Wade & Bradley Pages 417-419; 274-275.

Law of Treaties - McNair (1961) P. 89.

In the Court
of Appeal of
Lesotho

No.41

Petitioner-
Appellant's
Main Heads
of Argument.

7th February
1969
(continued)

Sammut v. Strickland 1938 A.C. 678.

The Basutoland (Constitution) Order in
Council 1959 Sections 45, & 99 -
Laws of Basutoland Vol. 1 P. 23.

The Zamora (1916) 2 A.C. 77 at 97.

The Parlement Belge (1879) 4 P.129

Walker v. Baird 1892 A.C. 491

(b) If the Appellant was a refugee in terms of
the Convention he acquired rights to
protection as a refugee, upon his arrival
in Basutoland, and has not lost these.

10

Lesotho Independence Act Section 2(1)

Lesotho Independence Order Sections 4
& 17.

Mahomed v. Union Government 1911 A.D.1.

Ex parte Foreman 1940 C.P.D. 266.

In re Daya 1913 N.P.D. 467.

Abbott v. Minister of Lands 1895 A.C. 425.

Hamilton Gell v. White (1922) 2 K.B. 422 C.A.

2. (a) The Parliament of Basutoland intended in
Section 38 (1) of the Aliens Control Act
1966 to refer to the Convention acceded to
on behalf of the Government of Basutoland by
the United Kingdom.

20

Judgment Pages 8 and 9.

Maxwell on Interpretation of Statutes
11th Edition Pages 221-243
especially Pages 221, 226-7, 241, 243.

Steyn - Die Uitleg van Wette 3rd Edition
Pages 21-69 especially Pages 21,
41, 49, 61, 69.

30

Venter v. Rex 1907 T.S. 910 at 915.

Attorney General for the Colony of Hong Kong
v. Kwok-A-Sing 1873 L.R. 179

The Mayor and Councillors of the Borough
of Pietermaritzburg v. Natal Land and
Colonization Co. 13 A.C. 478 (1888)

Re Lockwood 1958 CH. 231

Corocraft Ltd. v. Pan American Airways
Inc. 1968(2) A.E.R. 1059 (K.B.D.)
 at 1071 H.

10 Salomon v. Commissioners of Customs and
Excise 1966 (3) A.E.R. 871 C.A. at 872 C.

The Convention - Article 40.

The Lesotho Independence Act 1966 Ch. 24
Section 2 (1)

The Aliens Control Act 1966, Sections
2 (3), 37 (2), 37 (8).

30 (b) If the Appellant is a refugee in terms
 of the Convention he is entitled to the
 protection of Section 38 (1) of the
Aliens Control Act.

3. (a) The Prime Minister's letter is an
 accession to the Convention by the Government
 of Lesotho.

Record Annexure E. Page 16.

Judgment Pages 9-13.

Convention Preamble Articles 39(3) and 46(b).

Oxford English Dictionary Vol.1 Page 50 - "accede".

Shorter Oxford English Dictionary Vol. 1 Page
 10 - "accede"

40 Oxford English Dictionary Vol. 8 Page 243 -
 "reciprocity".

(b) If the Appellant is a refugee in terms of
 the Convention he is entitled to the
 protection of Section 38 (1) of the Aliens
Control Act.

In the Court
 of Appeal of
Lesotho

No.41

Petitioner-
 Appellant's
 Main Heads
 of Argument.

7th February
 1969
 (continued)

In the Court
of Appeal of
Lesotho

No.41

Petitioner-
Appellant's
Main Heads
of Argument.

7th February
1969
(continued)

4. The Government of Lesotho is not released from its obligations under the Convention by the provisions of Section 17 of the Lesotho Independence Order.

McNair (supra) P. 628,

State Succession in respect of Law-making Treaties - Jenks - The British Year Book of International Law 1952. Page 105.

Succession to Federal Treaties on the Dissolution of a Federation - du Gard. S.A. Law Journal (1965) P. 430.

10

S. v. Bull 1967 (2) S.A. 636 T.P.D.

5. (a) The Appellant is a refugee within the meaning of the Convention.

Convention Article 1 (A 2)

Judgment Pages 13 to 16.

Record

Page 6 Paragraph 9.
Page 8 Paragraphs 10(g) & (h)
Page 72 Paragraphs 2 (f)(g)(h).
Page 73 Paragraph 3 (a)
Pages 74 to 91 especially Page 83,
Paragraph F (i), Page 85,
Paragraph G (i) and Page 89.
Paragraph H.
Pages 91 to 92, Paragraph J (ii)
Pages 101 to 119.
Page 92, Paragraphs 4(a) & (b).
Page 93, Paragraph 4 (c).
Page 94, Paragraph 4 (i).
Page 95, Paragraph 4 (k) (l)
(m) (n).
Page 96, Paragraph 4 (o).
Page 122, Paragraph 4.

20

30

Causation in the Law - Hart & Honore'
Pages 21 48 to 54.

Causation in the Law - Glanville Williams
1961 Cambridge Law Journal P. 62 at
Pages 67 - 69.

R. v. Du Plessis 1960 (2) S.A.642 at
644 and 645.

40

Peterson v. Cuthbert 1945 A.D. 420

Room Hire Co. (Pty) Ltd. v. Jeppe St. Mansions (Pty) Ltd. 1949 (3) S.A. 1155.

The American Journal of International Law
Vol. 54 1960 P. 419.

In the Court
of Appeal of
Lesotho

No. 41

6. Section 72 (2) of the Constitution of Lesotho means that the offices of Minister of the Government of Lesotho may be established by the King, acting in accordance with the advice of the Prime Minister, if Parliament has so authorised the King.

Petitioner-
Appellant's
Main Heads
of Argument.

10 Record Pages 28 to 30.
Pages 37 to 39.

Lesotho Government Gazette 19 July 1968
Government Notice No. 78 Page 523.

7th February
1969
(continued)

The Lesotho Independence Order 1966 Section 5.

DATED at JOHANNESBURG this 7th day of February, 1969.

(Signed) J. Unterhalter
APPELLANT'S COUNSEL.
J. UNTERHALTER.

NO. 42

No. 42

20 RESPONDENTS' HEADS OF ARGUMENT

IN THE LESOTHO COURT OF APPEAL

C. OF A. (CIV) NO. 3 OF 1969

Respondents'
Heads of
Argument

In the matter between:

12th February
1969

JOSEPH SALLI POONYANE MOLEFI Appellant

versus

PRINCIPAL LEGAL ADVISER)
THE PRIME MINISTER)
THE COMMISSIONER OF POLICE) Respondents

HEADS OF ARGUMENT

30 It is submitted that

1. (a) The order expelling appellant was made by the Minister in the exercise of the powers conferred upon him by Section 25(1) of the Aliens Control Act (No. 16 of 1966).
- (b) Section 25(1) empowers the Minister to order the expulsion from Lesotho of "an alien whose presence within Lesotho is unlawful".
- (c) Appellant's present in Lesotho is unlawful by virtue of the provisions of Sections 5 and 7 of the Aliens Control Act.

40

In the Court
of Appeal of
Lesotho

No.42

Respondents'
Heads of
Argument

(continued)

12th February
1969

ALIENS CONTROL ACT - Sections 5(3) and 7(5)
RECORD - pages 3, 4, 12, 33, 40, 41.

2. (a) Section 25 is "subject to the provisions of section 38 of the Aliens Control Act" which is a "Saving as to refugees".

(b) The onus of showing that section 38 has application rests on the appellant.

ALIENS CONTROL ACT - Section 32.

3. The prerequisites of Section 38 are -

(i) the existence of an international treaty or convention "which has been acceded to by or on behalf of the Government of Lesotho", and which

10

(ii) relates to a refugee within the meaning of such treaty or convention.

4. The Convention Relating to the Status of Refugees (hereinafter referred to as the Convention) was acceded to by Great Britain on behalf of Basutoland, not Lesotho. Since independence, i.e. since the 4th October, 1966, Lesotho has not acceded, either to the Convention in question, or to any other convention or treaty relating to refugees.

20

5. Prior to independence Basutoland was bound by the terms of the Convention and since the Aliens Control Act was passed prior to independence, cognizance had to be taken of that fact and due allowance made for it in the Aliens Control Act during the transitional period.

ALIENS CONTROL ACT - Section 37(8).

30

6. (a) The Prime Minister's letter of the 22nd March 1967, addressed to the Secretary-General is not, and was not intended to be, an "accession" in the legal sense.

(b) The Prime Minister's letter is in fact an application of the "Nyerere doctrine" and is, if anything, a denunciation of all treaties terminable on notice rather than an accession of any sort.

RECORD - page 16

THE EFFECT OF INDEPENDENCE ON TREATIES - p. 370

40

STATE SUCCESSION IN MUNICIPAL LAW - II

D. P. O'CONNELL - p.118

CONVENTION - Article 44.

(c) The Prime Minister's letter cannot be construed as an "accession" because accession is an executive act. The executive authority of Lesotho is vested

in the King and may be "exercised by him either directly or through officers or authorities of the Government of Lesotho". Appellant has not shown that the Prime Minister's letter constitutes an action by the King in this sense.

In the Court
of Appeal of
Lesotho

No. 42

Respondents'
Heads of
Argument

(continued)

12th February
1969

RE WESTERLING (1950), 1, M.L.R.228 -
(See Yearbook of the International Law
Commission 1963 - Vol II - at p. 107).

10

CONSTITUTION - section 71.

- (d) The letter in question is, if (c) supra is not correct, a mere statement of the policy of the Government of the day, stating to what extent Government is prepared to apply the terms of former treaties and setting out the conditions which are to apply.

JUDGMENT - pages 11 and 12

RECORD - page 16.

20

7. (a) Lesotho is, as a result of independence, a separate entity from that of Basutoland. The new entity did not inherit any of the rights, liabilities and obligations of the old entity except insofar as specific provision was made therefor in the Lesotho Independence Order. The Lesotho Independence Order does not purport to transfer rights, liabilities or obligations arising from treaties or conventions, from the original entity to the new one.

30

S. V. ELIASOV, 1965(2)S.A.770(T)

SUCCESSION TO FEDERAL TREATIES ON THE
DISSOLUTION OF A FEDERATION - Dugard.

S.A. Law Journal (1965) p.430, 432, 433

A MANUAL OF INTERNATIONAL LAW - 4th Ed.

Vol. 1 - Georg Schwarzenberger - page 82

YEARBOOK OF THE INTERNATIONAL LAW
COMMISSION 1963 - Vol II - p. 107

40

THE LAW OF NATIONS - Briggs - 2nd Ed. p.232

LAW AMONG NATIONS - Gerhard von Glahn -
p.118

THE EFFECT OF INDEPENDENCE ON TREATIES - p.370

In the Court
of Appeal of
Lesotho

No. 42

Respondents'
Heads of
Argument

(continued)

12th February
1969

(b) The Lesotho Independence Order in fact specifically excludes the transfer of rights, liabilities and obligations incurred by Her Majesty in respect of the Government of Basutoland where such rights, liabilities or obligations arose from treaties or conventions.

LESOTHO INDEPENDENCE ORDER - Section 17.

(c) Any rights which appellant may have had by virtue of the provisions of the Convention were rights exercisable against Her Majesty in respect of the Government of Basutoland. With the advent of independence such rights (if there were any) were lost because of the disappearance of the entity against whom they could have been enforced, and because the new entity did not inherit the obligations of the old one. 10

LESOTHO INDEPENDENCE ORDER - Section 17. 20

8. (a) Even if Lesotho is bound by the Convention, either by virtue of an accession subsequent to independence, or because section 38 purports to apply the Convention to Lesotho by virtue of its having been acceded to by the British Government on "behalf of Lesotho", or because Lesotho automatically and willy-nilly acquired the obligations of the Government of Basutoland, appellant cannot rely on it. 30

(b) Appellant cannot rely on the Convention even if it is held to be applicable to Lesotho, because he is not and never was a "refugee" within the meaning thereof, and therefore is not and never was a member of the class of persons upon whom rights were conferred by the Convention.

(c) In order to qualify as a "refugee" appellant must show inter alia that he is outside the country of his nationality as a result of events occurring before 1 January 1951 etc. He has failed to do this. 40

CONVENTION - Article 1A(2)
JUDGMENT - pages 13 - 16
RECORD - pages 6, 34, 45, 72 - 96.

In the Court
of Appeal of
Lesotho

No. 42

Respondents'
Heads of
Argument

(continued)

12th February
1969

9. (a) Section 72(2) of the Constitution means that offices of Minister of the Government of Lesotho may be established in one of two ways viz. by Parliament or by the King acting in accordance with the advice of the Prime Minister. Appointments made by the King acting in accordance with the advice of the Prime Minister are subject to the over riding powers of Parliament.

10

(b) The offices of Ministers of the Government of Lesotho have been established by the King in accordance with the provisions of Section 72(2) of the Constitution and the Second Respondent is the lawful holder of the office of the Minister for the time being responsible for the administration of the Aliens Control Act.

20

RECORD - pages 28 - 30
 38 - 39

GOVERNMENT NOTICES - 78 and 79 of 1968 in
Government Gazette
No. 78 page 523.

DATED at MASERU this 12th day of February, 1969.

(Signed) (Illegible)

LAW OFFICER
Representing Respondents.

30

NO. 43

INSTRUCTIONS BY THE JUDGES OF APPEAL TO THE PARTIES

In the Court
of Appeal of
Lesotho

No. 43

IN THE LESOTHO COURT OF APPEAL

Instructions
by the Judge
of Appeal to
the parties

Between

J.S.P. MOLEFI

and

PRINCIPAL LAW ADVISER AND OTHERS

25th February
1969

The attention of the parties is invited to the provisions of the Basutoland (Constitution) Order in Council, 1959 (Laws of Basutoland, 1960, Vol I p.23) and in particular to Section 45 (i) thereof: 10

also to the statement in Oppenheimer, 8th Edition, Vol.I, S(?) .520 as to the means by which treaties are made binding upon subjects of the contracting states;

also to the passage in Halsbury, 3rd edition, Vol.VII, p.288, as to the practice of the United Kingdom for making treaties binding upon United Kingdom subjects;

also to Art. 40(3) of the Status of Refugees Convention. 20

Do the passages in Oppenheimer and Halsbury correctly set out the law or practice on these points?

If they do,

- (1) Were the necessary steps taken to make the Convention a part of the Municipal Law of Basutoland?
- (2) Does the record show that the declaration by the United Kingdom dated the 1st November, 1960 extending the Convention to Basutoland was notified to the High Commissioner, and if it was, what steps were taken by the High Commissioner as a result of the notification? 30

The parties are required to file submissions on these points in writing, in quadruplicate, and to serve copies upon the opposite party, not later than the 31st March, 1969.

E.R.R.

25.2.69.

NO. 44

WRITTEN SUBMISSIONS BY RESPONDENTS ON POINTS RAISED
BY THE JUDGES OF APPEAL AND EXTRACT FROM BASUTOLAND
(CONSTITUTION) ORDER IN COUNCIL 1959 (ANNEXURE "A")

In the Court
of Appeal of
Lesotho

No. 44

IN THE LESOTHO COURT OF APPEAL

C. of A. (CIV) NO. 3 OF 1969.

In the matter between:

JOSEPH SALLIE POONYANE MOLEFI

and

THE PRINCIPAL LEGAL ADVISER
AND OTHERS

Written Sub-
missions by
Respondents on
points raised
by the Judges
of Appeal and
extract from
Basutoland
(Constitution)
Order in
Council 1959
(Annexure A)

18th March 1969

10

WRITTEN SUBMISSIONS ON POINTS RAISED BY
THEIR LORDSHIPS THE JUDGES OF APPEAL

1. It is respectfully submitted that -

(1) the passages in Oppenheim and Halsbury do
in fact set out correctly the law and the practice
whereby treaties are made binding on the subjects
of contracting states;

20

(2) no steps were ever taken to make the
Convention on the Status of Refugees a part of the
Municipal Law of Basutoland;

(3) the record does not show that the
declaration by the United Kingdom dated the 1st
November, 1960 extending the Convention to Basuto-
land was notified to the High Commissioner; but,

(4) if it was so notified, the High
Commissioner took no steps of any sort as a result
thereof.

30

2. The Basutoland (Constitution) Order in Council
1959, to which the parties have been referred, was
preceded by and revoked the Order in Council of
2nd February, 1884 (See Orders in Council 1884-
1913, page 1. For easy reference a copy of the
relevant part thereof, viz. Part II, is attached
hereto as Annexure A), and was itself revoked by

In the Court
of Appeal of
Lesotho

No. 44

Written Sub-
missions by
Respondents on
points raised
by the Judges
of Appeal and
extract from
Basutoland
(Constitution)
Order in
Council 1959
(Annexure "A")

(continued)

18th March 1969

section 2 of the Basutoland Order, 1965. The successive changes, it is submitted, in no way altered the procedures relating to the implementation of Treaties, but are referred to only because the examples of treaty implementation given below occurred for the most part prior to the coming into operation of the 1959 Order.

3. During the period 1884 to Independence Basutoland became a party to approximately 392 Conventions, treaties and agreements on a wide variety of subjects. Comparatively few of these found their way into the statute books of Basutoland. It was apparently not considered necessary to implement the following (by way of example) by legislation of any sort -

10

(i) Paris Convention 1884 - Protection of submarine cables,

(ii) Paris Treaty 1928 - Renunciation of War (Kellogg Pact),

(iii) Hague Convention of 1807 - Conversion of Merchant ships into warships.

20

4. (i) Since independence only two formal instruments of accession have been lodged, viz. International Tele-communications Union and Universal Postal Union. Neither of these have as yet been implemented by legislation.

(ii) During the period subsequent to the Order in Council of 1959 very few international agreements were concluded to which Basutoland was a party (in fact the only one known to the respondents is the Geneva Convention Relating to the Status of Refugees and this was never implemented by legislation).

30

5. The procedure followed by the United Kingdom is in full accord with the Statement in Oppenheim and Halsbury to which the parties have been referred. The usual practice being that Parliament gives "subsequent consent" to the terms of treaties so as to render them "binding upon the subject and enforceable by officers of the Crown".

40

6. In some countries this principle has received formal recognition in the respective Constitutions of those countries. Thus Articles 253 of the

Constitution of India gives the "power to make any law for implementing any treaty". The writer Basu, in his "Commentary on the Constitution of India" contends that "no treaty which has not been implemented by legislation shall be binding on the Courts". Alexandrowicz ("Constitutional Development in India") takes a narrower view and states that "certain treaties only, such as treaties affecting private right, must be enacted by legislation to become enforceable". (See D.P.O'Connell, International Law, Vol. 1, page 64). Similarly section 214 of the Constitution of Burma states that "No International Agreement as such shall be part of the Municipal law of the Union, save as may be determined by Parliament" (O'Connell, p.66), and as to Israel O'Connell says (at p.67) that "Israel requires that treaties be brought into operation internally by act of the Knesseth".

In the Court
of Appeal of
Lesotho

No. 44

Written Sub-
missions by
Respondents on
points raised
by the Judges
of Appeal and
extract from
Basutoland
(Constitution)
Order in
Council 1959
(Annexure "A")

(continued)

18th March 1969

7. In respect of those countries which accept the supremacy of international law the position is sometimes different. But the reason for the difference is nearly always to be found in the respective Constitutions of the countries concerned. Thus the United States Constitution (Article VI, clause 2) provides that "..... all Treaties made..... shall be the supreme Law of the Land....". In France treaties have the force of law (provided they are duly ratified and published - Art 55 of the 1958 Constitution of the 5th Republic). Although the Italian Constitution states that the "Italian juridical system conforms to the generally recognised principles of international law" the Court of Cassation held that "an international treaty is an instrument which aims at establishing the reciprocal rights and duties of the adhering States in matters regulated by the Treaty; it does not aim at modifying the internal legal system of those States with regard to the matters regulated by it..... For this purpose a municipal law for the execution of the treaty is necessary" (O'Connell, p.78). As to the position in the Federal Republic of Germany, Japan, the Netherlands, Mexico, Luxembourg and Austria see O'Connell, p. 84 et seq. The last mentioned two countries adhere to the concept that a treaty is "superior to subsequent legislation".

8. In the light of the foregoing it is submitted therefore that even in those countries where

In the Court
of Appeal of
Lesotho

No. 44

Written Sub-
missions by
Respondents on
points raised
by the Judges
of Appeal and
extract from
Basutoland
(Constitution)
Order in
Council 1959
(Annexure "A")

(continued)

18th March 1969

treaty supremacy is accepted, such acceptance flows from the municipal law of the country concerned, that is to say, from the "previous.....consent of Parliament."

9. The following examples show the practice of implementation followed in the United Kingdom and Basutoland -

(1) UNITED KINGDOM

(a) Geneva Convention of 1949 implemented by the Geneva Conventions Act, 1937. 10

(b) Rome Convention of 1928 implemented by the Copyright Act, 1911.

(c) Convention of Paris 1919 (and subsequent Conventions) implemented by the Air Navigation Act, 1920 (and subsequent Acts).

(d) See also the Treaty of Washington Act, 1872, the Anglo-French Convention Act, 1904, the various Treaties of Peace Acts of 1919, 1920, 1921, 1924 and 1947, and the London Naval Treaty Acts of 1930 and 1937, and 20

(e) Vienna Convention 1961 implemented by the Diplomatic Privileges Act 1964.

(Note: Not all treaties are implemented by the legislature. In certain cases (e.g. the Diplomatic Privileges Act 1964) the legislature has seen fit to incorporate into the Statute some, but not all, of the terms of.....the Convention).

(2) BASUTOLAND

(a) The Geneva Convention (Red Cross) implemented by the United Kingdom by way of the Geneva Convention Act, 1911, was applied to Basutoland on the 22nd February, 1918, by the Geneva Convention Act, 1911 (Colonies) Order in Council, 1917. (Laws of Basutoland 1960, Vol.IV, page 2670), 30

(b) The Geneva Convention 1929 (wounded and sick in armies in the field) implemented by the United Kingdom by way of the Geneva Convention Act, 1937 and applied to Basutoland by the Geneva

Convention Act, 1937 (Colonies) Order in Council 1937. (Laws of Basutoland 1960, Vol. IV, page 2672),

In the Court
of Appeal of
Lesotho

No.44

10 (c) The Geneva Convention of 1949 combined the 1929 Convention with the Hague Convention of 1907 (for the amelioration of the condition of wounded, sick and shipwrecked members of the armed forces at sea), a new Convention Relative to the Protection of Civilian persons in time of war, and a Convention Relative to the Treatment of Prisoners of War. All of these were implemented by the Geneva Conventions Act, 1959 which was applied to Basutoland by the Geneva Conventions Act (Colonial Territories) Order in Council, 1959. (Halsbury's Statutes of England, 2nd Ed., Vol 37(1957); Laws of Basutoland 1964, Vol. IX, page 1.

Written Submissions by Respondents on points raised by the Judges of Appeal and extract from Basutoland (Constitution) Order in Council 1959 (Annexure "A")

(continued)

20 (d) Rome Convention 1928 (which replaced the Berne Convention 1886) implemented in the United Kingdom by the Copyright Act, 1911, which was applied to Basutoland by the Copyright (Rome Convention) Order, 1933 (Laws of Basutoland 1949, Vol. 1, page 25).

18th March 1969

30 (e) Convention of Paris 1919, implemented in the United Kingdom by the Air Navigation Act, 1920, certain sections of which were applied to Basutoland by the Colonial Air Navigation (Application of Acts) Order, 1937. (Laws of Basutoland 1949, Vol. 1, page 36.) The 1937 Order was followed by a second order in 1947 presumably as a result of the Chicago Convention of 1944, and both were revoked and replaced by The Colonial Civil Aviation (Application of Act) Order, 1952. (Laws of Basutoland 1960, Vol. IV, page 2442).

40 Note: During the earlier years of the history of Basutoland the practice was to implement treaties by Orders-in-Council which simply incorporated the relevant British Statute either completely or in part. Latterly however the procedure has been to implement the treaty without reference either to it or to the corresponding U.K.Act. See the Colonial Air Navigation Order, 1961 - Laws of Basutoland, 1963, Vol VIII, page 1.

(Sgd.) (Illegible)

FOR RESPONDENTS.

18th March, 1969.

In the Court
of Appeal of
Lesotho

ANNEXURE

PART II

Her Majesty is further pleased to order, and it is hereby ordered as follows:

Written Submissions by Respondents on points raised by the Judges of Appeal and extract from Basutoland (Constitution) Order in Council 1959 (Annexure "A")

On Taking Effect Of Order Basutoland Comes Under Direct Authority of Her Majesty

So soon as Part II of this Order takes effect, Basutoland shall again come under the direct authority of Her Majesty and the person for the time being exercising the functions of Her Majesty's High Commissioner for South Africa (hereinafter styled the High Commissioner) shall have and may exercise, in the name and on behalf of Her Majesty, all legislative and executive authority in and over the territory of Basutoland. 10

(continued)

POWERS AND DUTIES OF HIGH COMMISSIONER

18th March 1969

The High Commissioner is hereby empowered and required, in the name and on behalf of Her Majesty, to make by proclamation such laws as may to him appear necessary for the peace, order, and good government of the said territory, and to appoint such Resident or Deputy or Assistant Commissioners, Officers, and Magistrates, and generally to take such measures, and to do all such matters and things as he may think expedient for the like peace, order, and good government. 20

LAWS IN FORCE TO CONTINUE UNTIL REPEALED OR ALTERED

All laws in force in Basutoland at the time when this Order takes effect shall continue in operation until repealed or altered by proclamation of the High Commissioner, and all powers and authorities which by such laws are vested in the Governor and Officers appointed by him shall be vested in and exercisable by the High Commissioner and Officers appointed by him. 30

ORDER TO BE PROCLAIMED BY GOVERNOR OF CAPE OF GOOD HOPE

* The Governor of the Colony of the Cape of Good Hope shall cause this Order to be proclaimed at such place or places as he shall think fit and upon such proclamation Part II of the Order shall take effect and come into operation

* The Order was proclaimed by Proclamation No.75A on the 18th of March

NO. 45

PETITIONER-APPELLANT'S FURTHER WRITTEN ARGUMENT

In the Court
of Appeal of
Lesotho

No.45

IN THE COURT OF APPEAL OF LESOTHO

CIV/APPN/31/68

Petitioner-
Appellant's
Further written
Argument

In the matter between:

27th March 1969

JOSEPH SALLIE POONYANE MOLEFI Appellant

and

THE PRINCIPAL LEGAL ADVISER First Respondent

THE PRIME MINISTER Second Respondent

THE COMMISSIONER OF POLICE Third Respondent

10

APPELLANT'S FURTHER WRITTEN ARGUMENT

1. This Honourable Court having requested further argument on certain matters referred to by the Honourable the Presiding Judge in his memorandum dated the 25th February, 1969, the following further submissions are made on behalf of the Appellant.

20

2. (a) The Court has drawn the attention of the parties to the provisions of the Basutoland (Constitution) Order in Council 1959 (Laws of Basutoland, 1960 Vol. 1, p.23), and in particular to Section 45 (1) thereof.

30

(b) The effect of the Section is to empower Her Majesty, with the advice and consent of the Basutoland National Council and the Paramount Chief, to make laws for the peace, order and good government of Basutoland in regard to all matters which are not High Commissioner's matters. The High Commissioner is empowered to make laws in regard to matters specified in the Third Schedule, and among such matters so specified is External Affairs.

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

(c) Section 99 (1) of the Order in Council provides that Her Majesty "hereby reserves to Herself power, with the advice of her Privy Council, to revoke or amend this Order." Section 99 (2) of the Order says:-

"Nothing in this Order shall affect the power of Her Majesty in Council to make laws from time to time for the peace, order and good government of Basutoland".

10

(d) It is submitted that although at the time that Her Majesty extended to Basutoland the Convention Relating to the Status of Refugees, the Basutoland National Council was the Legislative Council for Basutoland, such Council was not the exclusive legislature, and Her Majesty then possessed a concurrent power to legislate in terms of the prerogative.

20

This is said because Her Majesty had reserved her powers in terms of Section 99 of the Order as stated above, in similar terms to the reservation mentioned in Sammut v. Strickland 1938 A.C. 678 (Judicial Committee). This case concerned the Island of Malta which the Court held (p. 701) to be a colony by cession. (Basutoland is also a ceded colony - Halsbury, 3rd ed., Vol. 5, p. 609, para. 1313). In commenting on Campbell v. Hall, (1 Cowp. 204) Lord Maugham L.C. said:-

30

"The true proposition is that, as a general rule, such a grant without the reservation of a power of concurrent legislation precludes the exercise of the prerogative while the legislative institutions continue to exist. Nor is it in doubt that a power of revoking the grant must be reserved or it will not exist".

40

A similar principle had been stated by Lord Darling in Abeysekera v. Jayatilake 1932 A.C. 260.

See also: Sabally v. Attorney-General
1964 (3) A.E.R. 377 at 388 I.

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

3. Thus, notwithstanding the creation of the Basutoland National Council as a legislature, if the Queen thereafter performed a legislative act in regard to Basutoland, such act, it is submitted, would have the force of law in Basutoland.

(continued)

10 4. (a) The Court has drawn the attention of the parties to a statement appearing in International Law Vol. 1 by L. Oppenheim (8th ed.) at p. 924 para. 520. This reads as follows:-

27th March 1969

20 "The binding force of a treaty concerns in principle the contracting States only, and not their subjects. As International Law is primarily a law between States only and exclusively, treaties can normally have effect upon States only. This rule can, as has been pointed out by the Permanent Court of International Justice, be altered by the express or implied terms of the treaty, in which case its provisions become self-executory. Otherwise, if treaties contain provisions with regard to rights and duties of the subjects of the contracting States, their courts, officials, and the like, these States must take such steps as are necessary, according to their Municipal Law, to make these provisions binding upon their subjects, courts, officials, and the like. It may be that, according to the Municipal Laws of some countries, the official publication of a treaty concluded by the Government is sufficient for this purpose, but in other countries other steps are necessary, such as, for example, special statutes to be passed by the respective Parliaments".

30

40

(b) The Court has also referred to Halsbury

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

3rd ed. Vol. 7 at p. 288. The relevant paragraph is No. 607 commencing at page 287 and it reads as follows:-

"Parliamentary sanction to treaties.
Treaties concluded by the Crown are in general binding upon the subject without express parliamentary sanction; but the previous consent of, or subsequent ratification by, the legislature is legally necessary to their validity in certain cases (l). 10

Thus though treaties relating to war and peace, the cession of territory, or concluding alliances with foreign powers are generally conceded to be binding upon the nation without express parliamentary sanction (m), it is deemed safer to obtain such sanction in the case of an important cession of territory (o). Where taxation is imposed or a grant from the public funds rendered necessary, or where the existing law is affected (p), or where the private rights of the subject are interfered with by a treaty concluded in time of peace (q), it is apprehended that the previous or subsequent consent of Parliament is in all cases required to render the treaty binding upon the subject and enforceable by officers of the Crown (r). In all cases the courts are competent to inquire into matters involving the construction of treaties and other acts of state; and the plea of an act of state, or that the matter involves the construction of treaties, affords no valid defence to an action against officers of the Crown for interference with the private rights of a British subject or of a resident alien friend (s)". 20 30 40

(c) The Court also refers to Article 40 (3) of the Convention Relating to the Status of Refugees. This reads as follows:-

"With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the governments of such territories."

In the Court
of Appeal of
Lesotho

—
No.45

Petitioner-
Appellant's
Further written
Arguments

(continued)

27th March 1969

10

(d) The Court enquires if the passages in Oppenheim and Halsbury correctly set out the law or practice on these points.

20

(e) It is submitted that the general observations quoted above from Oppenheim and Halsbury are subject to qualifications that will be mentioned hereafter, and in particular are not applicable to what was the constitutional position in Basutoland prior to independence. Reasons for these submissions follow herein.

30

(f) Most of the statements in the textbooks are concerned with the position that arises when the Crown has made a treaty and its effect has to be considered in relation to the Municipal Law of the United Kingdom or the self-governing dominions where Parliament is the legislature. In such cases the general rule is that the treaty must be translated into Municipal Law by Act of Parliament. However, even this general rule is subject to qualifications relating principally to the Crown's powers to make war or peace and to grant diplomatic immunities. The special position of a ceded colony such as Basutoland was and the effect of a treaty upon its Municipal Law is nowhere directly examined. What distinguishes the situation of a ceded colony such as Basutoland from the situation obtaining in the United Kingdom or the self-governing dominions is expressed by Oppenheim as follows in the work referred to above at p.40 para. 21a:-

40

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

"(b) Such treaties as affect private rights and, generally, as require for their enforcement by English courts a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament. To that extent binding treaties which are part of International Law do not form part of the law of the land unless expressly made so by the legislature. That departure from the traditional common law rule is largely due to the fact that, according to British constitutional law, the conclusion and ratification of treaties are within the prerogative of the Crown which would otherwise be in a position to legislate for the subject without obtaining parliamentary assent".

10

20

- (g) It will thus be clear that the rule requiring a treaty to be translated into Municipal Law arises from the fact that it is necessary to guard against the Crown making the law when Parliament is the proper lawgiver. In Cheney v. Conn 1968 (1) A.E.R. 779 Ch. D., Ungoed-Thomas J. expresses it thus at page 780 G:-

"It is, I may add, the Queen in Parliament and not the Queen independently of Parliament, acting as the Executive through the Cabinet, who makes what is law in this land".

30

- (h) There is an historical reason for the situation in the United Kingdom, and it is stated as follows by D.P. O'Connell - "International Law", London, Stevens, 1965, page 60:-

"The rule that treaties do not directly affect the Crown's subjects goes back to the 17th century and has a historical and not an ideological explanation. Matters of State connected with foreign policy were within the province of the Council, not of Parliament, and

40

the asserted incapacity of the Executive to legislate for its subjects by treaty was a manifestation of the constitutional struggle concerning the prerogative. The outcome of the struggle led to a partition of jurisdiction in the spheres of customary and conventional International Law. The enforcement of diplomatic privilege, which was virtually the only customary International Law that affected the subject of the Crown, was transferred from the prerogative to the Courts; the making of treaties remained a prerogative function, but the exercise of this function has no effect internationally save through the intervention of Parliament. Therefore the only treaties which bind English courts are those which fix the boundaries of Executive action. For example, if the Crown modifies by treaty its belligerent rights in regard to maritime warfare (Porter v. Freudenberg 1915 1 K.B. 857 at 865 to 866); or possibly its duties in the matter of diplomatic immunity the treaty will be acted on by the Courts. However, the limits of this cognisance of Executive acts have not been precisely fixed".

In the Court
of Appeal of
Lesotho

—————
No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

- (i) That this area of the law has not been completely surveyed is also apparent from the remarks of McNair in his article "When do British treaties involve legislation?" - The British Yearbook of International Law, 1928, p. 59. The learned writer had been discussing the comment of Sir Robert Phillimore in The Parlement Belge, 1879 4 Probate 129 at 154. The comment is as follows:-

"If the Crown had power without the authority of parliament by this treaty to order that the Parlement Belge should be entitled to all the privileges of a ship of war, then the warrant, which is prayed for

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

against her as a wrong-doer on account of the collision, cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished.

"This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution. Let me consider to what consequences it leads. If the Crown without the authority of parliament, may by process of diplomacy shelter a foreigner from the action of one of her Majesty's subjects who has suffered injury at his hands, I do not see why it might not also give a like privilege of immunity to a number of foreign merchant vessels or to a number of foreign individuals. The law of this country has indeed incorporated those portions of international law which give immunity and privilege to foreign ships of war and foreign ambassadors; but I do not think that it has therefore given the Crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons, who are not really ambassadors".

McNair says at page 61 that there is some reason to doubt whether the limit this set upon the power of the Crown is as definite as has been commonly supposed, and he refers to Fenton Textile Association v. Krassin (1922) 38 T.L.R. 259. He then says in Note 4:-

"If the decision of the Court of Appeal in Musmann v. Engelke, 1928 1 K.B. 90, were reversed by the House of Lords, before whom it will shortly come, it will be possible for the Crown, after having agreed by treaty to confer diplomatic immunity upon a non-diplomatic

person (there was no treaty in this case) to give effect to the treaty by recognising him as a member of a diplomatic staff upon his name being submitted by the Foreign Office for that purpose and to protect him from civil or criminal proceedings by means of a statement made to the Court through the mouth of one of the law officers".

In the Court
of Appeal of
Lesotho

—
No.45

Petitioner-
Appellant's
Further written
Argument

10

McNair is clearly pursuing the notion that in certain cases the Crown by treaty or agreement can affect the rights of persons within the jurisdiction by means of an order having the force of law, although not enacted by Parliament.

(continued)

27th March 1969

He goes on to discuss Krassin's case which was also concerned with a claim to immunity by a member of the staff attached to the Soviet Mission in England. The Court had held on the facts that this member of staff was not entitled to immunity, but the learned writer makes the observation that the agreement was discussed on the assumption that it bound the Court. He quoted Atkin L.J. at page 262 of the report as follows:-

20

"I see no reason why sovereign States should not come to an agreement as to the rights and duties of their respective envoys, ordinary or extraordinary, or why such agreements should not enlarge or restrict the immunities which otherwise would be due under the well-established usage of nations".

30

The learned writer's doubts are again expressed in his reference at page 65 of his article, to Porter v. Freudenberg, 1915 1 K.B. 857. The case concerned the right of an alien to sue in the King's Courts in time of war, and the writer says the following:-

40

".....The matter was argued on the assumption that the Hague Regulations

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

referred to bound the Court in spite of the absence of statutory enactment, and therefore, if the Court had pronounced in favour of the meaning contended for, alien enemies in the territorial sense would have been allowed to sue in the King's Courts in time of war, and an ancient rule of the common law would have been abrogated by a prerogative act without any statutory sanction. That is a more serious thing than a modification of prize law of the kind discussed above. It is nowhere objected in Porter v. Freudenberg that the Hague Regulations had never received statutory sanction."

10

The House of Lords did reverse the decision in Musmann v. Engelke, and decided in Engelke v. Musmann, 1928 A.C. 433, that a statement made to the Court by the Attorney-General on the instructions of the Foreign Office as to the status of a person claiming immunity from judicial process on the ground of diplomatic privilege, whether as Ambassador or as a member of the Ambassador's staff, is conclusive. In this context therefore, as the learned writer had said, effect may be given to a treaty by the Crown's recognition of a member of a diplomatic staff.

20

30

- (j) In his later work as Lord McNair in "The Law of Treaties", Oxford, 1961, the writer examines in detail the matter of the Municipal effects of treaties in relation to the United Kingdom, and says at page 80 that with a very limited class of exceptions, no treaty is self-executing. At page 83 he examines three classes of treaties for which parliamentary sanction is required, but it is noteworthy that in each case there is a direct reference to the application of the treaty in the United Kingdom. He refers, at pages 89 and 91, to exceptions in the case of treaties affecting belligerent rights,

40

and says that there is a possible exception in the case of treaties relating to diplomatic or consular immunities.

In the Court
of Appeal of
Lesotho

No.45

What is of significance in relation to the present submissions is his further comment on Fenton Textile Association Ltd. v. Krassin & Others, (1922) 38 T.L.R. 259 at p. 92. Referring to the case, the learned writer says:-

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

.0 ".....The Court of Appeal had to
consider the claim of the 'official
agent' in the United Kingdom, of
the Russian Soviet Government to
immunity from civil process.....
They did not question the right of
the Crown to confer certain
immunities by treaty upon the agent
of a foreign government in this
country without the need for
confirmatory legislature, either
because the Crown can give effect
to its agreement with the foreign
State by authorising the Attorney-
General to make a statement to the
Court upon the immunity enjoyed by
the foreign agent, or because the
Court would, mero motu, accept that
agreement as conclusive evidence,
in the same way as it would accept
a statement made on behalf of the
Crown".

20
30
0 (k) In the present matter because, in 1961,
by reason of the prerogative, the Queen
could have given effect to her agreement
as recorded in the Convention Relating
to the Status of Refugees, any immunity
claimed by a refugee would have been
given effect to in the Courts on the same
reasoning as is set out at page 92 of
Lord McNair's "The Law of Treaties".

It is submitted that it would be highly artificial, in the case of a matter concerning diplomatic immunity, for the Crown to declare a particular agent as immune, and then to give effect to such declaration by authorising the Attorney-

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

General to make a statement to the Court to that effect. It is recognised that if the Crown can give effect, then that is sufficient. Similarly, it is submitted that where the Crown has reserved the prerogative to legislate in Basutoland and can give effect thereto, then it is likewise artificial to require a legislative pronouncement by the Queen before the treaty takes effect in Basutoland. By reason of the prerogative the treaty was extended to Basutoland, and that very act of extension, it is submitted, serves as the legislative act in respect of Basutoland. More especially is this so in contrast with the United Kingdom, where the prerogative may not trespass upon the legislative function of Parliament; in Basutoland the Crown had concurrent legislative power. This provides the reason why the general rule stated in the text-books is not of application in the special circumstances of Basutoland as a ceded colony.

10

20

- (1) The Court's attention is respectfully directed to the judgment of Lord Atkin in Attorney-General for Canada v. The Attorney-General for Ontario, 1937 A.C. 326 (Judicial Committee). At page 347, the learned Law Lord said:-

30

"Within the British Empire, there is a well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of a treaty alone, have the force of law".

40

It is submitted that the learned Judge was not considering what the position might be in regard to a treaty extended by the Crown to a ceded colony where the

Crown could still legislate by prerogative. The Privy Council was, on the facts of that case, concerned with the power of the Federal Parliament of Canada to translate into Municipal Law the provisions of a treaty which, it was contended by the Respondent, could only be so translated by the appropriate Provincial legislatures. The learned Judge's remarks are therefore, it is submitted, not applicable to the present matter.

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

Although Walker v. Baird, 1892 A.C.491 was concerned with Newfoundland, the Privy Council, in the judgment of Lord Herschell, guarded itself against a wide statement of principle. The Crown was defending an action for trespass, and it pleaded that this had been done to perform the terms of a treaty between her Majesty and the Republic of France. It was held that there was no defence as it had been pleaded. The argument advanced for the Crown was that there must of necessity reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war, and the power must extend to the provisions of a treaty having for its object the preservation of peace. At page 497 the learned Judge said:-

"Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorised otherwise than by legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the Court below in thinking that the allegations contained in the statement of defence do not bring the case

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

within the limits of a proposition
for which alone the Appellant's
Counsel contended".

It is therefore submitted that the above
decisions do not preclude the Appellant
from submitting that the Convention was
in 1961 part of the Municipal Law of
Basutoland, by reason of the Queen having
extended the Convention to that territory.

- (m) Apart from the special constitutional
position arising from the sovereignty of
Parliament in the United Kingdom, the
principle of rights accruing to
individuals directly from treaties is
not foreign to International Law. In
Oppenheim (op.cit. at p. 21, sec. 13(a)),
the following is said:-

"As the Permanent Court of Inter-
national Justice expressly recognised
in the Advisory Opinion concerning
the jurisdiction of the city of
Danzig, States may expressly grant
to individuals direct rights by
treaty; such rights may validly
exist and be enforceable without
having been previously incorporated
in Municipal Law".

This decision of the Permanent Court is
to be found in "Cases and Materials on
International Law" - Orfield and Re,
London; Stevens, 1956 at p. 43. The
question had arisen as to whether railway
employees who had passed from the service
of the Free City into Polish service were
entitled to bring actions in respect of
pecuniary claims, even if these claims
were based on the Danzig-Polish Agreement
of October 22nd, 1921; as to whether the
Danzig courts were entitled to hear the
actions referred to and as to whether the
Polish Railways Administration was bound
to accept the jurisdiction of the Danzig
courts in disputes such as these, and to
enforce the judgments given by those
Courts. The following is said at page
44:-

"It may be readily admitted that, according to a well-established principle of International Law, the Beantenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the Beantenabkommen..... The wording and general tenor of the Beantenabkommen show that its provisions are directly applicable as between the officials and the Administration.

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

It was held that the Danzig officials had a right of action against the Polish Railways Administration for the recovery of pecuniary claims based on the Beantenabkommen.

This is consistent with the common law doctrine that the law of nations is part of the law of the land:

"A public right recognised by the law of nations is a legal right"
- Emperor of Austria v. Day, 2 Giff. 628, 678 (69 English Reports 263 at 284).

Were it not for the doctrine of parliamentary sovereignty that jealously watches the prerogative to prevent the Crown from legislating, the law of the treaty would be Municipal Law, as it is for example in the United States of America. - The Law of Treaties, - Lord McNair, p. 80.

There is further confirmation for this

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

proposition, having regard to the fact that a multilateral treaty (such as the Convention Relating to the Status of Refugees and the Hague Conventions) is law-making.

".....the contrast intended is thus between the bilateral political bargain and the 'legislative act' produced by a broad international conference".
- Principles of Public International Law - Brownlie, Oxford, 1966.

10

Many other States do not have the constitutional requirement requiring the legislative incorporation of treaties into Municipal Law - O'Connell - International Law, pp. 55-57. In the special circumstances pertaining to Basutoland as a ceded colony in 1961, the same principle should apply.

20

- (n) Article 40 (3) of the Convention requires the State concerned to consider the possibility of taking the necessary steps to extend the application of the Convention to territories for the international relations of which it is responsible, subject, where necessary for constitutional reasons, to the consent of the governments of such territories. It will be seen that what is contemplated is that, prior to the extension of the Convention to such territory the consent of the government of such territory should be obtained where necessary for constitutional reasons.

30

Whether or not the consent of the Government of the territory of Basutoland was obtained, it is clear and is common cause that the Queen extended the Convention to Basutoland. It is submitted that there was no necessity for constitutional reasons to obtain the consent of the Government of Basutoland prior to extending the Convention to Basutoland. The reason is that since

40

the treaty-making power is in the Crown, it was unnecessary to obtain the consent of the Government of Basutoland, just as, indeed, it is unnecessary for the Crown to obtain permission from Parliament in the United Kingdom for leave to conclude a treaty, although it is wise to have the concurrence of Parliament if the treaty in Great Britain requires to be translated into Municipal Law. - Introduction to the Study of the Law of the Constitution, Dicey, 10th ed., London, Macmillan, 1959.

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

It is significant that the Convention does not provide that its terms shall be translated into Municipal Law by the States who are parties thereto.

Even if it should be held that Article 40 (3) of the Convention means that a contracting State is required to obtain the consent of the government of the territory for the international relations of which it is responsible, before translating the terms of the treaty into Municipal Law, then it is submitted that in the case of Basutoland it was not necessary for constitutional reasons to obtain such consent, because the Queen, by reason of her prerogative, was in effect the Government and possessed concurrent powers to legislate.

5. (a) Although an examination of the Basutoland Government Gazette shows that there was no publication in it of the terms of the Convention, and although there is no relevant legislation other than the Aliens Control Act, No. 16 of 1966, it is submitted for the reasons stated above, that the Convention has been made a part of the Municipal Law of Basutoland.

(b) It has already been submitted when addressing the Court of Appeal, that the principle to be derived from The Zamora (1916) 2 A.C. 77 at 97 is that the Court will take notice of the prerogative acts of the Crown if such acts mitigate its

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

powers. In effect, by becoming a party to the Convention and undertaking the obligations therein imposed, the Crown mitigated its rights to legislate as it pleases in respect of aliens in Basutoland. Just as, to use the words in The Zamora at page 97, the Prize Court will act on Orders in Council in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be, so, it is submitted, a Court in Basutoland before independence, would act on the Queen's Order, in terms whereof she extended the Convention to Basutoland, and thereby made it part of the Municipal Law of Basutoland. 10

- (c) The Order in Council of the 2nd February, 1884, which appears in the Laws of Basutoland, 1949 at page 4, empowered the High Commissioner on behalf of her Majesty to make by Proclamation such laws as may to him appear necessary for the peace, order and good government of the territory. This, it is submitted, does not mean that unless the High Commissioner proclaimed the terms of the Convention, it would not be law in Basutoland. The reason is, as stated above, that the Crown possesses concurrent legislative power. In regard to such law as may be made by the Crown in Basutoland by virtue of the prerogative, it is not necessary, it is submitted, that the law so made should be notified by Proclamation. 20 30

There is a full discussion of the method of the exercise of the Sovereign's powers in Commonwealth and Colonial Law, by Roberts-Wray, Stevens, London, 1966, at p.143. There it is said that a large variety of instruments is available for the exercise of such powers, and among them are cited an Order in Council, Letters Patent, formal instructions and intimations from the Secretary of State. The subject is also discussed in The Law and Custom of the Constitution - Anson, 40

Oxford, 1892, Part 2, and at page 51; after having described the modes in which the Royal will is expressed for executive purposes, the learned author states that these "show how many restraints are imposed on its expression by the inter-position of responsible Ministers".

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

- 10 (d) In Halsbury, 3rd ed., Vol.7, p.287, sec. 606, it is said that the Great Seal of the United Kingdom is to be used for sealing all treaties with foreign princes and states.

(continued)

27th March 1969

There was handed in at the hearing of the Appeal by consent a photostatic copy of a Command Order, whereby the Secretary of State, on the instructions of the Queen, informed the House of Commons that the Convention had been extended to Basutoland.

20 It is therefore submitted that by reason of what is said above, the Royal will was expressed in regard to the Convention by the affixing of the Great Seal, and in regard to the extension of the Convention to Basutoland, firstly by the Queen having so extended it by an instrument expressing her Royal pleasure, and secondly, by her instructions to the Secretary of State to inform the House of Commons accordingly. This, it is further submitted, is equivalent to any other act of publication in regard to a law-making instrument, and has the same force in regard to publication as would an Order in Council or a Proclamation or Letters Patent.

30

40 Although certain English statutes require the publication of the Crown's legislative enactment before it has the force of law, this does not apply to every means whereby the Royal will is expressed. The Court's attention is respectfully drawn to the Letters Patent Act, 1863 (26 and 27, Vict. Ch. 76), which provides in section 2 that no future Letters Patent should, unless otherwise provided, take

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

effect in any colony or possession until it shall have been signified therein by proclamation or other public notice. It is significant that only Letters Patent are referred to, and it is therefore submitted that publication within the colony of the Royal will expressed by other instruments is not required by law.

- (e) Support for this proposition is to be found in Commonwealth and Colonial Laws - Roberts-Wray, at p. 189, where it is stated that where her Majesty has acquired jurisdiction by cession or conquest, she can exercise it by means of Letters Patent and other instruments. Reference is made to the judgment of Denning M.R. in Nyali v. Attorney-General, 1955 (1) A.E.R. 646 C.A., where that view is expressed at page 651 I. The learned Judge had decided that although ordinarily a Crown grant of franchise must be made by matter of record, it was not necessary in that case, which concerned a franchise relating to passage across a bridge between Mombasa and the Kenya mainland. The Court, at page 652 H, had referred to the Order in Council granting civil and criminal jurisdiction to the area, the Order having provided that the common law shall be in force in the Protectorate so far only as the circumstances of the Protectorate permit, and subject to such qualifications as local circumstances rendered necessary. At page 653, the learned Judge said:-
- 10
20
30

".....I think that the prerogative of the Crown to grant a franchise of tolls applies in the Kenya Protectorate, but with this qualification, that the grant need not be made by matter of record, such as a Charter or Letters Patent nor does it need any formal enrolment".

40

The grant in fact had been made under the Public Seal.

As regards Basutoland, Proclamation 213 of 1884, appearing in the Laws of Basutoland, Vol. 1 at page 340, has the following:-

In the Court
of Appeal of
Lesotho

No.45

Petitioner-
Appellant's
Further written
Argument

(continued)

27th March 1969

10

"2. In all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope".

20

Here, too, reference is made to the circumstances of the country, and it is submitted that just as in Kenya the Crown grant of franchise did not require to be a matter of record, having regard to the local circumstances, so too in regard to Basutoland, legislative enactment by the Crown does not necessarily have to be by way of publication in Basutoland to give such enactment the force of law.

30

6. It is therefore submitted finally that the detailed analysis of the authorities cited above shows that the statement in Oppenheim and the passage in Halsbury, referred to in the request dated the 25th February, 1969, of his Lordship Mr. Justice Roper, do not correctly set out either the law or practice insofar as these might apply to Basutoland. It is also submitted for the reasons stated above that the Convention became a part of the Municipal Law of Basutoland, and that no steps other than those disclosed on the record were necessary.

JOHANNESBURG, 27th MARCH, 1969.

(Signed) J. Unterhalter

J. UNTERHALTER.
APPELLANT'S COUNSEL.

In the Court
of Appeal of
Lesotho

NO. 46

JUDGMENT OF LESOTHO COURT OF APPEAL

No.46

C. of A. CIV. 3/69

Judgment of
Lesotho Court
of Appeal

IN THE LESOTHO COURT OF APPEAL

30th May 1969

Held at MASERU.

In the Appeal of:

JOSEPH SALLI POONYANE MOLEFI Appellant

v.

THE GOVERNMENT OF LESOTHO Respondent
(Principal Legal Adviser,
The Prime Minister and
The Commissioner of Police)

10

Coram:

ROPER, P.
SCHREINER, J.A.
MAISELS, J.A.

J U D G M E N T

ROPER, P. :

This matter comes before the Court on appeal from the Lesotho High Court. The appellant, having been arrested in the Republic of South Africa on a charge of contravening certain provisions of the South African Suppression of Communism Act, fled to Lesotho (then Basutoland) in October, 1961. In October, 1968 an order of expulsion from Lesotho was served upon him. He claimed to be a refugee in terms of the Status of Refugees Convention of 1951 and applied to the High Court for a declaration under Section 38(2) of the Aliens Control Act, No. 16 of 1966, that he was such a refugee and immune from expulsion under the provisions of the Convention. His application was refused by the Chief Justice and he now appeals to this Court.

20

30

In these reasons for judgment the applicant

will be referred to as the appellant.

Two main issues were raised and debated in the High Court:

(a) Whether the appellant was a "refugee" in terms of the definition, embodied in the Convention, which will be set out at a later stage herein. The Government denied that he was:

10 (b) Whether the Convention was binding upon the Government of Lesotho. It appeared that the Government of the United Kingdom had acceded to the Convention in 1954, and that on the 11th November, 1960, it extended it to Basutoland and the two other High Commission Territories (as they then were), subject to certain reservations. (These appear in a "First Supplementary List of Ratifications, Accessions, Withdrawals for 1961" in Treaty Series No. 23.(1961). This was five years before Lesotho became independent, and the appellant appears to have contended (as he did in this Court at the hearing of the appeal) that the Convention was binding upon Lesotho, after independence, by reason of that extension. In addition, or alternatively, he contended that the Government of Lesotho had acceded to the Convention after independence, relying for this contention upon a letter addressed by the Prime Minister of Lesotho to the Secretary-General of the United Nations Organisation on the 23rd March, 1967. This is described by the Chief Justice, in his reasons for judgment, as the appellant's main contention.

20

30

40 Counsel for the Government appears to have admitted that the Convention had been extended to Basutoland before independence, without challenging the validity of the extension. The reasoning upon which he may have contended that this pre-independence accession did not benefit the appellant does not appear from the Chief Justice's reasons for judgment; presumably it was on the ground that the Convention had not been made part of the municipal law of Basutoland. He disputed the appellant's contention that the Prime Minister's letter amounted to an accession to the Convention after

In the Court
of Appeal of
Lesotho

—
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

independence.

On the question whether the appellant was entitled to rely upon the Convention as protecting him against expulsion the Chief Justice held that in terms of Section 17 of the Lesotho Independence Order, 1966, the Kingdom of Lesotho was not bound by the pre-independence treaties, and that the Prime Minister's letter relied upon by the appellant did not amount to an accession after independence. He also held that the appellant was not a "refugee" in terms of the definition in the Convention.

10

It is unnecessary to refer in detail to the provisions of the Convention. Shortly summarised, its object is to ensure that persons who have fled their own countries for fear of persecution on account of race, religion, nationality or political views and have taken refuge in other countries, shall be allowed to enjoy in the countries of asylum what are described as fundamental rights and freedoms, and that they shall not be liable to arbitrary expulsion or return to countries in which they would be liable to persecution. Among the various rights embodied in the Convention are, for example, freedom from discrimination on grounds of race, religion or country of origin; refugees are to have access to the Courts, and are to have, in specified matters, the treatment normally accorded to aliens. No purpose would be served by enumerating all the benefits or rights conferred, but for reasons which will appear later it is important to notice that some of them are such as to involve expenditure out of public funds, and thus to add to the burdens of taxpayers in the countries of asylum. I refer in particular to the Articles of the Convention conferring rights in respect of Public Education (Art. 22) and Public Relief (Art.23). Those dealing with Housing (Art.21) and Labour Legislation and Social Security (Art.24) might also conceivably add to the taxpayers' burdens.

20

30

40

Any contracting State is entitled to denounce the Convention on twelve months' notice.

The issues discussed in the Court below were debated at length in this Court. I find great difficulty in arriving at a decision on the question

whether the Convention is binding upon the Government of Lesotho. I accept, with respect, the view of the Chief Justice that the Prime Minister's letter of the 22nd March, 1967, does not amount to an accession to the Convention after independence. The letter reads thus:-

" The Government of the Kingdom of Lesotho is mindful of the desirability of maintenance to the fullest extent compatible with the emergence into full independence of the Kingdom of Lesotho, legal continuity between Lesotho and the several States with which, through the action of the Government of the United Kingdom the country formerly known as Basutoland enjoyed treaty relations. Accordingly, the Government of the Kingdom of Lesotho takes the present opportunity of making the following declaration:

"2. As regards bilateral treaties validly concluded by the Government of the United Kingdom on behalf of the country formerly known as Basutoland, or validly applied or extended by the said Government to the country formerly known as Basutoland, the Government of the Kingdom of Lesotho is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of twenty-four months from the date of independence (i.e. until October, 4, 1968) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of the Kingdom of Lesotho will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

"3. It is the earnest hope of the Government of the Kingdom of Lesotho that during the aforementioned period of twenty-four months, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.

"4. The Government of the Kingdom of Lesotho

In the Court
of Appeal of
Lesotho

—————
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of the Kingdom of Lesotho proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument - whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which has, prior to independence, been applied or extended to the country formerly known as Basutoland, may, on a basis of reciprocity, rely as against Lesotho on the terms of such treaty.

10

"5. It would be appreciated if Your Excellency would arrange for the text of this declaration to be circulated to all Members of the United Nations."

20

The terms of this letter are substantially identical with those of communications to the League of Nations by the Governments of other newly independent African States, for example those of Kenya and Malawi (see "The Effect of Independence on Treaties", published by the International Law Association, pp. 387, 388.). Much learning has been displayed by commentators on the meaning of these letters and the effect given to them by the States responsible for them but I confess that I have been quite unable to find any clear guidance in these writings as to the proper interpretation of the communications. No light can be thrown upon the meaning of the Lesotho letter by surmise as to the intentions of other Governments; the Lesotho Government's intention must be gathered from the letter itself. The letter draws a distinction between bilateral and multilateral treaties. In regard to the former, subject to certain reservations, the Government is willing to carry out the treaties for a period of twenty-four months. This might well be construed as a conditional adherence for the period stated. In regard to multilateral treaties, however, the intention is different. As to them, in my reading of the letter, the Government will consider each treaty individually and decide whether to accede or not. During the

30

40

period of review (which is not limited in time) any party to a multilateral treaty which contains reciprocal obligations may rely upon the Government of Lesotho to carry out its obligations, provided that it carries out its own obligations to Lesotho. This is to be an interim arrangement pending a decision on whether to accede or not. Many multilateral treaties do create reciprocal obligations between the signatory States. This Convention, however, is one of those which are based upon purely humanitarian grounds and are part of a general agreement to behave in an enlightened way towards a class of persons deserving of sympathy. It embodies no reciprocal obligations between States, and in my view the letter has no application to this Convention.

In my opinion the letter cannot be construed as an accession or adherence to the Convention; indeed it seems to me to be the reverse.

I am not convinced that Section 17 of the Order-in-Council of 1966 has quite the effect attributed to it by the learned Chief Justice. This Section, which provides for the transfer of rights, liabilities and obligations of the Basutoland Government to Lesotho, excepts rights, liabilities and obligations under treaties and conventions. If the extension of the Convention to Basutoland was validly carried out, the Convention could only be denounced on one year's notice addressed to the Secretary-General of the United Nations, and it seems to me debatable whether the provision in the Order-in-Council is sufficient to dispense with such notice. I do not wish however to express a final view on this question.

The central issue on this part of the case is whether the extension of the Convention to Basutoland was validly carried out before independence. In my view the words "acceded to" in Section 38(1) of the Aliens Control Act of 1966 mean validly acceded to, and if there was no valid accession or adherence neither that enactment nor the Prime Minister's letter can have the effect of making the Convention obligatory upon Lesotho. The papers contain insufficient information on this point, and for the following among other reasons it is necessary that the Court should have full information as to the manner

In the Court
of Appeal of
Lesotho

—
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

—————
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

in which this was done and the prerogative or other power which supported the extension. In November, 1960, when the extension took place, the Basutoland (Constitution) Order-in-Council of 1959 (since repealed) was in force. This established a complicated system under which legislative and administrative powers were divided between the High Commissioner, the Resident Commissioner, the Paramount Chief and a Legislative Council, styled the Basuto National Council, composed of Official Members, Chiefs, Elected Members and Members nominated by the Paramount Chief. There was also an Executive Council composed of the Resident Commissioner, three ex-officio members, and four members of the Basuto National Council. Certain matters, described as "High Commission Matters" were reserved to the High Commissioner, among which were "External Affairs and Defence". On High Commission matters the High Commissioner was entitled to legislate by Proclamation, but on other matters the Crown could only make laws with the advice and consent of the Basuto National Council and the Paramount Chief. Furthermore, before legislating by Proclamation the High Commissioner was required to lay a draft of the proposed Proclamation before the Basuto National Council and to consider any observations which the Council might make upon it. There was also a provision requiring the High Commissioner to consult with the Executive Council in the exercise of his powers and the performance of his duties.

The record is silent as to whether there was any consultation of the Basuto National Council, the Paramount Chief, or any other Basutoland Government authority before the extension of the Convention to Basutoland. The only information put before the Court consists of a bald statement, contained in a letter dated the 26th November, 1968, from the office of the British High Commission in Maseru, to the effect that the United Kingdom had declared the Convention to be extended to Basutoland under Article 40 of the Convention. This Article provides that any State may declare that the Convention is to extend to any of the territories for the international relations of which it is responsible; but subsection (3) of the Article requires that the State should consider the possibility of taking

the necessary steps for extension "subject where necessary for constitutional reasons to the consent of the Governments of such territories". There is nothing in the papers to shew whether this procedure was followed, and if not, for what reasons. It may be added that the reservations to the extension of the Convention to the High Commission Territories are such that it would be natural to expect prior consultation with the Governments of the three Territories.

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In regard to conventions and treaties, other than treaties of peace and war and similar agreements, the rule followed in Great Britain is that treaties which impose duties or burdens, such as taxes, upon the subject are not binding internally, unless made part of the municipal law by Parliamentary legislation (see for example Oppenheimer, 8th ed., Vol. I, Sec. 520; Halsbury, 3rd ed., Vol. VII, p. 288).

In view of the provisions of the Convention which involve expenditure from public funds the question arises whether the concurrence of the Basuto National Council and the Paramount Chief were not necessary to the validity of the extension.

It seems to me most improbable that there is no correspondence in the files either of the former High Commissioner's Office in Pretoria or the former Chief Secretary's Office in Maseru dealing with this matter.

It is true that the Order-in-Council of 1959 concludes with a reservation of the Crown's power to make laws for the peace, order and good government of Basutoland. It seems to me to be an open question whether this power includes accession to a treaty, and more particularly a treaty with the provisions to which I have referred. In any case, we have heard no argument on the point.

In my view it would be unsafe to attempt to decide the question whether the Convention is binding upon Lesotho upon the information at our disposal.

I now turn to the question whether the appellant was a refugee in terms of the definition in the Convention.

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

By Article 1A(2) of the Convention the term
"refugee" is to apply to any person who

"as a result of events occurring before 1
January 1951 and owing to well-founded fear of
being persecuted for reasons of race, religion,
nationality, membership of a particular
social group or political opinion, is outside
the country of his nationality and is unable
or, owing to such fear, is unwilling to
avail himself of the protection of that
country, or who, not having a nationality
and being outside the country of his former
habitual residence as a result of such
events, is unable or, owing to such fear,
is unwilling to return to it."

10

In the present case the only important part of this
definition consists in the opening words "as a
result of events occurring before 1 January 1951".
The appellant maintains that his flight from the
Union (now the Republic) of South Africa, though
it took place in 1961, was a result of events
occurring in the Union before the 1st January 1951.
The "events" relied upon are the repressive policy
of the South African Government against the native
population of South Africa and the passing by the
Parliament of the Union of various repressive
measures directed against that section of the
population. These, together with legislative
developments after the date mentioned, are set out
in a lengthy affidavit by a member of the
Johannesburg Bar which the appellant attaches to
his petition.

20

30

The majority of these enactments call for only
passing mention. They are various statutes,
passed between 1923 and 1945, which imposed
limitations upon the right of natives to the
ordinary franchise; upon their freedom of movement
without "passes" and upon their freedom of influx
into certain areas; and which excluded natives
from the operation of the machinery for industrial
conciliation; and similar legislation. A
Proclamation of 1938 which gave the Governor-
General power to order the removal of a native
tribe, or portion thereof, from one area to another,
is also mentioned. These enactments are of no
particular importance in the present case. They
do not appear to me to have been a serious element

40

in the motives which led to the appellant's departure from South Africa in 1961. Nowhere in his affidavit, indeed, does he state that this legislation caused him any uneasiness as to his future residence in the Union. The statute upon which he mainly bases his case is the Suppression of Communism Act, No. 44 of 1950. Unlike the enactments just referred to, this Act makes no discrimination on grounds of race but is of general application. It will be necessary to refer later to some provisions of this Act and amending legislation, but before I do so it seems desirable to consider the meaning of the phrase "as a result of events" in Article 1 of the Convention.

This Court was not referred to, nor have I been able to find any judicial interpretation of this or any similar phrase, or of the word "result"; and the words used must be read in their plain and ordinary meaning, having regard to the context in which they are used. In the Shorter Oxford English Dictionary, of the meanings given for "result" the most apposite in the present context is "the effect, issue or outcome of some action, process, design, etc.". Having regard to the objects of the Convention I find some difficulty in appreciating what difference, if any, there is between "as a result of" and "caused by". "Result" does not connote a mere sequence in time. It implies some degree of causality; there must be a causal connection between the events relied upon and their sequel. The approach of the Courts to the meaning of "cause" is therefore relevant to the meaning of the phrase. The question which this Court has to consider is whether the placing upon the statute book of the Act of 1950, though no doubt it was part of the chain of events which preceded the appellant's flight from South Africa, can be regarded as the cause, or a contributing cause, of that flight; or whether, as Lord Wright put it in Smith Hogg and Co. v Black Sea Insurance Co. (1940 A.C. 997), when discussing causa sine qua non, it was merely "an incident which preceded in the history or narrative of events, but as a cause was was not in at the death", and therefore irrelevant.

As its name indicates, the object of Act No. 44 of 1950 was to discourage and eradicate communism, and it conferred upon the Governor-

In the Court
of Appeal of
Lesotho

—
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

—
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

General and the Minister responsible for the administration of the Act very wide powers in dealing with suspect organisations and persons. The Governor-General was empowered to declare any organisation an unlawful organisation, and, in regard to individuals, in Sections 9 and 10 of the statute authorised the Minister to prohibit a suspect person from attending any gathering in any place within an area during a period specified in the Minister's notice, and it also gave him power to prohibit such an individual from being within an area defined in the notice. Some amendments of the Act were made in 1951 and 1954. By Act No. 15 of 1954 persons dealt with under Sections 9 and 10 were given the right to demand reasons from the Minister, but otherwise these Sections remained in their original form until after the appellant had left the Union for Basutoland. 10

By Act No. 76 of 1962, however, increased and very drastic powers were given to the Minister, mainly by the amendment of Sections 9 and 10. For example, the Minister was given authority to prohibit an individual from attending not merely gatherings within an area specified in the Minister's notice, but any gathering whatever. And he was empowered to prohibit an individual from absenting himself from any place or area mentioned in the Minister's notice and from communicating with any person or receiving any visitors but his legal advisers. It seems that this is the provision for what the appellant refers to as "house-arrest". 20 30

The original Sections 9 and 10 and the amended versions of 1962 are set out verbatim in the affidavit by Counsel.

In his petition the appellant described his reason for leaving the Union for Basutoland as follows:-

"I came to Basutoland as a refugee. I had been charged in the Regional Court, Johannesburg, with being a member of an unlawful organisation, namely the Pan Africanist Congress, and with furthering its aims. I fled South Africa before the conclusion of the trial and sought refuge in Maseru." 40

In his later affidavit which was filed after the respondent had denied that he was a "refugee" because his flight was due to events subsequent to the 1st January, 1951, he amplified this statement as follows:-

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

10

"I say that when I fled South Africa, as stated in my petition, I had a fear of being persecuted because of the political opinions that I had entertained as a member of the Pan Africanist Congress prior to its having been declared unlawful. I was aware of the provisions of the Suppression of Communism Act above referred to and I feared that even if I were acquitted of the charge against me I might nevertheless be prohibited from attending gatherings or be house-arrested in terms of Sections 9 and 10 of that Act, or suffer other disabilities under that Act.

20

The powers under that Act could be exercised without the particular person affected having had a meaningful opportunity of knowing the complaint against him, testing such evidence, rebutting such evidence or exercising the rights otherwise available to him if he had been charged in a court of law.

30

"I say that such fears were well founded because at that time many political leaders had been banned from attending gatherings or had been confined to restricted areas in terms of that Act, and it seemed to me that if charges were brought against me under the Unlawful Organisation Act and I was nevertheless acquitted the Minister of Justice might well exercise his powers against me, more especially as I possessed no rights to defend myself in terms of that Act."

40

Mr. UNTERHALTER, for the appellant, commented upon the fact that the defendants had not availed themselves of their right to call for oral evidence by the appellant with a view to testing these statements by cross-examination. In view of the appellant's own statements, however, it does not appear that anything would have been gained by that course.

In so far as the appellant alleges that when he fled South Africa he feared that even if

In the Court
of Appeal of
Lesotho

—
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

acquitted he might be "house-arrested", his statement is manifestly untrue, because there was no provision for "house-arrest" in any enactment before 1962. Moreover it is difficult to accept his statement that at that time political leaders had been confined to restricted areas, because Section 10 in its original form only authorised the exclusion of an individual from an area, and it was the amendment of 1962 which authorised his restriction to one. However that may be, it is clear from his statements that the appellant's flight to Basutoland was due to fears which he entertained at the time of the proceedings against him, because of his membership of the Pan Africanist Congress. 10

He appears to have had good grounds for such fears. The Pan Africanist Congress came into being, according to the appellant, in 1958. By the Unlawful Organisations Act, No. 34 of 1960, the Governor-General was given power specifically to declare that body an unlawful organisation without notice, and it must have been fairly clear to its members, including the appellant, that an unfavourable climate lay ahead of them. I have come to the conclusion that the cause of the appellant's flight was his membership of the Pan Africanist Congress, which could not have begun before 1958, his resulting prosecution in 1961, and his fear of conviction and the direct and indirect penalties which might and probably would result from it. Properly regarded, the pre-1951 South African legislation and the repressive Government policy referred to by the appellant were merely the background to these events, or, as it was put by Lord Wright (l.c.) a part of the history or narrative. 20

In my view the appellant has not shewn that in terms of the Convention he was outside South Africa as a result of events occurring before January 1951. The decision of the Court below on this issue was therefore correct and the appeal must be dismissed with costs. 30 40

PRESIDENT: E. R. ROPER

Delivered at Maseru this 30th day of May, 1969.

IN THE LESOTHO COURT OF APPEAL

In the Court
of Appeal of
Lesotho

No.46

Held at Maseru.

In the Appeal of:

Judgment of
Lesotho Court
of Appeal

JOSEPH SALLI POONYANE MOLEFI Appellant

(continued)

v.

THE GOVERNMENT OF LESOTHO Respondent
(Principal Legal Adviser;
The Prime Minister;
The Commissioner of Police.)

30th May 1969

10

Goram:

ROPER, P.
SCHREINER, J.A.
MAISELS, J.A.

J U D G M E N T

SCHREINER, J.A.

20

The appellant is a national of the Republic of South Africa and he entered Basutoland, now Lesotho, in October, 1961. As he was an alien he required a permit to be or remain there and he received successive temporary permits until March 1967. Thereafter he remained in Lesotho but his presence there without a permit was unlawful and in the year 1968 he was served with a deportation order under Section 25 of The Aliens Control Act (Act 16 of 1966). That Act, in Section 38, contains a saving as to "refugees" which, so far as is material, reads -

30

"Section 38(1). If any international treaty or convention relating to refugees is or has been acceded to by or on behalf of the Government of Lesotho, an alien who is a refugee within the meaning of such a treaty or convention shall not be refused entry into or sojourn in Lesotho, and shall not be expelled from Lesotho in pursuance of the provisions of this Act

(2) If any question arises -

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

(a) whether an alien is a refugee.....
the High Court may on the application of that
alien declare.....that his expulsion from
Lesotho is or is not permitted by that treaty
or convention, or may decline to make any
such declaration."

In the year 1951 an international convention
relating to the Status of Refugees was entered into
by a number of states, and the material parts of
Article 1 of the Convention read -

10

" Definition of the term "Refugee".

A. For the purpose of the present Convention,
the term 'refugee' shall apply to any person
who :

(2) As a result of events occurring before
1 January 1951 and owing to well-founded
fear of being persecuted for reasons of
race, religion, nationality, membership
of a particular social group or political
opinion, is outside the country of his
nationality and is unable or.....
unwilling to return to it....."

20

On receipt of the deportation order the
appellant applied to the High Court for an interdict
against his expulsion and for a declaratory order
in support thereof. Jacobs C.J. dismissed his
application with costs and the appellant now appeals
to this Court. A number of interesting and
important points were raised in the course of the
argument but the main issues were only two -
(a) whether the Convention relating to the Status
of Refugees was operative in Lesotho in 1968,
and (b) whether, if it was, the appellant was a
refugee within the meaning of Article 1.A(2) of
the Convention.

30

I do not find it necessary to decide the first
issue as the appeal can and should be decided on
the second - whether Jacobs, C.J. was right in
holding that the appellant did not succeed in
showing that he was a refugee, as defined.

40

In terms of Section 32 of the Aliens Control
Act

"The onus of proving or disproving any facts

the proof or disproof of which is required to establish.....that a person is entitled to the benefit of Section 38.....shall lie on that person".

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

10 The appellant had therefore to prove, inter alia on balance of probabilities that he left the Republic of South Africa and came to Lesotho, or Basutoland, as it then was, "as a result of events occurring before 1 January 1951". There was a later amendment of the Convention so as to remove the date limitation but this did not operate in Lesotho at the relevant period.

In his petition the appellant explained why he made the move in the following passages -

"9. (a) I was born in Winburg, Orange Free State, South Africa and I lived in that country until my arrival in Basutoland in October 1961.

20 (b) I came to Basutoland as a refugee. I have been charged in the regional court, Johannesburg, with being a member of an unlawful organisation, namely the Pan Africanist Congress, and with furthering its aims. I fled South Africa before the conclusion of the trial and sought refuge in Maseru.

30 (c) If I am returned to South Africa this trial will no doubt proceed, and if I am found guilty, I may be sentenced to a long term of imprisonment for these political offences. Further, I believe from newspaper reports that I have read that I am banned in terms of certain provisions of the Suppression of Communism Act of the Republic of South Africa. If I am returned to the Republic of South Africa pursuant to the expulsion order I shall suffer the disabilities imposed by that Act upon a banned person, these including
40 confinement to an area and a prohibition against publication of anything I write. As I earn my living as a journalist this will gravely handicap me, more especially as I have a wife and two young children to support."

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

It is clear from the foregoing that in his petition the appellant gave as the reason for his migration that he was being prosecuted for his membership of the Pan-Africanist Congress and his activities connected with it. His membership, congress activities and prosecution happened about ten years after the 1st January 1951 - the congress was only formed in 1959 and declared to be unlawful under the provisions of the Unlawful Organizations Act 1960. The appellant does not, in his petition or in any other sworn statement before us, affirm or suggest that the passing of the Suppression of Communism Act (Act 44 of 1950) or the first amendment (Act 56 of 1951) led him to think that it would be wise for him to leave the Union, afterwards the Republic, of South Africa and settle in Lesotho. In the absence of explanation the fact that he did not make the change of residence until some ten years after the passing of the 1950/1951 legislation leads me to reject the view that it is more probable than not that he emigrated because of the passing of the 1950/1951 legislation or because of any other event or events happening before the 1st January 1951. He nowhere states that before his prosecution in 1960 it ever entered his mind to emigrate or that before that year, he had come to the conclusion that Lesotho was a better place for him to live in than South Africa, with all its disadvantages. The only acceptable inference to be drawn from the above-quoted language of paragraph 9 of the petition, the effect of which is not, as I shall indicate, modified in the appellant's favour by the further affidavits filed by the appellant, is that the appellant emigrated as the result of the prosecution and its accompanying risks.

The statement in paragraph 9(b) of the petition, "I came to Basutoland as a refugee" is clearly not an allegation, even a bald one, mixing law and fact, that he was a refugee in terms of the definition in Article 1A(2) of the Convention. The term "refugee" is here not used, expressly or impliedly, according to the definition, but is only an untechnical expression conveying that he was a resident alien in Basutoland - as, of course, he was. Equally ineffective as evidence is the general submission, made in the appellant's affidavit of the 28th November, 1968, that by

reason of all his foregoing allegations he was, when he arrived in Lesotho, a refugee within the meaning of the Convention. Indeed the generalisation from all his allegations tends to support the natural meaning of paragraph 9 of the petition (that it was the prosecution that resulted in the emigration) by its omission to specify and rely on anything, that could be said to be events prior to 1 January 1951, as having resulted in the emigration.

10

The appellant was permitted to file a supplementary affidavit in which he made a number of allegations aimed at shewing that he was, indeed, a refugee within the meaning of the definition in Article 1A(2) of the Convention. We were referred by the appellant's counsel to paragraphs 9, 10(g) and 10(h) of the petition and, in development or supplementation thereof, to a number of paragraphs in the supplementary affidavit.

20

One of the elements that might be thought to have a bearing on what resulted in the appellant's emigration is an allegation about "banning" made in the above-quoted paragraph 9(c) of the petition. It is there stated that the appellant believes, from what he has read in a newspaper, that he has been banned under the Suppression of Communism Act. But banning in terms of that Act requires that the person affected should be served with a notice, so that, hearsay apart, the appellant cannot have been effectively banned if his only knowledge thereof came from what he read in a newspaper. Moreover he does not state when the alleged banning took place or when he became aware of it. All that has been established therefore in this connection, is that the Suppression of Communism Act contained a provision for banning which might have been used against the appellant before the 1st January 1951. But there is no evidence that the appellant was in fact banned or that the risk of being banned influenced his conduct.

30

40

I conclude therefore that all that was shewn in the petition was that before the 1st January 1951 legislation was passed in South Africa that might have led to the banning of the appellant and to his prosecution for activities on charges of furthering the aims of widely defined "communism". He was so prosecuted and when that

In the Court
of Appeal of
Lesotho

—————
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

—————
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

happened, but not before, he fled South Africa.

The allegations in the main supplementary affidavit range far afield and appear to me to be very largely repetitious and irrelevant. They tend to establish yet again that there is a vast amount of serious discrimination against non-whites, and particularly against Africans, in many departments of life in South Africa, and that the discrimination has increased and is increasing. Stress is laid on the electoral powerlessness of the African, which renders the harshness of the other discriminatory provisions more serious.

10

Many amendments tending to increase restrictions and close loopholes are mentioned in the affidavits, largely without the recording of the date of the amending acts. A long period covering legislation before Union in 1910 and extending to the setting up of the Republic in 1960 and thereafter, is reviewed, but the issue of whether any "events" that happened before the 1st January 1951 resulted in the appellant's migrating appears to me to have been substantially ignored in the affidavits. If it was not ignored the absence of any direct treatment of what might be claimed to be such events contributes support to the conclusion, in effect stated in the above-quoted paragraph 9 of the petition that it was the appellant's prosecution, and the risks of what it might entail, that led to his migration.

20

It is not necessary to quote all the passages in the supplementary affidavit to which we were referred. I have considered them all in relation to the issues to be decided and I am satisfied that they do not allege that the appellant migrated as a result of events that happened before 1 January 1951. Acts 44 of 1950 and 50 of 1951 are the pieces of legislation that most nearly meet the appellant's case but even they do not amount to an event or events that could in themselves have resulted in the appellant's migrating ten years later. And he no-where says that they did. He cites amendments that are generally undated but which clearly contained more frightening material than the original unamended legislation. The evidence taken at its face value does no more than recite factors that over the years built up a general state of mind that was resentful and

30

40

anti-governmental. But there is no evidence to shew that the appellant came to a decision to leave South Africa for Basutoland before 1961, let alone before 1 January 1951. There is no evidence that anything that happened before the latter date resulted in the appellant's migration.

The appeal must in my view be dismissed with costs.

JUDGE OF APPEAL: O.D. SCHREINER

10 Delivered at Maseru this 30th day of May, 1969.

C. of A. CIV. 3/69

IN THE LESOTHO COURT OF APPEAL

Held at MASERU.

In the Appeal of:

JOSEPH SALLI POONYANE MOLEFI Appellant

v.

THE GOVERNMENT OF LESOTHO Respondent
(Principal Legal Adviser;
The Prime Minister;
The Commissioner of Police)

20

Coram.

ROPER, P.
SCHREINER, J.A.
MAISELS, J.A.

J U D G M E N T

MAISELS, J.A.:

Section 38(1) of the Aliens Control Act No. 16 of 1966 reads:

30 "If any international treaty or convention relating to refugees is or has been acceded to by or on behalf of the Government of Lesotho, an alien who is a refugee within the meaning of such a treaty or convention shall not be refused entry into or sojourn in Lesotho, and shall not be

In the Court of Appeal of Lesotho

No.46

Judgment of Lesotho Court of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

expelled from Lesotho in pursuance of the provisions of this Act except with his consent or except to the extent that is permitted by that treaty or convention, subject to any reservation that may be in force at the material time."

For the appellant to succeed in this matter (the onus being on him under Section 32 of the Act) he must establish that he falls within the provisions of this section, i.e. he must prove on a balance of probabilities both:

10

- (1) that an international treaty or convention relating to refugees is or has been acceded to by or on behalf of the Government of Lesotho, and
- (2) that he is a refugee within the meaning of such treaty or convention.

It is common cause that the only international treaty or convention relating to refugees which is relevant in this case, is the United Nations Convention relating to the status of refugees (to which I shall refer in this judgment as the Convention) which was adopted on the 28th July, 1951 and which entered into force on the 21st April, 1954. The first question thus is whether it has been shown that this Convention is or has been acceded to by or on behalf of the Government of Lesotho.

20

Up to the 4th October, 1966, Basutoland was a colony of the United Kingdom of Great Britain and Northern Ireland. On that date the sovereign kingdom of Lesotho came into being. The territory of Lesotho comprises all the areas that immediately before the 4th October, 1966 were comprised in the former colony of Basutoland (cp. Lesotho Independence Order No.1172 of 1966 and Section 1 of the Constitution of Lesotho). Article 1 of the Convention reads (I omit parts not relevant to this judgment):

30

A For the purposes of the present Convention, the term "refugee" shall apply to any person who:
.....

40

(2) As a result of events occurring before 1st January 1951 and owing to well-founded fear of

being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the Court
of Appeal of
Lesotho

—————
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

10 B (1) For the purposes of this Convention, the words "events occurring before 1st January 1951" in Article 1 Section A, shall be understood to mean either:

(a) "events occurring in Europe before 1st January 1951", or

20 (b) "events occurring in Europe or elsewhere before 1st January 1951" and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention."

30 The Convention was acceded to by the United Kingdom on the 11th March, 1954 and at the time of accession the United Kingdom declared that for the purpose of its obligations thereunder the words "occurring before 1st January, 1951" in Article 1 of Section A shall be understood as events occurring in Europe or elsewhere before 1st January, 1951. On the 11th November, 1960 and acting under Article 40 of the Convention, the United Kingdom, being at that time responsible for the international relations of Basutoland, declared that the Convention extended to Basutoland and to the two other territories bounding on South Africa for whose international relations it was also at that time responsible, i.e. Swaziland and what was known as Bechuanaland. In terms of Article 40 of the Convention, this declaration by the United Kingdom took effect 90 days after the 11th November, 1960, i.e. on the 9th February, 1961. I may mention that it seems to me that the fact that the United Kingdom took these steps in 1960 on behalf of these territories is probably not related to the events which occurred in 1960 in what was then the Union

40

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

of South Africa, and to which reference is made in paragraph 4(k) of the appellant's supplementary affidavit dated 28th November, 1968, namely mass demonstrations against certain laws affecting Africans, one of which being at Sharpeville, where a number of African demonstrators died.

It was contended on behalf of the respondents that despite the declaration by the United Kingdom that the Convention extended to Basutoland, that declaration did not serve to introduce the provisions of the Convention into the municipal law of Basutoland and that, therefore, the Convention did not form part of the law of Basutoland enforceable by the Courts cp. Oppenheim International Law 8th edition Volume 1, page 924, paragraph 520. Halsbury 3rd edition, Volume VII, paragraph 607, page 287. See also Pan American World Airways Inc. v. South African Fire and Accident Insurance Company Limited 1965 (3) SA 150 (AD) at 161., S. v. Tuhadeleni and Ors. 1969 (1) SA 153 (AD) at 173.

10

20

MR. UNTERHALTER for the appellant submitted however that the Convention was introduced into the municipal law of Basutoland by virtue of the provisions of the Aliens Control Act 1966. This Act was passed by the Parliament of Basutoland acting under powers conferred on it by the Basutoland Order 1965. It was assented to on 30th September, 1966 but was only to come into operation on a date to be fixed by the Minister by notice published in the Gazette (Section 1 of the Act). The date upon which it actually came into operation was 1st March, 1968 - see Government Notice No. 7 of 1968. Section 37(8) reads:-

30

"In this Act a reference to Lesotho shall, up to the expiry of the 3rd day of October 1966 be construed as a reference to Basutoland."

MR. UNTERHALTER submitted that as it was common cause that the Convention had been acceded to by and on behalf of the Government of Basutoland in 1960 and this was a date prior to the 3rd October, 1966, Section 38(1) supra read with Section 37(8) introduced the Convention into the municipal law of Lesotho. He argued that the words "up to the expiry of the 3rd October, 1966" in Section 37(8) must be read in effect as if

40

words such as "in relation to events" had been inserted in the sub-section immediately prior to the words "up to the expiry....." etc. Read this way and applying it to Section 38(1) this would mean that the Convention in question would be covered by Section 38(1). He pointed out that the Act was assented to on 30th September 1966 and that as appears from the Act itself, and indeed as events subsequently showed, it was visualised that Basutoland would cease to exist and Lesotho come into existence on the expiry of the 3rd October, 1966. He contended that it was unlikely that Parliament would have legislated for so short a period and that it leads to an absurdity to give the words their literal meaning, which is that if called upon to apply the Act prior to the expiry of 3rd October, 1966 the word Lesotho is to be construed as Basutoland. But this argument to my mind overlooks the fact that the Act may have been passed by the Basutoland Parliament well before 30th September, 1966. It would most certainly have been drafted well before that date. And giving the words their literal meaning does not, in my view, give rise to any absurdity. The sub-section, ignoring the heading to Section 37 which appears in the Statute, seems quite clearly to be dealing with the transitional period between the passing of the Act and the coming into being of the Kingdom of Lesotho. I was at one stage impressed by MR. UNTERHALTER's argument in support of the interpretation for which he contended by his reference to Section 38(5), which deals with aliens who lawfully entered Lesotho before 25th April, 1958. Mr. UNTERHALTER said, as indeed is the position, that it is plain that Lesotho in that sub-section means Basutoland whether one was called upon to apply the Act before or after the expiry of the 3rd October, 1966. Similarly in Section 37(5)(b) where reference is made to an alien who lawfully entered Lesotho on or after 28th April, 1958, this must mean an alien who lawfully entered Basutoland up to 3rd October, 1966 and Lesotho after that time, whenever one might be called upon to construe or apply that sub-section. I think that Mr. UNTERHALTER is correct in this submission as well. But it must be borne in mind that when the Basutoland Parliament passed the Aliens Control Act it obviously knew that the coming into being of Lesotho was imminent, the date "up to the expiry of 3rd October, 1966"

In the Court
of Appeal of
Lesotho

—————
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

in Section 37(8) shows this must have been so, and it also must have known that the territory of Lesotho was to be the same as that of Basutoland, as indeed turned out to be the case, cp. Section 1(2) of the Constitution of Lesotho which was a Schedule to the Lesotho Independence Order made by the Queen on 20th September, 1966, to come into effect "immediately before 4th October, 1966". In my opinion the words in Section 37(8) mean what they say, namely that if one were called upon to apply or construe the Aliens Control Act up to the expiry of 3rd October, 1966, the word Lesotho is to be read as Basutoland. In my opinion, Mr. UNTERHALTER's submission based on Section 37(8) must fail.

10

I pass now to the second submission raised by Mr. UNTERHALTER on this point. In November 1960 when the Declaration was made by the United Kingdom extending the Convention to Basutoland, Basutoland was, as stated above, a colony of the United Kingdom. It was governed in terms of the Basutoland (Constitution) Order in Council 1959 published under High Commissioner's Notice No.103 of 1959. Section 45 of that Order empowered Her Majesty with the advice and consent of the Basutoland National Council and the Paramount Chief to make laws for the peace, order and good government of Basutoland in regard to all matters which were not High Commissioner's matters. The High Commissioner was empowered to make laws in regard to certain matters specified in the Third Schedule and among such matters so specified is external affairs. Section 99(2) of the Order, however, reads:

20

30

"Nothing in this Order shall affect the power of Her Majesty in Council to make laws from time to time for the peace, order and good government of Basutoland."

MR. UNTERHALTER submitted that although at the time the Convention was extended to Basutoland, the Basutoland National Council was the legislative council for Basutoland, such Council was not the exclusive legislature and Her Majesty then possessed a concurrent power to legislate in terms of the prerogative. This he submitted is because Her Majesty had reserved Her powers in terms of Section 99(2) of the Order supra. I may mention

40

that in Section 99(1) of the Order Her Majesty reserved to Herself power with the advice of Her Privy Council to revoke or amend the Order in Council. Mr. UNTERHALTER consequently submitted that by extending the Convention to Basutoland, Her Majesty had performed a legislative act in regard to Basutoland and that such act had the force of law in Basutoland. I do not, however, find it necessary further to pursue this aspect of the case and in particular MR. UNTERHALTER's very full and helpful argument on it, because of the conclusion I have come to on the next argument submitted by Mr. Unterhalter.

In the Court
of Appeal of
Lesotho

—————
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

On the 22nd March, 1967 a letter was addressed to the Secretary-General of the United Nations by the second respondent. It reads:

"Your Excellency,

The Government of the Kingdom of Lesotho is mindful of the desirability of maintenance, to the fullest extent compatible with the emergence into full independence of the Kingdom of Lesotho, legal continuity between Lesotho and the several States with which, through the action of the Government of the United Kingdom the country formerly known as Basutoland enjoyed treaty relations. Accordingly, the Government of the Kingdom of Lesotho takes the present opportunity of making the following declaration:

2. As regards bilateral treaties validly concluded by the Government of the United Kingdom on behalf of the country formerly known as Basutoland, or validly applied or extended by the said Government to the country formerly known as Basutoland, the Government of the Kingdom of Lesotho is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of twenty-four months from the date of independence (i.e. until 4th October, 1968) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of the Kingdom of Lesotho will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

3. It is the earnest hope of the Government of

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

the Kingdom of Lesotho that during the aforementioned period of twenty-four months, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.

4. The Government of the Kingdom of Lesotho is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of the Kingdom of Lesotho proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument - whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which has, prior to independence, been applied or extended to the country formerly known as Basutoland, may, on a basis of reciprocity, rely as against Lesotho on the terms of such treaty.

5. It would be appreciated if Your Excellency would arrange for the text of this declaration to be circulated to all Members of the United Nations.

Please accept, Sir
the assurance of my highest consideration,
LEABUA JONATHAN
Prime Minister."

It was contended by MR. UNTERHALTER that this letter is an instrument of accession such as is contemplated in Article 39 of the Convention and that the appellant is therefore entitled to the protection of Section 38 of the Aliens Control Act. Paragraph 3 of Article 39 read with paragraph 2 of that Article of the Convention provides that the Convention is to be open for accession inter alia by States Members of the United Nations and that accession is to be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations. Lesotho has at all material times been a member of the United Nations. Before dealing with the question as to whether having regard to its terms, the letter of 22nd March, 1967

10

20

30

40

is to be regarded as "an accession", it would, I think, be convenient to refer to an argument by Mr. Blunden on behalf of the respondents that the letter cannot be construed as an accession because, so it was said, "accession" is an executive act. The executive authority of Lesotho is vested in the King and may be "exercised by Him either directly or through officers or authorities of the Government of Lesotho" (cp. Section 71 of the Constitution). It was contended that the appellant has not shown that the Prime Minister's letter constituted an action by the King in this sense. I find it strange that, although the Prime Minister made two affidavits in this matter, in dealing with the letter he did not specifically state that he did not have the necessary executive authority to write it. It purports to be written on behalf of the Government of the Kingdom of Lesotho. The Prime Minister is an officer of the Kingdom of Lesotho. He is also the lawful holder of the office of the Minister for the time being responsible for the administration of the Aliens Control Act - cp. Government Notices 78 and 79 of 1968. The first respondent in paragraphs 6(a) and (b) of his affidavit dated 12th October, 1968, admitted that the letter of the 22nd March had been written, but denied that the Government of Lesotho had acceded to the Convention in question in this case, or that it was bound by such Convention. I read this merely as a denial that as a matter of construction the letter constitutes an accession. The Prime Minister associated himself with the first respondent's affidavit, but nowhere in the affidavits filed by or on behalf of the respondents, is there any reference to a lack of executive authority on the part of the Prime Minister. In the absence of such a statement which I think is to be expected if indeed that were the case, I consider I am bound to hold that when the Prime Minister wrote to the Secretary-General of the United Nations and when he purported to write on behalf of the Government of Lesotho, he was cloaked with the necessary authority to do so. I reject the argument of Mr. BLUNDEN on this point.

MR. BLUNDEN's main contention was that the letter is not, and was not, intended to be an accession in the legal sense. He said it was an application of the "Nyerere Doctrine" and is, if

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

anything, a denunciation of all treaties terminable on notice, rather than an accession of any sort. Before I set out what I understand to be the meaning of the "Nyerere Doctrine", I draw attention to Mr. BLUNDEN's argument that the Lesotho Independence Order in fact specifically excludes the transfer of rights, liabilities and obligations incurred by Her Majesty in respect of the Government of Basutoland whether such rights, liabilities or obligations arose from treaties or conventions. He relies on Section 17 of the Lesotho Independence Order for this submission. This argument was accepted by the learned Chief Justice a quo, but I am bound to say that I am very doubtful as to its validity. If Lesotho were bound by a treaty or convention as a result of a lawful act of Her Majesty it does not seem to me that the provisions of Section 17 have the effect of releasing Lesotho from such treaty or convention. I shall assume however that the argument is correct. But if it is, I fail to see how this letter can be read as a denunciation of treaties. On Mr. BLUNDEN's argument there was nothing to be denounced. It seems to me that the terms of the letter manifest a plain desire on the part of the Government of Lesotho not to denounce but rather to adhere, albeit for a limited time and perhaps subject to certain conditions, to pre-independence treaties made by the Government of the United Kingdom in respect of Basutoland. I start from the premise, as contended by Mr. BLUNDEN, that there was not to be a continuation of treaties which had been entered into by the Government of the United Kingdom whilst Basutoland was a colony, and that the letter in question was an application of the "Nyerere Doctrine". Professor O'Connell in "State Succession in Municipal Law and International Law", volume II, page 113, et seq., points out (p.113) that the former colonial and protected territories following independence have acted with respect to treaty continuity in contradictory fashion. There have apparently been three different positions taken. Certain States have adopted a generally negative attitude towards the question, i.e. they have not admitted succession to treaties entered into by the former colonial powers and have started with a clean slate. A number of States (page 114) have acknowledged succession of the treaties, whereas others have adopted the "Nyerere

10

20

30

40

50

Doctrine", which is styled by the learned author as the "temporising position" (p.115). The learned author says at page 116:

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

10 "When it became independent, Tanganyika did not wish to compromise its position in respect of one or two sensitive questions by signing a devolution agreement with the United Kingdom, and chose instead to make a declaration embodying what is known in Africa as "the Nyerere doctrine".

10 Prime Minister Nyerere stated that for a period of two years Tanganyika would continue to apply British treaties. During that period these would be examined, and the other parties would be notified of the treaties which Tanganyika wished to continue. At the expiry of the period all treaties not confirmed would be deemed to have lapsed, save those succeeded to in virtue of customary international law. Largely because

20 Tanganyika was linked with Uganda and Kenya in the East African Common Service Organization, these two states adopted the Tanganyikan declaration (though in Uganda's case the period of review was eighteen months), so that treaties affecting the work of the Organization would expire in the case of both Tanganyika and Uganda at about the same time. Malawi adopted the Tanganyikan text, but prefaced it by an expression of desire to maintain existing treaty relations to the full extent compatible with independence, and gave itself a period for examination of a little more than one year. Botswana on

30 6 October 1966 and Lesotho on 22 March 1967 varied the text of this declaration. Following the making of each of these declarations, the United Kingdom wrote to the Secretary-General of the United Nations stating that the United Kingdom had ceased to have the obligations or rights which derived from the relevant treaties."

40 The terms of the Declaration by Mr. Nyerere, the Government of Kenya and by the Prime Minister of Malawi appear in "The Effect of Independence on Treaties", a publication of the International Law Association, at pp 370, 387 and 388 respectively. An examination of these declarations shows that the wording of the letter by the Prime Minister of Lesotho now under consideration must have been largely, if not entirely, based on the declaration of the Prime Minister of Malawi. Indeed mutatis mutandis and save that the period of the 24 months

In the Court
of Appeal of
Lesotho

—
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

mentioned in paragraphs 2 and 3 in the Lesotho Declaration is 18 months in that of Malawi, the Malawi and Lesotho Declarations are in identical terms. Professor O'Connell on page 119 op.cit. states:

"The Nyerere doctrine, in essence, embodies the claim that the successor State is free to determine which treaties it wishes to continue and which it wishes to reject. This raises serious questions concerning the legal basis for continuity during the period of review. Certainly the doctrine operates as notice to terminate those treaties which are terminable on notice, and to this extent it is merely an unusual device of lawful denunciation. But inasmuch as it purports to achieve the termination of treaties which would not lapse on independence and are interminable, it operates only on the principle of tacit consent. And inasmuch as it depends for its achievement on customary international law, it has no advantage over the devolution agreements or other policy statements on treaty succession, and its main utility lies in the diplomatic value of letting all parties know where they stand." 10 20

The learned author then goes on to consider the hazards with which, as a diplomatic exercise, the Nyerere doctrine is fraught. But it is unnecessary for the present purpose to pursue this aspect of the matter, for it seems to me that the real problem is to endeavour to interpret the declaration of the Government of Lesotho as contained in the letter before the Court. The letter itself starts with the statement "The Government of the Kingdom of Lesotho is mindful of the desirability of maintenance.....(of) legal continuity between Lesotho and the several States which through the action of the Government of the United Kingdom, the country formerly known as Basutoland enjoyed treaty relations." The word "accordingly" is the first word in the next sentence and everything that follows in the letter must, I consider, be read bearing in mind the declaration on the part of the Government of Lesotho that it is mindful of the desirability of legal continuity of pre-independence treaties. It is not, I think, unfair to say that it must have been apparent to the Government of Lesotho that to adopt an entirely negative attitude to pre- 30 40

independence treaties, may, certainly in some cases, have led to grave inconvenience. Consequently, despite the terms of Section 17 of the Lesotho Independence Order to which reference was made on behalf of the Respondents, it wished to continue bilateral treaties for a period of 24 months from the date of independence, subject to the conditions which are set out in paragraph 2 of the letter. As was recognised by the Government of Lesotho, it is obvious that multilateral treaties could not be treated in the same way as bilateral treaties, for example, questions of continuation, abrogation or modification of such treaties might well have been dealt with in quite a different way. Consequently, it seems to me that it wished to have an undefined time to enable it to make up its mind as to what steps it wished to take with regard to each instrument "whether by way of confirmation of termination, confirmation of succession or accession". What was to happen during the time it was making up its mind in regard to the multilateral treaties? Were the treaties to be considered as not binding on Lesotho, or were they to be considered as binding? For an answer I turn to the words of the Declaration itself, viz:

10

20

30

"During such interim period of the review any party to a multilateral treaty which has prior to independence been applied or extended to.....Basutoland may on a basis of reciprocity rely as against Lesotho on the terms of such treaty."

40

It will be noted that in relation to bilateral treaties there is a specific statement that these were to terminate on the 4th October, 1968, save for such as had been abrogated or modified earlier by mutual consent, or for such treaties which by application of customary international law would still survive. In the latter category, I assume there would be what are known as "dispositive treaties". Indeed, as is pointed out in "The Effect of Independence on Treaties" *op. cit.* at p. 220:

"If dispositive treaties are the hard core of treaties which are succeeded to, except where construction otherwise dictates, the resistance to succession in the case of other treaties is difficult to justify when these are, with very

In the Court
of Appeal of
Lesotho

—————
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

—
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

few exceptions, easily got rid of at political convenience."

In my opinion the meaning of the Lesotho Government Declaration in question, is that the pre-independence multilateral treaties are to continue in existence and will be considered as binding on Lesotho until such time as the Government of Lesotho makes up its mind what it wants to do finally in regard to all or any one of these treaties, whether to terminate them, to succeed to them or to accede to them. Some difficulty is, however, occasioned by the words appearing in paragraph 4 of the letter "on a basis of reciprocity". It may be said that before the Convention can be considered binding on Lesotho other States would have to agree that they accept the Lesotho Declaration. In Jowett's Dictionary of English Law, the following definition is given of "reciprocity":

10

"The term is used in international law to denote the relation existing between two States when each of them gives the subjects of the other certain privileges, on condition that its own subjects shall enjoy similar privileges at the hands of the other State."

20

Reciprocity in this sense really has no place in a Convention of the nature now under consideration. Indeed this Convention deals with cases where the citizen or national of one State flees from his own State. Moreover the granting of asylum does not constitute a wrongful act vis-a-vis other States, in particular the State of origin of the person to whom asylum is granted, cp Dr.P.Weis "Territorial Asylum", Indian Journal of International Law, Volume VI No. 2 April 1966 p. 174/5. A reference to the preamble to the Convention and to its terms shows that it really constitutes an example of international co-operation in a humanitarian field. By becoming parties to the Convention a number of States have agreed between themselves to deal with the problem of refugees in a certain way, irrespective of the nationality of the refugees. The Court was informed by Mr.Blunden that over 50 States have become parties to the Convention and each contracting State remains bound by it until it denounces in terms of Article 44. The Convention

30

40

itself also provides that at the time of signature, ratification or accession, a State may make reservations to articles of the Convention save for certain ones specifically excluded. As already stated above, the Convention can be acceded to by States Members of the United Nations, not originally signatories. On the question of reciprocity, it is of course possible in the ordinary sort of case such as is dealt with in the definition quoted above, for the other States to refuse to accept the terms of the Lesotho Declaration, but in the Convention under consideration, having regard to its objects to the methods of accession and denunciation provided for therein, I doubt whether this situation can really arise. It was not suggested by Mr. Blunden that any of the other signatory States or that the depositary had refused to accept or had objected to the Declaration by Lesotho. It may be argued that as in the ordinary sense of the word there appears to be no question of reciprocity in this Convention, the Declaration cannot constitute an accession to the Convention in view of the use of the words "on a basis of reciprocity"; in other words, that the Declaration is limited to those Conventions where there may be said to be reciprocity in the ordinary sense of the word. The Convention now under consideration is not the only one where reciprocity in the ordinary sense of the word is not apparent. Other examples are Conventions on genocide, forced labour and slavery, human rights, the Geneva Convention for the care of the wounded. In my view full meaning is given to the Declaration by reading the words "on a basis of reciprocity" as limited to those cases where reciprocity is required to make the treaty effective, but in those cases where this is not so, these words are to be treated as surplusage. C. Wilfred Jenks, in an article on "State Succession in respect of Law-making Treaties" in the British Year Book of International Law 1952 p.105 at pp. 108-109 says:

"The psychology of newly won independence is a formidable reality, and juristic speculation on state succession which ignored it would be an altogether unprofitable exercise. The obligations of multipartite legislative instruments are not, however, badges of continuing servitude; they are a necessary part of full co-operation in the

In the Court
of Appeal of
Lesotho

—————
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

In the Court
of Appeal of
Lesotho

—
No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

international community and participation in them must therefore be regarded as one of the hallmarks of emancipation. Fischer Williams has reduced it to a truism. "The life of human-kind is a process of perpetual change, and legal rights cannot be made an exception to this process". If the contention that law-making treaties survive changes of sovereignty were inconsistent with this principle it would be wholly unrealistic, but it is not more inconsistent with the mutability of human affairs than the principle that a new member of the international community is bound by existing customary international law or the principle that a change of sovereignty does not automatically change the law governing private relationships. It is not a matter of perpetuating the dead hand of the past, but of avoiding a legal vacuum. Subject to any special obligations binding upon it as a result of the circumstances of its creation or recognition, the new state will have the same rights of denunciation under legislative, instruments as existing states and, with the exception of the few instruments designed to effect a permanent and basic change in the law, virtually all multipartite legislative instruments now make reasonable provision for denunciation. In these circumstances, the independence of the new state is in no way impaired by the substitution of orderly processes of development and change for the uncertainty, confusion and practical inconvenience of a legal vacuum which may be gravely prejudicial not only to the interests of other states concerned but equally to the interests of the new state itself and its citizens. The suggestion sometimes made that there is no treaty vacuum because pre-existing treaty obligations will generally continue to be binding on an existing state misconstrues the nature of the problem. There is such a vacuum in respect of the territory and citizens of the new state, which may comprise hundreds of thousands of square miles and millions of citizens, and in a wide range of cases the effectiveness of law-making treaties which cease to be applicable to them, even temporarily will also be impaired elsewhere." 10 20 30 40

I think these remarks are apposite in the

present case. The Declaration by the Government of Lesotho was an intimation, I consider, of its recognition that multilateral treaties "are a necessary part of full co-operation in the international community" and of its intention to be bound by those entered into on its behalf by the United Kingdom pending an examination of each one, a matter which in the very nature of things would take time.

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

10 It was also contended on behalf of the
respondents that the Declaration was merely a
notification that the Government of Lesotho would
carry out the treaties but would not be obliged
to do so - a statement of policy without binding
obligations. The use of the words "may rely"
seems to me to negate this interpretation. The
Declaration was deposited with the Secretary-
General of the United Nations who in terms of the
Convention (Article 39) is the depositary, and
20 reading the Declaration as a whole, it does in my
opinion constitute an instrument of accession
by the Government of Lesotho to the Convention
which is an international convention relating
to refugees. That being so the Convention has
been made part of the municipal law of Lesotho by
virtue of the provisions of Section 38 (1) of the
Aliens Control Act supra.

30 On the second question namely whether the
appellant has established on a balance of
probabilities that he is a refugee within the
meaning of the Convention, I respectfully agree
with the judgment of the President and of Schreiner
J.A., on this point. I too am of the opinion
that he has not shown that it is because of "events
occurring before 1st January 1951" that he
is outside the country of his nationality.

40 In the result, therefore, although in my
opinion Lesotho is bound by the Convention in
question and the Convention is part of the municipal
law of Lesotho by virtue of the provisions of
Section 38(1) of the Aliens Control Act of 1966,

In the Court
of Appeal of
Lesotho

No.46

Judgment of
Lesotho Court
of Appeal

(continued)

30th May 1969

as the appellant has failed to show that he is
entitled to the protection of the Convention, I
concur in the dismissal of the appeal.

I. A. MAISELS

Judge of Appeal

MASERU, the 30th day of May, 1969.

NO.47

ORDER GRANTING FINAL LEAVE TO APPEAL TO THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

In the Court
of Appeal of
Lesotho

No.47

Order granting
final leave to
Appeal to the
Judicial
Committee of
the Privy
Council

28th October
1969

IN THE COURT OF APPEAL OF LESOTHO

JOSEPH SALLI POONYANE MOLEFI Applicant

vs

PRINCIPAL LEGAL ADVISER 1st Respondent

THE PRIME MINISTER 2nd "

THE COMMISSIONER OF POLICE 3rd "

ORDER GRANTING FINAL LEAVE TO APPEAL.

10 Roper J.P.

When the Application for Leave to Appeal was heard on the 30th May, 1969 an Order was made, orally, granting leave to appeal on the conditions set out in the document marked "A" annexed to the present Notice of Motion. For some reason or other, no formal Order of Court was made out.

20 The Order was made under the provisions of Section 6 of the Basutoland, Bechuanaland Protectorate and Swaziland (Appeals to the Privy Council) Order in Council, 1954 (statutory Instrument, 1964, No. 1370). This Section directs the Court to fix the conditions upon which leave to appeal will be granted; conditions covering such matters as the granting of security and the preparation of the record for the purposes of the appeal. Leave to appeal granted at this stage is conditional. Then Section 12 provides for the granting of final leave to appeal, upon proof to the Court that the conditions laid down
30 is for final leave to appeal.

When application was made on the 30th May, 1969 for conditional leave to appeal, the Court

In the Court
of Appeal of
Lesotho

No.47

Order granting
final leave to
Appeal to the
Judicial
Committee of
the Privy
Council

(continued)

28th October
1969

was given to understand that the record would be or might be printed in South Africa and that was the reason for the condition that the printed record was to be filed with the Registrar of the Privy Council within 5 months.

It now appears that arrangements have been made for the printing of the record in England under the supervision of the Registrar of the Privy Council. The other condition imposed by the Court on the 30th May, 1969, namely as to the lodging of security, has been complied with.

10

No objection has been made by the Respondent to the granting of final leave, and Final Leave to Appeal is therefore granted.

Costs of this Application are to be costs in the Appeal.

Schreiner J.A. & Maisels J.A. concurred.

BY ORDER OF THE COURT OF APPEAL OF LESOTHO

(Signed) P. Hurly.

REGISTRAR.

20

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 27 of 1969

O N A P P E A L
FROM THE LESOTHO COURT OF APPEAL

B E T W E E N :

JOSEPH SALLIE POONYANE MOLEFI

Petitioner-
Appellant

- and -

THE PRINCIPAL LEGAL ADVISER

First
Respondent

THE PRIME MINISTER

Second
Respondent

THE COMMISSIONER OF POLICE

Third
Respondent

RECORD OF PROCEEDINGS

BIRKBECK, MONTAGU'S & CO.,
7 & 9 St. Bride Street,
London, E.C.4.
Solicitors for the
Appellant.

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook, London, E.C.4.
Solicitors for the
Respondents.