IN THE HIGH COURT OF LESOTHO

In the Application of :

'MAMOHAU MALAHLEHA .... 1st Applicant
'MATANKI MPHOSI .... 2nd "
'MAMAMELLO MOLETSANE ...... 3rd "
'MAMOTSAMAI MOOROSI .... 4th "
'MABAFOKENG RATHOBEI ...... 5th "
'MALIRA SEBOKA .... 6th "
'MATSEPO MOKUKU .... 7th "

and

CAROLINA NTSELISENG
'MASECHELE KHAKETLA .... Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 6th day of August, 1991.

On 25th March, 1991 the applicants herein moved, before this court, an urgent Ex-parte application and obtained, against the Respondent, a Rule Nisi framed in the following terms:

"1. Rule Nisi be and is hereby issued returnable on the 15th day of April, 1991 calling upon the Respondent to show cause why:

(a) Respondent shall not be directed forthwith to pay the salaries of the applicants for as long as they continue to teach at Iketsetseng Private School.

(b) Respondent shall not be restrained from trying to force out applicants from Iketsetseng Private School pending the determination of civil Application 153 of 1990 which is pending before the Honourable court between Respondent and the management committee of the management of the said school.

(c) Respondent shall not be directed to pay costs.

2. That prayers 1(a) and (b) operate as an interim interdict with immediate effect pending the termination of this application."

On 27th March, 1991 the order was duly served upon the Respondent personally. She, however, did nothing about prayer 2 notwithstanding the fact that in terms thereof prayers 1(a) and (b) were to operate as interim orders, with immediate effect. Consequently, on 4th April, 1991, the applicants filed with the Registrar of the High Court another urgent Ex-parte application in which they moved the court for an order, against the Respondent in the following terms:

"(a) That the Deputy Sheriff do take the body of Caroline 'Masechele Khaketla (Respondent) and safely keep her, have her before court at 9 O'clock in the forenoon on the day of Monday the 8th of April, 1991 and there to show cause why she should not be detained until she complies with the order of the court directing Respondent to pay the salaries of applicants for as long as they continue to teach at Iketsetseng Private Primary School.

(b) That Respondent also show cause why she shall not be directed to pay costs of this application."

I granted this application in terms of the prayers in the notice of motion. It is significant that in terms of prayer (a) thereof the return day was fixed as

Monday, 8th April, 1991. However, in the morning of the following day, 5th April, 1991 the Deputy Sheriff served the order upon, and brought, the Respondent before court. As counsels for both the Respondent and the applicants also attended court I decided to go into court and hear them.

I was told, inter alia, that the Respondent was a citizen and owned property in Lesotho. There was no fear that she was about to flee out of the jurisdiction of the court. In the circumstances there was no justification for the arrest of the Respondent. On the other hand counsel for the applicants argued that by failing to pay the salaries of the applicants as ordered by the court the Respondent had committed a contempt of court for which she had rendered herself liable for arrest and committal to prison. Until she had purged her contempt of court the Respondent could not properly be heard by the court.

It was significant that on the papers before me the applicants had, on 25th March, 1991, obtained Ex-parte an order against the Respondent directing the latter, inter alia to pay the salaries of the former. The order which was to operate with immediate effect was served upon the Respondent on 27th March, 1991. Not withstanding service of the order upon her the Respondent had refused/neglected to pay the salaries of the applicants until the 5th April, 1991. It seemed

to me therefore, that unless good cause could be shown, the Respondent had committed contempt of the order of the court, for which she ought to be committed to prison. However, committal to prison is so drastic a step that no court of law would grant it before the Respondent had been afforded a fair opportunity to be heard. In the present case the Respondent had been serviced with the application papers and the order for committal in the morning of the same day, 5th April, 1991. I was not convinced, therefore, that it could properly be said she had been afforded a fair opportunity to be heard. I accordingly decline to grant the order for the committal of the Respondent until she had been afforded the opportunity to be heard.

I, however, expressed concern about the Respondent's attitude to refuse/neglect to pay the salaries of the applicants as ordered by the court. I had been told that if at the end of the day the applicants were unsuccessful in their application for payment of the salaries and unable to refund the money the Respondent would stand to incur irreparable harm. With that in mind I proposed to make an order that the salaries which the applicants had so far earned by teaching at Iketsetseng School be paid into court by the Respondent so that the money would be readily available to the applicants in the event of their being successful in the application. Counsel for

The Respondent assured the court that there would be no problems with such an order which was accordingly made.

It is perhaps convenient to mention at this stage that by agreement of both counsels consolidation of the two applications viz. for salaries and committal for contempt of court was ordered on 5th April, 1991. The matter was then postponed to 12th April, 1991 to enable the Respondent to file the opposing papers, if she so wished.

On 8th April, 1991 the Respondent filed with the Registrar of the High Court notice of intention to oppose and another notice setting down the matter for hearing on 12th April, 1991, in terms of the provisions of rule 8 (18) of the High Court Rules 1980. On 10th April, 1991 the Respondent filed two documents styled answering affidavits. One was in respect of the application to pay salaries whilst the other was in respect of the application for committal to prison for contempt of court. The Replying affidavits were also filed by the applicants on 11th April, 1991.

Although the second document filed by the Respondent on 10th April, 1991 purported to be an answering affidavit to the founding affidavits filed by the applicants in support of their application for committal the contents of the so-called answering affidavit firstly related to nothing but a criticism of the orders granted by the court and secondly an "application" that I should recuse myself in this case on the grounds that were somewhat

contemptuous viz. that in granting the orders I had acted arbitrarily with ulterior motives. I decline to recuse myself and the following are my reasons for so doing.

I have already pointed out that in granting the orders, the court based itself on the facts disclosed by the papers that were then available before it. That was permissible under the High Court Rules 1980 of which subrule (6) of rule 8 clearly provides, in part:

> " (6) On the hearing the court may grant or dismiss .... such application as the case may require ......"

In the instant case the Respondent is represented by a counsel of many years experience. He ought to have known better and accordingly advised the Respondent as to what remedy was open to her under the law if anything were wrong with the orders granted by the court. I found it totally unacceptable for the Respondent and/or her counsel to tell a judicial officer in facie curae, that in granting orders in execution of his official duties he was bias and acted with ulterior motives.

The "application" (if any at all) for recusal of the judicial officer was just an affidavit with no notice of motion. Rule 8(1) of the High Court Rules clearly provides:

7/ "8(1) ......

> "8(1) Save where proceedings by way of petition are prescribed by any law, every application shall be brought on notice of motion supported by an affidavit setting out the facts upon which the applicant relies for relief."
>
> (My underlining)

I have underscored the word "shall" in the above cited rule to indicate my view that the provisions thereof are imperative. Failure to bring the application on notice of motion was a serious irregularity. On that point alone the so-called "application" for recusal could not be allowed.

In as far as it is relevant the facts disclosed by affidavits relating to the main application, i.e. for payment of salaries, are that the applicants are teachers at Iketsetseng Private School of which ownership or control is the subject of a dispute between the Respondent and the management committee in CIV/APN/317/90 still pending before this court. The parents of the pupils at the school contribute money out of which the salaries of the applicants as teachers are to be paid. The money is under the control of the Respondent.

In January, 1991 the Respondent purported to suspend applicants and instituted, before a magistrate court, an application in which she moved the court for an order restraining them, inter alia, from going on to the premises of the school with a view to conducting educational instructions thereon. Her application was however, dismissed and the Respondent appealed against the decision.

On 14th February, 1991 and whilst the appeal was still pending, the Respondent wrote a letter by which she informed the parents of the pupils that some people were disputing; with her the ownership of the school and interfering with her administration thereof. She was, therefore, closing down the school. On the directive of the Ministry of Education it was, however, re-opened and according to them the applicants are still teaching the pupils at the school,

The Respondent refuses/neglects to pay the salaries of the applicants on the grounds that they had not been discharging any duties towards the pupils and were not bound to do so, presumably because she had allegedly suspended the applicants and closed down the school. Consequently the applicants instituted these proceedings for an order as aforesaid.

It is significant that the Respondent has made no attempt to gainsay the applicants' averment that following her purported closure of the school, on 14th February, 1991, it was re-opened on the directive of the Ministry of Education. The applicant's averment in this regard must, in my finding, be accepted as the truth.

Assuming the correctness of my finding and the fact that the Respondent's application to have the applicants restrained from teaching at the school was turned down by the Magistrate court, it seems to me likely that the applicants did continue to teach and are still

9/ teaching the ....

teaching the pupils at the school. I reject as false and, therefore, untenable and grounds on which the Respondent refuses/neglects to pay the salaries of the applicants out of the money contributed by the parents of the pupils for that purpose.

The onus of proof rests on the applicants. I am satisfied that they have, on a balance of probabilities, discharged that onus. I would accordingly confirm the rule as prayed in the main application.

It is ordered that the amount of money which was paid into court as the equivalence of the applicants' salaries be paid to them forthwith.

As it has already been pointed out earlier, the second application, i.e. for committal of the Respondent, is based on the facts that on 25th March, 1991 the Respondent was ordered to pay the salaries of the applicants. The order was to operate with immediate effect. Notwithstanding service upon her on 27th March, 1991 the Respondent refused/neglected to comply with the order. In the contention of the applicants, the Respondent was in wilful contempt of court for which she was liable for arrest and committal to prison.

The Respondent denied to have committed contempt of court. Even if it were held that she had, it was not the kind of contempt for which she could be committed to prison.

10/ On the......

On the affidavits before me there is no doubt that on 25th March, 1991 the Respondent was ordered to pay, with immediate effect the salaries of the applicants. Despite service of the order upn her on 27th March, 1991 she did not comply with the order. She had wilfully disobeyed the order and, therefore, committed a contempt of court. I accordingly reject her contention that she has not committed contempt of court.

The only question for the determination of the court is whether or not the contempt of court committed by the Respondent is the kind for which she can be arrested and committed to prison. Ordinarily, orders that are enforceable by committal to prison are orders ad factum praestandum i.e. not orders ad pecuniam solvendam. In the present case the Respondent was ordered to pay sums of money constituting the monthly salaries of the applicants. That, in my view, was an order ad pecuniam solvendam which was enforceable by a writ of execution and not committal to prison - vide P.514 of The Civil Practice of the Superior Courts in South Africa (1954 ED.) bv Herbstein and Van Winsen.

It is worth noting that subrule (2) of rule 7 of the High Court Rules 1980 provides:

> "(2) In all cases where any person may be arrested or brought to bail the process shall be by writ of arrest addressed to the sheriff or his depty and to the officer commanding the prison and signed as is required in the case of

> summons and shall as near as may be, be in accordance with Form "F" of the first schedule hereto".
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> (My underlining).

I have underscored the word "shall" in the above cited subrule to indicate my view that the provisions thereof are mandatory. In the present case the writ by which the Respondent was to be arrested in no way resembles form "F" of the first schedule. It is also worth noting that in drafting the writ the wording of of prayer (a), as granted by the court, has been altered by the addition of the word "and" between the words "her" and "have" so that prayer (a) now reads, in part:

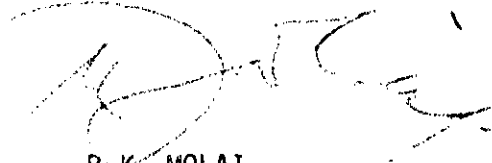
> "...... safely keep her and have her before court at 9 O'clock in the morning of the day of Monday the 8th April, 1991..."

The Registrar of the High Court ought not to have signed the writ which contained alterations not authorised by the court. Failure to draft the writ of arrest in accordance with form "F" of the first schedule has also resulted in the Deputy Sheriff arresting and bringing the Respondent before the court on 5th April, 1991 instead of taking her to the officer commanding gaol.

From the foregoing it is obvious that the view that I take is that the main application, i.e. for payment of salaries, succeeds and the rule is confirmed with costs. However, the second application i.e. for committal of the Respondent ought not to

12/ succeed. .....

succeed. It is accordingly dismissed with costs.



B.K. MOLAI
JUDGE

6th August, 1991.

For Applicant : Mr. Maqutu
For Respondent : Mr. Sello