CIV/APN/497/93

IN THE HIGH COURT OF LESOTHO

In the Application of

UNITY ENGLISH MEDIUM SCHOOL — Applicant

V

BERNADETTE MASIA )
LIZZY JOHN ) — Respondents
MATEBOHO KOELANE )

REASONS FOR JUDGMENT

Delivered by the Honourable Mr Justice W C M Maqutu
Acting Judge

This was launched as an ex parte application on the 9th December 1993 In it applicant sought an order in the following terms

1 That a rule nisi be issued by the Honourable Court returnable on a date to be determined ordering Respondents to show cause, if any, why -

(a) The normal forms and period of service provided for in the Rules of Court shall not be dispensed with on account of the urgency of this matter

(b) Respondents shall not hand over to Applicant and/or its Board the possession of the school and all its property including locks and keys for the main gate, the classrooms and other premises at the school, books, financial records, office and other equipment and all other property and assets of the Applicant of whatsoever nature,

(c) Respondents shall not be interdicted from doing any act or thing on behalf of the Applicant without the authorisation of the Board,

(d) Respondents shall not be interdicted from interfering in any way with the smooth running of the school or preventing the Board in any way from exercising its rights and carrying out its duties,

(e) Applicant shall not be granted such further and/or alternative relief as the Court may see fit,

(f) Respondents shall not be ordered to pay the costs of this application

2 That prayers 1 (a) to (d) operate with immediate effect as temporary relief

After reading the papers and hearing Mrs Makara counsel for applicant briefly the court made the following order

(a) In as much as the matter is urgent normal rules of service are dispensed with

(b) Nevertheless it is ordered that Respondents be personally served with the application The application for the issue of the Rule Nisi will be heard on Tuesday 14th December 1993 at 4 00 p m

The court's view was that it is a fundamental principle of our law that the court should hear both sides before making any order even if the matter is urgent Orders are provisionally granted without hearing the other side if circumstances of the case makes such a course unavoidable Beck J in Republic Motors V Lytton Road Service Station 1971 (2) SA 516 at 518 FH put this court's view succintly when he said

> "The procedure of approaching the court ex parte for relief that affects the rights of other people is one which, in my opinion, is somewhat too lightly employed Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily, for the time being invades the freedom of action of a person or persons who have not been heard and it is to that extent a negation of a fundamental *precept of audi alteram partem* It is
>
> accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or of well-grounded apprehension of perverse conduct on the part of respondent who if informed before-hand the course of justice is in danger of frustration unless temporary curial intervention can be unilaterally obtained"

Circumstances in which ex parte order might be sought are too varied to be enumerated Every case has to be determined according to its special circumstances

The important point to emphasise is that an urgent application need not be ex parte In the court's view urgent applications that are made on notice to the other side can even be more speedily disposed of because when parties appear before court (they are ready to argue the application because ordinary periods of service and preparation were dispensed with) therefore opposing affidavits are before court This is what happened in this case This urgent application was disposed of within five days There was no need to issue a Rule Nisi The court was able to deal with the merits and make a final order straight away There are cases where a Rule Nisi or interim order might be issued on notice It seems therefore that an application for the issue of a Rule Nisi can be on notice

These proceedings involve the right to run and be in control of Unity English Medium School

Unity English Medium School is the applicant herein In fact this application was brought by one faction claiming the right to control Unity English Medium School The Respondents (who also claim to be Board of the school) belong to the faction that failed in CIV/APN/441/93 to wrest control from the faction that have brought this application in the name of Unity English Medium School This is the reason that Respondents have objected to their right to bring this application

In CIV/APN/441/93 Respondents brought an application whose judgment is annexture "D" In it they sought to restrain Charles Mphaololi and ten others among whom was Unity English Medium School from exercising the functions of Board of Directors of Unity Medium School There appeared to be a dispute as whether the proprietorship of the school vested in "the Board of Directors with the founders inclusive" or that it is a community school To resolve it Kheola J held that "at the moment the school is now a community school"

Respondents claimed they were the lawful board of the school To Respondents the school was still a private school not a community school Therefore Respondents subsequently appealed against this decision of Kheola J They feel that Kheola J wrongly assumed they did not challenge the fact that the school was now a community school In particular in "MMB4" they say they were not only challanging the constitutionality of the events that followed but the amendment that turned the school into a community school

Charles Mphaololi is in this application applicant's deponent In CIV/APN/441/93 the said Charles Mphaololi was the First Respondent

Kheola J in CIV/APN/441/93 after hearing both parties and reading the papers filed of record had found that what caused the present respondents to bring that application was that

> "The First Respondent Charles Mphaololi is the Manager of the school and Chairman of the Board of Directors As such he was under an obligation to implement the decisions of the board to change the school into a fully fledged community school"

Charles Mphaololi in CIV/APN/441/93 is shown to have been not only the Chairman of the Board which the present Respondents recognise as the proper one, but one of the three founders of the school He is also the Chairman of the Board which was elected when the school became a community school It is this newly elected Board, that present Repondents are challenging, which has brought this application in the name of Unity English Medium School

In dismissing applicant's objection to the locus standi of the Board which brought this application I made the following ruling

> "The court feels it cannot review Mr Justice Kheola's judgment In the light of the aforegoing applicants application is granted in terms of prayers (b) (c) (d) and (f) of the Notice of Motion"

The view that I take is that the dispute over which Board is the rightful one has been settled by Kheola J the Respondent's appeal notwithstanding An appeal does not suspend the operation of a High Court Judgment See Rule 6 (1) of the Court of Appeal Rules 1980 which crisply state

> "The noting of an appeal does not operate as stay of execution of the judgment appealed from"

If any one doubts that Kheola J settled the dispute between the two Boards one has to read pages 5 and6 of Kheola J's judgment in which he said

> "The questions to be decided by the court are what was the effect of changing the proprietorship of the school to a community school?
> Did the constitution which was meant for a private school continue to have full effect after the school became a fully fledged community school?
> It seems to me that the answer must be that as soon as the amendment was made to the constitution that the school was a community school the existing constitution became ineffectual and irrelevant The First Respondent did the right thing to call the parents meeting to elect a new Board that would draft a new constitution I take the view that the constitution whcih was meant for a private school could no longer be-suitabble after the unanimous decision that the proprietroship of the school then vested in the school (community) It is a continuing process which involved as the next step, the election of the new Board who would draft a new constitution for the new school
> The applicants cannot be heard to say that after the unanimous decision that the school should be changed to a community school there should be a stalemate as to how this should be done"

After facing this issue squarely and recognising the newly elected Board as the legitimate one to change the private school into a community one, Kheola J dismissed applicnt's application This is the decision that this court cannot and will not review

I do not think Respondents are entitled to stand in the way of Applicants when Respondents did move court for control and having failed in that application to remain in control of the school, they cannot stay put especially when in dealing with the merits of their application the court has declared their adversaries to be rightful Board Their adversaries are entitled to rely on that court's judgement to continue where they left off (before Respondents brought their unsuccessful application) strengthened by the court's ruling in their favour

In so deciding I am conscious of the courts duty to consider the issues in each case and analyse the judgment in order to ascertain accurately what exactly it did affect See Beck's Theory and Principles of Pleadings in Civil Actions by Isaacs 5th Ed at page 164 (para 78) Caney J in Purchase V Purchase 1960 (3) SA 383 at 385AB said

> "I think that a dismissal and refusal of an application have the same effect, namely a decision in favour of respondent"

The view I take is that CIV/APN/441/93 was not on this point a purely interlocutory application Indeed if it was interlocutory Respondents should not have appealed without first obtaining leave of court

Kheola J in CIV/APN/441/93 also decided which of the Boards is current Board of Unity English Medium School (the applicant) He had to do this in order to dismiss applicant's application The view Kheola J took in reaching his decision was that he should take a robust approach and avoid "minute observance of the regularity of forms among people who are not familiar with legal forms"

Respondents at paragraph 10 of First Respondents admit writing annexure "B"

This vested the proprietorship of the school in the Unity English Medium School in the school (community) and amended the constitution by removing the words "proprietorship of the school is vested in the Board of Directors the founders inclusive" I accept what Kheola J found namely that there was no real dispute that the constitution was accepted by parties before him in CIV/APN/441/93 as having been changed

Respondents belatedly raised clause 18(1) on the amendment of the constitution marked "MMB1" This provides that the amendment shall not be discussed unless six months notice has been given Respondents do not directly say whether six monts notice an amendment would be made to the constitution were given Annexure "B" only states that the Board of Management amended the constitution at its meeting of 14/5/93 where the amendment was unanimously approved The court has no grounds to doubt that the holding of the meeting was assailable

Respondents in these proceedings tried to repeat failure to comply with Section 16 of the constitution which Kheola J had dealt with and again challange the amendment on the grounds that

> "In terms of Section 16 of the constitution only the Board of Directors has powers to amend the constitution after the lapse of a period of six (6) months after debating the motion to do so."

They have annexed to their papers (in this application) a constitution marked "MMB1" to which this court is referred to The court looked at Section 16 of the said constitution and found it dealt with officers not amendment of the constitution See page 9 of "MMB1" On page 10 of "MMB1" the court found Section 18(1) which deals with Amendment to Constitution and it reads

"The power to amend this constitution shall be a subject of a meeting of Board of Directors, and any intention to do so must be provided for a period of six (6) months before the date of debating such a motion"

It will be observed that the Respondents have deliberately misread the constitution or inventing what is not in the constitution to try and wriggle out of the amendment

If they are parties to the amendment they estoppel from challenging it especially as founder members First and Second Respondents are founder members This also applies to Third Respondent who appears to have been a party to the amendment as a member of the Board which made the said amendment which First and Second Respondents signed It is a fundamental principle of our law that no one shall derive any advantage from his wrongful act or culpable remissiveness See Baumann V Thomas 1920 AD 428 at 435 Tebbutt J in Sunday V Surrey Estate Meat Market 1983(1) SA 521 at 532E rejected the suggestion that culpa or negligence is not an element of this form of estoppel because

"The basis of estoppel is the fundamental principle of fairness and justice and the avoidance of inequity and unconscionable conduct upon which it is based also permeates our law of estoppel"

That being the case the findings of Kheola J which this court is in any event not entitled to review receive independent support from the above findings that come from a proper reading of Respondent's papers

Charles Mphaololi is the applicant's deponent, Chairman of the Board and Manager of the applicant school (from what Kheola J found) At present he is being impeded by Respondents from exercising the authority he has always had over the school Therefore I am of the view that curial intervention on his side and that of the current Board of Applicant is unavoidable

It is on that basis that on the 14th December 1993 I made the following order

Applicants application is granted in terms of prayers (b) (c) (d) and (f) of the Notice of Motion Respondents are in effect ordered to hand over control of the school to the newly elected Board of which the deponent Charles Mphaololi is the current Chairman

W C M MAQUTU

ACTING JUDGE