CIV/APN/5/94

IN THE HIGH COURT OF LESOTHO

In the Application of:

LESOTHO GIRL GUIDES ASSOCIATION **Applicant**

and

UNITY ENGLISH MEDIUM SCHOOL Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice W.C.M. Maqutu, Acting Judge on the 11th day of February, 1994

On the 27th January, 1994, applicant filed of record an application for an order of stay of execution in the following terms:-

> "(a) Directing the execution of judgment in CIV/APN/5/94 delivered on January 21st, 1994 be stayed pending the determination of the appeal taken by applicant against that judgment to the Court of Appeal;
>
> (b) Directing Respondent to pay the

costs hereof only in the event of opposition;

(c) Granting Applicant such further and/or alternative relief and that Malepekola Khotle's affidavit attached hereto will be used in support hereof

This application according to Applicant was necessary because in terms of Rule 6(1) of the Court of Appeal Rules 1980

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

What had caused Applicant to bring this application for stay of execution was the appeal that applicant lodged following the dismissal of Applicant's application for ejectment of Respondent from Applicant's premises

At the outset, Mr Pheko for applicant stated that the effect of the stay of execution would not be to get Respondent to be ejected from the premises

For purposes of enforcement, according to Herbstein and Van Winsen, The Civil Practice of the Superior Courts of South Africa 3rd Edition at page 652 -

> "Orders of court are, generally speaking divided into orders ad pecuniam solvendam (i e. orders to pay a sum of money) and orders ad factum praestandum (i.e orders to do, or abstain from doing a particular thing) "

Where an order is for payment of money, it is enforced by issuing a writ of execution against the judgment debtor in terms of which, if the judgment debtor does not pay the amount specified in the writ, the judgment debtor's property can be attached and sold in execution. Where, however, the respondent or defendant has been ordered to do or abstain from doing a particular act and he intentionally fails or neglects to comply with the court order, the order of court is enforced by committing the respondent or defendant to prison until he complies with the court order.

The problem that Applicant could not overcome was whether or not the dismissal of applicant's application by the Court was an order ad pecuniam solvendam or an order ad factum praestandum. What was the Applicant ordered to do save to pay costs? What was applicant ordered to do or not to do which respondent could enforce through contempt of court proceedings? It became clear at the outset that the

order dismissing Applicant's application which sought to eject Respondent from Applicant's site or premises did not fit into these two categories The only aspect of the court's order that fitted was that of payment of costs because it is an order ad pecuniam solvendam. The difficulty was simply that the court had not made an order that could be enforced against Applicant while the appeal was pending or at any time The only thing Applicant's counsel could say was that an order dismissing Applicant's ejectment application was an order in favour of respondent. Applicant's counsel got this proposition from Beck's Theory and Principles of Pleadings in Civil Actions in South Africa, where it was said an order dismissing an application is sometimes a judgment in favour of a party for purposes of supporting a special plea of res judicata.

It became clear that (in terms of Rule 6(1) of the Court of Appeal Rules) there was no judgment that could be automatically enforced despite the appeal that is pending. Therefore, there was nothing that could be done to/or against Applicant whose operation the court should suspend The court was clearly unable to comprehend the nature of the relief that Applicant was seeking.

The Court was referred to the case of South Cape Corp v. Engineering Management Services 1977(3) S.A 534 at 545 a case dealing with application for leave to execute. In it Corbett J.A. (as he then was) singled out the following factors as points to consider.

(1) Potentiality of irreparable harm or prejudice if the application is not granted.

(2) Prospects of success on appeal.

(3) Balance of hardship on both side.

It seems to me this case is not particularly in point because leave to execute is not sought The principles enunciated nevertheless apply to this application but they seem to apply in favour of the Respondent and not Applicant.

The court was referred to the case of Beecham Group PLC v. South African Druggists Ltd 1987(4) S A 869 in support of the proposition that a stay of execution can be applied for even in a case where a judgment cannot be given effect to through a writ of execution. This case is materially different from

this one in that in this case this court simply dismissed applicant's application for ejectment and no more In Beechams Group case the common law operated as an automatic stay of execution once an appeal had been lodged. There is no Rule in South Africa similar to Rule 6(1) of the Court of Appeal Rules of Lesotho In fact Rule 49(11) of the Uniform Rules of the Supreme Court of South Africa automatically suspends execution pending the determination of the appeal like the Common Law.

Applicant did not challenge the fact that in Lesotho the Common Law had been changed through powers of delegated legislation by the President of the Court of Appeal. The Court would have found argument on the point interesting although it would not unfortunately have helped applicant because in terms of the Common Law, there would be nothing to stay Rule 6(1) of the Court of Appeal Rules of Lesotho is similar to Rule 41 of the Court of Appeal Rules of 1955 which were made by the President of the Court of Appeal of the day with the approval of the High Commissioner who in those days legislated for Lesotho by Proclamations The Rule that an appeal does not automatically stay execution is based on the English Rules of the Supreme

Court (Rule 13(1)).

To go back to the Beecham Group case. The Beecham group had applied for an extension of their patent it owned which was about to expire. The Commissioner of patents extended the patent by three years S A Druggists Ltd, the respondent, who opposed the extension being dissatisfied appealed to the Full Bench of the Transvaal Provincial Division. The appeal of S A Druggists was dismissed but Full Bench which modified the Commissioner of Patents Order by granting a new patent to Beecham for a period of three years 236 S A Druggists appealed to the Appellate Division.

Rule 49(11) of the Uniform Rules of the Supreme Court of South Africa is the opposite of Rule 6(1) of the Lesotho Court of Appeal Rules of 1980 in that it provides that the noting of an appeal automatically suspends execution This means the Respondent who is a person in whose favour a judgment has been given has to apply for leave to execute judgment pending the determination of the appeal. This is the reverse of what has to happen in Lesotho where an appeal does not suspend execution of judgement. In Lesotho it is the

appellant who has to apply for stay of execution It was, therefore, the successful party Beecham Group (that had to apply for leave to put into effect the judgment favourable to them) that had to apply to court in terms of Rule 49(11) of the Uniform Court Rules of South Africa This is what the Beecham Group case that applicant's counsel referred to was about

Goldstone J in the Beecham Group at page 874B found that in that case the judgment was not of the type that could be carried into execution but was one to which Rule 49(11) of the Uniform Rules of the Supreme Court could apply by putting it into operation pending the determination of the appeal In that case the renewal of the patent could be operational pending the appeal. In the instant case (where an application for ejectment has been dismissed with costs). The Court, therefore, asked counsel for applicant the question, What is there that Respondent could put into operation to the prejudice of the applicant?

The Court did not get a clear answer save that the Respondent was no more a private school but a community school although the name outwardly remains the same In the court's view this had nothing to do

with the ejectment application Applicant stated the stay of execution would not lead to the ejectment of the Respondent school from the site In fact, applicant clearly stated that it was not asking for the ejectment of Respondent from the site. The court did not know what applicant's objective was in applying for the stay of execution.

Then came the question of prejudice if things were left as they are pending appeal. Here too. the court was not persuaded by applicant. Applicant believed it would not get rent for the premises, but applicant conceded that it had in its possession a cheque for rent which it had chosen not to deposit in the Bank. In terms of the agreement and for the duration of the lease appellant was entitled to rent which he would receive in terms of the lease agreement. It seemed to the Court that applicant would not lose anything pending the determination of the appeal

What could not, be disputed was that, if Respondent's occupation of the site was disturbed, the results would be catastrophic for Respondent and the school children The balance of hardship would

operate adversely against Respondent. Potential prejudice pending appeal was only manifest against respondent Consequently the balance of convenience favoured leaving things as they are pending appeal.

What remains for the court to determine is whether this appeal has prospects of success. Despite the apparent contradictions that applicant refers to in the judgment of Kheola J. and that of Maqutu A J This court is unable to see their relevance to the application for ejectment The Respondent school which retains its original name has amended its constitution This is something applicant expected to happen in terms of the Respondent's constitution.

The school is now a community school in terms of the existing constitution Kheola J says the school is in fact entitled to re-write its constitution completely There is faction fighting in the Board of the school which Kheola J resolved In the Court's view this matter is part of the internal affairs of the Respondent school and has nothing to do with Applicant Therefore, the Court is of the view that the ejectment application was misconceived from the very beginning. This application was argued with

vigour and points pressed with great determination.

I have given very careful consideration to Applicant counsel's submissions In my opinion, however, the prospects of success in the appeal are slight and insufficient to justify the stay of execution Applicant's counsel was unable to persuade me that there was anything to execute or put into effect in terms of the court's judgment which merely dismissed applicant's application for ejectment.

Mrs. Makara for Respondent referred to Cotran A.C.J's judgement (as he then was) in Gupta v Holynames High School 1974 - 75 LLR 417 at 419 E where he said:

> "That "dissatisfaction" with the judgment of the High Court is not a good ground for stay There must be other adequate and compelling reasons."

Mrs. Makara is correct in summarising the reasons for this application as being applicant's unhappiness with the Court's judgment

I gave serious consideration to granting Applicant a stay of execution of the judgment on the

question of costs This was not the thrust of Applicant's application and he was not moved away from his objective of applying for a stay of execution on the grounds that the Respondent school had changed in nature, scope and activities. I went through Applicant's founding affidavit in order to determine whether or not anything had been said about the execution of the court's order on costs. I found that nothing was said There is no suggestion that if the order as to costs is executed (and Applicant's appeal succeeded) the status quo ante will not be restored by Respondent If the Court suspected the Respondent would not be able to pay Applicant's costs (in the event of Applicant's success on appeal) the court would be obliged to stay execution or in terms of rule 6(5)(b) of the Court of Appeal Rules of 1980

> "refuse that execution be stayed subject to the respondent giving security for restoration of any sum or thing received under execution."

Applicant's founding affidavit does not allege any prejudice the execution of judgment as to costs might cause to applicant. It does not allege that Respondent will be unable to repay the amount of costs Respondent will have received from Applicant in the

event of applicant's success on appeal The court has been provided by Applicant with no material on which it could exercise its discretion in favour of Applicant (pending appeal) on the question of stay of execution on costs.

As I have already said, the appeal has doubtful prospects of success I have no option but not to grant the application for stay on the question of costs as well. This I feel I have to do, although it would have been Applicant's only relevant ground for stay of execution, had it chosen to press for it and substantiate it in its founding Affidavit

In the result, the application for stay of execution pending the determination of the appeal is refused with costs

W C M MAQUTU
ACTING JUDGE

11th February, 1994.

For Applicant Mr Malebanye
For Respondent Mrs Makara