CIV/APN/117/95

IN THE HIGH COURT OF LESOTHO

In matter between:

LESOTHO UNION OF PUBLIC EMPLOYEES **Applicant**

and

SCOTT HOSPITAL **1st Respondent**
LESOTHO EVANGELICAN CHURCH **2nd Respondent**

J U D G M E N T

Delivered by the Honourable Chief Justice Mr Justice on the 10th day of April, 1995

This application was launched as an **ex parte** application in which the applicant sought the stay of execution and rescission of judgment in **CIV/APN/61/95**.

On the 28th March, 1995 **Mr. Maieane,** applicant's counsel appeared before me and attempted to move the **ex parte** application. I declined to grant the order and ordered that the respondents should be given notice; that is to say that they should be served with the application. The matter was postponed to the 30th March, 1995. On that day I was on leave and I do not know why **Mr. Maieane** did not appear on that day to move his application or to postpone it before another Judge. The matter was left hanging in the air.

Mr. Sello, attorney for the respondents, told the Court that he appeared before the Registrar on that day but **Mr. Maieane** was not to be found anywhere. He left and rushed to the Labour Court where he had a case with **Mr. Mosito.**

On the 4th April, 1995 **Mr. Maieane** suddenly appeared before me having not set down the matter for hearing. It was obvious that the other party was totally unaware that the matter was going to be heard on that day. I was rather hesitant to hear **Mr. Maieane** on the ground that he was not properly before me. Having failed to appear on the 30th March, 1995 I had the feeling that he was under an obligation to set down the matter for hearing and serve the other party with a fresh notice of set down. However, when I checked the file I discovered that there was no notice of intention to oppose. I assumed that the respondents were not intending to oppose the matter. There was no return of service in the file indicating that the respondents had been served.

Mr. Maieane assured me that the respondents had been served. I stood down the matter to enable him to produce a return of service. After about an hour he came back and handed in a return of service. I granted the **rule nisi** and made it returnable on the 10th April, 1995. The orders relating to the stay of execution and to the dispensing with the ordinary rules of Court relating to modes and period of service were made to operate with immediate effect as interim orders.

As I have said above on the 4th April, 1995 when I checked

the file there was neither a notice of intention to oppose nor a return of service. The latter was handed in after the matter had been stood down for some time. The former was never produced and I assumed that there was no intention to oppose the matter. It is now in the file to-day on the 7th April, 1995. It is dated the 30th March, 1995 and was filed in the civil registry on the 3rd April, 1995. It was served upon the respondents' attorneys on the 31st March, 1995. It seems to me that it was the duty of **Mr Maieane** to inform the Court that the matter was being opposed more especially because he had not issued a fresh notice of set down.

It seems to me that this is a clear case of an order that was irregularly granted and seriously prejudiced the respondents.

Rule 8 (18) of the High Court Rules provides that 'any person against whom an order is granted **ex parte** may anticipate the return day upon delivery of not less than 48 hours notice'.

Mr Mosito submitted that he was given notice far less than the 48 hours required by the above Rule. I agree with him. However I am of the view that Rule 8(18) must be read with Rule 22(a) which provides that 'in urgent applications the Court or a Judge may dispense with forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure as the court or judge may deem fit'. This rule gives the court a discretion to shorten the periods prescribed by the rules if the urgency of

the matter so requires. In the view that I take Rule 8 (18) falls squarely within the provisions of Rule 8 (22)(a). It refers to a time of 48 hours and I see no reason why in the exercise of its discretion the Court cannot shorten that time on the ground of urgency. In fact in his notice of anticipation of the return day indicated that at the hearing of the matter the respondents would pray that the Court dispense with the periods of notice stipulated by the rules. This he did and I found no valid reason to refuse that application.

The irregularity alleged by the respondents was really a point of law which did not require any filing of affidavits. The facts leading to the granting of the order alleged to be irregular by the respondents were common cause and were clear from the record. I do not think that **Mr. Mosito** required 48 hours to prepare for such a short argument. I formed the opinion that the applicant was not prejudiced in any way by hearing the matter in less than 48 hours notice. They are responsible for the irregularity that was committed in the granting of the order. There is no justification in allowing the order to stand for longer that it has already done.

The rule nisi granted on the 4th April, 1995 shows the return day as the 10th April, 1995. However the order drawn by the applicant's attorney and served upon the respondents' attorney does not show any return day. On this ground again the rule nisi was irregular.

I also exercised my discretion in terms of Rule 59 of the High Court Rules 1980.

In the result the rule nisi granted on the 4th April, 1995 is discharged with costs.

J.L. KHEOLA
CHIEF JUSTICE

10TH APRIL, 1995.

For Applicant - Mr. Mosito
For Respondents - Mr. Sello.