CIV/APN/462/96

IN THE HIGH COURT OF LESOTHO

In the Application of:

NTSUKUNYANE MPHANYA : Applicant

And

MOHALEROE, SELLO AND CO.	**:**	**1st Respondent**
CHABELI SIMON MONYAKE		**2nd Respondent**
SHERIFF OF THE HIGH COURT	**:**	**3rd Respondent**
ATTORNEY-GENERAL	**:**	**4th Respondent**

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 19th Day of June, 1997.

The applicant herein seeks an order framed in the following terms:

"1. The Rules of this Honourable Court pertaining to notice and service be dispensed with and the matter be heard as of urgency.

2. A ***Rule nisi*** be issued returnable on a date and time to be determined by this Honourable Court calling upon the First Respondents to show cause why:

(a) First and second Respondents shall not be committed to prison for contempt of court;

(b) First and second Respondents shall not be directed to pay the costs of this application;

© Applicant shall not be granted such further and/or alternative relief."

It is significant to observe that when it was filed, with the Registrar of the High Court, the application was accompanied by a certificate of urgency, thus indicating that it was to be moved in terms of the provisions of rule 8(22) © of the High Court Rules, 1980. Indeed, on 19th December, 1996, an attempt was made to move the application ***ex-parte*** when I ordered that the respondents be served with the papers in the normal manner before the application could be entertained by the court. My reasons for the order were that an application of this nature (committal to prison) was a drastic step against the respondents and could not be properly granted before they had been afforded the opportunity to be heard.

It is, perhaps, convenient, at this stage, to mention, by way of a background, that on 22nd November, 1996, the 2nd Respondent repaired to the home of the applicant at Mapoteng, in the district of Berea, where he attached and removed the applicant's property in execution. The property was kept or stored on the premises of the residential home of the first respondent's Attorney of record pending disposal by auction sale.

On 25th November, 1996, the applicant went to the office of the Registrar of the High Court and settled the judgment debt reflected on the High Court writ issued under CIV/A/46/93. The Registrar of the High Court subsequently contacted the

first respondent's attorney of record and advised him that the applicant had settled the judgment debt. The attached property should, therefore, be released to him.

According to the first and the second respondents, the property had been attached in respect of two writs, one being in relation to the High Court judgment in CIV/A/46/93 and the other in relation to a subordinate court judgment in CC.1495/92. Although he had settled the judgment debt in CIV/A/46/93, the applicant still had the judgment debt in CC.1495/92 to settle. In their contention, the first respondent's attorney of record and the second respondent could not, therefore, be required to release the attached property to the applicant until the judgment debt in CC.1495/92 had been settled.

The Registrar of the High Court then instituted and moved, ***ex-parte***, urgent application number CIV/APN/438/96 in which she obtained, against the first respondent's attorney of record and the second respondent, an interim order, ***inter alia***, directing them to release the attached property to her. Before CIV/APN/438/96 could be finalized, the applicant himself instituted urgent application No. CIV/APN/462/96 in which he moved, ***ex-parte,*** the court for, and obtained, an interim order, ***inter alia***, directing the first and the second respondents to release the attached property to him. Again, before CIV/APN/462/96 could be finalised, the applicant has now instituted the present proceedings in which he prays for relief as aforesaid.

It is, perhaps, necessary to mention that I have not been able to find, in the papers placed before me, notice of intention to oppose filed by any of the respondents. The first and the second respondents have, however, deposed to answering affidavits. The third and the fourth respondents have not. I can only

assume, therefore, that the first and the second respondents intended to oppose the application. The third and the fourth respondents did not and were, therefore, prepared to abide by whatever decision would be arrived at by the court.

It is not in dispute, from the affidavits, that on 11th December, 1996, first and second respondents were served with the order of this court directing them to release to the applicant, the property which had been attached and removed, on 22nd November, 1996. The respondents, with full knowledge of the order, failed to comply. They were consequently in contempt of the court order. In the contention of the applicant, the first and the second respondents ought, therefore, to be committed to prison.

The applicant's contention was, however, denied by the first and the second respondents who averred that, to the applicant's own knowledge, the order admittedly served upon them on 11th December, 1996, was impossible of performance by them. Their failure to comply with the order did not, therefore, constitute contempt of court. Consequently, the first and the second respondent prayed that the application be dismissed with costs.

There can be no doubt, in my view, that in failing to release the attached property, as they admittedly did, the first and the second respondents were in breach of the court order which had been served upon them on 11th December, 1996. I am fortified in this view by the decision in Wickee v. Wickee 1929 W.L.D 145 where Tindall, J. had this to say at p. 148:

> "In Swanepoel v. Bovey (1926, T.P.D.457) Stratford, J., in referring to the effect of previous decisions, said that the court would treat non-performance of the order as a contempt of court."

The salient question that immediately arises for the determination of the court is, however, whether or not the first and the second respondents should, in the circumstances, be committed to prison for the contempt of court. In Haddow v. Haddow 1974(2) S.A. 181 at p.183 Goldin, J. had this to say on the issue:

> ".....whenever an applicant proves that the respondent has disobeyed an order of court which was brought to his notice, then both wilfulness and ***mala fides*** will be inferred. The ***onus*** is then on the respondent to rebut the inference of ***mala fides*** or wilfulness on a balance of probabilities. Thus, if a respondent proves that while he was in breach of the order his conduct was ***bona fides***, he will not be held to have been in contempt of court because disobedience must not only be wilful but also ***mala fide.***"

In the instant case, it was argued, on their behalf, that since the property, the subject matter of this dispute, was attached and removed in execution of the writs in CC.1495/92 and CIV/A/46/93 and the applicant had only settled the judgment debt in relation to the writ in CIV/A/46/93 but not the writ in relation to CC.1495/92, the first and the second respondents could not release it (property) to the applicant. To do so would imply that the messenger would have to return to applicant's home at Mapoteng to re-execute the writ in respect of CC.1495/92,with the resultant unnecessary costs to the applicant. Secondly, the first and the second respondents were required, in terms of the interim order in CIV/APN/438/96, to release the property, the subject matter of this dispute, to the Registrar of the High Court. If, in terms of the interim order in CIV/APN/462/96 they were to release the attached property to the applicant and not to the Registrar of the High Court, the first and the second respondents would obviously be disobeying the interim order in CIV/APN/438/96. The argument concluded, therefore, that the interim order in CIV/APN/462/96 was impossible of performance. There is, in my finding, sense in this argument.

Assuming the correctness of my finding that the first and the second respondents have successfully argued that the interim order in CIV/APN/462/96 is impossible of performance it seems that they have satisfactorily discharged the ***onus*** that vests with them viz. to rebut, on a balance of probabilities, the inference of ***mala fides*** or wilfulness. That being so, a committal for contempt cannot be granted against the first and the second respondents. I am fortified in this regard by Herbstein and Van Winsen in their invaluable work The Civil Practice of the Superior Courts in South Africa (3rd Ed.) where. at page 658, the learned authors have this to say:

> "Where a person's failure to comply is due to inability to do so, or flows from a mistake as to what was required of him, or if he bona fide believed that he was not required to comply with the Court's Order, a committal for contempt will not be granted."

In the result, I am of the opinion that this application ought not to succeed. It is accordingly dismissed with costs.

BK MOLAI

JUDGE

For : Applicant : Mr. Mahlakeng

For 1st & 2nd Respondents: Mr. Sello.