

**IN THE HIGH COURT OF LESOTHO**

**CIV/APN/353/2013**

In the matter between:

**KOREAN NATIONAL COMMISSION FOR  
UNESCO**

**APPLICANT**

**And**

**TUMELO SETHOJANE**

**1<sup>ST</sup> RESPONDENT**

**CITY CENTRE MASERU TRAVEL**

**2<sup>ND</sup> RESPONDENT**

**SETSOMI LETSIE**

**3<sup>RD</sup> RESPONDENT**

**TEBOHO MPHAHAMA**

**4<sup>TH</sup> RESPONDENT**

**SHERIFF OF COURT**

**5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Coram** :Honourable Acting Justice E.F.M. Makara  
**Dates of Hearing** :23 October, 2013  
**Date of Judgment** :23 October,2013

**Summary**

*An application for a declaratory order that an information technology training facility had been unlawfully executed by the Deputy- Sheriff contrary to a domesticated International Law – The respondents counter arguing that S 43 of the Subordinate Court Order 1988, should prevail over International Law – The Court making the declaration prayer for.*

## **BOOKS**

**Devenish GE Interpretation of Statutes Juta**

## **CITED CASES**

**Nestle (South Africa) (Pty) Ltd v Mars Inc 2001 (4) SA 542 SCA at 548-549,  
Richtersveld Community v Alexkor Ltd and Anor 2000(1) SA337 (LCC)  
Hajaree v Ismail 1905 TS 451, Nduli v Minister of Justice 1978 SA 893  
(A)**

## **STATUTES & SUB-LEGISLATION**

**The International Organisations (Privileges and Immunities) Act No.32  
of 1969**

**The Subordinates Court Order 1988.**

**The South African Magistrate Court Act 1944**

## **INTERNATIONAL LAW**

**The International Convention the Privileges and Immunities of the  
specialised Agencies of 1947.**

**International Organisations (Privileges and Immunities of Specialized  
Agencies) Regulations of 1969**

## **MAKARA A.J.**

[1] The applicant who is a Korean International Organisation (KNCU) it is recognised as such in accordance with the Laws of Lesotho.<sup>1</sup> In that standing it has brought an application before this Court praying in the main for a declaratory order that the attachment and sale of a property which constitutes the basis of

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<sup>1</sup> This per Regulation 5 of the International Organizations (Privileges and Immunities) Regulation 1969 made pursuant to the International Organisations Privileges and Immunities Act 1969. The end result being the domestication of the International Convention on the Privileges and Immunities of the specialised agencies, 1947.

this litigation which is described as a big steel container also technically called the Solar Powered Internet School (SPIS); be both declared null and void. It has in conclusion asked the Court that in the event of its declaration to the desired effect, it should consequently order for the restoration of the status *quo ante* in that the property should be returned to the place where it had been removed for sale by the 4th Respondent.

[2] The remedy which the Applicant sought for from this Court assumed the above stated form and content following the decision by the Applicant's Counsel to abandon part of their case relating to the alleged improper and unlawful conduct of the 4th Respondent in his management of the execution process as a whole. The charge having been that he had throughout the process acted contrary to the prescribed procedural rules.

[3] The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents respectively filed their intention to oppose the application. However, it was the 1<sup>st</sup> and 4<sup>th</sup> Respondents who filed their answering affidavits. The 2<sup>nd</sup> Respondent only featured before the Court to prosecute its raised points *in limine*. Advocate Manyokole acting at the request of Mr. Letsika who is an attorney of this Court, motivated the points on his behalf. The Counsel advised the Court that the 1<sup>st</sup> and 4<sup>th</sup> Respondents aligned themselves with the points raised and articulated them on their behalf of as well.

[4] The point *in limine* raised was one of *lis pendens*. It was founded upon a reasoning that the cause of action in this

proceedings and the relief sought were a **duplication** of a similar litigation instituted before the Maseru Magistrate Court and pending its decision. This introduced a jurisdictional issue centring on whether in the circumstances this Court could competently adjudicate over the matter. It transpired to be common cause that for a special plea of *lis pendens* to stand the prerequisites are; that the parties must be the same, so the cause of action and the remedy which the Court is asked to dispense. He for guidance referred the court to **Nestle (South Africa) (Pty) Ltd v Mars inc 2001 (4) SA 542 SCA at 548-549 and to Richtersveld Community v Alexkor Ltd and Anor 2000(1) SA337(LCC)**

[5] The background facts which it is common cause that they have precipitated the application are that the applicant who is an international agency registered in the country and operational as such since the year 2010, sent its representatives to Lesotho under the Bridge Programme which was aimed at accelerating the achievement of the Education for ALL (EFA) goals targeted towards 2015. Ever since the inception of the project there has been volunteers sent by KNCU into Lesotho as one of the Bridge Programme officers. The Programme is wholly funded by the KNCU working in partnership with the Lesotho National Commission for UNESCO.

[6] The Bridge Programme had been introduced in more than one Sub Saharan countries including South Africa, Zimbabwe, Zambia and many others. The evaluation report for the Programme revealed that Lesotho was the best performing among

the countries in which the Bridge Programme had been introduced. The KNCU decided that in order to encourage the much appreciated efforts in the country, a Community Learning Centre (CLC) would be installed at the Lesotho Workcamps Association (LWA) premises hence the installation there of what was later technically referred to as the **Solar Powered Internet School (SPIS)**. A memorandum of agreement (MOA) to this effect was concluded between LWA and KNCU on the 19<sup>th</sup> October 2012.

[7] The KNCU accordingly commissioned SAMSUGN Electronic SA (PTY) Ltd to build the SPIS. On the 18<sup>th</sup> day of January 2013, the SPIS was delivered into Lesotho and was delivered to the LWA premises where it was received thereat by Mrs Matšolo Tšasane Moliko (Executive Director of LWA) on the 18<sup>th</sup> day of January 2013.

[8] On the 22<sup>nd</sup> February 2013, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents arrived at LWA's premises and attached the SPIS which they referred to as the **steel container** in their return of service. It appears that on the 2<sup>nd</sup> day of March 2013 the sale in execution took place and the SPIS was sold for a mere M23,600.00. On the 5<sup>th</sup> March 2013, the 3<sup>rd</sup> Respondent arrived at the LWA premises and took away the SPIS from the place and when the officers of LWA objected to that, the 4<sup>th</sup> Respondent arrived at the place and told the officers that the SPIS had been sold in the execution on the 2<sup>nd</sup> March 2013.

[9] The issue which is projected by the presented factual scenario is whether or not the execution process of the “big steel container” or the SPIS should be declared null and void. The determining factor being the question of its compliance with **Regulation 5 of the International Organisation Privileges and Immunities of the Specialised Agencies Regulations 1969** by which the Minister acting pursuant to **Section 3 of the International Organisations (privileges and Immunities) Act No.32 of 1969**; has domesticated the **Convention on the Privileges and Immunities of the Specialised Agencies 1946**. This legislative move has rendered the Convention to be applicable in Lesotho and enforceable in the country.

[10] Adv. Selimo for the Applicant premised his argument on a point that the big steel container had been **illegally** made the subject of execution by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The basis hereof being that it had at all material times been the property of the Applicant who is an international organisation that enjoys the diplomatic privileges and immunities. The said status *inter alia* protects its assets from the judicial execution processes. The Counsel had in support of this argument relied on **Article II Sections 4 and 5 of the Convention on the Privilege and Immunities of the Specialised Agencies Convention of 1947** which have been incorporated into the domestic law under **Regulation 5 of International Organisations (Privileges and Immunities of Specialized Agencies) Regulations of 1969** which derives its power from **Section 3 of the International Organisations (Privileges and Immunities) Act No 32 of 1969**.

[11] In synoptic terms Regulations 5 *inter alia* specifically provides for the immunity of the assets of the international organisations as foreshadowed in **Section 4 and 5 of the Convention.**

[12] On the evidential terrain, the Counsel reinforced his position that the subject matter had at all material times remained the property of the Applicant by referring the Court to the contents of TK2 which represents the contractual agreement executed between itself and the Lesotho Workcamps Association which was a party in the proceedings before the Magistrate Court. The document is indicative that the applicant and the LWA had concluded an agreement which provided for the location of the SPIS within the latter's premises for the purpose of the training of Basotho in the use of the information technology. He further advanced before Court TK4 which evidences a payment it effected in favour of Samsung Electronics SA (PTY) Ltd for having constructed the big steel container as a self contained structure for the purpose which it was intended to serve.

[13] Advocate Manyokole counter-argued on behalf of the 1<sup>st</sup> and 4<sup>th</sup> Respondents that the container had been legally made the subject of execution. The primary argument which he advanced was that the process was sanctioned in terms of **Section 43 of the Subordinates Court Order 1988.** The provision deserves to be projected in *extenso* due to its significance in the matter. It details as follows;

A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.

[14] The Counsel assigned to the section the classical interpretation that it renders a person who has in good faith purchased property which was sold by the messenger in the execution of the judgment totally protected against impeachment. In the impression of the Court, the understanding given is that the section does not contemplate any legal or factual based exceptional situations. He strongly maintained, however, that a person who purchases the property in good faith can only be subjected to a cautioning process where the acquisition of same had been attained contrary to the **Subordinate Court Rules 1996**. In this respect, he capitalized on the concession made by the Applicant's Counsel that the issue of the compliance with the rules has been abandoned.

[15] In interfacing the **Convention**, the Regulations and **Section 43** of the Order, Advocate Manyokole contended that the **Section 43** should prevail. He maintained that the legislature had at the time of the enactment of the Order been conscious of the Convention and the Regulations on the privileges and immunities of the international organizations, but did not expressly or by necessary implication provide for the prevalence of the domesticated **Convention and the Regulations over Section 43**. Thus, his proposition of the law was that in the instant case, the Court



should be guided by the mandatory imperatives of **Section 43**. He, regarding the operation of the section referred the Court to Jones and Buckle where it was directed that in the event of impeachment on a different law other than **Section 70 of the South African Magistrate Court Act 1944** (which is couched in *pari materia* terms with Section 43) should be the exclusive provision to be applied in the impeachment. He emphatically concluded that the impeachment in this context should be made within the conspectus of the section and therefore that the Convention and the Regulations are not applicable.

[16] The Court determines that justice in this case turns on whether **Regulation 5 of the International Organizations (Privileges and Immunities of Specialized Agencies) Regulations of 1969** made pursuant to **S 3 of the International Organizations (Privileges and Immunities) Act 1969** should prevail over **S 43 of the Subordinate Court Order 1988** or not.

[17] In navigating towards the answer, the Court has received valuable guidance from the work of Professor GE Devenish. He has postulated a view that there obtains a presumption that a statute will not be interpreted so as to violate a rule of International Law or obligation and not in conflict with it. The Professor has elaborated that Parliament is in enacting legislation presumed not to have intended to derogate from the Principles of International Law or to derogate therefrom<sup>2</sup>. These learned views

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<sup>2</sup> Devenish GE **Interpretation of Statutes** Juta p212

had earlier received a judicial recognition in the old case of **Hajaree v Ismail 1905 TS 451 @456.**

[18] The position was further reiterated in **Nduli v Minister of Justice 1978 SA 893 (A)** where it was directed that:

Rules of International Law which are universally accepted or which have received local assent, should be regarded as part of the South African Law.

[19] On the strength of the authorities referred to in the two preceding paragraphs, the Court feels fortified in its view that the municipal regime of legislative instruments which have domesticated the Convention, should prevail over **S 43 of the Subordinate Court Order.** The latter section doesn't expressly exclude the application of the relevant domesticated law in the matter. It does not, in any event appear to have contemplated a legal challenge of the nature in consideration.

[20] The applicant has proven beyond the requisite standard of proof on the balance of probabilities that it is an international agency within the contemplation of the Laws of Lesotho. It has exhibited a certificate issued by the Minister to that effect. It follows, therefore, that it is entitled to the diplomatic immunities and privileges. The Court is fully satisfied that the Big Steel container or the SPIS belongs to the applicant and that it is dedicated for the training of the ordinary Basotho in the appreciation and utilisation of the information technology. This has been attested to convincingly by the MOU between the

applicant and the LWA and by a receipt of payment of money to Samsung Electronics SA PTY for the construction of the SPIS.

[21] It is specifically decided that the SPIS shouldn't by operation of the legislative regimes referred to, have been made a subject of the execution of a court judgment since it belonged to a legally recognised international agency.

[22] The Courts are understandably obliged to be inclined towards an interpretation which would facilitate for the upholding of the diplomatic immunities and privileges of the international organisations in the country. This applies to their personnel and assets. Otherwise, the international community would reciprocate adversely in a multiplicity of ways.

[23] In the premises, the application is granted as prayed.

[24] The Court registers its pleasure for the patience and meticulousness demonstrated by the Counsel and the Judge's Clerk in their recording of this judgement as it was being dictated to them.

**E.F.M. MAKARA  
ACTING JUDGE**

For the Applicant : Adv. Selimo instructed by A.T.  
Monyako & Co. Firm of Attorneys

For the Respondent : Adv. Manyokole Da Silva  
Manyokole Firm of Attorneys