IN THE HIGH COURT OF LESOTHO

In the matter between: **CIV/APN/353/13**

KOREAN NATIONAL COMMISSION FOR UNESCO **APPLICANT**

AND

TUMELO SETHOJANE **1ST RESPONDENT**
O/C THETSANE POLICE STATION **2ND RESPONDENT**
DISPOL MASERU **3RD RESPONDENT**
COMMISSIONER OF POLICE **4TH RESPONDENT**
DEPUTY SHERIFF OF THE
HIGH COURT OF LESOTHO (MR.MIKA) **5TH RESPONDENT**
ATTORNEY GENERAL **6TH RESPONDENT**

JUDGMENT

Coram **:** Honourable Acting Justice E.F.M. Makara
Date of Hearing **:** 11 November,2013
Date of Judgment **:** 11 November, 2013

Summary

Incidental proceedings – Application for contempt and application for stay of execution of judgment by the 1st Respondent – 1st Respondent failing to satisfy the Court that it is entitled to stay of execution – 1st Respondent failing to prove existence of irreparable harm resultant from the execution of the judgment – Court holding in abeyance application for contempt and ordering the Deputy Sheriff to forthwith execute the order of Court – The Applicant directed to maintain the facility in its present condition pending the appeal in this case.

CITED CASES

Korean National Commission for UNESCO vs. Sethojane and 4 others (CIV/APN/353/13).

STATUTES & SUB-LEGISLATION

International Organizations (Privileges and Immunities of Specialized Agencies) Regulations 1969

INTERNATIONAL LAW

Operationalised the Convention on the Privileges and Immunities of the Specialized Agencies 1946.

MAKARA A.J.

[1] The Court is ceased with incidental proceedings. They are both incidental from the original judgment of this Court in **Korean National Commission for UNESCO vs. Sethojane and 4 others (CIV/APN/353/13).** The parties herein would for the purposes of convenience be cited ad they appear in the original Application. In those founding proceedings, the Applicant had on agent bases approached this Court seeking for a declaratory order that;

1. The attachment of the 22nd February 2013 and the sale in execution of the 2nd March 2013 of the property described as **"Big Steel Container"** belonging to the Applicant shall not be declared null and *void ab initio*.
2. The 1st Respondent shall not be ordered and directed to release forthwith to the Applicant the **SPIS** immediately upon the service of the Final Order on him.

[2] The respondents save for the 2ndthe 3rdthe 4thand 6thhad not opposed the application or filed any answering papers there to. It was only the 1st, 2ndand 4threspondents who opposed the matter and who filed the answering papers. The 3rdrespondend only filed the supporting affidavit, the case was argued by the Counsel for the parties respectively and at the end of the

deliberations, the Court delivered and extempore judgment in the matter. In the same vein, it reserved its right to subsequently write a more systematic and comprehensive version of the judgment.

[3] It should suffice to indicate that the Court found that the applicant had on the balance of probability proved that it is entitled to the relief sought before the Court .it transpired that some inconceivable technical obstacles delayed the timeous writing of the said comprehensive judgment. This coincided with the official trip which the presiding officer took to Nairobi in Kenya.

[4] The Applicant's Counsel had understandably utilized the *ex tempore* judgment to make an order of Court and have it entrusted upon the Deputy-Sherriff for its execution. The return of service filed by the Deputy-Sherriff gave the impression that the 1st Respondent had obstructed the execution of the Order and thereby commits the contempt of the Court Order. It is precisely on the basis of this return of service that the Applicant launched an application for the committal of the 1st Respondent for contempt of Court.

[5] The Counsel for the 1st Respondent having duly opposed the application hastily advised this Court that the 1st Respondent had not in any manner obstructed the messenger in its execution of the Order and pleaded the impossibility of its execution. This was reasoned on the explanation that the 1st Respondent had encountered a technical problem in that whilst he was willing and is still willing to have the container recovered from his premises and delivered to those of the Applicant, there is lack of technical expertise to

detach the information technology specially in-built facilities from the container.

[6] The impression given being that if such expertise could be secured he would have no problem in having the container being taken to the Applicant's place.

[7] The position maintained by the 1st Respondent is against the backdrop of his adamant understanding that the said accessories were not part of the subject matter for litigation before this Court. According to him the applicant had before this Court applied for the release of the steel container exclusively. In his understanding therefore he is entitled to the ownership rights of the in-built accessories therein since it was never prayed before this Court that they be included in the Order.

[8] Advocate Selimo for the Applicant had strongly counter argued that reference had before this Court been made to the SPIS. In this regard he referred the Court to the papers in the Notice of Motion. On the question before the differentiation between the "big steel container and the information technology accessories therein, Advocate Manyokole repeatedly cautioned that in the narrowing of the issues involved, the Counsel for the Applicant conceded that the subject matter before this Court was the "big steel container and/or the SPIS as opposed to the said accessories.

[9] The second terrain of the proceedings concerned the 1st Respondents application for stay of the execution of the judgment pending the appeal which has already been noted before the Court of Appeal against the judgment of

this Court. The Counsel for the Applicant had reacted to the move by raising the legal points in limine. The first being that the application was deficient in that the 2nd to the 5th Respondents have not filed their supportive affidavits to as an indication that they have mandated the Counsel to represent them in the matter. He contended that the position rendered it uncertain as to whether he commanded their authorization or not and thus this may at the end of the day impact adversely against their possible entitlement to costs. The Court ruled that it should be conscious of the fact that litigation obtains between the parties and not between Counsels. Reluctantly, the parties should not easily be made a victim of a technical omission by the Counsel. The Applicants Counsel had subscribed to the idea that it would be sufficient for the Counsel for the Respondents to be clear on the record that he has mandate to represent the said Respondents and this was done.

[10] The resultant assignment before this Court is to determine the question of contempt of Court by the 1st Respondent and subsequently whether the 1st Respondent has made a case for the stay of execution of the judgment pending the decision by the Court of Appeal.

[11] The Court feels that the order asked for the committal of the 1st Respondent on the ground that he had obstructed the messenger in the execution of the judgment of Court and thereby committing contempt of Court is not of significance to the Court in that it should be considered as the last and desperate measure. What remains important is to focus on the question of the execution of the judgment or whether it should be stayed on the grounds advanced for that.

[12] It should be made clear that ex facie the record of proceedings in the original application and the corresponding judgment of this Court. The *lis* pendens argument was specifically raised to indicate that the litigation brought before this Court was in essence a replication of the proceedings before the Magistrate Court. This introduced a jurisdictional issue on whether in the circumstances the Court could competently adjudicate on the matter. The Court determined that the special plea could not stand because the relief sought for before this Court was different from the one in the Magistrate Court. It was specifically ruled that in the instant case the Applicant was asking for a declaratory order and that the magistrate Court has no jurisdiction to make such a pronouncement. Appreciably the declaration was desired since it primarily had to do with the ascertainment of the status of the Applicant in the light of **Regulation 5** of the **International Organizations (Privileges and Immunities of Specialized Agencies) Regulations 1969** read in conjunction with **section 3** of the **International Organizations (privileges and Immunities) Act No.32 of 1969**.

[13] Notwithstanding the narrowing of the issues by the Counsel, the Court had persistently comprehended the big steel container or the SPIS to be a special facility which had the in-built information technology accessories for the tutorship of the membership of public in information technology mechanisms. In precise terms, it never conceptualized the accessories to be a separate entity from the big steel container itself. Thus, in its judgment in unequivocally directed that there be a restoration of the status *quo ante* by removing the facility the facility from the premises of the 1st Respondent to whichever place that may be designated by the Applicant.

[14] The Court whilst appreciative of the litigant's constitutional right, including the right of appeal feels strongly that it would be in the best interest of justice for the big steel container to be immediately removed from the premises of the 1st Respondent to those designated by the Applicant.

[15] The genesis of the thinking by the Court is that the SPIS or the big steel container ought not in the first place been made a subject of execution by the messenger of the Court. This is by the dictates of the said **Regulation 5** which derives its authority from **section 3 of the International Organizations (Privileges and Immunities) Act.** The two legislative instruments **operationalised the Convention on the Privileges and Immunities of the Specialized Agencies 1946.**

[16] **T**he Court determines that the 1st Respondent has not successfully persuaded it to feel that it has made a good case for the stay of the execution of this judgment. It further fails to realize any irreparable harm which would be occasioned by the execution of the judgment. The only qualification is that the facility should be preserved in its present condition so that in the event of the success of the appeal the 1st Respondent could have it restored to him in its actual condition.

[17] The Court is of the view that application for the incarceration of the 1st respondent on the basis of his alleged contempt of Court may not be of paramount importance at this stage. The restoration of the *status quo ante* appears to be more significant and urgent. Thus, it may not be very necessary and indispensable at this juncture to address the contempt dimension of the case.

[18] The end result is that:

(1) The application for the 1st respondent to show cause why he may not be incarcerated for contempt, is in the circumstances, to be held in abeyance until such time that it may have to be re addressed.

(2) The Deputy-Sheriff should forthwith execute the judgment of this Court and that the 2nd to the 5th Respondents are respectively ordered and directed to reinforce the Deputy-Sherriff in that task.

(3) Costs to follow the event.

E.F.M. MAKARA
ACTING JUDGE

For Applicant	**:**	Adv. Selimo instructed by A.T. Monyako & Co. Firm of Attorneys
For Respondent	**:**	Adv. Manyokole Da Silva Manyokole Firm of Attorneys