

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/92/18

In the Matter Between:-

LEBOHANG NTŠINYI

APPLICANT

AND

MINISTER – FOREIGN AFFAIRS & I

NTERNATIONAL RELATIONS

1ST RESPONDENT

PRINCIPAL SECRETARY – FOREIGN AFFAIRS &

INTERNATIONAL RELATIONS

2ND RESPONDENT

MINISTER – PUBLIC SERVICE

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

JUDGMENT

CORAM : HON. M. MOKHESI AJ

DATE OF HEARING : 30th APRIL 2018

DATE OF JUDGMENT : 18th MAY 2018

CASE SUMMARY

Application to stay a dismissed application – Held, dismissal order incapable of being stayed – Application dismissed with costs.

ANNOTATIONS:

CASES : Lesotho Girl Guides Association v Unity English Medium School
CIV/APN/5/1994

STATUTES : Court of Appeal Rules

[1] INTRODUCTION

The Applicant (Applicant in the main case) approached this court on an urgent basis for an Order in the following terms

- “1. That the rules of this Honourable Court pertaining to normal modes and periods of the service be dispense with on account of the urgency hereof.
2. A rule nisi be and is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why; an order in these terms shall not be made absolute:-
 - a) That the recall of the applicant be staged pending finalization of the appeal of the applicant.
 - b) That the execution of the final judgment herein be staged pending finalization of this appeal.
 - c) Costs of suit.
 - d) That the applicant be granted further and alternative relief.”

[2] Factual Background

The factual matrix of the dispute between the applicant and the respondents is fully laid out in the main judgment and it is needless to repeat it in this judgment, suffice it to say that this application for stay of execution was precipitated by the judgment of this court in dismissing her application for review of the decision to recall her as this Country’s Ambassador to Beijing China.

This application for stay of execution is opposed. The 1st Respondent raised two preliminary issues, namely,

- 1) That the court is *functus officio* in that the applicant is effectively seeking the prayer which was dismissed in the main application, that is, that her recall be stayed pending finalization of her appeal;
- 2) That this application for stay of execution is bad in law in so far as the applicant is seeking to stay an order which is incapable of execution, as what the court did in the main application was simply to dismiss the application and Order Costs.

The issue for determination is whether the order of this court dismissing the applicant's application is capable of being stayed.

[3] The Law

This application was launched in terms of **Rule 13(2) of the Court of Appeal Rules 2006**. In terms of this Rule, as the noting of appeal does not automatically stay the execution of judgment, the appellant is enjoined to apply to the Judge of the High Court whose decision is appealed from, or in his absence, to any other Judge of the High Court to stay execution at any time after the noting of an appeal.

The question whether the dismissal order is capable of being stayed was answered authoritatively in the case of **Lesotho Girl Guides Association v Unity English Medium School CIV/APN/5/1994 (unreported)** at pp. 3 – 4 where the Learned Maqutu J (as he then was) said:

“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 obtain from doing in 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 order.

The problem that Applicant could not overcome was whether or not the dismissal of the applicant's application by the court was ad order as factum praestandum. What was the applicant ordered to do save to pay costs? What was applicant ordered to do or not do which respondent could enforce through contempt of court proceedings?"

I respectfully align myself with the views expressed by the learned Judge in this case. In the present case, what this court did was to dismiss applicant's application and to order her to pay costs. Mr. Molati struggled, understandably in my view, to explain what is it that was to be executed in terms of my judgment dismissing the application. In my considered view this application for stay is ill-conceived and falls to be dismissed. In the result the following order is made:

- (1) The application is dismissed with costs.

M. MOKHESI (MR)

ACTING JUDGE

FOR APPLICANT	:	ADVOCATE MOLATI
FOR RESPONDENTS	:	ATTORNEY MOSOTHO
DELIVERED JUDGMENT	:	18 APRIL 2018