IN THE HIGH COURT OF LESOTHO

HELD AT MASERU	**CIV/APN/49/20**

In the Matter Between:-

THE SCHOOL BOARD – LETLOTLO JUNIOR SCHOOL	**1ST APPLICANT**
'MALONYA FEKEFEKE	**2ND APPLICANT**
PALESA FEKEFEKE	**3RD APPLICANT**
TANKISO FEKEFEKE	**4TH APPLICANT**
AND	
THABO FEKEFEKE	**1ST RESPONDENT**
HIS WORSHIP MR. BALE	**2ND RESPONDENT**
THE CLERK OF COURT- LERIBE MAGISTRATE COURT	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

JUDGMENT

CORAM	**:**	**MOKHESI J**
DATE OF HEARING	**:**	**13TH FEBRUARY 2020**
DATE OF JUDGMENT	**:**	**05TH MARCH 2020**

CASE SUMMARY: *Civil Procedure: Application to review unterminated proceedings – Applicable principles re-stated – Application dismissed.*

ANNOTATIONS:

CASES : *Director of Public Prosecutions v Taole and Others LAC (2011 – 2012) 12*

Millennium Travel and Tours and Others v Director of Public Prosecutions LAC (2007 – 2008) 27

Kaleme Tech & Hire v Metsi A Pula Fleet Management Agency C of A (CIV) 60/2015 [2016] LSCA 29

Mda and Another v Director of Public Prosecutions LAC (2000 – 2004) 950

Schlesinger v Schlesinger 1979 (4) SA 342

BP Lesotho (PTY) Ltd v Moloi and Another LAC (2005 – 2006) 429

Per Mokhesi J

[1] The dispute in this case concerns a husband, his wife and their children. It would seem that at the core of the dispute are the alleged acts of domestic violence meted out by the husband on his family members. The 1st respondent (the husband) owns a school by the name of Letlotlo Junior School duly registered with him as the sole proprietor. The 1st respondent is also the school Principal of the same school. It would seem further that due to acts of domestic violence, the wife and daughters had to move out of the main matrimonial home to temporarily lodge in the school hostels. The wife and her two daughters (1st to 3rd applicants) lodged an application in the Leribe Magistrates' Court (CIV/APN/04/LRB/20) in terms of which they sought a number of reliefs on an urgent and *ex parte* basis, *viz*,

> "1. That ordinary modes and periods of service be dispensed with on account of urgency.
>
> 2. That rule be issued and returnable on the date and time to be determined by this Honourable Court, calling the Respondent to come and show cause, if any, why;
>
> > a) The Respondent shall not be restrained from entering the premises of Letlotlo Junior School situated at Maputsoe in the district of Leribe and/or using any property belonging to same school, until finalization of this matter.
> >
> > b) The respondent shall not be restrained from entering the hostel being in the premises of Letlotlo Junior School where the Applicants stay, situated at Maputsoe in the district of Leribe until finalization of this matter
> >
> > c) Respondent shall not be restrained from coming to at least 30 meters near the Applicants until finalization of this matter.
> >
> > d) Respondent shall not be completely evicted from the premises of Letlotlo Junior School situated at Maputsoe in the district Leribe

e) Respondent shall not be directed to allow access to the 2nd to 4th (sic) Applicants to the house situated at Maputsoe in the district of Leribe.

f) In the alternative to prayer (e) above, the Respondent shall not be directed to give to the 2nd to the 4th Applicants herein their property of everyday use, including but not limited to their clothing.

g) Directing the Respondents to pay costs of this application."

[2] The Learned Magistrate *a quo* granted an order that prayers 2(a) and (c) shall operate with immediate effect. The purport of this interim order was to restrain the 1st respondent from entering the school premises, and further to restrain him from entering the school hostels; it further restrained him from coming within at least 30 meters near the applicants.

[3] The 1st respondent faced with a predicament of an order which was obtained *ex parte*, anticipated the return day of the rule. The return day was anticipated on the 29th January 2010, on which date both counsel were present. What emerged from the papers filed of record in the court *a quo* (and this is common cause and was conceded by Advocate Nhlapo for the applicant) was that when Adv. Nhlapo lodged the said urgent and *ex parte* application he had concealed that the 1st respondent is the sole proprietor of the said school.

[4] Upon the Magistrate being made aware that certain information had been concealed from him, he altered the interim order in certain respects and discharged the rule *nisi* partially. To be precise the Learned magistrate altered the part of the Interim Order which restrained the 1st respondent from entering the school, left prayer 2(b) as it was and prayer 2(c) by removing proximity restriction and substituted it with an interdict against verbal and physical abuse, or threats to the applicants. Because the parties were not prepared to argue the application on the anticipated return day, the Learned magistrate extended the *rule nisi* to the 07th February 2010 for argument.

[5] On the 29 January 2010 the applicants served the 1st respondent with an application for committal for contempt of court and this application has not been heard. Meanwhile on the date on which the rule was extended for the main matter to be heard, applicants' counsel was not before court and the matter was re-set for hearing on the 04th March 2010 without extending the rule *nisi*. So as it is the rule *nisi* has lapsed.

[6] Instead of approaching the court *a quo* to revive the lapsed rule *nisi*, the applicants approached this court on an urgent basis seeking a stay and review of the proceedings in the court *a quo*, and further an order that the matter in CIV/APN/LRB/04/20 start *de novo* before a different Magistrate, and an order for dispatch of the record.

[7] When both counsel appeared before me, the issue which loomed large was whether this court should entertain this application in view of the fact that it seeks to review unterminated proceedings. Various arguments were advanced by counsel, but it appeared Adv. Nhlapo for the applicants was not aware of the applicable principles. The applicable principles were articulated in various decisions in this jurisdiction: see: ***Kaleme Tech and Hire v Metsi A Pula Fleet Management Agency C of A (CIV) 06/2015 [2016] LSCA 29 April 2016 at para. 18; Mda and Another v Director of Public Prosecutions LAC (2000-2004) 950; Millenium Travel and Tours and Others v Director of Public Prosecutions LAC (2007 – 2008) 27; Director of Public Prosecutions v Taole and Others LAC (2011 – 2012) 12***.

[8] All the above decisions express a salutary idea that it is undesirable to deal with matters on a piecemeal fashion, and that courts are loathe to entertain appeals or reviews against unterminated proceedings unless 'where grave injustice might otherwise result or when justice might not by other means be attained." (***Wahlhaus and Others v Additional Magistrate Johannesburg and Another 1959 (3) SA)***. In Mda matter the court had the following to say at para. 17.

> "***Adams*** and ***Wahlhaus*** and numerous subsequent decisions of the South African Courts have held that it is not in the interest of justice for an appellate court to exercise any power 'upon unterminated course of criminal proceedings' except in rare cases where grave injustice might otherwise

result or when justice might not by other means be attained. ***'(Wahlhaus).*** In ***Adams*** the Court of Appeal held that as a matter of policy the courts have acted upon be both inconvenient and undesirable to hear appeals piecemeal and have declined to do so except where unusual circumstances called for such a procedure…"

[9] In my considered view I do not consider this case to be one of those rare cases where injustice might result or where justice might not be obtained by other means, for the following reasons; It is common cause that the applicants moved an application *ex parte* and on urgent basis, and that certain information which could have influenced the court to not grant the interim reliefs sought, was suppressed. An application which is brought *ex parte,* because of its very nature of necessitating a hearing a matter on the basis of the papers of one party in the absence of another, places a duty of utmost good faith on the party who is launching it to disclose all the information to the court including the one which might be prejudicial to the applicant. This trite principle was authoritatively stated in the famous decision in ***Schlesinger v Schlesinger 1979 (4) SA 342 at 349 A – D*** where Le Roux J (as he then was) said:

> "…It appears quite clearly from these authorities that:
>
> (1) in *ex parte* applications all material facts must be disclosed which might influence a court in coming to a decision;
> (2) the non-disclosure or suppression of acts need not be wilful or *mala fide* to incur the penalty of rescission; and
> (3) the court, apprised the true facts, has a discretion to set aside the former order or to preserve it.
>
> Although these broad principles appear well-settled, I have not come across an authoritative statement as to when a court will exercise its discretion in favour of a party who has been remiss in its duty to disclose, rather than to set aside the order obtained by it on incomplete facts. On the other hand, the circumstances may be so divergent and variegated that it is impossible to lay down any guideline at all. ……"

[10] In the court *a quo*, the learned magistrate faced with the undeniable suppression of material information, varied partially, the interim order he granted and for practicality of the new order post the emergence of the material information made alterations to his former order and extended the rule to a later date for argument, as both counsel were not ready to argue the matter on the anticipated return day. This, in terms of the above authority, the learned Magistrate had a discretion to do. I do not fault him in any way for exercising his discretion in this way.

[11] Adv. Nhlapo, for the applicants, tried manfully, to argue that the effect of the learned Magistrate's variation of an order restraining the 1st respondent from entering the school premises is final and, therefore, amendable to be reviewed. I do not agree. The finality of an order or the determination thereof is not a formalistic but a substantive exercise, its effects, not only its form are the determining factors as to its finality. In BP ***Lesotho (PTY) Ltd v Moloi and Another LAC (2005 – 2006) 429 at 433*** Grosskopt JA (as he then was) quoted with approval ***Metlika Trading Ltd and Others v Commissioner, SARS 2005 (3) SA 1 (SCA)*** where at para. 23 the court said:

> "[23] In determining whether the order is final, it is important to bear in mind 'not merely the form of the order must be considered but also, and predominantly, its effects…."

[12] It will be observed that apart from an order restraining the 1st respondent (which was rescinded by the court *a quo*), there is also prayer 2(d) in terms of which the applicants are seeking an order for eviction of the 1st respondent from the school premises. In my considered view the question whether the 1st respondent should be permanently restrained from entering the school premises will be reconsidered when the court *a quo* ultimately determines whether he should be evicted.

[13] In the result I decline to entertain this review for the reasons articulated above.

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MOKHESI J

FOR THE APPLICANTS:	**ADV. NHLAPO K.E INSTRUCTED BY K. MABULU ATTORNEYS**
FOR THE 1ST RESPONDENT:	**ADV. MOLEFI INSTRUCTED BY V.M MOKALOBA & CO. ATTORNEYS**