CIV/APN/344/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

NTSUKUNYANE MPHANYA — APPLICANT

and

WILLIAM MOLEFI LEMENA — 1ST RESPONDENT
MOHALEROE, SELLO & CO. — 2ND RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. Justice G.N. Mofolo,
on the 20th day of November, 1995.

This is an application brought to this Court by the applicant claiming that:-

1. "Rules of this Honourable Court pertaining to notice be dispensed with and the matter heard of short notice 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 Respondents to show cause, if any, why:-

   (a) Pending the determination of review proceedings before this Honourable Court levying of execution shall not be stayed;

   (b) Respondents shall not be directed to pay the costs of this application in the event of opposing the application.

(c) Respondents shall not be granted such further and/or alternative relief.

I granted the relief sort in terms of prayer 2(a) and made the rule returnable on 30 October, 1995.

When the 2nd respondent received the papers (although he disclaims receiving them) he immediately lodged with the Registrar of this Court his intention to oppose accompanying the same with an answering affidavit which at the same time anticipated the rule by setting down the matter for 18 October, 1995 at 2.30 p.m. or so soon thereafter.

In anticipating the rule 2nd respondent was taking advantage of Rule 8 sub-rule (18) of the Rules of High Court which reads:

> "Any person against whom an order is granted ex-parte may anticipate the return day upon delivery of not less that 48 hours notice."

On 18 October by consent of the parties and in order to give applicant's counsel time to prepare for an eventuality he had not bargained for, the matter was postponed to 19 October, 1995. On this day (19 October, 1995) Mr. Mahlakeng for the applicant raised preliminary objections and was up in arms asserting that the matter had been postponed to 30 October, 1995 and could not be heard at such short notice. In saying this, it appears to me that Mr. Mahlakeng was oblivious of his own notice of motion whose first prayer sought to dispense with rules of court as to notice and an additional prayer that the matter be heard at short notice because of its urgency.

I must add to the above observation that notice to dispense with periods of service was accompanied by applicant's certificate of urgency which read, inter alia, that:

> 'I have read the papers in the abovementioned matter and consider it to be a matter of urgent relief.'

I therefore fail to appreciate Mr. Mahlakeng's concern that he should have been given 48 clear hours as is laid down by sub-rule (18) of Rule 8 of the Rules of High Court. Having himself dispensed with periods of service it follows that the 2nd respondent was obliged on the ground of reciprocity to have dispensed with periods of service.

Mr. Mahlakeng seemed to be of the view that a party intending to anticipate the rule was obliged to make a formal application to this effect. Now, Rule 8 sub-rule (18) reads:

> "Any person against whom an order is granted ex-parte may anticipate the return day upon delivery of not less than 48 hours notice."

2nd respondent has delivered such a notice and I do not think that the sub-rule contemplates anything other than notice as was delivered by the 2nd respondent. It may well be that the notice was not that elegant and formal but I would say for purposes of this application it was sufficient.

This is as it should be for it appears that a mandament van anticipatie (writ of anticipation) was, in Holland, granted upon

the request of the defendant to enable him to anticipate the return day of a penal interdict when such return day would otherwise have been too far off "

- see BELL's SOUTH AFRICAN LEGAL DICTIONARY - 3rd Ed. p.47.

This objection by Mr. Mahlakeng consequently fails. Mr. Mahlakeng also contended that 2nd respondent's affidavit was irregular in that it did not comply with Regulation 4 of Oaths Regulations, 1964 in that the regulation was couched in mandatory terms and was not permissible and for this he relied on the word "shall"; he also added and that it was necessary for the deponent to state his address.

Mr. Sello in reply claimed these were technical objections for an affidavit is a form as prescribed by the rules and that the content of the regulation which must agree with the form needed to do so only substantially and need not be so precise. It was enough if the deponent acknowledged that he knew the contents thereof for, after all, Mr. Molete the Commissioner of Oaths was a well-known legal practitioner and an officer of Court. Besides, the requisites for giving name, address and description of a deponent were necessary in founding papers only.

Regulation 4 of Oaths and Declarations Regulations, 1964 which applicant's counsel referred to reads:

sub-regulation 1

> "The form of words to be used in an affidavit which is sworn on oath shall be "
>
> "I of (setting out the name, address and description of the deponent) make oath and say as follows "

The form of words used in 2nd respondent's affidavit which Mr. Mahlakeng has attacked are

> "I, the undersigned
>
> KHALAKI SELLO
>
> do hereby make oath and say:"

> In strict compliance with Regulation 4(1) Mr. Mahlakeng would have had the 2nd respondent to have deposed:
>
> I, the undersigned
>
> KHALAKI SELLO
>
> a male adult residing at (2nd respondent's residential address) do hereby make oath, etc.

I agree that this is the acceptable format and that 2nd respondent's affidavit does not, strictly, conform to Regulation 4(1) as espoused by Mr. Mahlakeng nor, indeed, is the form of affidavit under scrutiny that elegant or desirable. But apparently it is the content other than form which should meet the eye. And although the 2nd respondent's affidavit is not framed in more lucid and identical terms as contemplated by Regulation 4(1) it has nevertheless fully identified the 2nd respondent as the deponent and I do not think that the applicant has suffered any prejudice thereby.

Concerning the second leg of Mr. Mahlakeng's objection regarding attestation by the Commissioner of Oaths, Herbstein and

Van Winsen - The Civil Practice of the Superior Courts in South Africa - Juta, 1954 have this to say at p.53.

> "When attesting any document a justice or commissioner shall state thereon the place at which and the date on which such document has been attested by him and below his designation state the area in respect of which he holds his appointment."

Mr. Molete's certificate contains the place and date at which the document has been attested to but below his designation i.e. Commissioner of Oaths his official stamp reads:

LEBOHANG AARON MOLETE
Commissioner of Oaths
Practising Attorney
1st Floor Lesotho Bank Centre
Kingsway, Maseru. Lesotho.

It will be seen that the official stamp of the Commissioner of Oaths in this regard does not comply, strictly, with the requirement as contained in Herbstein and Winsen and in my view it needn't because the law appertaining to Oaths is extracted from the South African Statutory Law which, in any event, is substantially the same as own law in this regard.

The schedule to the Form of Attestation derived from Oaths and Declarations Regulations, 1964 reads:

Form of attestation certificate

Sworn/Affirmed/Declared before me this day

of 19 at (after having been read over in the language through the interpretation of the undersigned of 2)

Signature of Commissioner of Oaths

3

Particular of appointment

In strict law, all that the attestation certificate after designation requires is `Particular of Appointment or the now trendy term `capacity' which Mr. Molete has given as `Practising Attorney.' All this quite apart, Regulation 10 reads:

> `A certificate of attestation may be in the form set out in the Schedule with such variations as the circumstances require.'

This provision appears fairly elastic to me thus importing no hard and fast rules. Consequently, in this regard too, applicant's objection fails.

Concerning the merits of the application, Mr. Mahlakeng for the applicant submitted that the applicant had, in the Chief Magistrate's Court, Maseru been sued by the 2nd respondent for a sum of M10,000-00 and judgment by default had been obtained against the applicant.

Pursuant to the judgment aforesaid according to Mr. Mahlakeng, the applicant had applied to this court for the review of the Magistrate's judgment. The reason for the review was that while applicant was sued for a meagre M10,000-00 for service rendered the writ of execution against the applicant was a staggering M60,010-00. According to Mr. Mahlakeng, the fact that the matter was lying before this court on review gave this court jurisdiction to hear this application.

Mr. Sello for the 2nd respondent denied this court had jurisdiction in that the court of proper jurisdiction was the Magistrate's Court which heard the action and also denied review proceedings were properly before this Court. In support of his contention Mr. Sello quoted the Subordinate Court Order No.9 S.37 thereof plus the High Court Act No.5 of 1978 Section 6 including an appeal case for which he had no citation.

In reply Mr. Mahlakeng submitted there were review proceedings before this Court contained in CIV/APN/186/95 and that in terms of the Rules of Court all that was required was to call upon the Magistrate to dispatch the record to the High Court for hearing.

Before Mr. Mahlakeng had finished his addresses the matter was postponed to 20 October, 1995 at 9.00 a.m. On 20th October, 1995 at 9.00 a.m. Mr. Sello was before Court but Mr. Mahlakeng

was not before Court and I asked Mr. Sello to wait a while in case Mr. Mahlakeng was somehow delayed. At. 9.40 a.m. Mr. Mahlakeng was still not before court and Mr. Sello asked the rule to be discharged with costs on account of Mr. Mahlakeng's non-appearance. I refused to discharge the rule immediately and reserved judgment to 24 October. 1995.

On the same afternoon, that is to say 20 October. 1995. Mr. Mahlakeng appeared before me in chambers but I ruled I could not hear him in the absence of Mr. Sello attorney for the 2nd respondent. Mr. Sello having been found both counsels appeared before me in chambers and Mr. Mahlakeng apologised for his non-appearance saying he had been held up in circumstances in which he could not have appeared before me timeously or appraised the court of his whereabouts. When, however, he offered to re-open the application I refused the application saying since I had reserved judgment I could not accede to his request. I did, nevertheless, allow him to make further submissions provided he gave his counterpart notice of such submissions in the event of the latter wishing to reply thereto.

In his further submissions which curiously, counsel for the applicant has termed "Heads of Argument" dated 20th October, 1995 copied to the 2nd respondent, Mr. Mahlakeng reiterated the submission that this court has jurisdiction to hear the application and he quoted SWANEPOEL v. ROELOF AND 3

OTHERS. 1955(2) p.524 as authority for his proposition. He also quoted Section 2 of High Court Act No.5 of 1978 in terms of which the High Court has unlimited jurisdiction to hear and determine any Civil or Criminal matter and also referred to the dicta in Swanepoel's case above where it was said:

> "There may be matters of urgency which would induce this court to stop certain proceedings under a Magistrate's writ, until the Magistrate has the opportunity of dealing with the matter."

In support SOJA (PTY) LTD vs. TUCKERS LAND DEVELOPMENT CORPORATION (PTY) LTD & ANOTHER p.407 AND BESTBIER vs. JACKSON & ANOTHER, 1986(3) S.A.482 were also quoted. The problem with Mr. Mahlakeng's authorities is that he has not indicated as from what division of the Supreme Court the judgments emanated.

In addition, in his address, Mr. Mahlakeng merely referred to application CIV/APN/186/95 without annexing a copy thereof for the benefit of the Court. I caused the record of proceedings to be brought to me for perusal and found that the application had duly been lodged with this court in terms enunciated by counsel for the applicant. I also found that on 6 October, 1995 an application in substantially the same terms as those before me had been made before my brother Molai J. but had been withdrawn on 9 October, 1995.

I must warn that it is not the duty of this court to scurry around the courtrooms looking for files and that counsels in

applications like the one before me must annex copies of proceedings for the satisfaction of the court.

Regarding Mr. Sello's application for the discharge of the rule in default of appearance by applicant's attorney, in CHIMANZI v. MUKANGE. 1966(2) S.A. 347 (R.,A.D.) it was decided:

> "If a defendant or respondent does not so appear, a judgment against him (not exceeding the relief claimed) may be given with costs."

It was submitted in this case that the Magistrate was obliged, as the word `may' was to be construed as `must' to give judgment for the appellant without considering evidence which appellant had already given. For this proposition reliance was made on SPARKS v. DAVID POLLIACK and Co., (PTY) LTD.1963(2) S.A.491(T.) in which the learned Judge had concluded:

> "Once he did withdraw the magistrate was obliged to grant default judgment."

In CHIMANZI's case above Beadle C.J. held that:

> "In my opinion, in a case such as this, the Court is perfectly entitled to examine the evidence which has been given and is properly before it, and, if it is satisfied from the evidence that not even a prima facie case supporting the claim in the summons has been made out, the court would be justified in the exercise of its discretion in dismissing the application for a judgment in default of appearance."

It is to be remembered that in the above case after the appellant had closed his case respondent's attorney had applied for postponement which on being refused withdrew from the

proceedings. It was in this case held that when respondent's attorney withdrew the proceeding were converted into an application for default judgment in terms of Order XXXII, Rule 4(2); and consequently it was held that the magistrate was entitled to examine evidence already given; the appellant had established a prima facie case to a portion of the account claimed and that the final judgment given was appealable.

Not satisfied that Mr. Mahlanketa's absence amounted to withdrawal or cessation of the pursuit of the application, I have refused Mr. Sello's application for the discharge of the rule and in my discretion ruled that the application will be decided on its merits.

With regard to implications of Act No.5 of 1978 Section 6 the High Court Act which reads:

> "No civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court) shall be instituted in or removed into the High Court, save:
>
> (a) by a judge of the High Court acting on his own motion;
>
> (b) with leave of a judge upon application made to him in Chambers, and after notice to the other party."

In the instant case no civil cause or action has been removed from the jurisdiction of the Magistrate's Court though noticeably on good cause such an action could be so removed.

Applicant has acted in terms of section 7(1) of the High Court act, 1978 whose sub-section (1) reads:

> "The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Lesotho, and if necessary to set aside or correct the same.'

I must now turn to the consideration whether this court has jurisdiction to entertain this application on the basis that the substantive application having emanated from the Magistrate's Court only that Court has jurisdiction to entertain this application.

When the question of jurisdiction arose in VAN GRAAN v. SMITH'S MILLS (PTY) LTD, 1962(2) S.A. 170 (T.P.D.)it was said the rule in Shame's case (Shames v. South African Railways and Harbours, 1922 A.D. 228) as interpreted by the majority of the court in Feldman case:

> " is that the court's jurisdiction is excluded only if the conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extend indicated by such necessary implication."

And in WELKOM VILLAGE MANAGEMENT BOARD v. LETENO, 1958(1) S.A. 490 (A.D) at p.503 Ogilvie Thompson A.J.A. is said to have continued:

> "In my judgment, the necessary implication in question can seldom, if indeed ever, arise when the aggrieved persons very complaint is the illegality or fundamental irregularity of the decision which he seeks to challenge in the courts."

Also in Van Graan's case above De Wet, J.P. is said to have said that although statutory provision existed for an appeal to the Native Commissioner, notwithstanding this the Court had held

that the respondent was not barred from applying to the Supreme Court for relief.

He went on:

> "it seems to me that in a case like the present a fortiori the appellant should not be barred from relief in this court because he has a right to apply to the very tribunal which was responsible for the fundamental irregularity or illegality."

> In SOUTH AFRICAN MOTOR ACCEPTANCE CORPORATION (PTY) LTD. v. VENTER, 1963(1) S.A. 214(O.) expressing a similar view HELD: there was nothing in the statutory provisions relating to the lower court which either expressly or by implication obliged the plaintiff first to exhaust his remedies in the lower court before it approached the Supreme Court."

It will be seen that the requisites for approaching the Supreme Court instead of the lower court from a reading of above cases are that the litigant is entitled to approach the Supreme Court where he complains of an irregularity or illegality by the lower court. The applicant has approached this court because although the amount claimed in the Magistrates Court was M10,000-00 +/-, when the writ of execution was levied he was faced writ an astronomical amount of M55,000-00 +/- which according to him, could not have flowed from the paultry amount of M10,000-00 +/-. In addition, it appears that a litigant needn't exhaust his remedies in the lower court before approaching the Supreme Court for relief.

Following hard on the heels of above quoted cases, SWANEPOEL v. FOURIE, N.O. and ANOTHER, 1953(2) S.A. 524 (W.L.D. is such a case where the applicant had applied in the Supreme Court for an

interdict restraining the transfer of immovable property which had been sold in execution following upon a writ issued by a magistrate's court.

HELD: that the court had jurisdiction to hear the application.

No case is closer to the present application than AHMED v. VAN DER MERWE, 1911 C.P.D.846 where Maasdorp C.J. at p.848 observed:

> "There may be matters of urgency which would induce this court to stop certain proceedings under a magistrate's writ, until the magistrate has had the opportunity of dealing with the matter. It is quite possible that a sale may be so imminent that injury might be done before the matter could be disposed of by the magistrate, and in such a case I have no doubt this court would come to the aid of the magistrate."

In this case, an application for review is lying with this court and the applicant apprehends that before it is disposed of he may suffer injury by the imminent levying of the writ of execution.

I rule that the fact alone that an application for review lies with my brother Molai J. is no bar to my hearing this application as the application before Molai J. has not been decided. But apparently GKULILY FAIRFIELD PAROW V.M.B. v. VAN REENEN, 1936 C.P.D. 162 gives a clear exposition of procedural aspects of an order to be made in applications like the present one. In terms of judgment in GKULILY above, a successful party has a choice whether he will execute and himself give security,

or not to execute and require the judgment debtor to give security. Once he has, however, made the choice he is bound by it and once the amount of security has been fixed he cannot go back on his choice and claim to levy execution.

It was notwithstanding decided in MOOLMAN v. VERMEULEN, 1911 C.P.D. 637 at p.638 by Maasdorp J.P. that:

> "The spirit of the rule of court seems to require that in all cases the respondent shall be secured pending the appeal, either by obtaining execution or receiving security."

Several reasons have been cited for stay of execution. Thus in BRINK v. DREYER, 26 S.C. 410 execution has been stayed pending the payment of the account of the judgment by instalments. Also when there was no proper service of summons and the promissory note relied on was obtained by forgery - HYCROFT v. FILMER 4 S217; also in SEARLE'S EXECUTORS v. LIQUIDATION OF LIEBERMANN, BELLSTADE and Co., 1916 E.D.C.198 where an interpleader summons was awaited.

The application for stay of execution is granted on following conditions:

1. That the applicant pending the result of the review proceeding in CIV/APN/186/95 pay security for 2nd respondents costs to the Registrar of the above Court within fourteen (14) days of the granting of this order: FAILING WHICH

2. Applicant to have prosecuted his review proceedings within two (2) months of the granting of this order.

3. Should the applicant opt for condition 2 above and fail to observe same, the creditor/2nd respondent may proceed to execute without the necessity of applying to court again in terms of the rule in WIID v. FICK, 18 C.T.R. 680.

On costs, this application came for judgment on 17 November, 1995 and Mr. Sello for the 2nd respondent duly presented himself, Mr. Mahlakeng was absent and there was no excuse of his absence.

I do not approve of senior members of the bar attending court timeously and regularly but being spurned and frustrated in their efforts. I was within a hairbreath of awarding wasted costs of the postponement of 20 October and 17 November, 1995 and do hope that now that I have not done so this will be taken as a warning of what might happen next time.

As of Mr. Mahlakeng, he appears to be the sort of person to expect when you see him - this does not augur well for him.

The circumstances of this case are such that as the applicant is the one seeking the indulgence of this court the applicant will pay 2nd respondent costs of this application.

G.N. MOTOLO
JUDGE
17th November, 1995.

For the Applicant: Mr. Mahlakeng

For the Respondents: Mr. Sello