

CIV/APN/165/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

SUPREME FURNISHERS (PTY) LTD
MOHOPOLO MACHELI

1ST APPLICANT
2ND APPLICANT

and

LETLAFUOA HLASOA MOLAFO

RESPONDENT

JUDGMENT

Delivered by Mr. G.N. Mofolo, Acting Judge
on the 6th day of July, 1995

This is an application seeking an order granted by this court on 30th May, 1995 to be stayed; directing respondent to pay costs of the application and further and or alternative relief.

Applicant's founding affidavit seeks the order on the ground that as applicant has appealed against the order, unless execution is stayed, applicant will suffer irreparable harm in that should the respondent be paid pursuant to the court's order and the applicant succeed on appeal, the respondent would not be in a position to re-imburse the applicants.

Respondent is resisting this application on the grounds that applicant has no prospects of success on appeal and that in any event as the appeal has no merit it is pursued to buy time and used to abuse process of this court.

When this application was placed before me, I was under the impression that the respondent being a successful party was the applicant.

Counsel for applicants stated that the judgment was wrong in that a servant at common law could be discharged so long as he was paid his salary and other ancillary benefits. Counsel appears to have been unsettled and took umbrage at remarks by the court that there was nothing wrong with the judgment. It appears counsel took this to mean that his application would not be entertained and this being the case the court was to recuse itself. The application was refused.

The questions to answer in this application is as whom, in my view, balance of convenience would favour or disfavour if execution were to be proceeded with regardless; whether the appeal lodged is bona fide and not resorted to for the sole purpose of delaying fruition of respondent's rights and the attendant abuse of process.

As far as the common law is concerned, an appeal automatically suspends operation of judgment appealed against. It depends on the successful party to approach the court to have judgment executed where circumstances permit this.

In Olifant Tin "B" Syndicate v. de Jager, 1912 A.D. 477
Innes, A.C.J. is claimed to have said at p.481:

"When an appeal has been noted, execution is by law automatically suspended, save in some excepted cases of which this is not one. It can only be carried out, in that event, by the express direction of the court, acting under the rule; and for that a special application by the successful party would be necessary. Hence, in the case of suspension automatically effected by operation of law, there can be no purpose in moving the court to do what the law has already done or to order security to be given, which the rule itself unconditionally requires."

The same sentiment was expressed in Pringle and Another v. the Union Government, 1923 C.P.D. where Benjamin J. said at p. 378:

"It might be competent, however, for the present respondent to apply that the order should be declared executable notwithstanding the notice of appeal; that is a matter, however, not at present before me. There having been no such order I think that the respondents were not justified in doing the acts to which objection has been taken and that an interdict should be granted with costs in terms of the notice of motion; but this order will be subject to the limitation that it shall be operative only unless and until the respondents shall obtain an order declaring the interdicts granted on the 8th and 20th March executable notwithstanding the notice of appeal."

Crystallised, the gist of this judgment is that where a party has been successful in an action, such a party is required in law to approach the court to execute notwithstanding an appeal. Where, however, such a party has not applied to court and nevertheless proceeds with execution, if the opposite party objects to such a procedure and comes to court to stop the execution, the court will grant relieve but that such relief will be conditional on the successful party applying to court to remove the interdict notwithstanding the fact that the first mentioned party has lodged an appeal.

De Villiers J.A. in his usual crisp analysis said in Reid and Another v. Godart and Another, 1938 A.D. 511 at p.513

"Now, by the Roman-Dutch Law the execution of all judgments is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out; and no effect can be given thereto, whether the judgment be one of money (on which a writ can be issued and levy made) or for any other thing or for any form of relief granted by the court appealed from. That being so, I see no reason why the Rule should not be confined to judgments on which a sheriff may levy execution. The foundation of the common law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by a levy under a writ, or by the execution of the judgment appealed from."

The learned judge was here concerned with the mischief that might result to the appellant if execution having been proceeded with appellant was successful an appeal. Van Winsen A.J. was emphatic in Levin v. Felt and Tweeds Ltd, 1951(1) S.A. 213(c) that except in certain exceptional cases a notice of appeal automatically suspended execution. He went as far as saying no application by the appellant was necessary to seek leave to execute against provision of security. The law, however, as I understand it, is that where an application for leave to execute is granted, the judgment creditor may pay security de restituendo in the event of the appeal succeeding though, as I have said, we are not concerned with that in this application.

In Wood, N.O. v. Edwards and Another, 1966(3) S.A. 443 (R), Lewis J. quoting Ruby's Cash Store (Pty) Ltd v. Estate Marks and Another, 1961(2) S.A. 118(T), traversed prospects of success on appeal and came to the conclusion that these came into focus where no question of irreparable loss arose and execution would be allowed where it sounds in money and the appellant can be safeguarded by an order for security de restituendo in the event of the appeal succeeding. Lewis J. went on to say that the question whether or not there were reasonable prospects of success on appeal would arise where, however, the object of the appeal would be completely defeated if execution were to proceed and that the court had not right to deal with the matter on the basis of whether or not there is reasonable prospect of success on appeal.

The learned judge above went on to emphasise that the position is that the appellant has an absolute right of appeal and to test the correctness of the judgment appealed from in the Appellate Division and, if by ordering execution the whole object of the appeal would be stultified then this court would, in effect, be usurping the functions of the Appeal Court if it ordered execution merely on the basis that it thought, in its opinion, that prospects of success on appeal were slight.

In Wood, N.O. v. Edwards and Another above it was also held it is only where the court is satisfied that the appeal is not brought genuinely with the bona fide intention of testing the correctness of the judgment in the court below but is only brought as a delaying tactic and as a means of staving off the evil day, that the lower court may order execution to proceed in such circumstances.

I am not refusing or granting this application at the behest of the applicant who was a successful party but on respondents' motion so that here priorities are more or less reversed. If the applicant was applicant in these proceedings, I would most probably grant the application with security de restituendo in the event of the respondents in the main application succeeding on appeal. As things stand, I cannot say that this application is not brought bona fide, or that it is brought to delay operation of the order of this court nor can I say that it is

brought to stave off the evil day. I am fully aware of the chaotic and invidious position the applicant might be placed in were this execution proceeded with as it stands now. On the contrary, I don't find the respondent in any way prejudiced as remedies are open to him.

I have been urged by counsel for the respondent that while this appeal is at large the respondent may starve and that as the record of proceedings has not been submitted by applicants to the Registrar of this court for transmission to the Appeal Court, it is uncertain when this appeal will be heard. As I have said, respondent has remedies open to him if he fears that the applicants may not, for some reason, abide the judgment of this court in the event of the appeal failing. As for ensuring that the appeal which applicants have lodged is heard timeously, I fear this is outside this court's control for that appeal will be determined in accordance with Rules governing the Court of Appeal.

In the circumstances I order that:

- (a) Execution against applicants be stayed pending the result of the appeal.

(b) Applicants are to pay security for costs to the satisfaction of the Registrar of this court within 2 weeks of this judgment.

(c) Costs are to be costs in the appeal.

G.N. MOFOLO

Acting Judge

5th July, 1995.

For Applicants: Mr. Marantiri

For Respondent: Mr. Mosito