

C OF A (CIV) NO.35 OF 1995

IN THE LESOTHO COURT OF APPEAL

In the matter between :

MOHALEROE SELLO & CO.

AND

N. MPHANYA

HELD AT : MASERU

CORAM:

BROWDE JA

LEON JA

v.d. HEEVER AJA

JUDGMENT

v.d. HEEVER AJA

The events leading up to the present appeal may be listed in chronological order as follows:

28 January 1993: The case between the appellant and the respondent commenced in the magistrate's court.

22 November 1993 : judgment was granted against the Respondent, but was set aside on appeal.

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14 October 1994 : judgment was granted for a second time against the respondent.

6 May 1995 : respondent commenced proceedings to review the matter.

27 September 1995 : A writ of execution was served on the Respondent.

5 October 1995 : the respondent lodged an application in the High Court on notice of motion, for stay of execution of the writ. When the appellant gave notice of his intention to oppose this, the application was withdrawn on 9 October 1995.

10 October 1995: Notice was given, but only to the Registrar, that application would be made as a matter of urgency for a rule nisi to operate as an interim order, staying execution pending the review proceedings before the High Court, with costs should the application be opposed.

11 October 1995 : A rule nisi was issued, returnable on 30 October 1995.

17 October 1995 : The appellant, who had become aware of the application which had not yet been served on him, gave notice of his intention to oppose.

18 October 1995 : the application was set down by the appellant, anticipating the return day of the rule.

17 November 1995 : judgment was given in the matter. The respondent's preliminary objections including one raised to the Court's jurisdiction, were dismissed. On the jurisdiction issue the Court *a quo* found in favour of the appellant, but granted a stay of execution subject to the conditions -

1. That pending the result of the review, the respondent "pay security for [the appellant's] costs to the Registrar" within 14 days of the order.

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2. That the review proceedings should be prosecuted within 2 months, failing which the appellant could proceed to execute without further ado

Costs were awarded in favour of the Appellant; who noted the present appeal on 6 December 1995.

It is this judgment which is on appeal before us. In his heads of argument the respondent took the preliminary point that the order of the Court *a quo* staying execution is interlocutory in both form and effect; so that the appellant in terms of section 16 of the Court of Appeal Act No. 10 of 1978 required the leave of this Court before approaching it on appeal.

Section 16 provides that:

"(1) An appeal shall lie to the Court -

- (a) from all final judgments of the High Court;
- (b) by leave of the Court from an interlocutory order, an order made *ex parte* or an order as to costs only."

It is common cause that no such leave was obtained. Whereas Section 6 of the High Court Act No.5 of 1978 was clearly enacted in order to prevent the High Court from being swamped with litigation not meriting its attention, different considerations underlie Section 16, as the

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provision of section 17 make clear. This reads:

"Any person aggrieved by any judgment of the High Court in its civil appellate jurisdiction may appeal to the Court with the leave of the Court or upon the certificate of the Judge who heard the appeal on any ground of appeal which involves a question of law but not on a question of fact."

The pattern seems obvious. A litigant may appeal once as of right against a final judgment of the High Court as a Court of first instance. Similarly an appeal from the lower to the High Court is "free". A second bite at the cherry is only permissible should the Court of Appeal - in the interests of the litigant so far victorious - regard the matter as potentially meritorious. Since interlocutory matters automatically do not determine rights once and for all; orders obtained *ex parte* are necessarily temporary and orders as to costs only are discretionary, there is no reason why an unsuccessful litigant should be permitted to burden his opposition with further proceedings unless the Appeal Court for good reason grants leave for him to do so.

Mr. Sello sought to persuade us that the order granting a stay was final, albeit efficacious only pending the outcome of the review. A stay may have a final effect in certain circumstances. It is unnecessary to go into detail. The order against which this appeal was brought is

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indubitably temporary.

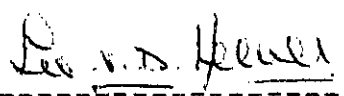
No leave was sought in the present matter. We were informed by Counsel for the appellant that the interim order had presumably served its purpose since the review proceedings had been determined. The appeal is therefore against an order no longer efficacious - hence clearly an interlocutory one - and as such, academic.

The matter is accordingly struck from the roll with costs.

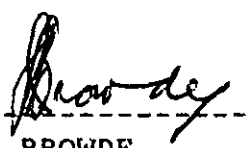
Delivered at Maseru this 19th day of January, 1996.

I agree

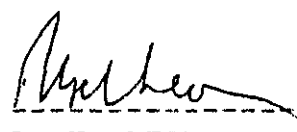
I agree



 L. V. D. HEEVER
 ACTING JUDGE OF APPEAL



 J. BROWDE
 JUDGE OF APPEAL



 R. N. LEON
 JUDGE OF APPEAL