CIV/APN/36/98

IN THE HIGH COURT OF LESOTHO

In the matter between

MASERU CITY COUNCIL — 1st Applicant
TOWN CLERK - MCC — 2nd Applicant

and

'Mamahali Mpho Molapo — Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 17th day of December 1998

The Applicants in this matter have approached this Court on a Notice of Motion for an order in the following terms :-

"1. Granting Applicants stay of execution of the judgment of the Court in **CIV/APN/36/98** pending the outcome of **C of A CIV/ NO.28/98;**

2. Directing Respondent to pay costs hereof in the event of her opposition hereto;

3. Granting Applicants such further and or alternative relief as this Honourable Court deems fit."

The application is opposed basically on the ground that there are no

prospects of success on appeal.

At the outset I am bound to say that the Court has a discretion whether or not to grant an application for stay of execution pending appeal depending on the circumstances of the case. This is so in terms of Rule 6 of the Court of Appeal Rules 1980 which provides as follows:-

> "6. (1) Subject to the provisions of the sub-rules infra the noting of an appeal does not operate as a stay of execution of the judgment appealed from.
>
> (2) The appellant may, at any time after he has noted an appeal, apply to the judge of the High Court whose decision is appealed from for leave to stay execution.
>
> (3) .....
>
> (4) On such an application the judge of the High Court may make such order as to him seems just and in particular without in any way depriving him of his discretion may order:
>
> (a) that execution be stayed subject to the appellant giving such security as the judge thinks fit for payment of the whole or any portion of the amount he would have to pay if the appeal should fail or

(b) refuse that execution be stayed subject to the Respondent giving security for restoration of any sum or thing received under execution or

(c). it may order that execution be stayed for a specified time but that after the lapse of such time execution may proceed unless the appellant has within such time furnished security for such sum as the judge may specify.

(d) The judge hearing such application may make such order as to costs as he may think fit" (my underlining).

The use of the word "may in the Rule clearly indicates that the Court has a discretion whether or not to grant an application for stay of execution depending on the circumstances of a particular case. This is however not an arbitrary discretion but is one that must be exercised fairly upon a consideration of all relevant factors. The discretion must always be exercised judicially and not capriciously.

It is further salutary to bear in mind that the main considerations in an application for stay of execution pending appeal are whether the applicant has prospects of success on appeal as well as the balance of hardships or convenience, as the case may be.

See **South Cape Corporation v Engineering Management Service 1977 (3) S.A. 534 AD at 545.**

It is upon the above mentioned principles of law that I approach this

matter and I turn then to the facts of the case.

It is common cause that the Respondent was employed by the 1st Applicant on the 22nd April 1992 and the appointment was duly communicated to the Respondent by letter Annexture "A" to the Respondent's founding affidavit. The author of this letter one S.M. Phamotse who was the Town Clerk at the time has deposed to an affidavit to the effect that the Respondent's appointment was effected by the Minister himself and that the deponent was merely communicating this information to the Applicant when he wrote Annexture "A".

The Applicants' case however was that the appointment in question was made by the Town Clerk S.M. Phamotse himself and not by the Minister.

Mindful of the fact that, **prima facie**, there appeared to be a dispute of fact as to who actually appointed the Applicant the Court's approach was to determine whether such dispute of fact was real or **bona fide.** In due course the Court came to the conclusion that the dispute of fact was not real, genuine or **bona fide** but artificial mainly because appointment of officers of Maseru City Council (1st Applicant) is the exclusive domain of the Minister of the Interior and Chieftainship Affairs in terms of Section 4 (1) of the Urban Government (Amendment) Order 1992. There was also direct evidence of the author of the letter of appointment Annexture "A" as opposed to the applicants' deponents who were not present at the time of the Respondent's appointment. In these circumstances the Court felt that it was perfectly

entitled to decide the matter on the papers and prefer the Respondent's version to that of the Applicants particularly as the latter did not avail themselves of their right to apply for cross examination of the deponent S.M. Phamotse. Accordingly the Court came to the conclusion that the Respondent was appointed by the Minister of Interior and Chieftainship Affairs and not by the Town Clerk S.M. Phamotse as alleged by the Applicants and that therefore the 2nd Applicant herein acted **ultra vires** his powers in purportedly dismissing the Respondent without the approval of the Minister.

Now, the main ground of appeal relied upon by the Applicants is that the Court erred in determining material issues of credibility on affidavits without referring same to oral evidence. With respect, this ground is ill-founded and misconceived in the particular circumstances of this case as fully set out above. The deponent S.M. Phamotse provided direct evidence that the Respondent was appointed by the Minister and this version was certainly more probable than that of the Applicants in view of the fact that appointment of officers of 1st Respondent is, as stated above, the exclusive domain of the Minister in question. Moreover, in view of the fact that the deponents who have filed affidavits in support of the Applicants' version were themselves not present and were not members of the 1st Applicant at the time of the Respondent's appointment, their version can only be a result of pure conjecture and speculation.

Taxed as to why the Applicants did not avail themselves of their right

to apply for cross examination of the deponent S.M. Phamotse Adv Mohau for the Applicants made a startling submission that failure to do so cannot be held against his clients because they were the respondents. I cannot accept this argument and in fairness to Adv Mohau he soon retracted from his position and rightly conceded, in the Court's view, that the right to apply for cross-examination of a deponent is not confined to an applicant only. In this regard it is necessary to bear in mind the following remarks of Corbett JA in **Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) S.A. 623 AD at 634 - 635:-**

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155(T) at 1163-5; Data Mata v Otto NO 1972 (3) SA 858 (A) at 882D-H).* If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court *(cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164)* and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks *(see eg Rikhoto v East Rand Administration*

> *Board and Another 1983 (4) SA278 (W)* at *283E-H*). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries case, supra,* at 924A)."

As stated above, it is precisely upon the above mentioned principles stated by Corbett JA that this Court approached the instant matter.

Again the Court's finding that appointment of officers of 1st Respondent is the exclusive domain of the Minister of Interior and Chieftainship Affairs is being challenged in the Applicants' ground of appeal. It proves convenient therefore to quote the relevant section that governs appointments namely Section 4 (1) of the Urban Government (Amendment) Order 1992. That section provides as follows:-

> "The Minister may, on such terms and conditions as he thinks fit, appoint,
>
> (a) a Town Clerk;
>
> (b) a Deputy Clerk;
>
> (c). A Treasurer; and
>
> (d) such other officers as may be deemed necessary for the proper performance of the functions of the Council."

That this section clearly empowers the Minister of Interior and Chieftainship Affairs and nobody else to appoint officers of the 1st Applicant

admits of no doubt.

It was sought to persuade the Court that the Minister had delegated the power of appointment to the Town Clerk S.M. Phamotse. Yet as I read the Urban Government Act 1983 read with the Urban Government (Amendment) Order 1992, the Minister in question has not been given any express or implied power to delegate in matters of appointment of officers of the 1st Applicant. It would appear that the Applicants have proceeded on the wrong assumption that the power to delegate exists automatically. This is not so, for as Lawrence Baxter succinctly puts it in his book **Administrative Law** at page 432:-

> "The power to delegate does not automatically exist: it must be provided for, either expressly or impliedly."

It follows from the aforegoing therefore that the Town Clerk had no statutory or delegated power to appoint the Respondent as that was the exclusive domain of the Minister in question. Accordingly it follows that the Applicants have no prospects of success on appeal.

The Court's order directing the Applicants to pay the Respondent her monthly salary with effect from September 1997 to the date of judgment is also being challenged on the ground that there was no factual basis for such a "finding". In order to appreciate the correctness or otherwise of this allegation it is necessary to bear in mind what this Court said on this issue on

page 7 of its judgment namely:-

> "Regarding Applicant's salary there is no suggestion that the Applicant has earned alternative salary elsewhere. Indeed there is no evidence that she worked anywhere during the period of her unlawful "dismissal". Accordingly I consider that this is a fit case where monthly salary should be ordered in favour of the Applicant."

I should mention at this stage that even as the instant application was argued before me there was no slightest suggestion that the Respondent has worked and earned alternative salary elsewhere during the period of her unlawful "dismissal". This is a factor that the Court, in its discretion, took into account in dealing with the matter. In the Court's view the question of inequity based on a double salary does not arise in this case. On this basis this case is therefore clearly distinguishable from **Lesotho Telecommunication Corporation v Thamahane Rasekila C of A (Civ) No. 24 of 1991** (unreported) in which there was, as Browde JA observed "uncontroverted allegation" by the employer that the dismissed employee was currently employed full-time by the Lesotho National Insurance Company. Hence the Court of Appeal held that it would be inequitable in the circumstances of that case to order payment of emoluments without proof that the dismissed employee had mitigated his damages.

It has long been the law that an order for specific performance lies entirely within the discretion of the Court whether or not to grant it. That discretion is however a judicial discretion that must not be exercised

arbitrarily or capriciously. Indeed this Court subscribes to the principles set out in the leading case of **Haynes v Kingwilliamstown Municipality 1951 (2) S.A. 371 (A) at 378 and 379.** Following that case Van Dijkhorst J paraphrased the nature and scope of the Court's discretion in the grant of specific performance in **National Union of Textile Workers v Stag Packings 1982 (4) S.A. 151 at 156** in the following words:-

> "As each case must be judged in the light of its own circumstances it is not possible to lay down any rules and principles which are absolutely binding in all cases."

I respectfully associate myself with these remarks. No rigid and or fixed general rules can be laid down in the matter as this would amount to fettering the Court's discretion.

In all the circumstances of the case therefore I have come to the conclusion that the Applicants have no prospects of success on appeal.

Before closing this judgment on the issue of prospects of success on appeal I should like to comment on a rather strange twist of events in this matter. For the first time in their grounds of appeal the Applicants rely on the affidavit of one Bereng Sekhonyana. They state in paragraph 3 of their grounds of appeal:

> "The Learned Judge in the Court **a quo** erred in holding that because there was no evidence of publication in the gazette of

> delegation of the powers of the Minister under sec. 4 of Order NO. 11 of 1990, then the Minister could not have at the very least purported to delegate those powers as attested to by BERENG SEKHONYANA."

Yet the record of proceedings will reveal that Bereng Sekhonyana's affidavit was not part of the record presented to the Court at the hearing of the matter. The index of the record commences at page 1 and proceeds as far as page 77. In all those pages there is no such affidavit of Bereng Sekhonyana and it was never brought to the Court's attention. Be that as it may I have now had sight of this affidavit and surprisingly it bears the Registrar's date stamp of 10th June 1998 while the rest of the answering affidavits were filed on the 12 February 1998. It seems quite clear therefore that this affidavit was never part of the answering affidavits in the first place and no intimation was made in the Notice of Intention to Oppose that the affidavit would be filed later. That being the case and in the absence of any application to the Court to condone and allow the affidavit as part of the other answering affidavits it is my considered view that the late filing of this affidavit is grossly irregular and prejudicial to the Respondent who had by then already filed her replying affidavits. She could not, then, be expected to deal with this affidavit.

Even if I may be wrong in the view that I take of the matter I consider that Bereng Sekhonyana's affidavit does not take the Applicants' case any further in as much as the deponent was not Principal Secretary at the time of Respondent's appointment in 1992. His averments are therefore based on

sheer speculation. In any event the allegation that the Minister delegated his power of appointment to the Town Clerk is unrealistic in view of the fact that the Minister had no delegated power as shown above. Hence Bereng Sekhonyana's allegation in that regard is not only unhelpful but is down right irrelevant more specially as it is clearly confined to the years 1988-91 and not the 22nd April 1992 which was the date of Respondent's appointment.

Balance of Convenience

In paragraph 4 of her Answering Affidavit the Respondent has set out circumstances pointing to the balance of hardship in her favour in the following terms:-

> "Firstly, I respectfully aver that nothing turns on whether because I will be away to join my husband in Abijan applicant will suffer prejudice. I wish to inform your Lordship that I am a Mosotho by citizenship and nationality. My husband is in Abijan on a diplomatic mission. He is not going to be in Abijan forever. He will come back home to Lesotho when the need arises and every now and then I will be back.
>
> Secondly I have a hire purchase finance agreement with Lesotho Bank, a copy of which is attached and marked "A" and is self-explanatory. I am already defaulting due to the applicant's clinging unto my salary arrears. As this Court will realize, the loan reflected in Annexure "A" is really huge and once I continue to default it accumulates tremendous interest. As I default in this payment, the bank has created an overdraft facility for me and it continues to render me ever overdrawn on my account with Lesotho Bank.
>
> Thirdly, I have a life assurance police with the Old Mutual

> Insurance Company. This policy is (sic) danger of lapsing today as I am paying it with great difficulty due to applicant's clinging to these salaries.
>
> Fourthly, I have a lay-bye facility with Fred's (Pty) Limited in Bloemfontein and I am now in default in the sum of M13 300.00 (thirteen thousand, three hundred). This is because I am no longer earning my salary, due to applicant's clinging unto my salaries and other dues.
>
> Fifthly, I have a couple of other financial responsibilities which I am not meeting because applicant is clinging unto my salaries and dues. I respectfully submit that the granting of this application will be extremely prejudicial to me and will serve only to exercibate (sic) the situation.
>
> Sixthly, I have landed residential property at Ha Mabote. This property is within the jurisdiction of this Honourable Court.
>
> It is therefore nonsensical for a (sic) deponent to say that I would not be able to pay M50 000.00 (fifty thousand maloti). I respectfully submit and verily aver that the balance of hardship favours the refusal of this application."

Significantly these allegations have remained completely unchallenged in the Applicants' replying affidavit of Makalo Ntlaloe Wa Ntlaloe. On the authority of **Plascon-Evans Paints (Pty) Ltd. v Van Riebeeck Paints** (supra) therefore I accept the uncontroverted version of the Respondent on the balance of hardship.

I observe that the 1st Applicant is by its very nature a very powerful entity which would not ordinarily suffer as much financial hardship as the

Respondent in the event of this application being refused. After all the 1st Applicant is not without a right of recourse altogether in as much as it may recover the lost salary back from the Respondent by simply attaching her property by due process of the law.

On the other hand I consider that the Respondent would naturally be exposed to more financial hardship if the Applicants were to be excused any further from paying her salary pending appeal.

In all the circumstances of the case therefore I am satisfied that there is no merit in this application.

Accordingly the application is dismissed with costs.

M.M. Ramodibedi
JUDGE
17th December 1998

For Applicants : Adv Mohau

For Respondent : Adv Rakuoane