

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOPHATO OA MORIJA

APPLICANT

and

LESOTHO EVANGELICAL CHURCH

RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 20th April 2000

This is an application for leave to stay execution of the judgment delivered by me on the 27th January 2000 pending the outcome of the appeal in CIV/A/12/2000. The notice of appeal and its grounds of appeal were filed on the 9th March 2000 (the last day of the six-week period [Rule 3 of Court of Appeal Rules- LN.10 of 1980]. Rule 6 of the Court of Appeal Rules states:-

- “(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) The application referred to in sub-rule (2) herein shall be brought by notice of motion, supported by affidavit, delivered to the respondent and filed by the Registrar not less than seven days before the date set down for hearing the application.
- (4) The respondent may deliver opposing affidavits not less than two days prior to the hearing of the application.
- (5) On such and 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.

- (6) The judge hearing such application may make such order as to costs as he may think fit.
- (7) If the judge whose decision is appealed from is unable for any reason to hear such application any judge of the High Court may hear it.
- (8) The judge before whom the application is brought may refer the application to the full Court of Appeal for hearing.”

It should be noted that our Rule 6 changes the common law wherein noting of an appeal suspends the execution of judgment appealed against unless the court otherwise directs. Under the common law once an appeal has been noted the successful party must make a special application in favour of execution [**South Cape Corp. v Engineering Management Services** - 1977 (3) SA 534] and in such an application for leave to execute a judgment pending appeal, the onus rests upon the applicant who is successful party in the court **a quo**. The rationale behind this common law rule is to protect the intending appellant against irreparable harm in the event of his appeal succeeding.

In Lesotho, under Rule 6, the noting of an appeal does not per se suspend execution and it is for the judgment debtor to make an application for leave to stay the execution of judgment pending the outcome of his noted appeal; and consequently he bears the onus to convince the court to exercise its judicial discretion in his favour. Usually the affidavit must allege and show good reasons why the execution of judgment must be stayed pending the outcome of appeal - for example the applicant must show that the execution of judgment shall occasion him irreparable harm (**Isaac Jeffy Smith v Minister of Interior** - 1974 -75 LLR R366) and that he has reasonably good prospects of success, and it can also be shown that the balance of convenience favours preservation of **status quo** and that execution is likely to place the

applicant/appellant in an irreversibly worse position from which he enjoyed before judgment - **Alexander v Joki and Others** - 1948 (3) SA 269 where it was held that the court should be slow to grant an order which would cause a judgment under appeal to have immediate operative effect. According to **Van Winsen**, *The Civil Practice of the Supreme Court of South Africa* (1997) p.885, it is also necessary to show that the matter taken on appeal is of substantial importance to one or both parties (**Haine v Podlashuc & Nicholson** - 1933 A.D. 104; **African Guarantee & Indemnity vs Van Schalkwyck & Others** - 1956 (1) SA - 326) or of importance to a section of the public (Podbrey v Stern 1946 CPD. 962, **Abromowitz vs Jacquet & Another** - 1950 (3) SA 378. The court ultimately has to consider whether it would be possible restore the **status quo ante** if the appeal were upheld-**Kalahari Salt Works (Pty) Ltd & Others vs Bonne Fortune Beleggings Bpk** - 1973 (4) SA 471 at 476 - 477. *It must also be recognised that the subject matter of the judgment appealed against is one that does not sound in money and that it would be rather difficult to restore status quo ante Omnia* in the event of the appeal succeeding. (**Wood v Edwards & another** - 1966 (3) SA 443 at 446. Lastly, the court should consider whether the appeal is frivolous vexatious and not bona fide and intended merely to gain time **African Congregational Church & Dube** 1944 WLD 204 at 6 - and whether there is a reasonable possibility of the Court of Appeal taking a different view from that of this court. In this case, access to all justice also means access to the courts including the highest in the land.

Under Rule 6, the court has very wide general discretion to grant or refuse leave and if leave be granted to determine conditions upon which the stay is granted. This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments. In exercising its discretion the court should determine what is just and equitable in the circumstances of each particular case bearing in mind that the execution of the order of the trial court may cause hardship or inconvenience to the intending appellant and that if the appeal succeeds then such hardship or inconvenience will have been suffered unnecessarily.

In this application, the applicant seeks to suspend certain orders made by the court on the 27th January 2000 the effect of which was to cause the Synod of the respondent to re-assemble and reconsider MM4 (the new constitution of Mophato made in November 1997) under a properly constituted Synod. Mr Mohau motivates his application by submitting that he has noted an appeal against the judgment of this court and that unless the execution of that judgment is stayed, the applicant - Mophato oa Morija - will suffer irreparable harm if its appeal is successful; he submits also that the appeal has arguable prospects of success Isaac Jefty Smith vs Minister of Interior No.2 - 1974-75 LLR 366 where Cotran ACJ stated:-

“Noting an appeal from a High Court judgment does not and ordinarily would not and should not operate as a stay.....

The highest court in the land may take, I am not saying it will, a different view of the matter than the court a quo.....

The principle is that no court can presume automatically that its judgment is correct and refuse a stay, and should do so only when it is clear that the appeal has not merit, or is frivolous or vexatious or its sole purpose is postponement of the evil day.”

Mr Mohau contents that the applicant would suffer irreversible prejudice if the controversial constitution is put into place by the Synod after, as the court directed, requisite quorum is achieved. Whilst there is a real likelihood that the respondent’s constitutional proposals will carry the day, I cannot say that the applicant’s present appeal is without merit, frivolous or vexatious. He submits that it is a lesser evil to maintain the **status quo ante** till the appeal

is disposed of because this situation had obtained for the last 30 years, and that maintenance of **status quo** as it has always been would not disrupt the affairs of the respondent or cause the Church irreparable harm. Balances of convenience and of hardship favour maintenance of the status quo, he contends.

Ms Thabane for the respondent vigorously maintains that the applicant's appeal is without merit and is intended merely to delay execution of judgment. She further submits that the supporting affidavit of Elisha Nkoka is based on hearsay regarding the threatened dismissals of the Applicant's personnel by the Synod after the disputed constitution MM4 is put in place by the Synod. She also goes on to submit that correspondence entered into between the applicant's attorneys and those of the respondent after the judgment was delivered on the 27th January 2000 was "**without prejudice**" and hence inadmissible in litigation - **Naidoo vs Marine and Trade Insurance Co, Ltd** - 1978 (3) SA 666. Which decided that correspondence conducted "**without prejudice**" in the **bona fide** efforts of both parties to an action to settle the plaintiff's claim is, in accordance with the general "**without prejudice**" rule, once a party objects to its being adduced in evidence, wholly inadmissible. (Law of South Africa - Vol.9, p.290). Such correspondence is indeed inadmissible in our case in so far as it relates to the issue whether the applicant will suffer irreparable harm. I should at once say that I have not taken into any consideration these correspondence at all in this inquiry. They are unnecessary and seem to cloud the issue with unfounded allegations.

Ms Thabane further contends that any other potential prejudice is also totally unfounded and based on sheer speculation. The issue of applicant's autonomy was a crucial one in the proceedings before court in regard to which the court heard lengthy **viva voce** evidence and had to come to a decision through inferential reasoning and concluded that the Synod had the ultimate authority to amend the constitution of the applicant. Another court can interpret

these constitutional documents that were presented differently; all I can say the matter is arguable.


On an application for stay of execution, Rule 6 requires the applicant, the onus being upon him, to file an affidavit establishing factors which should, on a balance of probabilities, convince the court to exercise the judicial discretion in its favour and stay execution of judgment pending appeal. (**South Cape Corp vs Engineering Managing Services** - supra). In exercise of its judicial discretion, the court cannot disregard the evidence and arguments placed before it during the original court proceedings. Indeed, in exercise of its wide discretion, the court is entitled to take into consideration all relevant matters raised during those proceedings.

The issue in the present proceedings does not sound in money but is an intricate issue of interpretation of documents or constitutions. Considerations of equity and fairness may have relevance in deciding whether or not to grant the application. (**Ruby's Cash Store v Estate Marks and Another** - 1961 (2) SA 118). It became quite clear during the proceedings that the tenuous constitutional relationship between the respondent, Lesotho Evangelical Church and the Applicant Mophato oa Morija is a matter causing great concern in the church. The importance of this issue in the church is therefore another factor to be taken into consideration.

Access to justice means that a party aggrieved by a decision of a court of law should have access to a higher court. If the applicant had the legal right to appeal against my decision, it would, in my view be an improper and injudicious exercise of my discretion to refuse the application - thus also rendering his appeal nugatory - merely on the ground that the applicant's appeal is without merit.

In exercise of my discretion under Rule 6 of the Court of Appeal Rules, I grant the application . The applicant is directed to undertake in writing to pay the respondent's costs on appeal in the event of the appeal not succeeding.

-The current administration of the Mophato to continue to be administered in terms of the Constitution in the Greenbook.



S.N. PEETE

JUDGE

For Applicant: Mr Mohau

For Respondent: Ms Thabane