CIV/T/392/96

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOKRAFS (PTY) LTD — **1st Applicant/ 1st Defendant**
PHETHISI SENEKANE — **2nd Applicant / 2nd Defendant**

and

LETSOSA HANYANE — **Respondent/Plaintiff**

For Applicants/Defendant : **Mr. S. Malebanye**

For Respondent/Plaintiff : **Mr. M. Ntlhoki**

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 4th day of March 2002

The main action between the parties was filed on the 5th September 1996. In that claim one Sheshe Mohloboli was one of the defendants together with the Applicants herein. The claim was for a total sum of M23,800.00. It was alleged that the Defendants had been, as fully described in the declaration, responsible for destruction of Plaintiff's business premises, stock-in-trade and had caused loss of business.

A successful application for rescission of default judgment had resulted in costs against the Plaintiff/Respondent. The costs were taxed on two occasions and this resulted further in issuance of a writ of execution which features in the present application. Significantly, these taxed costs now amount to more than half of the claim itself.

The present application, which was filed on the 3rd August, 2000 is "for an order as follows:

(1) Interdicting Respondent from proceeding with his main action in CIV/T/392/96 pending payment of the amount of M12,534.41 (Twelve Thousand Five Hundred and Forty one Lisente) being the total of Applicants' taxed costs in the application for rescission.

(2) Directing Respondent to pay Applicants' taxed costs pursuant to the writ of taxation dated the 3rd August 1999.

(3) Directing Respondents to pay costs in the even of opposition.

(4) Granting Applicants any further and or alternative relief."

It was suggested that if the amount shown in the writ was payed then there would be no need for prayer (1).

The application was opposed through a twelve paragraphs answering affidavit of the Respondent. The result was a replying affidavit deponed to by Applicants' attorney Mr. Seymour Clyde Harley.

I became satisfied that the Deputy Sheriff Mohoang attached the following property "of the Respondent": Toyota Hilux bearing registration numbers J 534, Roadside Garage and general dealer's shop. This was proved by the said Deputy Sheriff's annexed return of service. To this the Respondent's response was that the attachment was irregular inasmuch as the writ of execution was especially for movable property, yet it is alleged that that Deputy Sheriff Mohoang decided on his own to include immovable property. No reliance could be placed on that patently irregular attachment, as Respondents submitted. Furthermore as Respondent contended property allegedly attached did not belong to him but to his wife.

Whether the Respondent refused to show other movable property other than the vehicle or whether or not the Deputy Sheriff wrongly attached immovable property or whether or not the Deputy Sheriff was obstructed later from removing remaining goods or further executing did not overly bother me. I attached importance to the Respondent's statement that he had no property at all and all property belonged to his wife. What this

meant was that he was unable to satisfy a judgment of this Court on costs.

While the Respondent did not demonstrate how the property was owned by his wife except that their marriage was out of community of property the Applicant did not seek to contradict this. He was prepared to take things at their face value. That is to say if the property was not the Respondent's and if the wife's property cannot satisfy the claim for costs then there is no likelihood of Applicants' costs be recovered even if it succeeded in its defence. Indeed by his own admission the Respondent had actually prevented further property being attached and/or had refused to point out any.

That the Respondent would not be able to pay even if he was willing, he attributed to the fact that his business had collapsed after destruction of his business premises and stock-in-trade which is the subject of the claim in CIV/T/392/96 as intimated previously.

The same attitude (of his inability to pay) was exhibited by the Respondent when a debate in Court took place following on Mr. Malebanye's suggestion that the Respondent may perhaps offer payment of security only. It was that as Mr. Malebanye proposed, instead of granting prayers 1 and 2 the Respondent could accept to pay security by way of a bond or deposit into his own attorney's trust account for payment of the taxed costs in the amount of the writ. Respondent's response was straightforward. It was that if he could not pay he could not cause issuing out of a security bond or deposit into his attorney's trust account. Hence the Applicant became fortified indication in the point

he had made. It was that there was the initial difficulty of recovering costs and that consequently there was hopelessness in pursuing further execution in view of the Respondent's attitude.

In addition to above was the fact that, as mentioned by the Deputy Sheriff who was accompanied by one Bolibe, the Respondent had had difficulty in pointing out the property to be executed for the reason that, as he asserted, he was married out of community of property to his wife whose property it was. It was all the property that the messengers sought to attach.

The other issue that arose from the Plaintiff's response to the inability of the Deputy Sheriff to remove property was that while dealing with movable property the Deputy Sheriff was not entitled to execute on immovable property without a *nulla bona* return. The matter was not addressed before this Court but all in all I got the impression that the only explanation why the movables were not attached was that of obstruction by First Respondent based on the reason given above and the additional one, that the property had belonged to his wife.

Mr. Malebanye proposed that while the matter of stay remains in the discretion of the Court the main consideration should be that of prospects of success of the defendant's defence. The other side of the coin was whether the Court takes a *prima facie* view that the Plaintiff claims will succeed or whether it will not. This meant that the principles are

similar to those which one finds when investigating prospects of success in applications for stay of execution pending rescission. And in an investigation into whether one has a *bona fide* defence where entry of summary judgment is being opposed by a defendant.

It meant further as Mr. Malebanye wanted to persuade the Court, that if the defence was *prima facie* likely to succeed there was more of a risk that the Applicant's costs would not be paid. That prejudice would be even more when coupled with the present attitude of the Plaintiff not to pay whether it was through inability or unwillingness. What was more, there would be more costs to contend with on the part of the Plaintiff. In the circumstance as submitted the present action had to be stayed on condition that the Plaintiff was to pay the costs incurred so far: Mr. Malebanye submitted that there has been, as already shown, that prejudice and the not so good case of the Plaintiff as would be shown in Defendants' plea as well. This was therefore a good basis for the exercise of the Court's discretion in favour of the Applicant.

Mr. Ntlhoki countered by submitting that it would be an erroneous approach for the purpose of determining whether to stay proceedings or not, to investigate the merits in the way Mr. Malebanye submitted as shown hereinbefore. Counsel said the ratio for a stay of proceedings for non-payment of costs was abuse of process of the Court and vexatiousness. In one way or the other and in different forms this as he contended seem to be regarded as central. I suspected this applied mostly in cases where more than one actions were involved. This (vexatiousness) seems to be the thread that goes through all

the complaints where more than one action was involved.

As Counsel submitted further in dealing with stay and after considering the above indices the Court retained a wide discretion in the matter. Factors that should influence the Court to decide were not those concerned with proof of merits. But, they were to be found in the history of the matter or conduct of the parties, in dealing with procedures along the line until such time as one party seeks for stay. In the instant matter the Court was concerned with ruling on rescission until award of costs and writ.

Mr. Ntlhoki went on to spell out the requisites as being as follows: Firstly, that there must be substantial identity of cause of action and parties. This was necessary I suppose where the complaint was that many matters were being vexatiously filed by a plaintiff against a defendant. And where at a given moment there was more than one action or matter subsisting and where one of the cases or all were being sought be stayed pending payment of costs. Secondly, there must have been a judgment for costs already in existence in favour of the party seeking a stay pending payment of those costs.

At the end of it all the ordering of such stay was a matter of equity or was to be decided on equitable principles upon which the Court would exercise its discretion. Towards this such a discretion should not be exercised in such a way as to bar a litigant from finding his remedy for the infringement of his rights unless he has done something in or towards incurring the costs or in seeking to escape from paying them which invites

the Court's disapproval. See **Argus Printing and Publishing Co. Ltd v Rutland** 1953(3) SA 446.

Certain criteria, if not requisites, were to be established in order to investigate the propriety of ordering stay of proceedings; First whether the party who has been ordered to pay costs incurred them by reason of some abuse of process of the Court. Therefore it was to be considered whether that party has either deliberately or through carelessness occasioned unnecessary costs. And finally whether the party that has contumaciously refused to pay the costs awarded against him or was vexatious in withholding payment. See **Calusa v Minister of Justice** 1969(1) SA 251.

Mr. Ntlhoki reinforced his stance by saying that the conduct of the Plaintiff was paramount as decided in **Kalil v Minister of Interior** 1962(4) SA 755 at 758. That there were only few instances when the right of staying principles had been exercised. This was where the costs of former suit, had not been paid. Where the same relief was claimed there had not been payment. Furthermore where a plaintiff had harassed a defendant with repeated and unsuccessful actions for the same relief. And finally where it had been shown that the action was frivolous or vexatious.

Counsel advocated for an approach as follows: That there was not hard and fast rule as to when previous costs should be paid. If non-payment of the costs was vexatious, oppressive or *mala fide* the Court will not allow the litigant to proceed before

rule as to when previous costs should be paid. If non-payment of the costs was vexatious, oppressive or *mala fide* the Court will not allow the litigant to proceed before paying the earlier costs. If there was mere inability to pay the Court may grant its indulgence to the Applicant. There must be wilful refusal to pay the costs if the Court is to order for stay of proceedings.

This Court did not accept that it would be required to investigate the merits (proper) of the substance matter even if it were to form a *prima facie* view. It was more practical if the approach focussed on the conduct of the parties as after the ruling on rescission and award of costs. My concern would therefore revolve solely on the prospects of whether the costs incurred by the Applicant would be paid or not. In order to properly exercise my discretion I should not go further than that.

In my opinion it has hence been demonstrated that the Respondent would both be unable and/or was unwilling to pay the costs of the Applicant. As to which is most accurate I need not decide. What is important is that there is presently a greater risk that Applicant's costs (by Respondent's own demonstration) will not be paid than not. This is most unfair and unconscionable when the element of unwillingness on that part of the Respondent cannot be ruled out. It is not conducive to the justice in litigation but militates against that. The central principle is that a party who has incurred costs be indemnified as much as possible. This is unlikely in this case judging by the attitude of the Respondent.

Despite the attitude of the Respondent, I find that in my discretion, a middle course still has to be steered as I will provide in the alternative order that I will make presently. It is that which affords the Respondent/Plaintiff an opportunity to prosecute his claim and thereby does not close him out. The order that I make in that direction is as follows:

(a) Respondent is being directed to pay Applicant's taxed costs pursuant to the writ of taxation dated 3rd August 1999 within 30 days henceforth failing which he shall be interdicted from prosecuting his claim.

OR

(b) An interdiction is hereby being issued against the Respondent/Plaintiff proceeding in his main action against the Applicant/Defendant on the following condition. That the Respondent/Plaintiff shall put up security by means of a bond or a deposit of fees in a trust account equal to the claimed amount equal to the taxed costs within 30 days failing which he shall be permanently interdicted from proceeding with his action.

(c) Respondent is directed to pay costs of this application.

T. Monapathi
Judge
4th March 2002