CIV/T/589/95

IN THE HIGH COURT OF LESOTHO

In the matter between

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY Plaintiff

and

MASUPHA EPHRAIM SOLE Defendant

RULING ON APPLICATION TO POSTPONE MATTER AND RESERVE CROSS EXAMINATION.

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

On the 25th day of March, 1997.

Mr. Hoffman S.C. for the Defendant has, during the course of his cross examination of PW1 Dereck Andrew Davey in this matter made an application from the bar seeking for an order standing down the witness and postponing the trial in the matter until after the Court of Appeal has disposed of an appeal which the Defendant has filed against this Court's ruling dismissing his application for discovery of documents and postponement of the matter.

This application is opposed by Mr. Penzhorn S.C. for the Plaintiff on four main reasons namely:

(1) That this application ought to have been a substantive one made on notice to the other side.

(2) That the rulings appealed against were interlocutory in nature and therefore not appealable without leave of the Court of Appeal.

(3) That the order sought is prejudicial to the plaintiff.

(4) That in any event there is no automatic stay of execution in the matter.

Before dealing with the merits of this application it is necessary to refer briefly to the aforesaid rulings of this court which were delivered on 2nd December 1996 and 3rd February 1997 respectively. In the former the Defendant applied for postponement of the trial sine die on the 4th November 1996.

In dismissing the application this court stated the following:

"It was therefore clear to me that the application for postponement was made without any reference to discovery of documents or in terms of Rule 34 (6) of the High Court Rules. Indeed Mr. Fischer conceded the application in terms of the said Rule had not even been filed when the application for postponement was made. I am therefore not satisfied

with the defendant's bona fides in this application. I gained the impression that the defendant's strategy was to move the application for postponement and if that failed he would then fall back to the question of discovery of documents and move another application for postponement based on such discovery. All this in my view amounts to delaying tactics."

Merely four (4) days later and notwithstanding the above mentioned remarks by this Court and the resultant dismissal of the application Mr. Hoffman for the Defendant moved yet another application for postponement of the matter on the 8th November 1996 citing late discovery of documents as the reason. This application was "reluctantly" granted with an appropriate order as to costs. The main reason for the granting of the postponement was the non preparedness of Defendant's Counsel Mr. Hoffman coupled with the unavailability of his Junior Mr. Fischer.

Regarding the other ruling of this Court delivered on the 3rd February 1997 it is again of paramount importance to bear in mind and repeat what this court stated therein namely:

"In this regard I have considered the timing of this application as amounting to delaying tactics. This is because as earlier stated the Plaintiff's discovery affidavit was filed as long ago as the 30th May 1996 yet the defendant sat back for an inordinate length of time and only filed Rule 34 (6) Notice on 23rd September 1996 with the actual date of hearing just around the corner.

Then the actual application itself was moved on the actual date of trial itself namely the 4th November 1996. I have since had to deal with a series of

applications by the defendant in an attempt to postpone the matter. Indeed such is the defendant's determination to put every spanner in the progress of this trial that it has now been intimated to the court on his behalf that plaintiff's resolution authorising this claim before court will now be challenged at this stage of the proceedings.

In dealing with a similar situation Browde JA in Pitso Phakisi Makhoza (CIV) No. 34 of 1995 had occasion to remark as follows at page 10 of the judgment:-

> 'As respondent made discovery on 17 July 1995 i.e. a month before the trial was to start the complaint raised at the trial that the affidavit of discovery was defective for the reason set out above can only be regarded as one of many examples of the appellant's efforts to take every technical points in order to prolong the matter.'
>
> I respectfully find that these remarks are apposite to the case before me."

It is against the above mentioned background that the application for postponement of this case is once more made before me. The defendant has himself still not purged his contempt to furnish full discovery of documents sought by the Plaintiff and as ordered by the Court.. It is nevertheless sought to persuade this court on his behalf that until the Court of Appeal has determined the appeal as aforesaid this Court cannot proceed with the trial. I should mention that Mr. Hoffman was unable to refer me to any authority in that regard nor could my own researches reveal any.

On the contrary Mr. Penzhorn submits, as earlier stated, that the rulings

appealed against were interlocutory in nature and therefore not appealable. He refers to Section 16 (1) of the Court of Appeal Act 1978 which provides as follows:-

"16. (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."

In the leading case of Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd. 1948 (1) S.A. 839 (A) at 870 it was held per Schreiner JA that while it was desirable that all final judgments should be appealable, it was equally desirable to restrain the bringing of appeals from orders of a preparatory or procedural character arising in the course of a legal battle.

The Learned Judge then stated the test whether an order was a "simple" interlocutory one or not in the following words:-

"A preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to dispose of any issue or any portion of the issue in the main action or suit or ..... unless it irreparably anticipates or precludes some of the relief which would or might be given at the hearing."

I respectfully agree with these principles.

Deciding in the same vein Corbett JA in South Cape Corporation (Pty) Ltd. v Engineering Management Services (Pty) Ltd. 1977 (3) S.A. 534 at 550 held, inter alia, that the question is not whether any matter has been fully determined, or whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal can put right, but whether the decision bears upon, and in that way affects the decision in the main suit adding "thus all orders which are merely procedural in nature are simple interlocutory orders, and as such are not appealable."

I respectfully discern the need to adopt the Learned Judge's view that statutes relating to the appealability of judgments or orders which use the word 'interlocutory' such as our Section 16 (1) of the Court of Appeal Act are taken to refer to simple interlocutory orders which are therefore not appealable.

I should state that the main reason why appeals on interlocutory orders are statutorily prohibited is the discouragement of piecemeal appeals. After all the litigant against whom an interlocutory order is made is not entirely without a remedy in as much as such order may be attacked in an appeal against the judgment in the whole case.

Mr. Penzhorn has referred me to a very useful case. It is Zweni v Minister of Law and Order 1993 (1) S.A. 523 A.D. in which Harms AJA after reviewing the authorities on the subject of interlocutory orders or rulings stated the following at page 536:-

> "In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally

> speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

I respectfully agree. Moreover I respectfully share the Learned Judge's view expressed on page 535 of the judgment that discovery orders are examples of simple interlocutory orders and thus not appealable. This is so because the court of first instance is entitled to alter them at any time before judgment.

Accordingly I have come to the conclusion that the ruling that this court made on the 3rd February 1997 dismissing Defendant's application for discovery of documents is interlocutory and thus not appealable without leave of the Court of Appeal.

Taking into account the whole conduct of the defendant and his legal team as evidenced by the string of frivolous applications as earlier stated I remain convinced that the so called appeal is abuse of court process and that this application is nothing but delaying tactics aimed at frustrating the progress of this trial. I have no doubt in my mind that the so called appeal was filed solely for the purpose of forcing a postponement. See Hudson v Hudson and Another 1927 AD 259 AT 268.

Moreover I consider that the order sought in this application would seriously prejudice the plaintiff who would have to suffer a considerable delay in the determination of its case.

In this regard I should mention that Mr. Hoffman could not even guarantee as to when the Court of Appeal would dispose of the so called appeal.

As earlier stated I have also taken into account the undesirability of appeals being made on a piecemeal basis. I consider that this too amounts to prejudice to the plaintiff as it would inevitably lead to endless delays and more costs while the matter is shuttling between this Court and the Court of Appeal. Conversely, I consider that time and costs will be greatly saved if the trial proceeds to its conclusion and the defendant deals with the complaint raised in the so called appeal thereafter. After all there may even be no need for such appeal if the judgment is in favour of the defendant at the end of the trial.

Mr. Hoffman threatens that he is not going to continue with the cross examination unless his application is acceded to. This Court disapproves of this tactic of forcing the Court's arm and I have taken this into account in refusing this application as a mark of the Court's displeasure.

In dealing with a similar situation in Senior University Staff Union v National University of Lesotho CIV/APN/422/96 I had occasion to state the following remarks which I discern the need to repeat here "what is more it must be recorded that this court takes a dim view of the above mentioned threats which amount to intimidation of the court by the Applicant. The Applicant was ill advised to employ this type of arm twisting tactic which can only bring our justice system into disrepute if it is tolerated. Consequently this court disapproves of this type of attitude in the strongest possible terms."

Nor has it escaped the attention of this Court that despite the fact that the

appeal was filed as far back as the 18th February 1997 the defendant and his legal team have inexplicably failed to make timeous application on notice supported by relevant affidavits as to the facts relied upon. As matters stand I have not even had sight of the Notice and Grounds of Appeal in the matter.

It must always be borne in mind that applications of this nature do not affect the convenience of the applicant only. The convenience of the respondent and that of the Court must also be taken into account in the matter. Indeed the granting of such applications as I am seized with here can never be automatic. It is for that reason that some explanation must as a general rule be placed before the court on affidavit in order for the court to arrive at a just decision. Each case must however be decided on its own merits and particular circumstances.

I have also taken into account the fact that there is no automatic stay of execution of my aforesaid rulings in the matter which must therefore stand. In any event I consider that the defendant has absolutely no prospects of success on appeal and I suspect that the defendant's legal team and the defendant himself know it too. In my view such appeal is utter abuse of court process made solely for the purposes of delay. Similarly this application must be viewed in that light.

In all the circumstances of the case therefore I have come to the conclusion that this application ought not to succeed and it is accordingly dismissed with costs including costs of two (2) Counsel.

M.M. Ramodibedi

JUDGE

25th day of March, 1997.

For Applicant/Defendant:	Mr. Hoffman S.C. Assisted by Mr. Fischer
For Respondent/Plaintiff:	Mr. Penzhorn S.C. Assisted by Mr. Woker.