

CIV/APN/117/97

**IN THE HIGH COURT OF LESOTHO**

In the matter between

**LESOTHO FLOUR MILLS  
MINISTRY OF AGRICULTURE, CO-OPERATIVES  
MARKETING AND YOUTH AFFAIRS  
ATTORNEY-GENERAL****1ST APPLICANT****2ND APPLICANT****3RD APPLICANT**

and

**SEHOHOANA JOHANNES KAO****RESPONDENT****JUDGMENT**

Delivered by the Honourable Mr. Justice M.M. Ramodibedi  
On the 12th day of August 1997

This is an application for stay of execution pending appeal to the Court of Appeal. The application is opposed on the ground that there are no prospects of success on appeal.

This application was argued before me on the 25th July 1997 and after having heard submissions from both sides I dismissed the application with costs and intimated that reasons would be filed later. These are the reasons:

It will be convenient if I start this judgment by referring to the general principles involved in an application for stay of execution pending appeal and in that regard I am bound to say at the outset that the Court has a discretion whether or not to grant such application depending on the circumstances of the case. That discretion is however not an arbitrary one but is one that must be reached fairly upon a consideration of all relevant factors. Thus it must be exercised judicially and not capriciously.

See Western Bank Ltd. V Laurie Fossati Construction (Pty) Ltd 1974 (4) S.A. 607 at 610.

I observe that Section 6 (1) of the Court of Appeal Rules 1980 indeed confers the Court's discretion in the following terms:

- “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.
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- (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
- © 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.”

The main considerations in an application for stay of execution 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 Corp v Engineering Management Services 1977 (3) A.D. at 545.

I turn then to a consideration of the facts of the matter before me with a view to determining whether there are prospects of success on appeal. I do not however propose to add to the length of this judgment by dealing in detail with the facts as

these have been fully dealt with in my judgment in the main application.

Suffice it to say that on the 9th December 1996 the Principal Secretary in 2nd Respondent's Ministry wrote a letter "SJK5" to the Respondent who is the General Manager of 1st Applicant in the following words:-

"Charges of fraud and conspiracy to commit fraud have been preferred against you in September, 1996; case No. CR/793/96 refers.

2. It is my intention to institute charges of Breach of Discipline contrary to Sections 18 (1) and 14 (1), (2) of the Public Service Act against you.

3. In terms of Section 20 (1) of the Public Service Act 1995, I propose to suspend you from duty. Sub-Section (2) provides that you shall not be entitled to payment of any salary or any benefits during the period of suspension.

4. You are entitled to make representations to me regarding the above proposal. Such representation should be in writing, and should reach me not later than 13th December, 1996.

Yours sincerely

Moeketsi Masilo

**PRINCIPAL SECRETARY FOR AGRICULTURE**

The Respondent specifically challenged the authority of the Principal Secretary to write the letter in question and duly pointed out to him that the Respondent's employment with 1st Applicant was not governed by the Public Service Act 1995. Indeed it has been conceded on behalf of the Applicants that the said Act does not apply to the Respondent. Yet this notwithstanding, the Principal Secretary in question proceeded to "stop" payment of the Respondent's salary in terms of a letter Annexure "MM2". No Section was quoted authorising the Principal Secretary to take this drastic step. As no other notice or letter was addressed to the Respondent other than "SJK5" it is reasonable to assume, however, that the Principal Secretary purportedly acted in terms of Section 20 (2) of the Public Service Act 1995 as he had threatened to do in the said letter "SKJ5 itself." That Section reads:-

- "20 (1) The head of department may at any time before or after an officer has been charged under this Part, suspend him from duty.
- (2) An officer who has been suspended from duty in terms of subsection (1) shall not be entitled to payment of any salary or benefits for the period of his suspension but the Commission may, in its discretion, order payment to that officer of the whole or a portion of his salary or benefits."

Now following the authority of *Tseuoa Tseuoa and 3 others v the General Manager Lesotho Flour Mills and 4 others C of A (Civ) No. 23 of 1988* I am satisfied that the Respondent is not the holder of an office of emolument and that consequently the Public Service Act 1995 has no application on him. The

concession by the Applicants in that regard was accordingly properly made.

It was incumbent upon the Applicants therefore to show that the Principal Secretary in question did have alternative power and/or authority to “stop” the Respondent’s salary and that he did in fact act on such alternative power and/or authority. This they failed dismally to prove. On the contrary the Respondent’s allegation in paragraph 10 (a) of his founding affidavit to the main application to the effect that the Principal Secretary in question “could not act alone but had to act on the authority of the Board which must have sat to take decisions” has remained uncontroverted. As stated in my judgment in the main application I have accordingly accepted the correctness of the unchallenged version of the Respondent in this regard.

In sum, therefore, I have come to the conclusion that there are no prospects of success on appeal. In my view that is sufficient to dispose of the case against the Applicants but I will consider how the matter stands on the unlikely assumption that I am wrong in the conclusion that I have so far reached. This in turn leads me to the question of the balance of hardship or convenience, as the case may be.

I shall bear the following scenario in mind namely that if this application is dismissed the Applicants shall be obliged to pay forthwith Respondent’s salary right up to the hearing of the appeal. On the other hand if the application is upheld the Applicants will be relieved immediately from making such payment.

I observe at once that the Applicants are very powerful entities who would ordinarily not suffer as much financial hardship as the Respondent in the matter. After all they are not without a right of recourse altogether in as much as they can


recover the lost salary back from the Respondent by holding on to his future salary or simply attaching his property by due process of the law. In this regard I attach due weight to the Respondent's unchallenged averment in paragraph 5 (d) (iii) of his answering affidavit to the following effect:

“In the papers before Court now deponent has not shown that I am a man of straw and that the status qua (sic) ante would not be restored if the appeal succeeded. I state that I am not a pauper. I own movable and immovable property of great value and it would thus be possible for the Appellants to recover what may be due to them if the appeal succeeds.”

On the other hand I consider that the Respondent would be exposed to more financial hardship if the Applicants were to be excused any further from paying his salary pending appeal . For that matter there is no assurance as to when the said appeal will be heard and finalised. I have also considered that it would be wrong to allow the applicants to benefit from their own dilatoriness in failing to prosecute Respondent's disciplinary charge or criminal case if any.

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**

12th August 1997

**For Applicants : Mr. Makhethe**  
**For Respondent : Mr. Mafisa**