IN THE HIGH COURT OF LESOTHO

CIV/APN/533/06

In the matter between:

TIP TOP FAST FOODS **APPLICANT/APPELLANT**

And

SAFEGUARD SECURITY CASH MANAGEMENT SERVICES (PTY) LTD **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice T. Nomngcongo
On the 2nd March 2010

This is an application for leave to appeal. The applicant had on the 15th December 2006 moved an application for stay of execution of the judgment of the Maseru Magistrate's court and sought condonation for the late noting of the appeal. Condonation was not opposed and by the 19th November of the following year the appeal was ready to be heard and Mr Molete for respondent was prepared to proceed. However Mr Potsane for the appellant indicated that he could not proceed with the appeal as he had no record of proceedings from the magistrate court. This was surprising because as the appellant he had the duty to prepare the record. Mr Molete had the record and Mr Potsane wanted to have it from him.

This matter was then postponed to the 28th November 2007 for hearing . On that day it was crowded out. It finally came before me on the 16th November 2008. On that day Mr Molete appeared alone and argued the matter. He had his heads of argument and none had been filed by the appellant. It cannot be correct therefore that I did not hear the appeal which was in fact before me. The applicant/appellant now argues that the court should not have dismissed the appeal but rather should have struck it off the roll. If an appellant chooses not to prosecute his appeal he only has himself to blame if the respondent argues and the appeal and it is dismissed.

Now there is something else that appellant misses here that in order to succeed in his application he must:

> "establish …that the appeal involves a matter of substantial importance to one or both of the parties concerned and that the appeal has a reasonable prospect of success. It is therefore necessary that a clear statement, should appear in the petition of the questions involved in the dispute. If the case originated in magistrate's court, the magistrate's reasons or a summary of them should be annexed". *See Herbstein A Van Winsen 4th Ed. p.864.*

The latter is in fact required by Rule 52 4 (a) which provides

> "It shall be the duty of the appellant or of the party who has applied for a date of hearing to prepare and lodge with the registrar from typed or photocopied copies of the record of the case (other than the original) not less then fourteen days before the date of hearing."

Now contrary to this rule Mr Potsane is on record as saying that he could not proceed on the date of hearing obtained by the appellant because he did not have a copy of the proceedings of the magistrate's court. The reason for this requirement is obvious. The court has to assess the prospects of success from the record. It cannot do so on the mere say so of the appellant. It appears then that the appellant did not only fail to appear to prosecute his appeal but also that he had failed to comply with the rules and indeed even the basic requirement for the granting of the relief he now seeks.

The application for leave to appeal is dismissed with costs.

Nomngcongo
Judge

2/03/2010