

# **IN THE HIGH COURT OF LESOTHO**

CIV/APN/395/2011

In the matter between:

**MOEKETSI TSATSANYANE  
TSEPANG PHANGOA  
LIMEMA PHOHLO  
THABO NTABE  
LEKORANA MATETE  
LESOTHO BUS AND TAXI OWNERS  
ASSOCIATION**

**1<sup>ST</sup> APPLICANT  
2<sup>ND</sup> APPLICANT  
3<sup>RD</sup> APPLICANT  
4<sup>TH</sup> APPLICANT  
5<sup>TH</sup> APPLICANT  
6<sup>TH</sup> APPLICANT**

**AND**

**LESOTHO PUBLIC MOTOR  
TRANSPORT COMPANY LTD  
KARABO MABOTE  
PHAFOLI PHAFOLI**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT**

## **RULING ON STAY OF PROCEEDINGS FOR UNPAID COSTS**

Delivered by the Honourable Acting Judge, Justice L.A. Molete  
on the 06 October, 2011.

### **SUMMARY**

*Civil Procedure – stay of proceedings pending payment of costs in previous application – order in the discretion of the Court – vexatiousness an aspect to be considered, though not invariable – Court considering relevant factors and makes order of stay of proceedings pending payment.*

1. The Applicants seek an order to stay of proceedings in this case until payment has been made of costs awarded in the previous matter of CIV/APN/323/2011 between the same parties.
2. The matter is opposed by the Respondents. They argued that they are entitled to proceed with the new application despite non-payment of the costs which they admitted. The Respondents argued that since the previous matter had been withdrawn and the second Application was not vexatious, the Court ought to exercise its discretion in their favour.
3. A brief outline of the relevant facts is necessary to understand the position of the parties and the arguments advanced.
4. The Applicants in the previous proceedings, (Respondents herein) are a company and two of its alleged directors. They brought an Application before Court on an urgent basis, for an order that Respondents be restrained and interdicted from acting or purporting to act as directors of the Applicant company and that they should return the books, equipment and funds of the company.
5. In addition the Applicants sought to nullify the appointment of certain directors cited as respondents as irregular and unlawful. They wanted the court to confirm themselves as directors of the company and to authorize them to take control of the assets and administration of the company's business.
6. The Respondents opposed the matter and filed opposing affidavits on the issues raised in the applicants' founding Affidavit. They are not relevant for the purposes of this Ruling; except to single out one Affidavit filed on behalf of the Respondents to oppose the order sought.

7. The Affidavit was deposed to by Attorney A.T. Monyako who was on record as the attorney for the Applicants. He stated categorically and under oath that he had never signed the notice of motion in the Application and had not signed the papers before Court on behalf of Applicants. He went on to say that he had not taken any instructions in the matter and therefore did not brief Advocate Maqakachane. The Attorney stated that his signature had been forged in the papers before Court and he wanted his name to be expunged from the records.
8. On the date of hearing being the 4<sup>th</sup> August 2011, Mr Maqakachane for Applicant wanted to proceed with the matter notwithstanding the serious allegations on record by his attorney. He did not appreciate the seriousness of the irregularity in the proceedings and the effect of the sworn statement by his attorney.
9. The Court, he argued could overlook the irregularity and proceed; alternatively he submitted Mr Monyako be called to give viva voce evidence on this aspect. I could not agree and the inevitable result had to be that the matter was not properly before Court and would have to be dismissed.
10. In the end however the Applicant chose to withdraw the matter and to tender costs. This was made into an order of court and in that way the CIV/APN/323/2011 came to an end.
11. On the 8<sup>th</sup> August 2011, Applicants filed a new Application under CIV/APN/395/2011 on an urgent basis and *ex parte*, once more seeking the same relief as in the previous Application. The Application was opposed once again and this time Respondents went on to further apply for a stay of proceedings until their costs in the previous matter have been paid. The costs were subsequently taxed and allowed in the amount of M21,772-50.

12. The matter for stay of proceedings was once again opposed, and relying on the authority of Stoner v Griffin Engineering Co. 1927 AD 552; the Respondents (applicants in the main) argued that the Court should not stay proceedings in the matter, mainly because the Application had not been decided on the merits. They argued that the Court should be slow to exclude Respondents from litigating genuine and reasonable cause against Applicants, moreso, counsel submitted because there was no element of vexatiousness.

Strydom v Griffin Engineering Co. 1927 A.D was also relied on.

13. It was common cause between the parties however that;

- (a) the principle to stay of proceedings pending payment of costs in previous proceedings is applicable in our law.
- (b) the Parties and the Relief sought in CIV/APN/323/2011 and CIV/APN/395/2011 was identical and the papers filed exactly the same.
- (c) the question of whether or not to stay the proceedings is in the discretion of the Court which is expected to look into all the surrounding circumstances of the case.

14. It was therefore accepted by the Parties Counsel and very clear on the authorities that should the Court be inclined to exercise its discretion in favour of Applicant, this would be a proper case for stay of proceedings in all other respects.

15. The question of staying proceedings until payment of the costs in previous proceedings rests on a well established practice and the authorities are to the effect that where the applications are substantially identical it is accepted practice that the new proceedings will be stayed until the previous costs are paid.

16. In Weston Cape Housing Development Board v Parker 2003 (3) SA 168 at 171-D Comrie J stated that

“A Court will be slow to exclude a litigant from proceedings because costs of previous litigation remain unpaid. Some element of vexatiousness is usually required though not, it would seem invariably.”

17. The argument of Mr Maqakachane for the Respondents was that the present proceedings are not vexatious and therefore the Court should not stay the proceedings.
18. This Court has considered the following factors in exercising its discretion in this particular matter;
- (a) These parties have been involved in continuous Litigation, all of which have been opposed where they basically contested the same issue of the control of the company.
  - (b) The nature of the irregularity of the previous proceedings in CIV/APN/323/2011 and the seriousness on the sworn statements by the attorney of record of the Applicant therein.
  - (c) The manner in which the Applicants sought the second Application on an urgent and *ex parte* basis despite the already clear disputes and opposition of which they were already aware.

19. In my view all the requirements for an order of stay of proceedings have been satisfied. It is not a determining factor that the initial proceedings were withdrawn and that the Bill was only taxed subsequently because both Counsel agreed that the principle is applicable in this case.
20. In the circumstances the Court will exercise its discretion in favour of a stay of the proceedings and accordingly the following order is made;
- The proceedings in the present Application CIV/APN/395/2011 will be stayed until payment of the costs in CIV/APN/323/2011 is made.
  - The costs of this Application are awarded to the Applicants for stay on a party and party scale.

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**L.A. MOLETE  
ACTING JUDGE**

For the applicants : Adv K. Ndebele  
For the respondent : Adv S.T. Maqakachane