

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MAMABU NTS'EKHE

APPLICANT

AND

GOVERNOR NTS'EKHE

RESPONDENT

JUDGMENT

Coram : **Hon. Chaka-Makhooane J**
Date of hearing : **9th November, 2011**
Date of judgment : **14th December, 2011**

Summary

Husband and wife – Spouses judicially separated – Application for stay of execution pending appeal – Application opposed – A stay of execution will generally be granted where real and substantial justice requires such a stay – Application granted.

ANNOTATIONS

CITED CASES

Makoala v Makoala C of A (CIV) 04/09 (unreported)

Strime v Strime 1983 (4) SA 850 (C)

Bestbier v Jackson 1986 (3) SA 482 (W)

Morais v Aldridge & Other 1976 (2) SA 746

Moeketse Vincent Malebo v Attorney General C of A (CIV) 7/2005
(unreported)

Teaching Service Commission v St. Peter's High School C of A (CIV) 26/2004
(unreported)

Chobokoane v Solicitor General 1985 – 1989, LAC

Theko v Commissioner of Police and Another 1991 – 92 LLR – LB 239

South Cape Comporation (Pty) Ltd v Engineering Management Service 1977
(3) SA 534 (A)

Rood v Wallchi 1904 TS 257

Skimer v Shapiro 1924 WLD 175

STATUTES

BOOKS

[1] This is an application for an order of stay of execution of judgment in **CIV/T/136/2009** pending the finalization of an appeal. It is common cause that that the appealed judgment was granted following an order of judicial separation which was granted in favour of the applicant.

[2] The application for the stay of execution is vehemently opposed by the respondent. **Ms. Thethe** on behalf of the respondent has raised what she

says is a point *in limine* namely that the applicant has failed to file her replying affidavit and argues that, if that is the case, then the respondent's version must be regarded as true. That notwithstanding, this argument ought to be properly raised when merits are traversed and not at this preliminary stage. See **Makoala v Makoala C of A (CIV) 04/09**.¹

- [3] As a general rule a Court will grant a stay of execution where real and substantial justice will be met.² The court will usually grant stay of execution of its judgment where there is a real likelihood of injustice.³ The court, in deciding whether or not to grant a stay of execution exercises a discretion and such a discretion must be exercised judicially. In exercising its judicial discretion the court must have regard, *inter alia*, to the following factors:

Potential or irreparable harm or prejudice being sustained by;

- (a) the applicant should stay be refused;
- (b) by respondent should stay be granted
- (c) the prospects of success on appeal including more particularly the question as to whether the appeal is frivolous or vexations or has been noted not with the *bona fide* intention of seeking to

¹ Page 5 paragraph 5

² *Strime v Strime* 1983 (4) SA 850 (C) at 852B

³ *Bestbier v Jackson* 1986 (3) SA 482 (W) at 484

reverse the judgment but for indirect purpose such as to gain time or to harass the other party⁴.

- [4] The court was referred to several authorities by both counsel, which the court had occasion to consider and in the case of **Rood v Walachi**⁵, the court held that real and substantial justice requires that the court may take into account all the circumstances surrounding the case and *inter alia* it would be justified in taking into account the special circumstances of the parties.
- [5] I am persuaded that the applicant has made out a case for the granting of an order for stay of execution in this regard. If real and substantive justice is to be served and in considering the circumstances surrounding the case *in casu*, also, in exercising my judicial discretion, I find that it would be proper that the execution of the judgment given by this court be held in abeyance, especially because it has a bearing on the subject matter of the appeal.

⁴ South Cape Corporation (Pty) v Engineering Management Services 1977 (3) SA 534 A at 545

⁵ 1904 TS 257

[6] It is for the foregoing that the application for stay of execution pending the finalization of the appeal is granted. No order ask to costs.

L. CHAKA-MAKHOOANE
JUDGE

For Applicant : **Mr. Letsika**

For Respondent : **Ms. Thethe**