

IN THE HIGH COURT OF LESOTHO
COMMERCIAL DIVISION

HELD AT MASERU

CCT/0290/2017

In the matter between:

BASOTHO CONGRESS PARTY

APPLICANT/PLAINTIFF

AND

**MUMTAZ ABDULLA
SHAHEED ABDULLA
EXECUTOR-ESTATE OF UNICE
CASSIM ABDULLA
MASTER OF HIGH COURT
THE ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT

3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT**

Neutral Citation: Basotho Congress Party v Mumtaz Abdulla & 4 others [2022]
LSHC 328 Comm. (14TH DECEMBER 2022)

CORAM: MOKHESI J

HEARD: 30TH NOVEMBER 2022

DELIVERED: 14TH DECEMBER 2022

SUMMARY

CIVIL PRACTICE: *Application for stay of execution pending appeal against a provisional sentence in circumstances where the leave of Court of Appeal should have been sought- Application dismissed as appeal was lodged without the leave of the Court of Appeal being sought.*

ANNOTATIONS

Books

Herbstein and Van Winsen. **The Civil Practice of the High Courts in South Africa (5th ed. 2009) Vol. 2**

Van Loggerenberg, **Erasmus Superior Court Practice 2nd ed. Vol. 2**

Cases

Beinash v Wixley 1997 (3) SA 721 (SCA)

CGE Rhoades Construction Co. (Pty) Ltd v Provincial Administration, Cape & Another 1976 (4) SA 925 (C)

Ndamase v Functions for All 2004 (5) SA 602 (SCA)

JUDGMENT

[1] **Introduction**

This is an application for stay of execution pending appeal. A provisional sentence judgment was granted against the applicant/defendant on the 06 June 2019 by my Late Brother Molete J. The applicant appealed against this judgment. Following the noting of appeal, the applicant lodged the current application for stay of execution seeking the following reliefs:

“1. That the rules of court relating to the modes, manner and periods of service be dispensed with due to the urgency of this matter.

2. The execution of the order of this court granted pending the final determination of this application.

3. That the rule nisi be issued and made returnable on the date and time to be determined by this Honourable Court calling upon the Respondent to show cause why if any, the following shall not be made final.

3.1 That the execution of the order of this court granted on the 06th June, 2019 be stayed pending Applicant’s appeal in C of A (CIV) NO. 47/2019.

3.2 That Respondent be and is hereby directed to pay costs of this application in the event of opposition.

3.3 Further and/or alternative relief.”

[2] The applicant lodged the application on an urgent basis because the Writ of execution had been issued. In opposition to the application, the 1st respondent raised two preliminary points, namely; (i) that the matter was not urgent given the time lapse between the issuing of writ of Execution and the lodging of the application. Given that a period of more than two years has lapsed before this matter could be argued, I consider that urgency point is no longer a live issue. The second point is in *limine* raised by the 1st respondent is that this application is defective, irregular and/or improper in the sense that the applicant is appealing a provisional sentence without first seeking leave of this court. In the circumstances, the argument goes, the application for stay is untenable.

[3] **Issues to be determined**

Whether this application is tenable without the applicant having first sought leave of this court to appeal against its judgment.

[4] I shall first deal with the nature of a provisional sentence procedure. This procedure allows a creditor who is armed with a liquid document to obtain speedy recovery of its debt without the necessity of a more onerous and dilatory, and expensive action proceedings procedure. The procedure is provided for under Rule 9 of the High Court Rules 1980. The history and purpose of this relief was considered in the case of **CGE Rhooide Construction Co. (Pty) Ltd v Provincial Administration, Cape & Another 1976 (4) SA 925 (C) at 927 A – 928 D**: see also **Ndamase v Functions for All 2004 (5) SA 602 (SCA) at 607 C – 608**).

[5] The nature of this procedure was articulated by the learned author Van Loggerenberg, **Erasmus Superior Court Practice 2nd ed. Vol. 2 at D 1 – 98** thus:

“Provisional sentence (namptissement or handvulling) is an extraordinary, summary and interlocutory remedy designed to enable a creditor who has liquid proof of his claim to obtain a speedy judgment therefore without resorting to the more expensive and dilatory machinery of an illiquid action. Provisional sentence precludes a defendant with no valid defence from ‘playing for time’. Apart from the fact that provisional sentence is only available to a plaintiff who is armed with a liquid document, two further inherent characteristics of provisional sentence have always rendered it distinguishable from other remedies. The one is that it only leads to a provisional or interlocutory order. Final judgment is still to be considered in the principal case. In the final instance, the claim against the defendant can be dismissed. The other is that, while on the one hand it entitles the plaintiff to payment of the judgment immediately that is, before entering into the principal case, on the other hand it affords the defendant to insist on security for payment pending the final outcome.”

(see also Herbstein and Van Winsen, **The Civil Practice of the High Courts in South Africa (5th ed. 2009) Vol. 2 at 1313 – 1315; 1375 – 1411)**

[6] The above quoted authorities make it clear that provisional sentence judgment is interlocutory. Provisional sentence judgment only becomes final when the conditions which are provided for in Rule 9 (10) and (11) will have arisen. These sub-rules provide that:

“(10) Any person against who provisional sentence has been granted may not enter into the principal case unless he has satisfied the judgment for provisional sentence with taxed costs or unless the amount due has been tendered to plaintiff and plaintiff fails to furnish security in terms of sub-rule (9).

(11) Any person wishing and entitled to enter into the principal case shall, within two months of the grant of provisional sentence or within one month after he has satisfied the judgment (whichever is the earlier date), deliver notice of his intention to do so, in which event summons shall be deemed to be a combined summons. The defendant shall deliver his plea within 14 days after such notice. If no notice of intention to enter into the principal case is given within the times allowed as aforesaid the provisional sentence shall automatically become a final judgment and any security given by the plaintiff shall lapse.”

[7] At the time of lodging the present application the conditions stipulated in Rule 9(10) and (11) had not been triggered because the applicant had not satisfied the provisional sentence judgment. The judgment remained interlocutory and therefore, in terms of section 16(1) (b) of the Court of Appeal Act, 1978 the applicant should have sought leave of the of the Court of Appeal before appealing against interlocutory orders of this court. Failure to seek leave in the circumstances renders the appeal defective and irregular and amendable to be struck off the roll of the Court of Appeal. In the circumstances, the application for stay of execution pending appeal cannot succeed.

[8] **Costs**

When the matter was called, both counsel appeared before court. Adv. Makara, for the applicant, did not file the applicant's heads of argument. It should be stated that Adv. Makara intimated to the court that he was only allocated the matter that morning and was only prepared to register the applicant's concession to application for substitution. That was on the 17 November 2022. He intimated to the court that he will be prepared to argue the matter of provisional sentence today, being 30 November 2022, and that the applicant's heads of argument will be ready on that date.

- [9] Regrettably, on the 30 November 2022 Adv. Makara's heads of argument were nowhere to be found. His explanation for this unprofessional scenario was that he had been under the impression that Mr Rasekoai as his senior would be handling the matter and would have accordingly prepared the heads of arguments. This is contrary to Mr Makara's clear undertaking that he will have prepared the heads of argument on the date of hearing. The court looks disfavouredly at this sought of behaviour of counsel and will show its displeasure by an appropriate award of punitive costs.
- [10] One disturbing feature of this case is that the applicant noted an appeal against the judgment of this court in 2019 and that appeal lapsed for non-prosecution. All this time, as I understand, the 1st respondent had been patient and did not overzealously pursue execution of its judgment. It is therefore baffling that in November 2022, the applicant having been comfortably seated on its laurels and not pursuing its appeal, would now still pursue the stay of execution. This in my view is a classic "playing for time" example by a litigant who wants to frustrate execution. In the circumstances, I consider the pursuit of this application to be an abuse of this

court's processes (**Beinash v Wixley 1997 (3) SA 721 (SCA)** at paras. 28 – 29).

[11] In the result therefore:

- (i) The application is dismissed with costs on attorney and client scale.

MOKHESI J

For the Applicant/defendant: Adv. Makara instructed by Rasekoai, Lebakeng and Rampai Attorneys

For the Respondent/plaintiff: Mr T. Mahlakeng from T. Mahlakeng & co. Attorneys