

IN THE HIGH COURT OF LESOTHO
COMMERCIAL DIVISION

HELD AT MASERU

CCA/0025/2020

In the matter between:

NTŠELISENG MOTLOLI t/a MOTLOLI CATERING APPLICANT

AND

PONTSO NTSEUOA 1ST RESPONDENT

**NTSEUOA ENTERPRISE SUPPORT SERVICES
(PTY) LTD (NESS) SOUTH AFRICA 2ND RESPONDENT**

THABO CLIVE ABEDNEGO NTLATSANG 3RD RESPONDENT

DEPUTY SHERIFF LEQHAOE 4TH RESPONDENT

IN RE:

NTSELISENG MOTLOLI APPLICANT

AND

LSP/WBHO JOINT VENTURE	1 ST RESPONDENT
NIGEL JOHNSTONE	2 ND RESPONDENT
PONTSO NTSEUOA	3 RD RESPONDENT
NTSEUOA ENTERPRISE SUPPORT SERVICE (PTY) LTD (NESS) SOUTH AFRICA	4 TH RESPONDENT
BONANG TSEUOA	5 TH RESPONDENT
GREATER DESTINY INVESTMENTS	6 TH RESPONDENT
SELOTHO MOTHOKOA	7 TH RESPONDENT
POLIHALI TLOKOENG TRUST	8 TH RESPONDENT
POLIHALI DEVELOPMENT TLOKOENG TRUST (PDTC)	9 TH RESPONDENT
STANDARD LESOTHO BANK	10 TH RESPONDENT
DEPUTY SHERIFF	11 TH RESPONDENT

Neutral Citation: Ntseliseng Motloli t/a Motloli Catering v Pontso Ntseuoa and Others In Re: Ntseliseng Motloli v LSP/WBHO Joint Venture & 10 Others [2022] LSHC 176 Comm. (18 AUGUST 2022)

CORAM: MOKHESI J
DATE OF HEARING: 11TH MAY 2022
DATE OF JUDGMENT: 18TH AUGUST 2022

SUMMARY

CIVIL PRACTICE AND PROCEDURE: *Application for leave to appeal a dismissed application- whether tenable- A dismissed application incapable of being stayed- Application for leave dismissed with costs.*

ANNOTATIONS

STATUTES

Court of Appeal Rules 2006

CASES

Khaketla v Malahleha and Others LAC (1990 – 1994) 275

Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409

Lesotho Girl Guides Association v Unity English Medium School CIV/APN/5/94 [1994] LSCA 25 (11 February 1994)

Motaung and Another v Julia Pheko t/a Pheko Building Construction LAC (2007-2008)

JUDGMENT

Introduction

- [1] This is an urgent application in terms of which the applicant is seeking to stay what she terms ‘execution’ of my Judgment delivered on the 17 March 2022, and an order further that the Deputy Sheriff of this court be ordered to not to release the vehicle: Toyota Hilux: Registration number DV16XGP: VIN number AHTEZ39G307038538, Engine number 1KDA796553, held in his custody pending finalisation of this application and appeal.
- [2] The application is opposed by the 3rd respondent. The main application had sought several reliefs against the 1st respondent who is a *perigrinus*. But of relevance to the present matter, a vehicle which is mentioned in the preceding paragraph was attached to confirm and to found jurisdiction. The 3rd respondent, who is also a *perigrinus* had lodged an application in terms of Rule 6(6) claiming the vehicle as his, and in fact, had annexed to his papers a copy of the certificate of ownership, the authenticity of which was never in issue. This court dismissed the main application on the basis that there were foreseeable material disputes of fact. What that meant was that all the ancillary applications, such as the one lodged by the 3rd respondent in terms of Rule 6(6) were rendered moot. Importantly, upon dismissing the application, out of abundance of caution, I issued an order for the release of the vehicle in issue. It was not necessary to do so because the dismissal of the main application rendered all the ancillary applications academic. Put differently, all the ancillary applications fell with the collapse of the main case.

- [3] The applicant's case is that she will suffer irreparable harm unless what she calls 'execution' of this court's judgment is stayed pending appeal. She says she will suffer irreparable because the 1st and 2nd respondents who are *peregrine* are likely to remove the vehicle from this court's jurisdiction. Secondly, she avers that she has prospects of success because:

"12.1.....[T]he court dismissed my application notwithstanding that it has found as a fact that among others, I have complied with Rule 6 pertaining to attachments of perigrinus to found jurisdiction.

12.2 I am advised and belief same to be true that dismissing my application for attachment of the perigrinus to found jurisdiction on the basis that the application had foreseeable dispute of facts is justifiable as the rules provide that such an application can be made even where the applicant intends to lodge an action against the perigrinus. Consequently, viva voce evidence or action proceedings should have been ordered by the court.

....

12.4 Furthermore I am advised and believe same to be true that the court erred in ordering the release of the said vehicle where there is dispute on the papers pertaining to the ownership of the said vehicle."

This basically, all that the applicant posits as the basis of her application for stay of execution.

- [4] The 3rd respondent's case is that the applicant's case is ill conceived because once jurisdiction has been found there is no need for continued attachment of *perigrinus* property, especially where the matter has been disposed of. He avers that in the present matter a security to the tune of

M80,000.00 was paid per Chaka-Makhooane J's order in December 2020. He avers as follows in his opposing affidavit which captures the true nature of this case:

“AD [ARA 8, 9 & 10 THEREOF:

...[T]his application is both malicious and frivolous because the Applicant is making this whole judgment and subsequently this application as if the merits of the main application were about vehicle. The main application it must be clear was about certain monetary claims that applicant had against 1st and 2nd Respondent. The vehicle was attached to found jurisdiction. I wish to boldly say that once jurisdiction had been found and the matter defended before Court by 1st and 2nd Respondent the attached property warranted for it to be released because the court is already exercising jurisdiction.”

- [5] This application was lodged in terms of Rule 13 of the Court of Appeal Rules 2006 which provides that:

“(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.

(3) The application mentioned in sub-rule (2) 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;

(b) refuse that execution be stayed subject to the respondent giving security for restoration of any sum or thing received under execution; or

(c) order that the execution be stayed for 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 he may deem fit.”

[6] The above excerpt highlight the fact that in this jurisdiction the noting of an appeal against judgment does not have the automatic effect of staying it. A party so appealing must after noting appeal apply for stay of execution. The judge seized with an application for stay is enjoined to exercise his/her discretion, and must do so taking into account what is just and equitable in the circumstances (Rule 13(3): **Khaketla v Malahleha and Others LAC (1990 – 1994) 275 at 291**). In exercising its discretion, the court is enjoined to consider (i) the potential of irreparable harm or prejudice befalling the appellant should leave to stay execution be refused, (ii) the potential of irreparable harm or prejudice being sustained by the respondent on appeal should leave to stay execution be granted, (iii) the prospects of success on appeal, inclusive of the question whether the appeal is not frivolous or vexatious and to determine where the balance of convenience falls between the parties (**Khaketla v Malahleha and Others above p. 292**).

[7] As to what constitutes reasonable prospects of success on appeal, was stated in **Smith v S 2012 (1) SACR 567 (SCA) at para. 7**; as follows:

“[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore, appellant must convince this court on proper

grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case is cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[8] I will revert to these issues in due course. During arguments by counsel, I put a question to Adv. Sekonyela, for the applicant, whether a dismissed application can be stayed and I referred him to the decision of this court in **Lesotho Girl Guides Association v Unity English Medium School CIV/APN/5/94 [1994] LSCA 25 (11 February 1994)**, and because that issue had not been addressed in his heads of argument, I directed him to file supplementary heads of argument on the issue, and they were filed. The essence of the **Lesotho Girl Guides Association case** is that a dismissed application is incapable of being stayed in terms of these Rules (then Rule 6(1) of the Court of Appeal Rules 1980) because a dismissed application is neither an order *ad pecuniam solvendam* or *ad factum praestandum*.

[9] In his supplementary heads of argument Adv. Sekonyela sought to distinguish this case from the **Lesotho Girl Guide Association case** by arguing that:

“I...[T]he dismissal of the applicant’s application has the result of ordering the sheriff to levy execution and release the car belonging to a perigrinus. Suffice it to mention that though the court has not made an order that could be enforced against Applicant while the appeal is pending or at any time, however there is judgment that could be automatically and immediately enforced, the enforcement of which would be prejudicial to the applicant...”

[10] In support of his stance he cited the case of **Motaung and Another v Julia Pheko t/a Pheko Building Construction LAC (2007-2008)**. It should immediately be stated that this case is distinguishable from the present matter as in that case an appellant had been found to be in contempt of an order for payment of money and granted an application for committal to prison of the appellant for three months, and suspended it for one month on condition that appellant complied. After noting the appeal, she applied for stay of execution, which was refused by the court. She approached the Court of Appeal directly and was granted stay of execution as refusing the stay application would have rendered the appeal nugatory. The appellant would have served three months sentence before the next sitting of the Court of Appeal. The stay was thus granted as already said. It will readily be seen that the **Motaung case** and the **Lesotho Girl Guides Association case** are distinguishable.

[11] Upon a closer reading of Rule 13 of the Court of Appeal Rules, 2006, it is apparent that it is focused on staying “execution” of judgment. I am in agreement with Maqutu J in the **Lesotho Girl Guides Association case** that when an application is dismissed there is no way it be stayed. ‘Execution’ does not refer to any order which the court issues, rather it “is a means of enforcing a judgment or order of court and is incidental to the judicial process” (**Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 at para. 13**). The applicant seems to be focusing on the fact that I ordered the release of the vehicle consequent upon dismissing the application. The order to the effect that the vehicle be released was made out of abundance of caution, and as I said, it was unnecessary because the collapse of the main case meant that it ought to have been released without the necessity of an order to that effect.

[12] Assuming without conceding, that this application is capable of being stayed. I do not think that the applicant has any prospects of success on appeal. I agree with the respondent that the applicant seems to be making the main case to be about the vehicle in question. The main application was dismissed on the basis that the applicant made the wrong choice of proceedings to have her disputes adjudicated. The application was dismissed on the ground that there were reasonably foreseeable material disputes of fact. However, in her application for leave to stay ‘execution’, the applicant devotes her entire energy on showing the purpose of attaching the 3rd respondent’s vehicle, without showing that the Court of Appeal could reasonably arrive at a different conclusion from this court’s. She says this court erred in ordering the release of the vehicle as there were disputes on the papers regarding ownership of the vehicle. She pins the said dispute on what was averred by the 1st respondent in her opposing affidavit to the main case when she said (at para. 20) that “the attachment of my property has been simply to embarrass me in a bid to solve business dispute...” The 3rd respondent, it should be stated, did attach copy of the certificate of registration showing him as the owner of the vehicle. There was nothing coming from the applicant by way of a certificate different from that one showing the 1st respondent as the owner. There is, therefore, no dispute as to who the owner of the vehicle is, to my mind. For these reasons, I find that the applicant has no prospects of success on appeal. As regards irreparable harm, it goes without saying that the owner of the vehicle stands to suffer irreparable if the vehicle, which has been exposed to elements for two years, is left to endure a further period away from him without any just cause. The balance of convenience, in the circumstances, favours the 3rd respondent.

[13] In the result;

(1) The application is dismissed with costs.

MOKHESI J

For the Applicant: **Adv. B. Sekonyela instructed by K. D
Mabulu Attorneys**

For the 1st, 2nd, 4th Respondents: **No Appearance**

For the 3rd Respondent: **Adv. L. D. Molapo instructed by Masoabi
Attorneys**