IN THE HIGH COURT OF SWAZILAND

In the matter between:

HAVELOCK ASBESTOS MINE LTD

v

DAVID SCHOLES PRESIDENT OF THE INDUSTRIAL COURT

CORAM:	S.W. SAPIRE, ACJ
For Applicant	Mr. Flynn
For Respondent	Mr. Dunseith

Case No 1453/97

Judgment

(3/6/97)

The applicant on Notice of Motion, and as a matter of urgency seeks an order

a) that a ruling of the Second Respondent in case number 95/94 in respect of an application to stay execution be set aside
b) that the first respondent pay the Costs

The notice of motion, calls upon the Respondents to show cause why the decision of the Second Respondent should not be reviewed and corrected or set aside, "as prayed above"

and requires the Second respondent to despatch, forthwith on receipt of the notice of motion the record of the proceedings, if any, with his reasons for his decision. The Notice of Motion was served in haste on the 19th May 1997 informing the respondents that the matter would be heard on the 20th May. Not surprisingly a record of the proceedings that the Applicant seeks to review were not before the court either then or when the matter was argued on 27th May. All that was before the court was a copy of the "Ruling" which it is sought to set aside.

The First Respondent opposes the application.

These are the circumstances giving rise to this application. The first Respondent instituted proceedings in the Industrial Court in 1994, seeking compensation for unfair dismissal. He obtained judgment against the Applicant for payment of amounts greater than E56 000. The Applicant filed a Notice of Appeal on 22nd November 1996. On 22nd January 1997 the Applicant applied to the Industrial Court for an order staying execution on the judgment pending the determination of the appeal

Although in the founding affidavit, the Applicant begged leave to refer to the full set of papers filed in the Application to stay execution, they did not include these documents among those filed. It was only

during the hearing and with the consent of the Respondent that I accepted a copy of the sets of affidavits that were before the Industrial Court when it heard the application. There is however no information before this court relating to the merits of the main case, so that it is not possible to relate the Notice of Appeal to the reasons for judgment. The applicant's prospects on appeal cannot therefore be considered.

The President of the industrial Court who heard the application allowed the stay of execution to this extent, that he ordered that the amount of the judgment to be paid by the Applicant, not to the Respondent but into an interest-bearing deposit account with a financial institution. The account is to be opened and operated upon jointly by the Attorneys who represent the respective parties. The balance standing to the credit of the account is to be paid to the party successful in the appeal. This seems an eminently reasonable and equitable arrangement, accommodating both the fears of the respondent as to the Applicant's intention to close down its mining operations or otherwise disabling itself from making eventual payment to the Respondent, and the Applicant's, unstated but implied misgivings of its prospects of recovering from the Respondent the monies paid in discharge of the judgment in the event of it being successful in the pending appeal.

The Applicant however is most dissatisfied with this order. An aspect that I gathered from the argument that most rankled was that fact that the Respondent should it be successful in the appeal would receive interest on the judgement debt. No payment of interest was ordered in terms of the judgment. In the light of judgments in South African Courts the Applicant has no cause for complaint, may consider itself fortunate that it was granted even the limited relief granted to it on its application for stay.

At this point it is necessary to turn to the question of urgency. The Applicant in paragraph 15 of the founding affidavit states that the application is one of urgency, justifying a

departure from the prescribed times of the rules of court. The only basis for this is said to be that fact that the Respondent was insisting on immediate execution because the Applicant had not complied with the terms of the order of the Industrial Court upon which execution was stayed. As the Applicant with little inconvenience, let alone prejudice, could have complied with these conditions as I am informed it now has done, and thus avoided the attachment of its property, no urgency whatsoever attaches to the matter. Were it not that the Respondent was ready and willing to have the matter dealt with when it was called, the matter should not have been enrolled .Litigants must not rely on this case as precedent.

The considerations that should have influenced the second Respondent in the exercise of his discretion, to refuse a stay of execution have often been stated in judgments of South African Courts and applied in this court. It is important that the Applicant did in its founding affidavit not deal with and justify any apprehension it may have had that it would not be able to recover amounts paid in discharge of the judgment in the event of it being successful in its appeal. It has not even attempted to do so in the answering affidavit.

In

ENGINEERING MANAGEMENT SERVICES (PTY) LTD v SOUTH CAPE CORPORATION (PTY) LTD 1977 (2) SA 64 (T)

it was held, as appears from the head note here quoted, that

"Where an appeal has been noted against a judgment sounding in money, execution will be allowed subject to security unless the judgment debtor satisfies the Court that, in the special circumstances of the case, a stay of execution should be granted."

There was an attempt to take this decision on appeal. The attempt did not succeed as it was held in the Appellate Division that the order was interlocutory and could not be appealed against without leave of the court a quo

SOUTH CAPE CORPORATION (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD 1977 (3) SA 534 (A)

the head note of which reads

" It is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from. The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if the leave be granted, to determine the conditions upon which the right to execute shall be exercised. This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments. In exercising this discretion the Court should determine what

is just and equitable in all the circumstances. The factors to which the Court, in the exercise of such discretion, would normally have regard, and the conditions the Court may attach to any order in acceding to the application for leave to execute, or to an order staying execution, set out".

There is one significant difference. The Industrial Relations Act of 1996, section 11(4),provides that the noting of an appeal shall not stay the execution of the Court's order unless the court on application, directs otherwise. That this difference exists does not detract from the inherent power of the court to control its own judgments and in so doing to determine conditions upon which a stay of execution may be granted. The difference may affect questions of onus, but the considerations determining whether execution should proceed or not remain the same. It follows that in so far as the application to review the proceedings and to set aside the order is made on the grounds stated in paragraph 12.1 of the founding affidavit, that the Industrial Court did not have the power or jurisdiction to lay down the conditions upon which the stay was granted, the application must fail.

The second ground upon which it is alleged that the order of the second Respondent is liable to be set aside on review is that,

"12.1 The order was arbitrary and unreasonable in that

12.2.1 it is based on a misconception of the law applicable to such applications

12.2.2 it amounts to a grossly irregular order that the Applicant pay interest at the commercial rate

should it fail in its appeal"

The second respondent did not act in an arbitrary or unreasonable manner in making the order which is not to the liking of the Applicant. The order itself is reasonable and equitable. If anything the second Respondent erred in effect granting a stay of execution in the absence of any evidence at all that if money was paid to satisfy the judgment it would in the event of Applicant succeeding in its appeal not be recoverable. He correctly perceived that the Respondent had a judgment in his favour and was entitled to be paid. The Respondent has been kept from his money for more than two years Only if such payment would have occasioned irremediable prejudice to the applicant should the stay have been granted, No prejudice of this nature is even suggested in the affidavits. The paltry interest which will accrue on the amount deposited or to be deposited will be little solace to the Respondent for being kept out of his money for an excessively long period, should the Applicant fail in its appeal. The interest is not even to be paid by the Applicant. It accrues on money which if the Applicant loses the appeal should have been paid to the Respondent two years ago. It does not lie in the mouth of the Applicant to say that the Second respondent has been unreasonable in ordering that the interest on the deposit will be paid to the winner.

The third ground for review alleged in paragraph 12.3 of the founding affidavit is that the judgment is based on hearsay evidence improperly admitted. The evidence to which objection has been taken is that of press reports to the effect that the applicant may at anytime close its mining operations. This evidence was placed before the court by the respondent in the form of extracts or cuttings from the "TIMES" in which the closure of the Applicanf's mine is

said to be imminent. The respondent pointed out that these reports had not been denied by the applicant in circumstances where a denial or repudiation could have been expected and could therefore be taken to be substantially correct. The respondent sought to draw the inference from this implied admission that a stay of execution, could cause him irreparable harm in that the Applicant would have disposed of all its assets by the time the appeal had been heard and dismissed. In this connection the dilatory prosecution of the appeal was said to be relevant.

The reports in the newspapers are clearly hearsay. The failure of the Applicant promptly to deal with the contents of the report in circumstances where a reply reassuring to the public could have been expected to have been made, could arguably constitute an admission of the truth of the articles, proof of which is allowable in accordance with the normal rules of evidence.

The Applicants case is weakened on this point by the provisions of Section Eight of the Industrial Relations Act which allow the Court not to be bound by the rules of evidence or procedure which apply in civil cases. The Court was therefor enjoined to admit evidence of this nature and the admission of the reports can not be said to by an irregularity grave or otherwise vitiating the proceedings and warranting review by this court.

Furthermore even if this evidence were to be disregarded there was nothing to prevent the Court having made the order for the stay of execution with the proviso that the money be paid into a neutral trust account pending the determination of the Appeal. The cases lay down that the overriding consideration is the prevention of irreparable harm to either side without overlooking the judgment creditor's right to satisfaction of his judgment. In many if not most cases of judgments sounding in money, execution will be allowed subject to security de restituendo being provided by the execution creditor. It he present instance full execution has been stayed, subject to security being given for the payment of Respondent's judgment in the event of the Applicant failing in its appeal.

This court derives its power and jurisdiction to review decisions or orders of the Industrial Court from the provisions of Section 10 (5) of the Industrial Relations act which reads

"A decision or order of the Court shall at the request of any interested party, be subject to review by the High Court on grounds permissible at common law."

The Supreme Court Act applicable in the RSA provides that the grounds upon which the proceedings of any inferior court may be brought under review are the following:

(a)absence of jurisdiction on the part of the court;
(b)interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(c)gross irregularity in the proceedings;
(d)the admission of inadmissible or incompetent evidence or the rejection of

admissible or competent evidence.

Assuming that these grounds include the grounds permissible at common law referred to in section 10(5) of the Industrial Relations Act there does not appear to be any basis for review of the proceedings before the Second respondent or the setting aside of the order made by him.. The court clearly had jurisdiction to entertain the Application; there is no suggestion of interest in the cause, malice, or corruption on the part of the second respondent; no gross irregularity in the proceedings is alleged, and there has been no admission of evidence which the court was not permitted to admit.

The second Respondent certainly put his mind to the facts of the application, and came to a perfectly proper conclusion to which a reasonable man could have come.

The Respondent has filed a counter application in which he seeks an order declaring that the Applicant's appeal has lapsed by reason of the Applicant's failure to file the record timeously. This question cannot be dealt with by this court as it clearly has no appellate or original jurisdiction to entertain such an application .

Both the application and the counter application are dismissed. As the counter application occupied little of the time spent in argument and the paperwork relative thereto was minimal the Applicant is to pay the costs.

S W SAPIRE

Acting Chief Justice