THE HIGH COURT OF SWAZILAND

Civil Case No.995/04

In the matter between:

CYPRIAN MFANUZODLANI GULE	Applicant
And	
MPHEZENI VILAKATI	1st Respondent
THEMBA DLAMINI	2nd Respondent
CORAM :	MASUKU J.
For the 1st Applicant :	Mr S. Nsibande
For the 1st Respondent :	Mr S. Bhembe
For the 2nd Respondent :	No appearance

JUDGEMENT 19th May 2004

Relief Sought

In this application, filed under a Certificate of Urgency, the Applicant prays for the following relief;

1. Dispensing with the normal forms of service and normal time limits as provided by the Rules of this Honourable Court and having this matter heard as one of urgency,

2. An order directing the Sheriff or his lawful Deputy to attach and remove nine herd of cattle from the 1st or 2nd and/or any other person in possession thereof being the cattle attached and removed on the 1st April 2004, from the Applicant's farm.

3. That the said nine (9) herd of cattle be placed back to the possession of the Applicant pending finalisation of an appeal filed by Applicant in the main action.

4. Directing the 1st and 2nd Respondent to pay costs on the Attorney and own client scale one paying the other to be absolved.

Background

It is apparent that there is a convoluted history behind this matter and to which it is necessary to refer in order to place this application in its proper historical perspective. I shall refer to the parties as they appear in the above citation, for purposes of convenience.

The Applicant, by Combined Summons, dated 28th August, 2001, sued the 1st Respondent for delivery of three (3) herd of cattle at the value of E2, 950.00 each or failing delivery of the said cattle, payment of an amount of E8, 850.00, interest thereon and costs of the suit. A judgement by default was entered in the Applicant's favour on the 12th October, 2001, followed by an execution process which resulted in the attachment of fourteen (14) herd of cattle belonging to the 1st Respondent.

The 1st Respondent launched an urgent application for rescission of the default judgement on the 12th February, 2002. A consent Order, endorsed by Sapire CJ. (as he then was) and dated 22nd February 2002, was granted. In terms of that Order, the default judgement was rescinded; the Deputy Sheriff who attached the cattle, was interdicted from selling or disposing of that herd of cattle, pending finalisation of the matter.

The 1st Respondent, thereafter approached this Court on an urgent basis, for an Order directing the Deputy Sheriff, who had attached the cattle, to release the same to the 1st Respondent. I dismissed that application with costs by a written judgement, dated 10th May, 2002.

The main action, which the 1st Respondent eventually defended, was heard by Shabangu A.J. on the 20th October, 2003. Shabangu A.J. granted absolution from the instance in the 1st Respondent's favour with costs and proceeded on the same day, to issue an Order for the release of the attached cattle. The Applicant noted an appeal against the said judgement on the

following day i.e. the 21st October, 2003, claiming that the trial Judge, in granting absolution, erred in respects that I need not venture into.

On the 1st April, 2004, the applecart was upset by the 1st Respondent, who, in the company of the 2nd Respondent, a duly appointed Deputy Sheriff for the District of Lubombo, attached and removed 9 herd of cattle from the Applicant to the 1st Respondent. They claimed that they were armed with an Order of Court to that effect.

The Applicant alleges that the removal of the cattle from his farm was unlawful for the reason that by virtue of noting his appeal, execution was thereby automatically stayed and that it was therefor not open to the Respondents to execute upon the Order of Shabangu A.J., in the absence of an Order setting aside the stay of execution. It is for that reason that the Applicant seeks the relief set out in full above.

Urgency

There is an argument that Mr Bhembe sought to advance in limine and this relates to the question of urgency. I however found that this point had fallen away and had been overtaken by events since the matter was enrolled and the Respondents were afforded time within which to file their papers in opposition to the relief sought. Nothing further therefor needs be said regarding this point.

Locus standi in judicio

There is however a legal point raised by Mr Bhembe, on the merits, which I however consider proper and prudent to consider ahead of the Applicant's case. I do so for the sole reason that if upheld, it has the potential to decide and dispose of the matter even at this stage. This related to the question of the Applicant's locus standi in judicio or his lack of it.
Mr Bhembe, argued that the consent Order of the 22nd February, 2002, authorised the Deputy Sheriff to continue holding the cattle under attachment. It was his argument therefor that if for any reason, that Order was contravened, only the Deputy Sheriff had the right to approach the Court with a view to maintaining the integrity of that Order. Not even the Applicant, in whose

farm the herd of cattle was attached and kept, had a right to bring this application independently of the Deputy Sheriff, so the argument ran.

In the judgement of LAWYERS FOR HUMAN RIGHTS (SWD) AND ANOTHER VS THE ATTORNEY-GENERAL OF SWAZILAND AND ANOTHER, CIVIL APPEAL CASE NO.34/01, Beck J.A. stated the

following at page 3 to 4 of the judgement regarding the issue of locus standi in judicio: -

"The extent of an interest in the subject matter of the litigation that must be evident in order to clothe a litigant with locus standi has been considered in many reported cases. It must be a direct interest and not an interest that is too remote-Dalrymple and Others v Colonial Treasurer 1910 T.S. 372 at 390. It must be a direct and substantial interest in the subject matter of the litigation which could be affected by the judgment of the court-United Watch and Diamond Co. (Pty) Ltd v Disa Hotels 1972 (4) S.A. 409. In order to be a direct interest it must be more than the sort of interest which all citizens might have in the subject matter of the litigation-Roodepoort-Marisburg Town Council v Eastern Properties (Prop.) Ltd 1933 A.D. 87."
In my view, the question to be determined in casu is whether the Applicant has a material interest in the subject matter in issue and has a special grievance to himself or he can only be described as a busy body or a crank, entangling himself in matters that have no connection or sufficient connection with him. The question, posed differently, in view of Beck J.A.'s rendering later in the aforesaid case, is whether it can be said of the Applicant, that he is intervening in this matter for no other cause than his curiosity in the relief sought or in the facts on which the matter is based?

In answering the above question, it is imperative to consider firstly, that the Applicant from the very first proceedings, was the dominis litis. The default judgement was in his favour and so was the attachment at his behest. The Deputy Sheriff, in effecting attachment, did so in execution of the Order in the Applicant's favour. Clearly, at the end of the execution process, the Applicant was the main beneficiary. The flip side of the coin is that if the Order for attachment was for any reason defied or contravened, and as result of which the cattle were removed from attachment, then clearly, the Applicant's hopes of tasting the fruits of success would become like a mirage.

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Secondly, the Deputy Sheriff kept the cattle at the Applicant's farm. If anyone, would therefor come and remove the cattle from attachment, without a valid Order of Court surely, the Applicant has a right to stop that even if he was not the dominis litis. If he did not, the Deputy Sheriff could understandably hold him accountable for the breach of the Court Order as the custodian of the attached cattle. The Applicant therefor satisfies the criteria set out in the Court of Appeal judgement above. I am of the considered view that the Applicant could not fold his hands in idleness, resting on the forlorn hope that the Deputy Sheriff would act unilaterally to safeguard the Applicant's interests by launching remedial preventative proceedings. It was incumbent upon the Applicant, given the totality of the facts and the material interest that he had in the matter, to launch the present proceedings.

In the circumstances, I am of the view that the Applicant has the locus standi in judicio to launch these proceedings and Mr Bhembe's point fails. This then leads me to consider sustainability or otherwise of the points raised by Mr Nsibande in the application, subject of course to the argument raised au contraire by Mr Bhembe.

In dismissing the 1st Respondent's point in limine, I must point out that prayer 3 of the Notice of Motion, read together with paragraph 6 of the Applicant's Founding Affidavit, create the erroneous impression that the Order of the 22nd February, 2002, was for the Applicant to keep the cattle under attachment. This is clearly incorrectly understood for it explicitly was an Order for the Deputy Sheriff to hold the cattle under attachment. The Deputy Sheriff in his wisdom and absolute discretion kept the cattle at the Applicant's farm. This, however, did not amount to nor can it be equated to or construed to be an order that the Applicant was to keep the cattle. The dismissal of the point relating to locus standi above, was therefor based on the common cause facts and not on the misleading and erroneous understanding propagated by the Applicant in the aforesaid paragraphs and which finds no support from the previous proceedings.

Propriety of executing upon a judgement appealed against.

The next question, for determination, is whether it was proper and legally correct for the Respondents to execute upon the judgement of Shabangu A.J., notwithstanding that an appeal was properly and timeously noted against the said judgement by the Applicant.

Mr Bhembe argued that the 1st Respondent was perfectly entitled to do so because, not withstanding the timeous noting of the appeal, the Applicant failed to timeously lodge the record of proceedings within the time set out in the Court of Appeal Rules, 1954, as amended. In particular, reference was made by Mr Bhembe to the provisions of Rule 30 (1), read with Rule 30 (4) of the aforesaid Rules and which provides the following: -

"The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall within 2 months of the date of noting of the appeal lodge a copy thereof with the Registrar of the High Court for certification as correct."

Rule 30 (4), on the other hand reads as follows: -

"Subject to Rule (16) (1), if an appellant fails to note an appeal or to submit or resubmit the record for certification within the time provided by this Rule, the appeal shall be deemed to be abandoned."

Sub-Rules (5) and (6) of this Rule, mentioned in Rule 30 (1) are of no relevance in the question for determination. Rule 16 (1), headed "Extension of time", referred to in Rule 30 (4), quoted above reads as follows: -

"The Judge President or any Judge of appeal designated by him may on application extend any time prescribed by these Rules:

Provided that the Judge President or such Judge of Appeal may if he thinks fit refer the application to the Court of Appeal for decision."

The import of these Rules, read together, in my view, is that the appeal is deemed to be abandoned if it is not noted within the period prescribed or if so filed, the record is not submitted within the time prescribed in the Rules. The appeal is however, deemed to have been abandoned, subject to the extension of time in terms of Rule 16. It is common cause that in casu, no application for the extension of time was lodged by the Applicant, for consideration and determination by the Court of Appeal, whenever that Court is reconstituted.

Mr Bhembe argued that in the absence of an application for the extension of time under Rule 16 (1), the 1st Respondent was entitled to execute upon the judgement as soon as the deeming provision came into effect after the lapse of the period within which the record was to be lodged. In his argument, Mr Bhembe, stated that the 1st Respondent was entitled to do so without more, and particularly without any notice or declaratory Order in his client's favour being necessary.

Mr Nsibande argued that the course advocated by Mr Bhembe introduces a startling proposition in the sense that it entitles the successful party in this Court to take the law in its own hands, based on its own interpretation of the Rules of Court and its computation of the time limits, without subjecting the correctness of either conclusion to the rigorous test of the Courts.

Rule 40, of the Rules of the Appeal Court, as amended, was repealed by Legal Notice No. 132 of 1999. The import of the repeal of the said Rule is to bring our law into conformity with the law in other jurisdictions on the effect of an appeal on the proceedings. This therefore means that an appeal now automatically stays execution, whereas Rule 40 provided otherwise. The onus to reverse this position therefor lies on the successful party, on application, ably demonstrating to the Court that in the circumstances, it is proper for execution to ensue. The alternative, is for that party to pay security to the satisfaction of this Court, which the Court, upon satisfaction, may allow execution to ensue.

This position, in my view, shows the importance of the Courts being in control of appeals. This

element of control that this Court, particularly in the absence of the Court of Appeal, which obtains at the writing of this judgement, must exercise, ensures that the successful party does not rely on its own interpretation of the Rules and its own computation of the time limits. If it is of the view that due to the Appellant's failure to lodge the record timeously the deeming provision comes into play, I am of the view that it should seek a declaratory Order, in the present circumstances, from this Court.

It is in that application that this Court can rule upon the correctness of the successful party's interpretation that the deeming provision is in operation and whether its computation of time is in keeping with the Rules of Court. To leave these crucial decisions to the whims of the parties and to allow them to implement the same without the sanction of the Court would in my view

be untenable and would yield grave injustices, which it may not be possible to redress later, particularly where an application for the extension of time is subsequently made to the Court of Appeal and there are cogent and compelling reasons why the appeal was not noted in time or the record was not lodged timeously. To endorse this line of reasoning, would in my view be a species of taking the law into one's own hands, which is otherwise impermissible. I therefor agree with Mr Nsibande on this score.

The consideration raised by Mr Bhembe, to the effect that recourse to the Courts for a declarator would indulge the successful party in further unnecessary costs, is not in my view sufficient to lightly jettison the question of taking the law into one's own hands. An appropriate Order for costs in favour of the successful party can always be prayed for, since it would be that unsuccessful party's neglect that would render the declarator necessary in the first place. In like manner, it would be the successful party that would have to bring an application for execution to ensue, once the provisions of Rule 40 come into operation by the noting of an appeal

Both parties' representatives referred me to the judgement I made in SWAZI PHARM WHOLESALERS (PTY) LTD VS RANBAXY (SA) (PTY) LTD t/a RANBAXY LABORATORIES AND ANOTHER in re: RANBAXY WHOLESALERS (SA) (PTY), LTD VS. SWAZI PHARM WHOLESALERS (PTY) LTD CIV APPL. 1878/03

(unreported), regarding the question under scrutiny. The one distinguishing factor between that case and the present one is that in the former case, the successful party did put the unsuccessful party on notice by letter that in its view, the appeal was deemed abandoned in the light of the failure to lodge the record timeously. That letter spurred the unsuccessful party to move an application before this Court, staying the intended execution of the judgement. That approach is in my view, the necessary and mandatory modicum of courtesy that an Appellant is entitled to. In a profession like law, sudden surprises, which do not allow the other party to remedy whatever needs to be remedied are frowned upon. In point of fact, there is a plethora of examples that the parties normally reserved the question whether or not an appeal is deemed abandoned to the Courts for determination, particularly the Appeal Court, when still constituted. See MUSA MAGONGO V SWAZILAND DEVELOPMENT AND SAVINGS BANK AND ANOTHER APP. CASE NO. 27/2000 and ANDRIES STEPHANUS VAN WYK AND ANOTHER V BRL a division of BARLOWS CENTRAL FINANCE

CORPORATION CIV. APP. NO. 44/2000, both being unreported judgements of the Court of Appeal.

It is fitting to also consider, at this juncture, that in the unreported judgement of the Court of Appeal, in UNITRANS SWAZILAND LIMITED V INYATSI CONSTRUCTION LIMITED, a judgement delivered by that Honourable Court on the 7th November, 1999, the Court seems to have been persuaded that even in circumstances where the deeming provision has become operative, that Court, can on application, revive the appeal in order to prevent any injustice. This, it will be seen, is not a matter that the Appeal Court decided definitively. This is because the Court held that it was unnecessary so to do in view of the approach that the Court took in that matter.

There is a related argument raised by Mr Bhembe, to the effect that the consequence of prayer b) of the Order dated 22nd February, 2002, was that once that application was finalised, then the Order fell away. The said prayer b) reads as follows: -

"The Second Respondent (i.e. Deputy Sheriff of Lubombo District) is interdicted and restrained from selling or disposing of the fourteen (14) herd of cattle attached on the 6th day of December 2001 pending finalization of this matter. "

"This matter" referred to in this Order, cannot be said relate to the application, because that Order of the 22nd February, marked the end of the rescission application, after which the plea, discovery and other pre-trial procedures, culminating in the actual trial occurred. In my view, the proper construction of the Order was that the cattle were only to be released at the end of the action as there was no other proceeding then anticipated. This, in my view included an appeal. In that event, Mr Bhembe's contention cannot be upheld. I am therefor of the view that following the noting of the appeal, it could not be said that the "finalisation of the matter" had been reached. It is only after the disposal of the appeal, or if this Court dismisses this application that it can properly be held that the matter is finalised. The latter event would however be subject to the Applicant filing an appropriate application in terms of the provisions of Rule 16 of the Court of Appeal Rules.

Mr Bhembe, not to be outdone, had another string up his bow. He argued that the cattle initially seized were fourteen and that only a herd of nine (9) was released after the judgement

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of Shabangu J.A., leaving a balance of five (5) beasts in the Applicant's farm. He argued that the beasts left under attachment were sufficient to cover the costs and the judgement in the event that the Applicant's appeal is upheld by the Court of Appeal. It was his contention that there would be no prejudice accruing to the Applicant in view of the five beasts still under attachment.

In my view, the question of prejudice must not be allowed to enter the equation, thereby obfuscating the issues. The question is whether the nine (9) herd of cattle was properly removed from the attachment and by an Order of a competent Court. A negative finding, which appears inevitable in the circumstances, renders the issue clearly caedit quaestio. This argument cannot therefor be sustained and is accordingly not upheld.

There is yet another related question, which requires an answer and this is in respect of whether the filing of the record was in any event due, regard had to the provisions of Rule 8 of the Appeal Court Rules.

The relevant portion of Rule 8(1), headed "Time for filing notice of appeal", reads as follows;
"The notice of appeal shall be filed within four weeks of the date of the judgement appealed against;

Provided that if there is a written judgement such period shall run from the date of delivery of such written judgement;"

There appears to be a dispute regarding whether the trial Judge did or did not give reasons for the Order he gave in respect of the absolution. The Applicant's position was that the trial Judge gave the Order and undertook to furnish written reasons in due course. Mr Bhembe on the other hand, indicated that some oral reasons were handed down. An attempt to obtain the Judges' original file inexplicably drew a blank. The file would have resolved this quandary, as the trial Judge would most probably have contemporaneously recorded on the file what he did and ordered on that day.

I am however of the view that the absence of the file is of no moment, in relation to the noting of the appeal in a case where written reasons are to be delivered. I say so for the reason that

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"judgement" is described in Rule 2 of the Court of Appeal Rules, as including "decree, order,

conviction, sentence and decision."

As seen above, this includes an Order, which renders the question of the delivery of reasons in relation to the noting of an appeal not crucial. This is however not to be construed in isolation and oblivion of the concerns raised and directions given by the Court of Appeal in previous cases regarding the desirability and imperativeness of this Court giving its reasons for any Order or judgement it hands down. The handing down of reasons, it was said, places the litigants and the Appeal Court in a position to know and to evaluate the propriety and correctness of the reasons. I refer, in this regard to ANDRIES STEPHANUS VAN WYK (supra) at page 2 and RECKSON MAWELELA V M.B. ASSOCIATION OF MONEY LENDERS AND ANOTHER CIV. APP. CASE NO, 43/1999, at page 5.

Conclusion and Order

In view of the conclusions I have reached above, I am of the view that the Respondents were not entitled to remove the cattle at the time they did and for the reasons proffered. An Order of Court in that regard, authorising the release of the cattle was in my view a sine qua non. The relief sought by the Applicant is therefor granted in terms of prayers 2 and 3 of the Notice of Motion.

Costs

No case has in my view been made for the mulcting of the Respondents with costs on an attorney and own client scale. It would appear that the Respondents were of the belief that the appeal had been abandoned and that they were entitled to the release of the cattle, a position that has been pronounced to be erroneous. Costs be and are hereby granted against the Respondents on the ordinary scale.

Observation

An issue that cries out for mention however, relates to the apparent lack of clarity regarding the identity of the cattle to be returned to the Applicant. A full and accurate description of the cattle, their colour, gender and other peculiar and distinguishing features should have appeared

ex facie the Notice of Motion. A Notice of Motion, it must be recalled, is the draft Order that the Court is moved to grant and it must therefor be clear and precise in its terms, leaving no room for doubt or vagueness. A wide and vague Notice of Motion as the one under scrutiny, should not ordinarily be allowed to stand as is. I do, however, grant the Applicant leave, in the Order of Court to be issued in pursuance of this judgement, to fully and properly describe the cattle in question, as should appear in the 2nd Respondent's Writ of Attachment or whatever document he used to record the identity of the cattle released on the 1st April. 2004.

This matter is an indication and pointer to the urgent need to reconstitute the Court of Appeal. This Court, in the absence of the Appeal Court, is being called upon to determine issues and to extend justice where it is due in matters that would, in the ordinary course, all things being equal, be determined by the Court of Appeal. The sooner that Court is reconstituted, the better for the proper administration of justice, not to mention the relief to litigants, in both civil and criminal causes, whose right to enter the final lap of justice, has been held in abeyance for a long time. Justice delayed, so the adage goes, is justice denied.

JUDGE