SWAZILAND HIGH COURT

HELD AT MBABANE

Civil Case No. 2265/2004

In the matter between

MATER DOLOROSA HIGH SCHOOL Applicant

and

NEDBANK SWAZILAND LIMITED 1st Respondent

R.M.J. STATIONERY (PTY) LTD 2nd Respondent

SIKELELA DLAMINI N.O. 3rd Respondent

In Re:

R.M.J. STATIONERY (PTY) LTD Plaintiff

And

MATER DOLOROSA HIGH SCHOOL Defendant

Coram: ANNANDALE, ACJ

For the Applicant: Mr. Mabila

For the 1st Respondent; No appearance

For the 2nd and 3rd Respondents: Ms Zwane

JUDGMENT

10 June, 2005

[1] Following a summary judgment against the applicant in favour of the second respondent, the latter acted under Rule 45(13)(a) and caused the first respondent to remove a sum of money from the account that the applicant kept with it. In the ordinary course of events this would be quite in order as judgments of the court have to be complied with and attachment of monies held by a judgment debtor in a banking account by way of garnishee is frequently an expeditious and proper procedure to follow when no direct payment is made by the debtor on presentation of a writ of execution by the sheriff.

[2] However, due to the facts of the matter set out below, the applicant has come to court to seek a reversal of the transaction, alternatively, that it be paid out by the Bank, and to keep everything on hold, once the status quo ante has been restored, until such time that the applicant's appeal against the summary judgment has been determined.

[3] The problem of the matter is that the applicant school noted its appeal at virtually the same time as when the judgment was being executed. The first respondent Bank effected a transfer out of the applicant's account on strength of the garnishee notice but did not pay it over to the third respondent sheriff, who in turn has not yet been able to pay over the attached amount of money to the second respondent, the judgment creditor, since the Bank wisely decided to stay out of the fray and presently keeps it in a suspense account.

[4] The issue that requires to be decided is whether the noting of the appeal at very much the same time as the execution process of the judgment debt, entitles the applicant to regain its money until such time that the appeal has been determined, or whether the money should remain in a suspense account until that time.

[5] Most of the facts in this matter are common cause. The stationers (2nd respondent) sued the school for the amount of E354 092.20. The stationers eventually obtained summary judgment against the school, in this amount, plus mora interest and punitive costs. The judgment was granted on the 27th January 2005 by Maphalala J, in a written judgment of that date. For purposes of the present application, it remains totally irrelevant whether the summary judgment is sound in law or not, or whatever the prospects of success on appeal may be.

[6] Very soon thereafter, the second respondent served a notice, issued in terms of Rule 45(13)

(a) on the bankers of the judgment debtor. The garnishee notice, or a copy thereof, was not filed with the papers in this application, nor was the return of the deputy sheriff.

[7] From a casual perusal of the court file, I found a copy, datestamped on the 31st January 2005 by the Registrar of the High Court. The notice itself is also dated the same.

[8] The notice is directed to Nedbank Ltd, (Swaziland) and refers to details of the judgment and adds that "...which amount remains unsatisfied". It then requires of the Bank to pay over to the stationers or their attorneys (Mamba & Associates), an amount of E385 960.05, or else to face the consequences of non-compliance.

[9] The garnishee notice does not specify the manner in which this amount is calculated. It correctly refers to the judgment debt as E354 092.20 "...together with interest thereon at the rate of 9% p.a. a tempore morae and costs, and which amount remains unsatisfied."

[10] Before I proceed, it needs to be noted that the costs order is nowhere alleged to have been taxed at the date when the notice was issued, so it could not include costs. The mora date is not specified in the summary judgment. Summons was issued on the 6th August 2004 and according to the return of service attached to it, served on the school principal on the 11th August 2004. The prayer for interest reads that 9% per annum is sought a tempore morae. This

date is the date when the process was served, namely the 11th August 2004.

[11] By simple calculation, by the time that the garnishee notice was issued on the 31st January 2005, the period over which mora interest could have accrued is some 173 days, on the amount of the judgment debt.

E354 092.20 at 9% equals E31 868.29 interest per year, and 173 days of 365 equals E15 104.70, which when added to the capital sum is someE369 196.90.

[12] The writ of execution, which was issued at the same time as the garnishee notice, specifies the amount to attach and take into execution as E354 092.20 ".. .together with interest thereon at the rate of 9% per annum a tempore morae ...plus costs to be taxed and charges thereon besides all your costs thereby incurred." It is not possible to execute in respect of costs until they have been taxed or agreed to in a fixed sum. Neither feature in the present case. Further, only one writ if execution may be issued in respect of one judgment unless a second writ has been sanctioned by the court. (Van der Merwe v Carstel 1995(4) SA 248(w) at 250 and 251). Once the costs have been taxed, it may be included in the sheriffs account and plan of distribution provided that the taxed bill of costs is lodged with the sheriff before the date of sale, but in the present situation, no sale in execution was envisaged as the sheriff attached funds of the debtor school, more than enough and more than allowed, to cover the amount specified in the writ of execution.

[13] The financial amounts and calculations reflected in both the writ and garnishee notice were not attacked in either the papers or in argument. Despite this, and especially since it is the very same garnishee notice vis-a-vis the notice of appeal that form the substance of the present application, it is apposite to deviate on this brief excursus to further examine the correctness of the documents on which the application is based.

[14] With a judgment debt of E354 092.20 and mora interest of E15 104.70 added to it, some E369 196.90 could be required to be paid by the judgment debtor, prior to the addition of taxed costs and sheriffs fees. As recorded above, the writ of execution, which apparently was issued simultaneously with the garnishee notice, in the same amount of E354 092.20 (plus interest), clearly states that costs were yet to be taxed and that the sheriffs fees still had to be added.

[15] The incongruous aspect is that the garnishee notice requires an amount of E385 960.05 to be deducted from the school's account at the Bank. This amount is stated to be, ex facie the notice itself, as "...being capital sum plus interest...". Obviously this cannot be correct. The difference between the amount required to be deducted and the correct amount to be deducted is some E16 763.15 extra or4;oo much. Both the judgment costs, yet to be taxed, as well as the sheriffs fees are still to be added. Fact remains that costs were not yet then taxed and the sheriffs fees was not agreed upon, or even estimated.

[16] Rule 45(13)(a) is fairly unambiguous and it reads that:-

"Whenever it is brought to the knowledge of the sheriff that there is any debt which is subject to attachment, and is owing or accruing from a third person to the judgment debtor the sheriff may, if requested thereto by the judgment creditor, attach such debt, and shall thereupon serve a notice on such third person (hereinafter called the garnishee), requiring payment by him to the sheriff of so much of the debt as may be sufficient to satisfy the writ, and the sheriff may, upon any such payment, give a receipt to the garnishee which shall be a discharge, pro tanto, of the debt attached. "

[17] The sheriff is authorised to attach from the garnishee so much of the debt as may be sufficient to satisfy the writ. The writ itself requires an amount yet to be determined, to be attached. The only amount in liquid terms, calculable, is capital and interest. Costs could not be estimated by the sheriff, as it still had to be taxed at that time, further he is not deemed to be able to know or even guess how much the taxed costs could be. Not by the furthest stretch of imagination could his own costs be estimated, nor was it so agreed, to amount to more than E16 000.

[18] It remains a curiosity as to how an ostensibly exact figure of "E385 960.05" came to be the amount to be deducted and paid over by the bank. The only indication, which cannot be correct, is that it is in respect of capital plus interest. The amount stipulated in the garnishee notice does not and could not include costs and execution fees.

[19] For these reasons, and despite the absence of issue being taken in the affidavits or ventilated in argument, the very same writ of execution and garnishee notice under Rule 45(13)(A) (sic) is more than just suspect. It is wrong, it is not consonate with equity and fair justice between man and man. When a litigant comes to court to defend enforcement of its absolute, technically founded rights to execute, its own processes must be compliant with acceptable norms, which presently, seems to be prima facie not only suspect, but wrong and unenforceable.

[20] An incorrect writ of execution or garnishee notice, to the extent of the matter at hand, erodes the very foundation on which enforcement of its contested rights are sought.

[21] Returning to the matter at hand, there is a so called technical point taken on the ability of the deputy sheriff to be lawfully enabled to have done what he did.

[22] The applicant takes issue on the status of the executing deputy sheriff to operate in the Mbabane area. The summons was served by the deputy sheriff for the region (district) of Hhohho, Mr. Themba N. Dludlu. The third respondent, who served the garnishee notice, is described by the applicant as the deputy sheriff for the district of Manzini (not Mbabane) and further alleges that he was not empowered to deal with the writ of execution or the garnishee notice. To the reply of the respondents, the applicant reiterated its stance, seeking fortification in the absence of a request to the sheriff (addressed to the Registrar) to appoint this person to

execute.

[23] From the papers in the court file, which were not also incorporated in the Book of Pleadings, it nevertheless seems as if the stationer's attorneys did request for an appropriate appointment and that the sheriff (the Registrar) also did in fact appoint the deputy sheriff to act as he did.

[24] Nothing much seem to turn on this point and it was not pursued in argument either. I proceed on the basis that whatever trie deputy sheriff did, he did so under full and appropriate authority, in his official capacity ex officio, as mandated by the attorneys of the judgment creditor, L.R. Mamba & Associates.

[25] The further and more material issues at hand are the consequences of noting an appeal vis-a-vis the consequences of execution.

[26] The main point taken by the stationer's attorney is that they were first in line, so to speak, which precludes the school from regaining its money until such time that the appeal has been decided.

[27] It is common cause between the parties, as is the accepted common law rule, that the execution of a judgment is ipso facto suspended upon the noting of an appeal. Until such time that the appeal has been finalised, the judgment cannot be carried out and no effect can be

given to it unless the court which granted the judgment, gives leave to execute. This is to prevent irreparable harm or damage to the intending appellant. (See Herf vs Germani 1978(1) SA 440(T); Hermansburg Mission vs Sugar Industry Central Board 1981(4) SA 717(D); and South Cape Corporation (Pty) Ltd vs Engineering Management Services (Pty) Ltd 1977(3) SA 534(A) at 544H - 545B for an exposition of the rationale and background of this basic principle.)

[28] The object of the exercise is that if a dissatisfied party notes an appeal and successfully prosecutes it, it should remain in the position it was before the (initial) judgment was given. Where the execution process has run its course, as may be the case when leave is given by court to execute even though an appeal is pending, the successful appellant may have severe difficulty in undoing the execution taken against it, hence the usual requirement that the party that wishes to execute in the time being is required to furnish adequate security.

[29] In this matter, no leave to execute pending the outcome of the appeal has been sought, or granted.

[30] The essence of the dispute is that the second respondent/judgment creditor contends that it embarked on the execution process before the appeal was noted with the result that the applicant school cannot have its money returned, to make the process undone, through a reversal of the debit entry, back from the suspense account of the Bank into the school's

account. The school contends that it did not note the appeal because it was made aware of the execution process, as the second respondent contends, but rather that it noted the appeal because it is dissatisfied with the outcome of the summary judgment taken against it, and that its money should be returned to it. Further, the school state that in any event, should it become necessary, it has fixed property in the Kingdom, that it is an incola, against which it could still be executed if need be.

[31] The school noted the appeal on the 1st February 2005, the same date on which R.M.J. Stationery obtained the writ and garnishee notice, serving the latter on the Bank. It was also on the same date when the Bank was made aware of the noted appeal.

[32] In its answering affidavit, the Bank's Managing Director says that as they were in the process of honouring the directive in the garnishee notice, applicants attorneys advised that the garnishee notice was automatically stayed. Thereupon, it enquired from the second respondent's attorneys what the position now was. "(S)he was advised that they issued and served the Garnishee Notice concerned before the filing of the Notice of Appeal, arguing we had to comply with the Garnishee Notice and disregard the Notice of Appeal. "

[33] The same argument was advanced at the hearing of the application by the attorney of the second respondent. In paragraph 13 (page 32 of the record) of the second respondent's opposing affidavit it is averred that the applicant will not have sufficient funds to satisfy the judgment

debt, costs and interest, should the Bank release the money to it. Also, that the applicant "has failed to substantiate the fact that it has other assets including immovable property situated in Swaziland."

[34] The point is that the application before me is not to determine whether the applicant indeed has sufficient assets to satisfy the judgment if it fails in the appeal. Nor is it necessary to find whether the second respondent will be able to put the applicant back in funds if the appeal is successful, as the application is not to determine whether the execution may proceed pending the finalisation of the appeal. There is no such application before court. The crux of the resistance to the application by the second respondent is its fear of ending up with an unexecutable judgment if the appellant/applicant is unsuccessful with its appeal.

[35] What is before court is determine whether the execution process must remain in the present state of affairs - the second respondent aptly terms it to "freeze" the process, or, on the other hand, whether whatever has been commenced with, must be made undone, pending the outcome of the appeal. Certainly, it cannot be so that the third possibility, to order release of the funds on suspense to the second applicant, could be considered at all, in the present matter.

[36] The only factual dispute between the parties is who was first in line at the Bank with its notice, and whether the appeal was noted as result of the execution process, or not. Neither of these aspect are material to the outcome of the matter.

[37] The law is settled, and both parties are in agreement thereto, that the noting of an appeal suspends or stays the process of execution. To "suspend" is to cause to cease for a time, to interrupt temporarily, to hold in a state undetermined, to debar for a time from any privilege, to cause to cease for a time from operation or effect. Ms Zwane referred me to Blacks Law Dictionary by Bryan A Garner, the New Pocket Edition at page 593, where a "stay" is described as "the postponement or halting of a proceeding, judgment, or the like."

[38] Ms Zwane seeks to distinguish the present situation in that execution had already been effected, with all that was left was for the Bank to issue a cheque of the funds taken from the school's account.

[39] That does not alter the fact of the matter - noting of an appeal stays execution. Execution of a judgment cannot be carried out without special leave of the court that granted the judgment and no such leave was sought or obtained. The consequence is that execution cannot be proceeded with.

[40] As matters stand, the execution process, by way of a garnishee notice, has begun but is not completed. I do not need to decide what the position would have been if the Bank had already paid over the attached money to the second respondent, as it is not the position.

[41] To order that the money must remain in the suspense account at the first respondent Bank will have the same effect on the applicant as when execution is not stayed at all, pending the appeal. It will also be so if it is ordered that it must be paid over to the second respondent, which cannot be done as aforesaid. The only remaining option, which is also in consonance with the effect that noting of an appeal has on the process of execution, is to order as the applicant seeks to have done. In my judgment, it is not only the only logical option but also is in line with the legal position as set out above.

[42] The applicant's stated state of affairs is that it requires the money under attachment to be used in order to continue its operations. It seems from the papers that the school had some E500 000 in its account with the Bank before the better part of it was removed on strength of the execution process. The very harm that a stay of execution seeks to prevent is irreparable damage. This is what the school says will befall it if the money is not returned to it.

[43] The ancillary issues of whether the judgment creditor will still have enough to execute if the appeal fails and whether the school indeed has enough immovable property in Swaziland to satisfy the judgment debts, as it says it has, cloud the issue at stake. It is not those factors on which the outcome of the matter hinges.

[44] It is for the reasons stated above that the application has to succeed.

[45] In its answering affidavit, the first respondent Bank states that it received a garnishee notice to pay a sum of "E354 000" to the second respondent. It also states that it seeks to place before court its reasons why it could not pay "the amount of over E354 000" to any of the parties. It seems that the applicant itself is also of the view that E354 000 has been attached, an averment not denied by the second respondent. Yet, the second respondent also refer to the money as a sum "in excess of E354 000".

[46] As noted above, the garnishee notice refers to the sum of the judgment debt as "E354 092.20", but requires an amount of"E385 960.05" to be paid over to attorneys L.R. Mamba and Associates.

[47] It is possibly for this uncertainty that the amounts reflected in the first prayer of the application and elsewhere in the papers read "in excess" of E354 000 and not an exact or known amount.

[48] The order in this application is therefore that:

"Lit is ordered that Nedbank Swaziland Limited forthwith reverses the debit entry that it made in respect of the account of the Mater Dolorosa High School, pursuant to the Garnishee Notice in terms of Rule 45(13)(a) dated the 31st January 2005;

2. Execution of the Notice aforesaid or any other process of execution in the principal action herein is stayed pending the outcome of the

appeal therein, unless otherwise ordered by court;

3. Costs of the application are ordered against the second respondent."

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE