IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 1356/08

In the matter between:

THE MINISTER OF HOUSING AND URBAN DEVELOPMENT	APPLICANT
AND	
SIKHATSI DLAMI	1st RESPONDENT
ZEPHANIA NKAMBULE	2nd RESPONDENT
THULANI MKHONTA	3rd RESPONDENT
GEORGE BENITO JONES	4th RESPONDENT
GRACE S. BHEMBE	5th RESPONDENT
ARNOLD DLAMINI	6th RESPONDENT
BHEKI MKHONTA	7th RESPONDENT
BENEDICT BENNETT	8th RESPONDENT
JAMES NCONGWANE	9th RESPONDENT
GEDLE MDLULI	10th RESPONDENT
JOSEPH SHONGWE	11th RESPONDENT

IN RE

THE MUNICIPAL COUNCIL OF MBABANE	1st APPLICANT
FELIX MATSEBULA	2nd APPLICANT
ZEPHANIA NKAMBULE	3rd APPLICANT
BENEDICT BENNETT	4th APPLICANT
AND	
THE CHAIRMAN OF THE COMMISSION OF ENQUIRY INTO THE AFFAIRS OF THE MUNICIPAL COUNCIL OF MBABANE	1st RESPONDENT

THE MINISTER OF HOUSING AND
URBAN DEVELOPMENT 2nd RESPONDENT

THE ATTORNEY-GENERAL 3rd RESPONDENT

CORAM: MAMBA J

FOR APPLICANT: Mr M. Mabila (with him Mr M. Vilakati)

FOR RESPONDENTS: Mr J. Hlophe

JUDGEMENT
9th July, 2008

[1] The bitter relationship between the parties herein that has culminated in this application is well or handsomely documented. Its checkered history is found in the papers filed herein and in the main or initial application that was heard by my brother Maphalala J. Notwithstanding that both sides have been extremely prolix in their respective depositions - leaving nothing to chance on whatever or everything each had to say against the other - about their acrimonious wrangle for control of the Mbabane City Council, none of the details of this wrangle is worth mentioning or is necessary for purposes of this judgement. Suffice to say that on the 19th June 2008 Maphalala J issued the following order in favour of the respondents namely:

> "2. Setting aside or interdicting implementation of the ministerial order dissolving the Council of Mbabane pending the finalization of the main application herein... ."

[2] The Applicant was dissatisfied with the said order and immediately appealed against it to the Supreme Court. This appeal is yet to be enrolled in that court.

[3] The Respondents argue that the Applicant's notice of appeal is null and void and of no force and effect in law inasmuch as the decision appealed against is unappealable. The Applicant thinks otherwise. As a result of this stance by the respondents, the Applicant has launched this application seeking inter alia a declaration by this court that:

> "3. ... the 1st Applicant's notice of appeal filed against the Honourable Maphalala J's judgement of the 19th June 2008 automatically stays execution of the said judgement. 4. The regularity or otherwise of the Applicant's notice of appeal filed against the judgement of Maphalala J of 19th June 2008, is a matter within the exclusive domain of the Supreme Court."

[4] Appeals from this court to the Supreme Court are governed by section 14 of the Court of Appeal Act 74/1954 and article 147 of the Constitution.

[5] One notes from the outset that the two orders sought are nothing more than a restatement of the law in general, pertaining to the effect that a notice of appeal has on the operation and execution of the judgement appealed against. In South Africa, this common law rule has been enacted as rule 49(11) of the Uniform Rules of Court. We do not have a similar rule and therefore our position on the issue is governed by the Common law. This court had occasion to refer to this point in the unreported case of **SWAZI MTN LTD v MVTEL COMMUNICATIONS (PTY) LTD & ANOTHER** (Civil Case 7/06 delivered on the **8th** March 2006).

[6] **Erasmus, Superior Court Practice,** at page B1-369 states the rule as follows:

> "The accepted common law rule of practice in our courts is that generally the execution

of a judgement is automatically suspended upon the noting of an appeal, with the result that pending the appeal the judgement cannot be carried out and no effect can be given thereto. The purpose of the rule as to the suspension of a judgement on the noting of an appeal is to prevent irreparable damage being done to the intending appellant, either by levy under a writ of execution or by execution of the judgement in any other manner appropriate to the nature of the judgment appealed from." (footnotes have been omitted by me)

[7] The issue was comprehensively dealt with by Kriegler J in **RENTEKOR (PTY) LTD AND OTHERS v RHEEDER & BERMAN NNO & OTHERS, 1988 (4) SA 469 (TPD) at 503B-504G** wherein the court was asked, inter alia, to declare that:

"2.1 (a) ...the order placing the first applicant under final liquidation issued out of this honourable court under case no. 8034/87 on 27th May 1987 is suspended both as to its operation and execution in terms of Rule 49 (11) of the Uniform Rules of Court; ...

(c) ...the affairs of the first applicant are vested in its Board of Directors who were duly appointed on 5th May 1987;...,"

In that case the Learned Judge stated that:

"It would be convenient to deal next with prayers 2.1 (a) and (b) of the notice of motion. Mr Zeiss drew attention to the fact that the former did not really come to grips with the issue. The declaration it seeks says no more than is contained in Rule 49 (11) of the Uniforms Rule of Court. However, when read together with the latter prayer and with prayer 2.1 (c), the point becomes clear. What was sought was an order that, by virtue of the suspension of the operation and the execution of the winding up order in terms of Rule 49(11), the Board of Directors of **Rentekor** was re-vested with the control of the company's affairs. The issue thus raised need not detain us unduly long. The answer in my view is clear. The wording

of Rule 49 (11) which was ordered by the Appellate Division to apply without qualification, is unambiguous, viz

"where ...an application for leave to appeal against ...an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appealing unless the court which gave such order... otherwise directs."

Once leave to appeal had been granted by the Appellate Division, the winding up order, both in respect of its operation and its execution, was suspended pending the judgement on appeal. It no longer operated. It could no longer be carried out. The position at common law was put as follows by De Villiers JA in **Reid & Another v Godart and Another, 1938 AD 511 @ 513 and 514:**

"Now, by the Roman Dutch Law the execution of all judgements is suspended upon the noting of an appeal; that is to say, the judgement cannot be carried out and no effect can be given thereto, whether the judgment be one for money (on which writ can be issued and levy made) or for any other thing or for any form of relief granted by the court appealed from.

... "execution" means, as it seems to me, "carrying out" of or "giving effect" to the judgement, in the manner provided by law; for example, by specific performance, by sequestration, by the passing of transfer, by issue of letters of administration, by ejectment from premises, or by a levy under a writ of execution."

The effect of the sub-rule in question and the position at common law were again dealt with by the Appellate Division in the case of **SOUTH CAPE CORPORATION (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD, 1977 (3) SA 534 (A). @ 544H - 545C**

CORBETT JA, with whom RUMPFF CJ and TROLLIP, RABIE and MILLER JJA concurred, said the following:

"Whatever the true position may have been in the Dutch Courts, and more particularly the court of Holland ...it is today the accepted common rule of practice in our courts that generally the execution of a judgement is automatically suspended upon noting an appeal, with the result that pending the appeal, the judgement can not be carried out and no effect can be given thereto, except with the leave of the court which granted the judgement. To obtain such leave the party in whose favour the judgement was given must make special application. ...the purpose of this rule as to the suspension of the judgement 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 judgement in any other manner appropriate to the nature of the judgement 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 leave be granted, to determine the conditions upon which the right to execute shall be exercised ... ." The Learned Authors of Herbstein and Van Winsen **THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA 3rd ed @ 719,** in the penultimate paragraph of their discussion of the effect of noting appeal on the execution of the judgement under appeal, say the following :

> "Where an appeal lies to the Appellate Division, it is quite clear that the noting of the appeal automatically suspends execution of the judgment appealed against, unless, in terms of the Appellate Division Rules, "the judgement appealed from is carried into execution by direction of the court appealed from. ... Thus, even if the order of the Appellate Division granting leave to appeal in this case had not contained the express reference to sub rule 49(11), the judgement could not have been carried out, nor could any effect have been given to it. It is so that in the time that had elapsed between the refusal by Harms J of the application for leave to appeal and the reversal of that order by the Appellate Division, Rheeder and Berman had entered upon the winding up of Rentekor, albeit largely by Rheeder, with Berman sniping the while. It is also true that such a belated suspension of the liquidation order was highly disruptive. However, that is the way the law stands" ... The liquidators' appointment and their powers and duties were suspended, as were all the other consequences of winding up. Suspended means lifted, removed but subject to possible reimposition."

At the end the Court granted an order declaring that

> "...the order of the Appellate Division dated 12 October 1987 granting the 2nd Applicant leave to appeal the order granted by this court on 17 May 1987 (whereby 1 Applicant was placed under final liquidation under case no. 8034/87) suspended the operation and

execution of such order of liquidation pending the determination of the said appeal."

[8] The facts in the **Rentekor case (supra)** were materially or substantially different from the present application. There the appealability or unappealability of the judgement appealed against was not in issue. The appellate Division, to which the appeal lay had granted leave to the first applicant to appeal to it. The regularity or validity of the notice of appeal had been determined or sanctioned by the Appeal Court. The validity or efficacy of the notice of appeal was never in doubt and had been granted by the Appeal Court. In easy, the very notice of appeal by the applicant is put in issue. The respondents argue that it is a nullity as the judgement appealed against is purely interlocutory and unappealable. The parties herein are in agreement, I think, that it is the appeal court to which the appeal lies that has the power or jurisdiction to determine the validity or otherwise of the notice of appeal. It is that court that has the sole prerogative to determine whether the judgement by Maphalala J is appealable or not. The applicant in fact takes the issue further by saying that the respondents have usurped the jurisdiction of the Appeal Court by pronouncing on the validity or regularity of his appeal. The position would, of course, be otherwise if this court were being asked to grant leave to appeal. The court would have to be satisfied first that the decision sought to be appealed against is appealable with leave of the court.

[9] The common law rule I have referred to above is a general rule. It is premised on the assumption to noted. It is only a notice of appeal - properly so called - that has the effect of suspending the operation and execution of the judgement appealed against. The validity of the notice of

appeal or leave to appeal is a prerequisite or precondition for the said notice to suspend the operation and execution of the judgement appealed against. For example, a notice of appeal that is patently noted well out of time would not have the effect of a valid one (notice of appeal). A notice of appeal on a non appealable judgement is analogous to no notice at all. This is also true of a notice of appeal that has lapsed. (See **Schmidt vTheron, 1991 (3) SA126 (c)).**

[10] For the foregoing reasons, I rejected the Applicant's contention that the court must not consider the validity of the notice of appeal and appealability of the judgement appealed against, but must assume that the notice of appeal is valid and not a nullity. Implicit in this is that the validity of the notice of appeal is the determinant or defining factor. But it must be ascertained by the Appeal Court and not thus court. The application was therefore dismissed with costs.

MAMBA J