IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 1356/08

In the matter between :

WALTER BENNETT N.O. & OTHERS	1st APPLICANTS
THE MINISTER OF HOUSING AND URBAN DEVELOPMENT	2nd APPLICANTS

AND

SIKHATSI DLAMINI & 10 OTHERS	RESPONDENTS

In re:

SIKHATSI DLAMINI & 10 OTHERS	APPLICANTS

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 OPERATIONS OF THE MUNICIPAL COUNCIL OF MBABANE	1st RESPONDENT
THE HONOURABLE MINISTER FOR HOUSING AND URBAN DEVELOPMENT	2nd RESPONDENT
THE ATTORNEY GENERAL	3rd RESPONDENT

WALTER BENNETT	4th RESPONDENT
JABU MABUZA	5th RESPONDENT
LOMCEBO DLAMINI	6th RESPONDENT
PETROS MBHAMALI	7th RESPONDENT
TOM BAYLY	8th RESPONDENT
JOSEPH NDLANGAMANDLA	9th RESPONDENT
LOMALANGENI KUNENE	10th RESPONDENT

CORAM: MAMBA J

FOR APPLICANTS: Mr S. Mdladla & Mr M. Mabila

FOR RESPONDENTS: Mr N. Hlophe & MrZ. Shabangu

JUDGEMENT

30th July, 2008

[1] Following an application by the Respondents, my colleague Maphalala J granted the following order in their favour:

> "2. Setting aside or interdicting implementation of the Ministerial order dissolving the Council of Mbabane... .
>
> 3. Directing the 2nd Respondent to restore the status quo ante existing prior to his issuing the Ministerial order... ."

The court held further that the Minister had failed to follow the rules of natural justice in that he had failed to afford the Applicants the opportunity to be heard, individually, before he removed them from office.

[2] This order was made on the 19th June, 2008 and the applicants immediately filed an appeal against it. The Respondents have,

however, argued in this court and in the various correspondence that was exchanged between the parties before the filing of this application that the order granted on the 19th June 2008 is interlocutory or preparatory and therefore unappealable and consequently the notice of appeal filed by the applicants herein is of no force and effect in law; it is a nullity. Founded on this argument the Respondents have sought to exercise their duties as municipal council members for Mbabane saying that the order of Maphalala J referred to above effectively re-instated them into office (with full powers for them to act as such Councillors).

[3] The Applicants disagree and they have filed this application seeking an order inter alia that:

> "3. ...the respondents be interdicted and restrained from interfering with the functions of the first Applicant and from entering the premises of the Municipal Council of Mbabane. 4. ...the respondents be interdicted and/or restrained from assuming the position of councilors of the Municipal Council of Mbabane pending the finalization of the determination of whether the appeal before the Supreme Court is irregular or not."

The Applicants argue that the order of the 19th is final and definitive in both its nature and application and therefore is appealable as of right to the Supreme Court.

[4] Section 14 of the Court of Appeal Act provides that:

> "14.(1) An appeal shall lie to the Court of Appeal-
>
> a)from all final judgements of the High Court; and
>
> b)by leave of the Court of Appeal from an interlocutory order, an order made *ex parte* or an order as to costs only.

(2) The rights of appeal given by sub-section (1) shall apply only to judgments given in the exercise of the original jurisdiction of the High Court."

Article 147 of the Constitution is substantially in the same vein as it states that:

"(1) An appeal shall lie to the Supreme Court from a judgement, decree or order of the High Court-

a)as of right in a civil or criminal cause or matter from a judgement of the High Court in the exercise of its original jurisdiction; or

b)with the leave of the High Court, in any other cause or matter where the case was commenced in a court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law or is in the public interest.

(2) Where the High Court has denied leave to appeal the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant or refuse leave accordingly."

[5] In terms of the common law, the noting of an appeal has the effect of automatically suspending the operation and execution of the order appealed against, unless the court orders otherwise. In a judgement handed down on 9th July 2008 between the parties, I dealt with this issue in the following terms:

"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).

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)

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 1st 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."

In that judgement I refused to grant the Declaratory Order and stated that :

"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.

The common law rule I have referred to above is a general rule. It is premised on the assumption that a valid notice of appeal has been 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 v Theron, 1991 (3) SA 126 (c))•"**

[6] The relief sought in this application is an interdict. The relief sought in the earlier application was a declaratory order. Both remedies are discretionary. The considerations to be had in determining the reliefs are different. To satisfy the grant of an interdict, the applicant must establish a clear right. This right need not be beyond question. The threshold is therefore lower than that required for a declaratory order. It's a matter of degree only.

[7] The requirements for the grant of a temporary interdict were stated by Corbett J (as he then was) in the case of LF BOSHOFF INVESTMENTS (PTY) LTD v CAPETOWN MUNICIPALITY 1969 (2) SA 256 (C) AT 267 as follows:

" ...the Applicant for such temporary relief must show -

(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to doubt;

(b)that, if the right is only prima facie established, there is a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

c)that the balance of convenience favours the granting of interim relief; and

d)that the applicant has no other satisfactory remedy."

[8] For a declaratory order the test or standard is higher, but it remains

on a preponderance of probabilities. The Applicant must satisfy the court that the right sought to be declared is certain - It can not be based on a mere prima facie view or determination. The right must be established and it must not be in doubt. Where the appealability or otherwise of the order is outside the province or domain of this court to determine, and therefore not established, a declaratory order may not, in my respectful view be granted. (See in this regard generally the case of **FAMILY BENEFIT FRIENDLY SOCIETY v COMMISSIONER FOR INLAND REVENUE & ANOTHER, 1995 (4) SA 120 (TPD), and MUNN PUBLISHING (PVT) LTD v ZIMBABWE BROADCASTING CORPORATION 1995 (4) SA 675.)**

[9] The right, sought to be protected by the interdict, pending the appeal, is that which enures or flows or emanates from the filing of the notice of appeal. Whether that right exists or not as a matter of law will be the subject of the pending appeal. The Supreme Court shall determine whether the order of the 19th June is appelable or not.

[10] It is common cause that each side claims to be lawfully in office by virtue of the conflicting legal status each attaches to the notice of appeal. On the one hand, the applicants contend that the notice of appeal is valid as the decision appealed against is final and definitive and therefore appealable as of right. The respondents on the other hand argue that the notice of appeal is a nullity as the decision in question is purely interlocutory and not appealable, or if appealable, only with leave of the court.

[11] The crux or nub of the order of the 19th June is that the Minister

violated the rules of natural justice in failing to afford the applicants (respondents herein) the right to be heard, individually, before he sacked them and therefore their removal from office is null and void. That, in my judgement, is a final and definitive order or determination. It disposes, in a final way, the central issue between the minister and the Councillors; namely the ministerial decree sacking the councillors from office. The order says; assuming the ministerial powers contained under section 107 of the Urban Government Act are Constitutional, he nonetheless exercised them improperly by failing to adhere to the rules of natural justice. Prima facie, this determination is appealable as of right and the interdict had to succeed, as amended; the applicant having established a clear right, though open to doubt.

[12] There is in my view insufficient material in support of the Respondents' counter-claim herein-for leave to execute the judgment by Maphalala J, pending the finalization of the appeal. The Respondents have not stated why they want leave to execute the judgement pending the appeal or what prejudice they would suffer if such leave is not granted. The court has a judicial discretion to exercise in determining whether or not to grant such an order. This discretion though must be based or grounded on objective facts.

(See **MTN SWAZILAND LTD v MVTEL COMMUNICATIONS (PTY) LTD & ANOTHER Case 7/06** (unreported) and the cases therein cited.)

[13] I noted in my ex tempore judgement that I had sympathy for the respondents and the residents of Mbabane in general who as the

elected councillors find themselves out of office through a ministerial decree. The electoral voice has been supplanted or superseded by ministerial decree. The people of Mbabane expect to enjoy the fruits of our new Constitutional dispensation which is based on a free and open democracy - where the voice of the electorate is to rule the roost. Governance or rule by ministerial decree is not my idea of an open, decentralized and people-based local governance and this is the reason, I suspect, Maphalala J referred the issue of the constitutionality or otherwise of the powers of the Minister under section 107 for determination by a full bench.

[14] The court's uneasiness about this should nonetheless not render nugatory, the right of the Applicants to appeal against the determination by Maphalala J.

[15] The Minister, as the law stands, is the overall overseer of all local authorities. He is, however, not the Lord of the manor. Ideally, the electorate must be represented by the elected. There can be no objection in principle though that, if the elected fail the electorate, then the overseer, mandated by the electorate, must step in and restore order and good governance.

MAMBA J