



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 952/2013

In the matter between:

JAHA MALAZA

APPLICANT

AND

MARGARET LOMDUMO MALAZA NO

RESPONDENT

*Neutral citation: Jaha Malaza v. Margaret Lomdumo Malaza NO (952/2013)
[2014] SZHC 216 (22nd September 2014)*

Coram

M.C.B. MAPHALALA, J

Summary

Civil Procedure – application to enforce and execute a court order in the face of a notice of appeal – held that the noting of an appeal suspends the implementation of a court order – held further that the applicant was at liberty to make an application to execute the order pending appeal – held that it is only the court seized with the appeal which can make a declaration that the appeal has been abandoned – application dismissed.

**JUDGMENT
22nd SEPTEMBER 2014**

[1] The applicant seeks an order directing and authorising the Registrar of the High Court to sign the necessary documents in order to effect the transfer of Portion 7 (a portion of portion 2) of Farm No. 950 situate in the District of Hhohho, Swaziland; the property is measured 3, 999 (three comma nine nine nine) hectares. The applicant further seeks costs of suit.

[2] It is common cause that on the 11th March 2014 this court granted an order directing the respondent to do all that is necessary to facilitate the transfer and registration of the immovable property into the name of the applicant upon payment of the sum of E26 925.28 (twenty six thousand nine hundred and twenty five emalangenani twenty eight cents) in terms of the Liquidation and Distribution Account in the Estate of the Late Henry Butana Malaza E37/91 dated 19th August 1994.

Consequently, the amount of E26 925.28 (twenty six thousand nine hundred and twenty five emalangenani twenty eight cents) was paid by the applicant to the Master of the High Court, and, conveyancers were duly instructed to effect transfer of the property. However, this is not possible on the basis that the whereabouts of the respondent is not known; the respondent has to sign transfer documents. The respondent's attorneys

have not been helpful in assisting the applicant to locate the respondent despite a request from the applicant to do so.

[3] The respondent has raised three Points of Law: Firstly, that the application is irregular on the basis that the applicant has failed to comply with Rule 16 (2) (a) when terminating the authority of his previous attorneys and appointing the present attorneys by failing to give notice to the Registrar and to the other parties. Secondly, that the applicant has not joined the Registrar of Deeds yet he is a necessary party and has an interest in any order authorizing and/or directing anyone to sign the necessary documents in order to effect transfer of any immovable property to any person. Thirdly, that the respondent has noted an appeal against the order which the applicant is relying upon to seek the relief and that there is an automatic stay in respect of the execution of the said order.

[4] When the matter was heard in court, the respondent's attorney did not argue the first two Points of Law and his Heads of Arguments only dealt with the third Point of Law.

With regard to the first point of law, Rule 16 (2) (a) provides:

“(2) (a) Any party represented by an attorney in any proceedings may at any time, subject to the provisions of rule 40, terminate such

attorney's authority to act for him, and thereafter act in person or appoint another attorney to act for him therein, whereupon he shall forthwith give notice to the Registrar and to all other parties of the termination of his former attorney's authority and if he has appointed a further attorney so to act for him, of the latter's name and address."

This point of law is misconceived on the basis that the initial application which was heard and granted on the 11th March 2014 has been finalized. This application is new and the main prayer seeks relief against the Registrar of Deeds who should have been cited in the proceedings, and, the applicant's previous attorneys never dealt with the present application. The applicant's present attorneys have indicated that they are representing the applicant, and, the address of service of documents has been identified.

- [5] The second point of law relating to non-joinder is good on the basis that the Registrar of Deeds is a necessary party and ought to have been joined in the proceedings. It is trite law that if a third party has or may have a direct and substantial interest in any order which the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, he is deemed to be a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined. It is equally trite that a court cannot deal with issues

affecting a necessary party without a joinder being effected; in these circumstances, no question of discretion or convenience arises.

- [6] A necessary party is entitled as of right to be joined as a party. It is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest. It is well-settled that where the parties have not raised non-joinder in instances of joinder of necessity, the court should *mero motu* raise it in order to safeguard the interests of third parties; the court should decline to hear the matter until such joinder has been effected or until the court is satisfied that the third parties have consented to be bound by the judgment or have waived their right to be joined.

See: *Amalgamated Engineering Union v. Minister of Labour* 19449 (3) SA 637 (A) 1, 651, 659-660

Ex Parte Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA) para 9

Pretorius v. Slabbert 2000 (4) SA 935 (SCA) at 939 C-F

- [7] The third point of law is that the respondent has noted an appeal against the order which the applicant is seeking to enforce in the face of an automatic stay of execution arising from the appeal. The applicant contends that the Notice of Appeal was served on the 8th July 2014, a day after receiving the

application proceedings. Accordingly, the applicant contends that the appeal is out of time as contemplated by Rule 8, and, that the respondent has not filed an application for leave to appeal out of time in terms of Rule 9 of the Court of Appeal Rules. On the contrary the respondent argues that no written judgment was handed down in respect of the order appealed against, and, to that extent the period within which the noting of an appeal should be made has not started running.

[8] Rule 8 of the Court of Appeal Rules, 1971, provides the following:

“8. (1) The notice of appeal shall be filed within four weeks of the date of the judgment appealed against:

Provided that if there is a written judgment such period shall run from the date of delivery of such written judgment:

And provided further that if the appellant is in gaol, he may deliver his notice of appeal and a copy thereof within the prescribed time to the officer in charge of the gaol, who shall thereupon endorse it and the copy with the date of receipt and forward them to the Registrar who shall file the original and forward the copy to the respondent.

(2) The Registrar shall not file any notice of appeal which is presented after the expiry of the period referred to in paragraph (1) unless leave to appeal out of time has previously been obtained.”

[9] Rule 9 provides the following:

“9. (1) An application for leave to appeal shall be filed within six weeks of the date of the judgment which it is sought to appeal against and shall be made by way of petition in criminal matters or motion in civil matters to the Court of Appeal stating shortly the reasons upon which the application is based, and where facts are alleged they shall be verified by affidavit.

(2) The appellant shall deliver such petition and its supporting documents to the Registrar, and serve a copy on the respondent forthwith:

Provided that if the appellant is in goal he may deliver the petition and supporting documents and a copy thereof to the officer in charge of the gaol who shall thereupon endorse them with the date of receipt and forward them to the Registrar who shall file the original and forward the copy to the respondent.

(3) Such motion accompanied by supporting documents shall be delivered to the Registrar and a copy thereof shall be served by the appellant on the respondent forthwith.

(4) The respondent may file an affidavit in reply to the petition or motion within seven days from the date of service or within such longer period as the Registrar may allow.

.....

16. (1) 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.

An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which *prima facie* show good cause for leave to be granted.

17. The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these rules and may give such directions in matters of practice and procedure as it considers just and expedient.”

[10] It is common cause that the respondent has noted an appeal against the order made by this court on the 11th March 2014; and, the appeal is pending before the Supreme Court. The applicant cannot, therefore, execute the order in the face of the pending appeal. However, it is open to the applicant to lodge an application to execute the judgment pending appeal. It is a trite principle of our law that the noting of an appeal suspends the execution of a court order. However, the court may grant an interim order of execution where it considers that the suspension of an implementation to execute would result in injustice. Such an order is discretionary, and, the court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties.

See: *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (5) SA 703 (CC) at pp 707 and 709.

[11] The South African Constitutional Court in the case of *Minister of Health and Others v. Treatment Action Campaign and Others* (supra) at p. 709 approved and dealt with considerations relevant to the grant of an application for leave to execute pending appeal; and, to that extent the court approved the decision in the case of *South Cape Corporation (Pty) Ltd* 1977 (3) SA 534 (A). The court at para 10, page 709 had this to say:

“10. In our view, this is another case where prospects of success will not necessarily be determinative of the interests of justice. The appellants sought leave to appeal against an interim execution order. Such orders are discretionary orders. In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545C-G, Corbett JA identified the considerations relevant to the grant of an application for leave to execute pending appeal in the following manner:

“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 (see *Voet*, 49.7.3; *Ruby’s Cash Store (Pty) Ltd v Estate Marks and Another* [1961 (2) SA 118 (T)] at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. *Fismer v Thornton* 1929 AD 17 at p.19). In

exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.”

Before making an order to execute pending appeal, therefore, a court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties, as the judge clearly did in this case.”

[12] The applicant has urged this court to make a finding that the appeal has been abandoned in terms of Rule 30 (4) of the Court of Appeal Rules on the

basis that the appeal was filed out of time; and, in addition, that the respondent has not applied for leave to file the appeal out of time as contemplated by Rules 16 and 17 of the Court of Appeal Rules. However, such a determination should be made by the Supreme Court to which the appeal lies and not this court.

His Lordship Chief Justice Ramodibedi in the case of *Sandlane Zwane t/a Bullnose Bonanza v. Busisiwe Khanyile (born Dlamini)* Civil Appeal case No. 45/2012 at para 20 had this to say:

“20. . . .

Logic and common sense dictates that it is only the court which is seized with an appeal that has the right to make a declaratory order to the effect that the appeal is deemed to have been abandoned. That decision does not lie with the litigants themselves. Until the court has made a decision in the matter, litigants are obliged to observe the Rules up to finality.”

[13] Accordingly, the application is dismissed. No order as to costs of suit.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant: Attorney Mduduzi Mabila

For Respondent: Attorney Sabelo Bhembe