

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 151012019

In the matter between:-

TQM INVESTMENTS (PTY) LIMITED

Plaintiff

and

LUCKY'S ARK MOTOR SPARES (PTY) LIMITED

Defendant

*Neutral citation: TQM Investments(Pty) Ltd v Lucky's Ark Motor Spares (Pty) Ltd [SZHC 82] (1510/2019)(2019)(30/04/2020).*

CORAM: MAPHANGAJ

HEARD: 2710312020

DELIVERED: 3010412020

*Summary: Civil Procedure - Application for leave to execute judgment pending appeal; the applicable rules considered; common law rule being that noting of an appeal automatically stays execution whether Court of Appeal Rule 40 in force; On account of repeal of the erstwhile Court of Appeal rule by Legal Notice 132 of 1999 common law rule revived necessitating an application by a judgment creditor of a civil judgment for leave to execute judgment upon meeting appropriate requirements; onus on the appellant to establish special circumstances entitling him to execute - Application for leave to executed judgment granted; respondents failing to show*

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JUDGMENT

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MAPHANGAJ .

- [1] In this application the Applicant (Judgment creditor) seeks leave to execute judgment of this court of the 18/02/2020 wherein it was granted summary judgment in the sum of E242,359.39 to settle with interest a temporal moral at the rate of 9% per annum and costs of suit.
- [2] The application is necessitated by an appeal noted by the Respondent Qudgment Debtor) on the 20<sup>th</sup> February 2020 seeking to impugn the judgment of this court.
- [3] The application was launched on the 24<sup>th</sup> February 2020, and upon notice served on the Respondents on the same day who immediately caused a Notice to opposed to be filed on the self-same date indicating an intention to contest the application. However, no answering affidavit was filed thereafter with the result that the Applicant sought to have the matter set down in the unopposed roll of motions for hearing on the 28<sup>th</sup> February 2020.
- [4] Curiously on the 2]1h February 2020 the Respondent surreptitiously procured the filing of a parallel application under a Notice of Application bearing the same date in terms of which it purported to seek the following orders:
  - 4.1 Dispensing the usual forms and procedure and time limits relating to the institution of proceedings and allowing this matter to be as one urgency.(sic)
  - 4.2 That a rule nisi be issued with immediate and interim effect calling upon the Respondent to now cause, why an order in the following terms should not be made final.
    - 4.2.1 Setting aside the writ of execution issued in the above case number.
    - 4.2.2 That the Respondent be and is hereby directed to stay the execution of the writ issued under the above case number pending finalization of this application.
    - 4.2.3 That the order in prayer 2,3. & 4 above operate with immediate and

interim effect, pending finalization of this application.

#### 4.2.4 Further and alternative relief.

- [5] When the matter came before the court the instance of the judgment on the 2a<sup>th</sup> February 2020 having been enrolled upon the filing by its attorneys of a Notice of Set Down, it came to my attention that at the same time the judgment Debtor had sought to bring the parallel application for a stay of execution pending the appeal; albeit before another court in this Division. That matter came to be placed before Mabuza J whereupon her Ladyship caused it to be referred before me on account of the judgment having issued from this court.
- [6] I cannot conceive of any circumstance other than a deliberate sleight by the Respondents through their attorneys to seek to avoid the original application and by stealth sneak in their own and in so doing to engage in a form shopping exercise. This conduct is to be deprecated in the strongest of terms and deserves serious censure by this Court.
- [?] The legal profession is a venerable one demanding the utmost duty to observe good faith, candour and highest ethics. Any form of dishonesty and overreach by a practising attorney as well as acts ambush bring administration of justice and the court systems if not the practice and the court itself into disrepute. It is by its nature contemptuous.
- [8] Most importantly I must remark that the integrity of the established system for the registration and involvement of the civil cases in under the Rules of this Court is critical and fundamental to the proper functioning of the judicial process.
- [9] During the hearing of the main application the Counsel for Respondents was hard put to explain how the duplication of the court files had come about in light of the second application over the same subject matter. His explanation he alluded to the Rules of the Supreme Court (formerly Court of Appeal) as the basis for the Respondents application.
- [10J] In this regard he referred this court to Rule 40 of the Court of Appeal Rules,1971. He further referred this Court to two judgments of this Court in the cases of ***The Gables (Pty) Ltd v Amilda Farms t/a Just Kids case no.(212/12) 2017 SZHC(144J*** and ***Thanda Mngwengwe v Nomfundo Sibandze & Ano. 04/2015 [2015] SZSC 37*** as authority for the proposition that the noting of an appeal does not automatically stay execution as was the position in the crown law (prior to the

promulgation of the Rule in contention; thus necessitating an application by a would be appellant to seek a stay of execution.

### **The Law**

- [11] The common law rule is that the act by a party of noting an appeal has the effect of automatically staying execution of the judgment sought to be impugned. For a while in our jurisdiction the position was altered by the promulgation of Rule 40 of the then Rules of the Court of Appeal which provided as follows:

**" An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the High Court or Court of Appeal may order on application".**

- [12] Now that position obtained in regard to judgments of this court until the advent of Legal Notice no.132/1999 which repealed the aforesaid Rule 40 and in effect reverted the procedural rule to the *status quo ante* as it was in the common law. That is the prevailing rule at this time. It therefore seems quite clear and beyond question that in so far as reliance is had on the two judgments of this court in *The Gables (Pty) Ltd v Amilda Farms t/a Just Kids case no.(212/12) 2017 SZHC(144)* and *Thanda Mngwengwe v Nomfundo Sibandze & Ano. 0412015 [2015] SZSC 37* at page 10 paragraph 11) it becomes necessary to state the correct position. It appears both these decisions of this court were handed down after the Legal Notice had taken effect and it is very likely that the Court would have been unaware of the existence and effect of the Legal Notice I refer to above and consequently might have been led into error. This I say with due diffidence. It would appear therefore that the above cases were inadvertently wrongly decided.

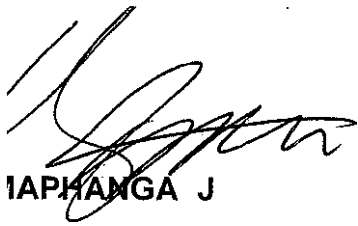
- [13] The correct position; which has for some time been maintained is that the noting of an appeal would on account of the Common law rule necessitate the judgment creditor as has occurred in cash to bring an application for leave to execute a judgment against which an appeal lives.

[14] In the  
applicants have  
this view, that  
of leave to  
judgment granted  
by this court in its  
application has  
been opposed by  
respondents in  
failure to file an  
affidavit to wit  
representations  
to grant leave to  
appeal. It is stated  
that the law is  
that unless  
otherwise directs,  
see *Wainman and  
Cottrell's Rules of*

Ed, JUTA at page 558; *O/iphant's Tin '8' Syndicate v De Jager* 1912 AD at 477. The learned authors in reviewing the principles also point out that the onus of establishing special circumstances entitling him to execute inspite of a pending appeal lies on the plaintiff/applicant and must furnish security *de restituendo* and for the appellant costs of appeal under South African rules. In spite of the repeal of the rule for petition to stay execution on appeal it appears to me that no rule similar to the then South African rule for the furnishing of costs *de restituendo* and for the costs of appeal was inserted. The position under the rules is therefore unclear on the question of security. I deal here only with the issue of whether sufficient special circumstances exist for the grant of the sought leave to appeal the judgment obtaining in this matter.

- [15] As was submitted by Mr. Simelane before court, the judgment in question is in respect of payment of a liquid claim - a debt in the summary judgment granted and in regard to which the Respondent in any case made an admission to a substantial point of the debt claimed and in any event has failed to make good even on the admitted indebtedness.
- [16] When the matter came before me I granted an *extempore* order for the sought leave with costs on an attorney and client scale.
- [17] I make further comment in regard to award of costs I have entered in this matter on a punitive scale. It is clear to me in the circumstances of this case that the respondents have engaged in under hand tactics to undermine to due administration of justice for the reasons I allude to above; for that reason I deem it appropriate that this Court registers its disapproval of the Respondents not only in the form of a reprimand in words only but to reflect the Court's displeasure by way of a commensurate order as to costs. The conduct of the defendant through its attorneys is egregious in the abuse of the court process and in my view warrants such an award. It would have also merited an order of costs *de bonis propriis* had such been sought.

[18] In the result he orders of this Court of the 28 February 2020 in terms of Prayers 1, 2 and 3 in substance granting applicant leave to execute the judgment of this court of 18 February 2020 and that the Respondent pays the Applicants costs of this application at a scale as between attorney prevail.

  
IAPHANGA J

Appearances:

For Applicant Mr, B,J, Simelane

For Respondent - Mr, A Motsa