

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 59/2024

In the matter between:

ZANDILE MARY NSIMBINI

Applicant

And

WOODLANDS SHOPPING CENTRE (PTY) LTD

1ST Respondent

MESSENGER OF COURT N.O

2ND Respondent

In re:

ZANDILE MARY NSIMBINI T/A

LE BOA RESTAURANT

Appellant

And

WOODLANDS SHOPPING CENTRE (PTY) LTD

Respondent

WRITTEN REASONS FOR THE *Ex –Tempore* RULING

Neutral citation: *Zandile Mary Nsimbini vs Woodlands Shopping Centre (pty) Ltd [59/2024] SZHC 54 (14th February 2024).*

Coram: S.M. MASUKU J

Date of heard: 14TH February 2024

Date delivered: 14th February 2024

Summary: *Civil Procedure – The noting of appeal from the Magistrate’s court to the High Court has an effect of staying execution of the judgement pending the finalization of the appeal.*

In the absence of a statutory provision or rule or orders of the magistrate’s court it follows that resort must be had to the common law.

Discussed: *The present application is in effect a stay but couched as spoliation. It seeks to stay execution and to maintain the status quo ante pending the finalization of an appeal from the Magistrate’s orders to the High Court. Where execution has been completed to restore the status quo ante by unlocking the premises.*

Held that: *At common law the noting of an appeal operates as an automatic stay of execution . The Applicant succeeds in her quests for a stay of the Magistrate’s order. An order restoring the status quo ante by unlocking the premises pending the outcome of the appeal granted with costs.*

Held further that: *The prayers sought are not inconsistent with the substantive relief claimed and are well supported and*

dealt with by the Respondents. The order granted is competent in that regard.

The orders made

- [1] Having heard counsel for the Applicant and the 1st and 2nd Respondents the court made the following orders:-
- a) Stay of the execution of the Magistrate's court order granted on the 3rd January 2024. Restoration of the *status quo ante* by unlocking the premises at portion 430 and 1431 Farm No.188, Woodlands shopping centre, Mbabane, in the district of Hhohho pending the outcome of the appeal to this court noted by the Applicant from the Magistrate's court.
 - b) Interdicting the 2nd Respondent from executing any writ under the appealed case.
 - c) Costs to follow the course at ordinary scale.
- [2] It appeared from the Notice of Motion that the applicant in her second prayer applied for the setting aside of any writ of execution issued under the appealed order of the Mbabane Magistrate Court case no.393/23. This court in this matter is not the appeal court hence it refused to grant the Applicant's wishes. Instead, it opted for a stay of execution of the appealed order or judgement of the Magistrate pending the outcome of the Appeal.
- [3] There are a number of insightful judgements in our jurisdiction that have determined the question of whether or not it is competent for a court of law to deal with the merits or issues pending before an appeal court elsewhere. For example can the High Court dealing with an application for a stay of execution of its order pending appeal, also deal with the merits of the appealed decision?

[4] The Judgement of T.S.Masuku J in the matter between Gareth Evans V Lisa Evans, High Court case No.26/09, page 21 paragraph 36 is apposite. He stated thus;

“For that reason, it would appear in the first place that this court ordinarily has no business in deciding on any matter which is placed before the Supreme Court on Appeal. That appeal, lying as it does with the Supreme Court is in my view that it is that court that should deal with the issue of the validity or otherwise of any notice or document by which an appeal is noted...” See also Tee Douglas Masuku v Lobusuku Grace Masuku and six others (64 of 2022) [2023] SZSC 1 (7 February 2022).

[5] It would therefore be incorrect for this court to order the setting aside of the writ issued by the Magistrate’s Court in this matter because it is a decision that is pending in the appeal from the Magistrate to the High Court. This court is not sitting as the appeal court.

The facts before this court

[6] On or about 3rd May 2023, the 1st Respondent instituted legal proceedings on an *ex-parte* basis against the Applicant in the Hhohho Magistrate Court under case no 393/2023. The 1st Respondent was claiming arrear rentals in the main, coupled with cancellation of the lease of the premises rented out by the Applicant.

[7] The matter was determined by His Worship Magistrare S.Vilakati in favour of the 1st Respondent. The Applicant apparently, and according to her version, noted an appeal two weeks after the Magistrate’s ruling (15th January 2024)

but due to the fact that most Attorneys' offices were closed, the notice of Appeal could not be served within that period until after the 1st February 2024.

[8] A writ of Execution apparently following the Magistrate's ruling was executed on the 31st January 2024 on the leased premises closing down the business. Although there seem to be a dispute on the dates of the service of the notice of appeal, there is no dispute that the appeal was noted prior to the execution of the writ. It is also apparent that the service of the appeal on 1st Respondent's offices was on the 1st February 2024 a day pursuant to the execution of the writ.

[9] Nothing much turns on whether the appeal was noted on time or whether the execution proceeded even after the 1st Respondent attorneys were served with the appeal. It would seem that, the appeal was noted and served on time allowed by the rules/orders of the Magistrate's Court. This conclusion can easily be drawn from the 1st Respondent's answer at paragraph 19 when it states:-

'[19]... It is paramount to point out that the service of the appeal was taken Ten (10) days pursuant to the 1st Respondent's attorneys having re-opened their offices for the new year. I duly state that the 1st Respondent's attorney's re-opened on the 22nd January 2024. The 2nd Respondent duly executed without knowledge of the notice of appeal as both Respondents were unaware of same. There was therefore nothing arbitrary and unbecoming of the conduct of the Respondents in executing the order as was granted''.

[10] The court shall not judge the conduct of the Respondents in executing the order as they say they were not aware of the appeal since they had not been

served when it was executed. However, counsel for the 1st Respondent in a letter dated 2nd February 2024 (Annexure M3) acknowledged the notice of appeal and did not protest against the noting of the appeal, that it was out of time. Instead they raised their dissatisfaction on its validity and the lateness of its service.

[11] Despite the Notice of Appeal being noted on time, the 1st Respondent's Attorneys submitted that the Applicant had used dilatory tactics in the main proceedings at the Magistrate's court. The Respondents ignored the appeal and proceeded to demand payment of the arrear rentals and pursued the execution of the order appealed.

[12] The Respondent's persistence to execute the Magistrate's ruling despite it being appealed to the High Court or pending, propelled the Applicant to then approach this court for orders in the following terms;

- a) *Restoring the status quo ante, by unlocking the premises situate at Portion 1430 and 1431 Farm No.188, Woodlands shopping centre, Mbabane, in the District of Hhohho.*
- b) *Setting aside any writ of execution under Mbabane Magistrate Court case no.393/23.*
- c) *Interdicting the 2nd Respondent from executing any writ under the above mentioned case number...'*

[13] This court granted the orders as set-out-in paragraph 1 of this judgement *ex tempore*, these are the reasons for the ruling.

Issues for Determination

- [14] There are two issues that stands out for determination in this matter. The first is, does this court have jurisdiction to entertain an application where the writ sought to be stayed was issued by the Magistrate's court? Put differently is this not a matter that must be heard by the Magistrate's court that heard and granted the orders sought to be stayed?
- [15] The Applicant argued in paragraph 4 of her founding affidavit that 'the court is clothed with jurisdiction to hear and determine this matter by virtue of the fact that an appeal (from the magistrate's court) has been launched before this court.' The 1st Respondent had no issue on the court's jurisdiction. I tend to agree with the Applicant's statement and state further that it is not only permissible but also convenient for this court to seize itself with jurisdiction of this matter because of the pending appeal, filed by the Applicant before the High Court.
- [16] The second question to be determined is whether a civil appeal from the Magistrate's court to the High Court gives an automatic stay on the noting of the appeal regard being had to the fact that the Magistrate's orders/rules are silent in that area.
- [17] The 1st Respondent down played this question in its answering affidavit and arguments. The 1st Respondent preferred to criticize the Applicant for adopting the 'stalin-grand' approach to the application both at the Magistrate's Court and High Court. It also chose to concentrate on what it comprehended as the spoliation remedy in which the Applicant was required to prove in this application. The 1st Respondent submitted that the Applicant

failed to prove the requirements of spoliation and in that regard the application she should fail.

[18] The Applicant on the other hand comprehended the remedy it sought as a stay of execution pending the finalization of the appeal it filed against the magistrate's order. The Applicant asked this court to direct the Respondents to restore the *status quo ante* by unlocking the premises.

[19] In the body of her founding affidavit the Applicant stated that:- *'[8] in these proceedings I seek an order for spoliation in that I have been unlawfully dispossessed. I say so because despite being informed that, there is a pending appeal the Respondent refuses to restore the status quo. I submit as stated above, that though they might not have been aware of the appeal due to the fact that the Respondent's Attorneys offices were closed, my attorneys have sought to inform the offices of S.V Mdladla and Associates and even served them with both the notice of appeal and the record which I have also filed for ease of reference. The conduct of the Respondent is so unwarranted regard being had to the fact that they are represented and it is common cause that noting of an appeal stay execution in civil proceedings unless leave is sought before court. The writ at present cannot be executed.'*

[20] The Applicant's assertion above forms the nub of the nature and course of action in this matter. Although the first part of paragraph is couched as spoliation proceedings, the Applicant's borne of contention and reason for her application is that even though she appealed the magistrate's decision which should have meant to stay its execution against the leased premises, the 1st Respondent despite being informed of the notice of appeal proceeded with the execution, when it should not have without the leave of the court. She sought

to interdict the Respondents from executing the writ and that the *status quo ante* be restored in the event the execution had progressed pending the outcome of the appeal.

- [21] It is my view that the Respondents misdirected their defence by holding firmly to the law on spoliation which they submitted the Applicant must prove. They pointed out that the Applicant failed to prove peaceful possession at the time of spoliation and that she was wrongfully deprived without her consent or by court order. They stuck to this point and nothing further.
- [22] The Applicant implored this court to grant a competent order under further and/or alternative relief because the application she moved is not confined to spoliation requirements. Where the requirements are not met, the court may still grant a competent order because in essence the relief sought 'is a stay plus restoration'. She argued, that in essence spoliation is the restoration of the *status quo ante* which in *casu* means unlocking the premises pending finalization of the appeal.
- [23] The Applicant made reference to the case of Swazi MTN Limited and Others vs Swaziland Post and Telecommunication Corporation, High Court Case No.1896/2021 where the court in a similar couched application observed that:-
"It is undoubtedly so that the present application sought to maintain the status quo ante pending the finalization of the appeal in case 19/2011 of the Supreme Court. In my view, the application was in effect in the nature of a stay of execution, albeit labelled as an interdict"(emphasis added).
- [24] This is the course the court followed in deciding the application in *casu*, although the court did not specifically invoke the alternative prayer. The

orders granted are as prayed for in the notice of motion and are competent for the application. I found a series of South African authorities supporting the Swazi MTN case (*supra*) and the notion of competent orders. See for example Tsosane and Others v Minister of Prisons and Others 1982 (2) SA 55 (c) 63 E-G, the following was pronounced on the issue:-

“In any event and in so far as the relief sought may not have been appropriate or even legally competent, I would have been prepared to grant an appropriate order directed at the decision of the second respondent (assuming the merits of the matter justified this) under the prayers for further or alternative relief. Relief may be granted under this prayer where what is sought is not inconsistent with the substantive relief claimed and whether the basis for such relief has been laid in the supporting papers and dealt with in the answer of the Respondents.”

[25] In so far as the relief sought in the notice of motion as supported in paragraph 8 of the founding affidavit is construed by the Respondent in its answer as misconceived and very dishonest (to use its words), I am prepared to grant an appropriate and competent order from the prayers in the notice of motion. The prayers are not inconsistent with the substantive relief claimed and are well supported . The 1st Respondent dealt with it in its answer specifically in paragraph 20.

[26] I have no doubt that the present application seeks to stay execution and to maintain the status quo ante pending the finalization of the appeal. Where execution has been completed to restore the *status quo* by unlocking the premises. The application is in effect a stay but couched as spoliation.

Stay on Noting of Appeal

[27] The position in our jurisdiction is trite. It is that the noting of an appeal against a final judgement of the High Court automatically stays the execution of that judgement pending final determination of the Appeal. The judgement or order cannot be carried out or given effect unless leave to execute has been obtained first. See, the Supreme court of Eswatini in Good Shephard Mission Hospital v Sibongile Bhembe (56/2020) [2020] SZSC 32 (22/10/2020).

[28] The Magistrate's court rules or orders are silent on this point. I have captured this part because the orders appealed are orders of the magistrate's court. What is then the position regarding the effect of appealed magistrate's court orders? The Good Shephard decision(*ibid*) held:-

*"...[8]This age old principle was succinctly stated in **Read and Another v Godart and Another 1938 AS 513** where **De Villers JA** stated as follows: now, by the Roman Dutch Law the execution of all judgements is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out and no effect can be given thereto, whether the judgement be on for money (on which a writ can be issued and levy made) or for any other thing or for any form of relief granted by the court appealed from. That being so, I see no reason why the rules should be confined to judgement on which a sheriff may levy execution. The foundation of the common law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by*

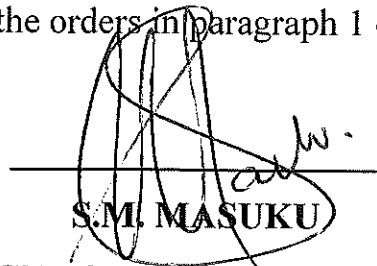
a level under a writ or by the execution of the judgement in any other manner appropriate to the nature of the judgement appealed from”.

[29] The position above is in essence incorporated in our jurisdiction by the Swazi MTN Limited case (*supra*) where Ramodibedi CJ stated in paragraph 12-15 that;

“Now, there is no statutory provision in this jurisdiction dealing with stay of executions. In some jurisdiction an appeal does not operate as an automatic stay of execution. In the absence of a statutory provision in this country, it follows that resort must be had to the common law. At common law, the noting of an appeal operates as an automatic stay of execution”.

Conclusion

[30] It is for these reasons that considering all the principles set above, the nature and purpose of the present application though couched in its body as spoliation it is undoubtedly an application that seeks to stay execution and maintain the status *quo ante*. Where the execution has been completed, to restore the status *quo ante* by unlocking the premises pending the outcome of the determination of the appeal filed of record in the High Court. The noting of the appeal gave the Applicant the right to the stay of the execution pending the finalization of the appeal. I granted the orders in paragraph 1 of the written reasons herein.


S.M. MASUKU

JUDGE - OF THE HIGH COURT

For the Applicant: N.Nxumalo of MTN Ndlovu Attorneys

For the Respondent: M.Dhlamini of S.V.Mdladla & Associates