

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 84/2009

In the matter between:

**LONG DISTANCE SWAZILAND
(PTY) LTD**

**APPLI
CANT**

AND

SWAZI PAPER MILLS (PTY) LTD

**RESPOND
ENT**

CORAM

**HLOPH
E J.**

FOR THE APPLICANT

**ADVOCATE
J.M. VAN DER
WALT**

FOR THE RESPONDENT

**MR. D.
MADAU**

JUDGMENT

[1] The applicant instituted these proceedings on the basis of urgency seeking an order in the following terms:-

1.1 That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as one of urgency.

1.2 That the Applicant's non-compliance with the rules relating to the above said forms and service be condoned.

1.3 That a *rule nisi* do hereby issue calling on the Respondent to show cause on a date to be determined by the above Honourable court why an order in the following terms should not be made final:-

1.3.1 That leave be granted to allow the judgment of the above Honourable Court under High Court Case Number 84/2009 dated the 18th August 2009 to be carried into operation and into effect and to be executed.

1.3.2 Pending finalization of the appeal noted by the Respondent under Supreme Court Case Number 49/2009 against the judgment of the above Honourable Court that the Respondent be and is hereby restrained and interdicted from removing, dismantling alienating or disposing of any assets and or movables on its premises.

1.3.3 That the Deputy Sheriff for the District of Manzini or any other authorised person be authorised to attach the assets of the Respondent to the value of the judgment amount under High Court Case Number 84/2009, and to do whatever necessary to give effect to prayers 3.1 and 3.2 hereof.

1.3.4 That the Royal Swaziland Police be and are hereby ordered to assist the Deputy Sheriff or any other authorised person to give effect to prayers 3.2 and 3.3 hereof pending finalization of these proceedings;

1.3.5 That the interdict referred to in prayers 3.2 above shall lapse once the Applicant's judgement in the above said matter has been fully satisfied.

1.3.6 Granting costs of these proceedings at Attorney and own client, save including the costs of Counsel as certified in accordance with Rule 68 (2) of the Rules of the above Honourable Court.

1.4 Pending the outcome of this application, that prayers 3.2, 3.3 and 3.4 above (and as amended) operate with immediate and interim effect.

1.5 Such further and/or alternative relief as the above Honourable Court may deem fit.

2. On the 26th November 2009, this Court issued a *rule nisi* calling upon the Respondent to show cause on the return date why the orders prayed for and set out above, could not be confirmed. An order operating with immediate and interim effect was also issued which *inter alia*:-

2.1 Interdicted and restrained the Respondent from removing, dismantling, alienating or disposing of any assets and/or movables on its premises;

2.2 Authorised the Deputy Sheriff for the District of Manzini or any other authorised person to lay under attachment the assets of the Respondent to the value of the judgment amount under High Court Case Number 84/2009 and to do whatever was necessary to give effect to the foregoing order;

2.3 Directed or ordered the Royal Swaziland Police to assist the Deputy Sheriff or any authorised person to give effect to the foregoing orders.

3. The background to the matter is that the applicant was on or about the 18th day of August 2009 granted summary judgment in a sum of E301 000.00. The grant of the said summary judgment followed an averment by the Respondent in the affidavit resisting summary judgment that it did not owe applicant the sum of E318 000.00 claimed in the said summons but rather owed a sum of E301

000.00, alleging that the sum of E318 000.00 was a result of the duplication of one or some of the cheques.

4. The Summary Judgment was itself resultant from the filing of a notice of intention to defend the summons issued by the Plaintiff against the Defendant for the recovery of the said sum of E318 000.00. The basis of the suit was certain cheques which the current Respondent (then defendant) had issued in favour of the current applicant (then Defendant). Which had however dishonoured on presentment for payment by the Bank.

5. When it granted the summary judgment this Court had found that the Respondent had no bona fide defence following that it had unequivocally admitted in terms of paragraph 5.7 and 5.8 of its affidavit resisting summary judgment that it owed applicant a sum of E301 000.00 as opposed to the E318 000.00 the applicant had claimed as the Plaintiff in terms of the summons.

6. The Respondent had then noted an appeal to the Supreme Court of Appeal which he did sometime in August 2009. It is worth noting that the Supreme Court of Appeal's last session for 2009, sat as

from the 4th of November 2009 to the 28th of the same month. The Respondent's appeal was however not one of those matters that were heard notwithstanding that the matter may have been ripe for hearing as the applicant contends.

7. Sometime in November 2009, the Applicant avers to have noted that the Respondent had closed down, its operations in Swaziland and was removing its machinery and other assets in Swaziland. Its investigations revealed that the Respondent was actually setting up another factory at a place called Embongwitini (or some word next to that) in the KwaZulu-

Natal Province of the Republic of South Africa. This position was confirmed by one Martin Akkar, a Deputy Sheriff, who claimed to have learnt of such developments from a certain employee of the Respondent whose name sounded like Dauhar Shah.

8. It was apparently as a result of this observation and investigation that the Applicant instituted the current proceedings in terms of which he sought *inter alia* an order of this Court interdicting the Respondent from dismantling and removing its machinery and assets from Swaziland pending the finalization of the appeal made

by the Respondent to the Supreme Court as well as an order granting Applicant the leave to execute the judgment notwithstanding the appeal. Several other ancillary orders as set pit above were sought.

9. It was Applicant's contention that the Respondent's aim was take all its assets outside the jurisdiction of this Court so as to leave Applicant with a judgment that could not be satisfied. To this end the interdict aforesaid was sought. It was further contended that the appeal noted by Respondent was not a genuine one but one that had been noted for purposes of preventing or frustrating the Applicant from executing the Summary Judgment. In view of the legal position that an appeal once noted has the effect of suspending execution. It was contended that there was no merit in the said appeal in view of the Respondent's admission that it owed Applicant the amount forming the basis of the Summary Judgment.

10. On the 26th November 2009, this Court granted an interim order interdicting the Respondent from removing any movable assets hitherto situate at its Matsapha factory, pending the outcome of this application whilst postponing the other prayers for

hearing on the return date. This Court further authorised the Deputy Sheriff to lay movables under attachment, to the value of the judgment debt.

11. In opposition to the application, the Respondent filed an answering affidavit in terms of which it raised several points in *limine* together with a denial in the merits that the removal of its assets to its new site in KwaZulu Natal was aimed at rendering Applicant's judgment nugatory. It also denied that its appeal was not genuine.

It contended in the merits that the assets being moved out of Swaziland were not those of itself but were those of its creditors including NAMPAK (PTY) LTD. It was further contended that Respondent had in any how sufficient goods with which to settle the judgment debt should the Court of Appeal find against it. It was further contended that Applicant should not be granted the reliefs it sought as the aim was to liquidate the Respondent from which Applicant would be able to receive payments as part of the Creditors in such liquidation.

It is crucial to note that these goods that could be used to settle the judgment debt are not being disclosed by the Respondent.

12. It was also indicated that most of the assets concerned were hypothecated to some financial institutions, which did not entitle the Applicant to execute against the Respondent by attaching them.

13. I note that whilst Respondent claims that assets concerned do not belong to it, it is strange that such assets are however being moved by it from Swaziland to its new factory in KwaZulu Natal. In any event, Applicant's attachment is not a vindicatory right but an execution in satisfaction of a judgment of this Court. The position is settled by now that a person who claims that his goods have been laid under attachment when he has nothing to do with the debt, ought to utilize inter-pleader proceedings.

Whereas Respondent claimed that it had sufficient movables with which to settle the judgment should the Court of Appeal

find against it, it did not disclose what these assets are and where they are kept particularly in light of the fact that it was Now establishing itself outside the jurisdiction of this Court, to which its movables were being moved.

14. The several points in *limine* that the Respondent had raised in terms of its answering affidavit which included among others, urgency, dispute of facts and hearsay were abandoned on the return date of the matter; which in my view was correct in the circumstances of the matter. This necessitated that the merits of the matter be dealt with.

15. I mention from the onset that Counsel for the Applicant made it clear both in her submissions and in her Heads of Argument that in pursuing its prayer for the execution of the judgment notwithstanding the Appeal noted, the Respondent was prepared to put up security *de restituendo* as determined by the Court if it were granted leave to execute judgment pending the appeal. When I enquired from both parties as to what in their views was to comprise security *de restituendo* if execution was to be allowed against its payment, none of both Counsel seriously objected to a sum equivalent to the

judgment debt being paid into an interest bearing account by the Applicant pending the finalization of the appeal.

16. It did not seem that there was any difficulty with the interdict prayed for and granted as an interim order being, confirmed pending the finalization of the appeal.
17. The only issue that was contested was that of executing the judgment notwithstanding the appeal. This is the issue I am called upon to decide in this matter.
18. I clarify that I am alive to the fact that it is the right of any party to any proceedings to appeal against a judgment such party does not agree with. The position is now settled that once such a party has appealed, execution of the judgment appealed against is then stayed.

Erasmus H. J. in his book, *The Superior Court Practice*, had this to say at page BI - 369;

"The accepted common law rule of practice in our courts is that generally the execution of a judgment is automatically suspended upon the noting of an appeal,

with the result that pending the appeal the judgment cannot be carried out and no effect can be given thereto."

The said writer further states at page BI - 370, that "it is only the court which granted the order appealed against that has the power to grant an application under the subrule for leave to allow the judgment to be carried into effect pending the decision on the appeal.

In *Southern Cape Corporation (Pty) Ltd vs Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) it was stated that:

"The purpose of this 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, either by being under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from."

19. Following Counsel for the Applicant's contention that the appeal was noted as a means of delaying the execution or of

frustrating the Applicant, I was urged to grant the Applicant leave to execute the said judgment pending the appeal on such terms as I found appropriate.

20. Whereas I am very sceptical to comment on the propriety or otherwise of an appeal as it is best left for an appeal court's decision, I am alive to the fact that the authorities do provide guidelines on those matters where execution is sought or ought to be carried out notwithstanding the appeal.

21. The following position was expressed in the South Cape Corporation (Pty) Ltd vs Engineering Management Services (Pry) Ltd Case (op cit):-

"The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave to execute and, if the leave be granted, to determine the conditions upon which the right to execute shall be exercised. This discretion is part and parcel of the inherent jurisdiction of which the Court has to control its own judgments. In executing this discretion, the Court should determine what is just and equitable in all the circumstances of the matter."

22. The learned Judge in the said case further set out the guidelines to be followed in exercising this discretion whether or not to grant the leave to execute and had the following to say in that regard:-

In exercising its discretion aforesaid, the Court should have regard 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."

24.It seems to me that when considering all the circumstances of the matter, it would be fair and just to grant the Applicant the leave to execute when considering the following:-

1. The Respondent has been shown to be re-establishing its business outside this country, there is therefore a danger that the Applicant is left with an empty judgment. Furthermore, the machinery that could be held under attachment could deteriorate in value whilst the appeal is awaited.
2. Whatever prejudice or harm the Respondent stands to suffer, such could be obviated if the Applicant files security *de restituendo*, by paying the equivalent of the Judgment debt into an interest bearing account pending the outcome of the appeal.

The Applicant has already obtained a judgment and it would not be equitable if it has to await other would be judgment creditors as may be there at the time the appeal is finalised, yet its claim is based on cheques that were prepared by and paid to the Applicant by the Respondent only to be dishonoured.

4. Although the determination of it is often best left to the Court of Appeal, it does seem to me *prima facie* that the prospects of success are fairly slim against the Respondent when considering its acknowledgement of indebtedness in the affidavit resisting Summary Judgment to the effect that it owes an equivalent of the judgment debt as well as the fact that the summons was based on cheques which the Respondent had purported to pay but for their being dishonoured by the Bank.

25. Having considered all the circumstances of the matter, it is my considered view that the following order will be a just and equitable one in the circumstances of the matter.

25.1 The Respondent and those acting at its behest be and are hereby interdicted and restrained from dismantling any machinery or removing or alienating any of the movables situate at its Matsapha factory pending the satisfaction of the Judgment upon execution of a writ of execution issued pursuant to the judgment in the main matter herein.

25.2 The Applicant be and is hereby granted leave to forthwith execute the judgment and or carry into effect the writ of execution issued in the main matter herein.

25.3 The Applicant be and is hereby directed to provide security *de restituendo* through paying the equivalent of the judgment debt into an interest bearing account to be operated by the Applicant's attorneys prior to executing this judgment. The Applicant's attorney shall have to provide proof of such payment with the Registrar of the High Court including the details of the account and the quarterly bank statements indicating the bank balances.

25.4 The interdict granted Applicant in terms of prayer 25.1 is to lapse upon satisfaction of the writ of execution.

25.5 The Royal Swaziland Police be and are hereby ordered and directed to give effect to this order as may be necessary.

25.6 The Respondent be and is hereby ordered to pay the costs of this application on the ordinary scale including the costs of Counsel as certified in terms of Rule 68 of the Rules of this Court.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 22 DAY OF DECEMBER, 2009.

N.J. HLOPHE

JUDGE