

**IN THE INDUSTRIAL COURT OF APPEAL OF
SWAZILAND**

HELD AT MBABANE

CASE NO. 8/2007

**SMALL ENTERPRISE
DEVELOPMENT CO**

APPELLANT

**AND
PHYLLIS NTSHALINTSHALI
RESPONDENT**

**CORAM: BANDA JP
MAPHALALA, MAMBA JJA**

FOR APPELLANT: MR N. HLOPHE

FOR RESPONDENT: MR Z. JELE

JUDGEMENT

18th OCTOBER, 2007

MAMBA JA

[1] The parties herein are referred to as they appeared in the initial or main application in the Industrial Court.

[2] The applicant, an adult married female had been in the continuous employ of the respondent from 1978 until the 3rd day of November 2003 when her services were terminated by the respondent. The latter claimed that her post as personnel officer had become redundant. Applicant challenged this

assertion by the respondent and successfully applied for compensation for unfair dismissal in the Court below. The judgement of the said court was delivered on the 16th day of August, 2007, wherein the court ordered, inter alia, that she be reinstated into her employment.

[3] The respondent noted an appeal against the decision referred to above and this appeal is yet to be heard by this Court. I pause here (in the narrative) to note that in argument before us, both parties herein indicated their desire and preparedness to have this appeal heard during the next session of this Court, commencing on the 12th day of November 2007.

[4] The respondent's grounds of appeal are, inter alia, as follows;

"3. The Court a quo erred in law and exercised its discretion wrongly by not staying execution of the Judgement in as much as it was apparent that the Applicant a quo was not going to suffer an irreparable loss in as much as she had acknowledged that she and her husband had means to sustain herself during the interim.

4. The Court a quo erred in its assessment of the evidence by ignoring the proven fact that the monies it ordered be paid to Respondent had not been budgeted

for hence the Applicant was to suffer an irreparable loss if ordered to pay the Judgement Debt, particularly in the absence of sufficient security."

[5] In view of the fact that the noting of the appeal did not have the effect of automatically suspending the effect and execution of the judgement appealed against,(per section 19(4) of the IRA), the respondent applied in the court *a quo for* the stay of execution of the judgement, pending the appeal.

[6] The Court *a quo* granted the application in part and this appeal is on that portion of the application that was refused or dismissed. In refusing the application the court ruled that

"(b) Execution of paragraph (b) of the order dated the 16th August 2007 may proceed, subject to the applicant delivering to the respondent's attorneys a suretyship undertaking in terms of which her husband Dan Ntshalintshali guarantees payment of all monies paid by the respondent to the applicant in execution of the judgement dated 16th August 2007 to the extent that such payment may not be due by virtue of the outcome of the pending appeal."

[7] The Applicant's husband, who is married to her in terms of civil rites and in community of property, has filed the "suretyship undertaking" ordered. Consequently, the Deputy Sheriff has attached property of the respondent in execution

and the public auction sale has been advertised for the 22nd of this month. It is this attachment and looming auction sale of its property that has prompted the respondent to file this urgent application wherein the respondent seeks an order, *inter alia*;

"2. Staying or suspending the execution of any writ of execution issued in execution of the judgements of the Industrial Court handed down on the 16th August 2007 and 27th September 2007 respectively pending the outcome of this matter and the appeal filed by the applicant/appellant herein.

3. Hearing the applicant's appeal on the stay of execution as a matter of urgency and upon such terms as this honourable court deems appropriate."

[8] The applicant opposes this appeal and has argued that the appeal is fatally defective inasmuch as the order of the court a quo pertaining to the stay of the execution is an interlocutory one and is not appealable without leave of the court below. It was submitted further that the Court a quo exercised its discretion properly in arriving at its decision that execution of that portion of its judgement could be effected if the ordered undertaking was furnished by the applicant.

[9] Interlocutory orders are generally classified under two categories, namely; (a) simple interlocutory orders and (b) other interlocutory orders that have a definitive and final effect

in their application.

[10] Pure or simple interlocutory orders are not appealable whilst those listed under (b) above are appealable, some with leave of the court. A refusal for a stay of execution falls under those orders under (b).

[11] In terms of section 19(1) of The Industrial Relations Act No.1 of 2000 (as amended) (hereinafter referred to as the IRA) "there shall be a right of appeal against the decision of the Court or of the arbitrator on a question of law to the Industrial Court of Appeal."

The operative word in the afore-quoted section is "decision." This word does not seem to me to bear the same technical meaning or import attached to terms like "judgement, order or decree", used under the Common Law or the rules of the civil courts.

[12] Therefore the authorities such as **SOUTH CAPE CORPORATION (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD 1977 (3) SA 534 (A)** referred to us in argument by counsel for the respondent, **DU RANDT v DU RANDT, 1992 (3) SA 281** and **BEKKER NO v TOTAL SOUTH AFRICA (PTY) LTD, 1990 (3) SA 159** must be read, interpreted and understood in the context of the relevant rules of court and the Common law under consideration therein. In the last two cases cited above, the

Court held that a refusal to stay execution pending appeal is appealable.

[13] In the Republic of South Africa the issue relating to appeals regarding interlocutory orders is governed by Section 7 of the Appeals Amendment Act 105 of 1982. We do not have an Act with similar provisions.

[14] Section 19 (1) of the IRA does not appear to me to require a litigant who is dissatisfied with a decision of the Court a quo to seek and obtain leave of that Court to appeal to this Court. The qualification of course is that it must be an appeal on a decision on a matter of law. I have not been able to find any provision in the IRA that requires a litigant to seek leave of the Industrial Court to appeal to this Court, as is the case in the Rules of the High Court and Supreme Court. Article 147 of the Constitution provides that

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

1. 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
2. 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."

These provisions of the Constitution are not applicable in these proceedings.

[15] In view of the above, I am unable to agree with the respondent's attorney that this appeal should fail because leave of the Court a quo to appeal to this Court was not sought and obtained.

[16] Implicit in the judgement of the Court a quo is the fact that the court was of the view that there were, remote, as they might be, prospects of success in the appeal and in deciding to refuse the application for the stay of execution, the Court ordered the applicant's husband to provide the suretyship undertaking, to safeguard the interests of the respondent. The Court, however, came to this conclusion based on its earlier finding that the respondent had conceded that the applicant had sufficient property with which to compensate the respondent in the event the appeal was upheld. The Court was in error in coming to this conclusion. The concession had not been made. The respondent had merely submitted that if indeed the applicant had sufficient means or property to provide as security, she might as well use that property to cater for herself pending the appeal. This submission was made in relation to the issue of the irreparable harm to be suffered by the applicant if execution was stayed. It was, in my view this misdirection that influenced or resulted in the Court to refuse to suspend the execution of its judgement but order

that the applicant's husband should provide surety instead.

[17] The misdirection referred to above is one on a point of law. The Court misinterpreted the material before it and at the end arrived at an incorrect conclusion

[18] In **TIBIYO TAKANGWANE v PAUL SIBA SIMELANE (CASE N04/99)**, a decision of this Court to which we were referred by both counsel; SAPIRE JP, (as he then was) writing for the Court, stated that:

"There is ample authority that the interpretation of a document is a matter of law....The Court a quo therefore misdirected itself on a question of law in interpreting the letter in such a way as to find that it was not an acceptably clear intimation to the respondent that the employment with the applicant was at an end."

[19] I do not think it would be in the interests of justice that the matter between the parties herein should be done in a piecemeal or truncated form. This would be the result if the execution is not stayed. It is not desirable, in my judgement, to have the execution done in instalments; one now and possibly another after the appeal. Again, should the appeal succeed, to undo the effects of the auction sale would result in unnecessary loss on both sides.

[20] For the afore-going reasons, I would allow the appeal and

issue the following orders:

1. The appeal is upheld.
2. The judgement of the Court a quo issued on the 27th day of September 2007, dismissing the application for the stay of execution of the judgement of the court a quo issued on the 16th August 2007 is hereby set aside and there is substituted therefor an order suspending and or staying execution of the said order.
3. The attachment of the property of the respondent by the deputy sheriff, pursuant to the order of the court a quo is set aside.
4. The costs of this appeal shall be costs in the main appeal.
5. The main appeal is to be enrolled for hearing before this Court in the next session.

MAMBA JA

I AGREE

BANDA JP

I ALSO AGREE

MAPHALALA JA