IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO: 1198/17

In the matter between:

THULANI RUDOLF MASEKO	**APPLICANT**
And	
THE CHAIRMAN OF THE LIQOUR LICENSING BOARD	**1ST RESPONDENT**
ATTORNEY GENERAL	**2nd RESPONDENT**

Neutral Citation: *Thulani Rudolf Maseko vs. The Chairman of the Liquor Licensing Board and Another, (1198/17) [2018] SZHC (06) February 2018*

Coram: **MLANGENI J.**

Heard: **28th November 2017**

Delivered: **8th February 2018**

Flynote:

Civil procedure – application for leave to execute judgment of the court pending appeal – court has wide and general discretion – in the case of judgments sounding in money leave to execute may be granted subject to security de restituendo.

Onus upon the Applicant – guiding principles discussed – court to take into account all circumstances of the case in order to determine what is just and equitable.

Application dismissed, each party to pay its own costs.

Summary:

Liquor Licencing Board refused to issue a liquor licence on the ground that King's consent was required. Upon review, refusal set aside on ground that in terms of the applicable law King's consent was not a requirement.

Upon appeal by Liquor Licensing Board against review order, Applicant/Respondent filed an application for leave to execute order pending appeal.

Application dismissed on the basis that Applicant had failed to establish irreparable harm.

JUDGMENT

[1] On the 22nd September 2017 I heard legal arguments and made an *ex tempore* order in favour of the Applicant. Reasons for the judgment were handed down on the 6th October 2017. The effect of the judgment was that the Liquor Licencing Board was to issue a liquor licence to the Applicant in respect of business premises that are on Swazi Nation land at Ka-Luhleko area around Bhunya. On or about the 2nd October 2017 the Liquor Licencing Board lodged an appeal against the judgment and the appeal is pending in the Supreme Court.

[2] It is in the nature of things in this jurisdiction that this appeal had no chance of being heard immediately, and the likehood was that it would be heard in the first session of 2018 or later. It is clearly upon this consideration that on the 10th October 2017 the Applicant launched an application in this court for leave to execute the order of the 22nd September 2017, pending the outcome of the appeal. The Application papers for leave to execute present an example of ineptitude in that although it was not presented as an urgent one, it seeks an order calling upon the Respondents **"to show cause, if any, on a date and time to be fixed by the .....court, why and (*sic*) order should not be made: Granting the Applicant leave to implement and execute of (*sic*) the order of this Honourable Court dated September 22, 2017 immediately pending the finalization of the appeal by the Respondents."**

[3] It is unfortunate that not enough effort is made by litigants to reflect thoroughly upon the orders that they seek and then proof – read their work before it is presented to the courts. In the instant case there was obviously no need for the Applicant to seek interim relief that would be

subject to a return date – all that the Applicant required was leave to execute the order pending the outcome of appeal and could have put this in a less circuitous and more simple prayer.

[4] Understandably the Applicant wished for quicker redress but the reality of back-log has not permitted this to happen.

[5] Leave to execute an order of court pending the outcome of an appeal is at the discretion of the court that is called upon to deal with the matter. The discretion has been described as **"general"** and **"wide"**[1]. The purpose is to ameliorate or prevent further hardship that may be occasioned to a party who has judgment in his favour, by delay in execution of the order. This exercise requires striking a balance between the conflicting interests of the Applicant and those of the Respondent, in a manner that advances justice and equity[2]. To this end principles have been laid down for the guidance of the court in the exercise of its discretion. These principles have been considered by this court in a very recent case[3] and I deal with them presently.

PROSPECTS OF SUCCESS ON APPEAL

5.1 Under normal circumstances the time lag between the lodging of an appeal and having it heard can be substantial, depending on the calendar of the appeal court. To a party who has already waited a long time for relief in the lower court, as is often the case, further delay can occasion prejudice and, depending on the facts and circumstances of the case, such prejudice can be enormous and incalculable in monetary terms. A familiar example in this

[1] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 at page 545 para C.
[2] South Cape Corp, supra, page 545 para D.
[3] Swaziland Development and Savings Bank v Mchepa Chemical Industries (Pty) Ltd and Two Others (1661/2011) [2016] SZHC 152, August 2016.

jurisdiction is offered by the unpleasant disputes over burial rights where the body of a deceased person is kept in storage for a prolonged period of time while the parties litigate over its internment. The resultant emotional hardship is immeasurable and incompensible.

5.2 If the appeal is on frivolous grounds and or has poor prospects of success there might be little or no justification to make the successful party wait any longer, especially where the waiting occasions hardship and prejudice. In such a situation leave may be granted to execute the judgment, upon the consideration that the outcome of the appeal is not likely to favour the Appellant. This would be particularly so where there are indications that the appeal is *mala fide* and calculated to buy time. Whether an appeal is *mala fide* and calculated to buy time is a matter to be discerned from the facts and circumstances of the matter, including its history.

5.3 The grounds of appeal in casu, per notice of appeal dated 2nd October 2017, are as follows:

"1. The learned Judge erred in fact and in law of directing that the Liquor Licencing Board forthwith issue a liquor trading licence to the Respondent in the absence of the King's consent to operate under Swazi Nation Land;

2. The learned judge did not take into consideration the fact that the constitution provides for a dual legal system to operate in Swaziland. So one cannot ignore the requirements as needed under the traditional government."

5.4 In simpler and brief language the first ground of appeal is that this court erred in holding that the King's consent is not a legal requirement for purposes of a liquor licence. I am in no doubt that this ground of appeal has no reasonable prospects of success. This I say because the regime for issuing liquor licences and regulation of trade in liquor is in black and white, and comprehensive and contained in an Act of Parliament[4]. This piece of legislation makes no reference to the King's consent. Rather, the provision for such consent is in a different and unrelated piece of legislation[5]. In my respectful view there is no reason in law or in logic why a requirement in one piece of legislation must be superimposed on another unrelated one.

5.5 Hopefully the Respondents have a reasonable explanation why they have not done the simple, right and important thing of amending the liquor licencing laws to make the specific additional provision that they seek to bring. This is particularly so because as far back as 2014 a judge of this court expressly and specifically recommended that the relevant organ of Government should effect the amendment that would advance the desired result[6]. This has not been done, and one must forgive anyone who apprehends that courts are possibly expected to cover up for this inexplicable indifference. An appeal that was lodged in respect of the 2014 Magwaza judgment was subsequently withdrawn. This withdrawal suggests, on the face of it, that the appeal was deemed not worthy of pursuit. Any other inference would be preposterous.

[4] See the Liquor Licences Order No. 30/1964 as amended.
[5] Trading Licences Order No. 20/1975.
[6] In the case of Percy Magwaza v The Chairman of, Liquor Licencing Board and Another (1951/2013) [2014] SZHC 09.

5.6 On this aspect of the matter the Respondent is further presented with an enormous hurdle in the form of Section 12(5) of the Liquor Licences Act No. 30/1964 as amended. The main section is headed **"Review of Board proceedings"** and it deals with review at subsections 1, 2 and 3. Significantly, Sub-section 5 stipulates that there **"shall be no appeal from a decision of the High Court under this section."** The obvious effect of that is that in the event of an order on review in the High Court, there shall be no appeal therefrom. Could this be the reason why the appeal in the Magwaza matter was not pursued? It surely cannot be assumed that the Attorney-General is not aware of this momentous provision.

5.7 The Applicant has correctly argued that the Attorney General would do well to challenge the constitutionality of Section 12(5) and, if successful, pave the way for an appeal. To actually lodge and pursue an appeal in the face of such an unambiguous provision is, in my view, a spectacular ambition.

5.8 There is no doubt in my mind that the word **"appeal"** in this section is used in contra-distinction with **"review"**. In other words, the legislature was absolutely alive to the two legal procedures and expressly procured that there shall be no appeal. This position is perfectly rational and consonant with a recognition that in commerce time is important, and in some cases it may be decisive.

5.9 The second ground of appeal is based on the dual nature of our legal system, as recognized in the laws of the country[7]. Dualism

[7] Section 115 (6) (d) of the Constitution makes reference to Swazi Law and Custom.

has, in this country, been recognized since 1905[8]. I understand dualism to mean the co-existence in this jurisdiction of two legal cultures, namely the Roman Dutch Law and Swazi Law and Custom. I do not understand dualism to mean that in a case where the applicable law is expressly one and not the other we are at large to impose the other. There are obviously cases where both may be applicable, in which event there could well be a choice that is available to a litigant. But this is not one such case, because an entrepreneur who wishes to trade in liquor is required to comply with the requirements of the Liquor Licences Act and as the Law stands, no other. Until the law is amended.

5.10 The Respondent has argued that there is significance in the distinction between the grant of a licence and a renewal. If this implies that in one situation the letter of the law can be overlooked or subverted, I am afraid I cannot agree. Whether the Board is dealing with an application for a grant or a renewal or a removal the law that obtains needs to be followed to the letter. A reading of Section 14[9]makes this abundantly clear. Any other way would create uncertainty and frustrate those who wish to make a living through business ventures that are sanctioned by law.

[6] POTENTIALITY OF IRREPARABLE HARM OR PREJUDICE UPON EITHER PARTY.

6.1 If the Applicant was granted a licence timeously, it is reasonable to assume that he would have been in business by now. The court was informed from the bar of an intention to take advantage of

[8] General Administration Act No. 11 /1905 section 3 of which adopts the Roman- Dutch Common Law as "Law in Swaziland." This was to co-exist with Swazi Law and custom which is as old as the Swazi people.
[9] Of the Liquor Licences Order supra.

high turnover during the festive season of December 2017. It is a matter of regret that this has not happened, and in the nature of things the judgment could not possibly be ready earlier than now. There is no doubt that the Applicant has been occasioned prejudice and continues to suffer prejudice in the form of lost business opportunity. The real question, however, is whether this delay does or has the potential to occasion irreparable harm. If so, this prejudice or harm would still need to be weighed against that of the Respondent. In my understanding irreparable harm means harm that is irreversible or incompensible. An obvious example would be a case where time is of the essence, such that if certain things do not happen now the adverse result would be irreversible or incompensible.

6.2 Appealing against judgments and orders is a very important part of our justice system, obviously up to a certain point because matters must finally be concluded. The right of appeal must not lightly be hampered, and the granting of leave to execute a judgment pending appeal has a good potential to do so. In the case of judgments sounding in money leave may be granted subject to *security de restituendo*[10]. Undoubtedly, such security gives adequate protection to the Respondent in the event that the appeal succeeds after execution has occurred. The matter in *casu* is not one such case. It is my view that although the Applicant is prejudiced by the delay, such prejudice does not occasion irreparable harm. Because the onus is always upon the Applicant to establish irreparable harm, I am of the view that in the circumstances of the case it has not succeeded in doing so.

[10] See South Cape Corporation (Pty) Ltd. Supra.

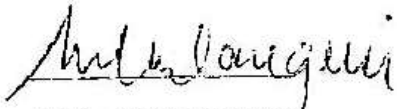
[7] A court dealing with an application for leave to execute must caution itself against the temptation to deal with the application as if it was the appeal court, for this would have the undesirable effect of pre-judging the outcome of the appeal. I have stated above that in my opinion the appeal does not have good prospects of success, and if this was the only consideration I would probably find for the Applicant.

[8] In conclusion of this discourse I can do no better than quote the eloquent words of Corbett JA in the case of South Cape Corp[11], where the Learned Judge had this to say:-

> **".....if, upon a consideration of all the evidence the court were left in doubt as to whether irreparable harm would be suffered or not, then the Applicant, upon whom the true onus rested, would fail on this issue. Moreover, even if the Applicant succeeded on this issue, the court would still retain its discretion to decide whether in all the circumstances (including) factors other than irreparable harm to the other party) leave to execute should be granted or not. Nor would failure on this issue be conclusive....."**

[11] See note 10 above, at page 548.

[9] Taking all the circumstances of the case into account, including the importance of the subject matter in commercial enterprise of this country, I am unable to grant the application for leave to execute. The application is therefore dismissed, each party to pay its own costs.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Applicant: **Mr. S.M. Nhlabatsi**

For the Respondent: **Ms. B. Shabalala**