

IN THE HIGH COURT OF LESOTHO

In the Application of :

GEORGE THABO MONAHENG

Applicant

v

CLIFFORD TRADING CO.(PTY) LTD.  
LESOTHO NATIONAL DEVELOPMENT  
CORPORATION

1st Respondent  
2nd Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice  
T.S. Cotran on the 7th day of September 1984

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This is the extended return date of Rule Nisi granted to the applicant by my brother Kheola A J calling upon the two respondents to show cause why they should not pay a commission of Maloti 10,415 with interest and costs allegedly due by a term in the contract of employment between the applicant and the second respondent being his share of the profits as General Manager of the first respondent for the trading year 1983/84. There were prayers for other relief, but for the purpose of this Judgment, they can be ignored.

The application is resisted on two main grounds, viz.,

- (1) that the sum claimed was not due and payable, and
- (2) that there existed disputes of facts between the parties that could only be determined or resolved after viva voce evidence is heard.

Mr. Maqutu argues that proceeding by way of motion is permissible if the Court is able to decide that a debt is in fact due and that the disputes which the respondents allege exist, are in fact fabricated (or non-existent) and advanced in bad faith solely to protract the proceedings. (Tamarillo (Pty) Ltd. v B.N. Aitken (Pty) Ltd. 1982 (1) SA 398 et seq).

/It is

It is common cause that the applicant had entered into a contract of employment with the second respondent Lesotho National Development Corporation (hereinafter referred to as LNDC) on the 12th February 1980 to manage the first respondent Clifford Trading (Pty) Ltd. a wholly owned subsidiary (hereinafter referred to as Clifford) and that a clause in the contract provided that the applicant is entitled to get 5% of the net audited profits of Clifford.

The applicant retired from Clifford on the 31st May 1984. It appears to have been an honourable retirement. The end of the financial year was the 30th April 1984 and the applicant was expecting his 5% share of the net profits for the year 1983/84, when on the 29th June 1984 he received a letter from LNDC informing him that when he was General Manager of Clifford he extended "certain special credit facilities" of around M20,000 to Mokoko Plumbing which amount was still unpaid (by Mokoko) and that "any monies due to you", should be deferred until such time as the "outstanding amounts shall have been recovered" (Annexures A and B of founding affidavit).

The applicant took legal advice and Mr. Maqutu wrote to LNDC that their action in withholding the applicant's entitlements to his share of the profits until Mokoko Plumbing settled their debt was "illegal" and that unless the applicant is paid "within 7 days" proceedings will be instituted and a "Court injunction" obtained. LNDC replied that the applicant in extending the facilities to Mokoko Plumbing had acted:-

- (a) outside his authority as General Manager,
- (b) against the best interests of Clifford, and therefore
- (c) is personally liable to make good the loss which was incurred through his carelessness.

LNDC indicated that they will defend any proceedings (Annexures C and D of founding affidavit).

/This

This application was then launched. The founding affidavit was of course based on the charges LNDC levelled against the applicant as detailed above. The applicant denied the allegations in the LNDC letters and proceeded to demonstrate that their complaint about the credit to Mokoko Plumbing (their only complaint in fact) was within his authority as General Manager, and that Mokoko Plumbing did not owe Clifford around M20,000. The respondents opposed the application and replied, in extenso, pointing out:-

- (a) that the applicant was in breach of his contract of employment and/or negligent and had caused loss to the company, i.e. Clifford,
- (b) that the applicant is entitled to 5% of the net final audited profit of Clifford but the auditors had not certified the accounts yet so the sum claimed is "not due and payable",
- (c) that the respondents may be entitled to counterclaim against the applicant in that the loss he caused Clifford to suffer in his dealings with Mokoko Plumbing may exceed his entitlement and hence they have a right to withhold his commission.

The respondents' complaints concerned only one customer, Mokoko Plumbing. This company occupied premises in the same building as Clifford the latter being the landlord. The substance of the complaints were to the effect that the applicant failed to collect rent due from that customer, that the credit facilities extended were not bona fide and were tantamount to financing the customer at Clifford's expense by stocking goods not actually on order but in expectation of an order being received from the customer, and that the exercise has caused loss for which the applicant is liable.

The applicant replied, and supported his reply by an affidavit from the manager of Mokoko Plumbing.

/The papers

The papers of the parties are voluminous. What Mr. Maqutu may have succeeded in showing, on balance of typewriter evidence, was this:-

- (1) That LNDC, in their correspondence with the applicant, did not say that they withheld payment on the ground that the accounts for the year ending April 1984 were yet unaudited and brought up this point in bad faith simply as an excuse not to pay.
- (2) That Clifford have not sued Mokoko Plumbing to recover M20,000, or any amount, thus showing that the applicant had acted in good faith and that the respondents were acting otherwise.
- (3) That Mokoko Plumbing do not owe M20,000 but a lesser amount and are still trading with Clifford so that the applicant cannot have been in breach of his contract of employment or negligent.

Well, with respect, even if this is true the rule cannot be confirmed. In Tamarillo's case *supra*, there were:-

- (1) several issues between the parties,
- (2) the issues were severable and not dependant one on the other, and
- (3) some issues could be resolved on papers to justify partial confirmation of the rule.

In the case before me, there is in the final analysis, one issue, viz, whether the respondents will be able to discharge the onus, and the onus is on them, of this I am sure, that the applicant is not entitled to his commission by reason of causing the respondents loss through breach of contract or negligence in performance of his duties. Mr. Maqutu wants me to hold, in advance, that the respondents will not be able to discharge the onus. I am not prepared to do so.

In exercise of the powers conferred upon me by Rule 8(14) of the High Court Rules, I order that the matter be converted into  
/a trial.

a trial, the affidavits forming the pleadings in the action, with the following directions:-

- (1) The respondents (LNDC and Clifford) to ensure that by the 31st of October 1984 the final audit of Clifford for the year ending April 1984 is completed and certified, alternatively that there is an interim audit report for the same period, failing either of which, the figure for the net profit for the year ending April 1984 given by the applicant in his founding affidavit, to stand as correct for the purpose of the trial.
- (2) The respondents to file their counterclaim, if any, on or before 15th November 1984.
- (3) The applicant to file his reply to the counterclaim, if any, on or before 30th November 1984.
- (4) Either party may seek amendments and in particular the applicant may pray for the award of commercial interest if successful.
- (5) The Registrar to fix an early hearing date but not before the commencement of the next session of the High Court in February 1985.
- (6) Costs of the application to be costs in the cause.

  
CHIEF JUSTICE

7th September 1984

For Applicant : Messrs Maqutu & Co. (Mr. Pitso)

For Respondents: Mr. Olivier S.C. (instructed by Israel & Sackstein)