

IN THE HIGH COURT OF LESOTHO

In the Application of :

MARTHA MARGRIETHA BURGER

Applicant

V

OCRIM S.A.P.  
THE MINISTRY OF AGRICULTURE  
AND MARKETING OF THE  
GOVERNMENT OF LESOTHO  
BINNIE & PARTNERS - LESOTHO

1st Respondent

2nd Respondent

3rd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 30th day of May, 1986.

First Respondent has raised points in limine in an application wherein applicant, who carries on business as general engineers and specialists in steel construction and fabrication in the Republic of South Africa under the style of Adrimar Engineering moved the court for an urgent order framed in the following terms:

1. A. That the Rules relating to the forms and service be dispensed with in terms of Rule 8(22) and that this matter be heard as one of urgency.
  1. Authorising and directing the Deputy Sheriff to attach ad confirmandum jurisdictionem all the Respondent's right, title and interest in and to;
    - 1.1. the amounts owing to the First Respondent by the Second Respondent and or such amounts standing to the credit of the First Respondent in the books of account of Second Respondent and or the books of account of its consultants and agents, the Third Respondent, being amounts owing

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- to First Respondent or to which First Respondent is now or in the future will be entitled to payment of arising from the contract between Second Respondent and First Respondent in respect of the MASERU MAIZE MILL AND SILO COMPLEX ("THE CONTRACT") in an amount not exceeding R631,565.00 plus an amount of R50,000 00 as a contingency and provision for current and future legal costs ("THE DEBT").
- 1.2. such other movable assets of the First Respondent as may be found within the area of the jurisdiction of this Honourable Court inter alia Contractor's site equipment and tools, motor vehicles, site buildings, unfixed materials and engineering plant and accessories on THE CONTRACT site.
  2. Directing that a copy of this Order be served on the First Respondent at No. 76 Via Massarotti, Cremona, Italy by the person or persons authorised to effect service of process in Italy.
  3. Granting leave to the Applicant to institute action out of this Honourable Court against the First Respondent by Edictal Citation, within one (1) month of the service of this Order on First Respondent, for the following relief :
    - 3.1. payment of the sum of R631,565.00 ;
    - 3.2 interest a temporibus morae ;
    - 3.3. costs of suit ;
    - 3.4 further or alternative relief.
  4. Directing that service of the Edictal Citation be on the First Respondent at No. 76 Via Massarotti, Cremona, Italy by the person or persons authorised to effect service of process in Italy.
  5. That First Respondent be informed in the Edictal Citation that if it wishes to defend the action it shall give notice in writing within one (1) month of the date of service of the Edictal Citation to the Registrar of this Honourable Court and to the Applicant's Attorneys of its intention so to do.
  6. That costs of this Application be costs in the action.
  7. Further or alternative relief.

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- C. 1. Directing the Respondents to forthwith allow Applicant access to the Contract site for the purpose of making an Inventory of its Contractor's Tools and Equipment which it was compelled by First and Third Respondents to leave on the Contract site.
2. Directing that the Respondents be interdicted from using and/or damaging such Contractor's Tools and Equipment pending Applicant's application for the return thereof.
- D Granting Applicant's application for an order :
1. Directing and requiring the First and Third Respondents, forthwith upon completion of the Inventory referred to in paragraph C above, to deliver up to Applicant at the Contract site, the Applicant's Contractor's Tools and Equipment as detailed in the Inventory :
2. Costs of this Application ;
3. Further or alternative relief.
- E. 1. A rule nisi be issued calling upon Second and Third Respondents to show cause, if any, on a date to be determined by the above Honourable Court why the Attachment in paragraph B. 1.1 above should not be confirmed.
2. That the Order referred to in paragraph B. 1.1 above shall operate with immediate effect as an interim interdict preventing Second and Third Respondents from paying or releasing the whole or any part of the DEBT to the First Respondent or any other person to instance."

The application was placed before me on 28th April, 1986 when by consent of counsels for the Applicant, the First and Third Respondents who had attended, it was ordered that the application be postponed to Monday 19th May, 1986 to enable the Respondents who had intimated their intention to oppose this application, to file their answering affidavits. The answering and replying affidavits were duly filed by the First Respondent and the applicant respectively.

In as far as <sup>it is</sup> material, the gist of the facts disclosed by the applicant's founding affidavit is that 1st Respondent, a company with limited liabilities

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incorporated in Italy and carrying on business as international engineering contractors, particularly in the area of food processing plants has contracts in the Republic of South Africa and the Kingdom of Lesotho. On 11th March, 1985 1st Respondent and 2nd Respondent entered into a written agreement, Annexure "A", whereby the former was to supply plant and equipment for the contract known as the "Maseru Maize Mill and Silo Complex" (hereinafter referred to as the contract). On 23rd March, 1985 the applicant and the 1st Respondent entered into a sub-contract whereby the former would carry out certain part of the contract. The Second Respondent, as Employer in terms of the contract, appointed Third Respondent as the Engineer for the purposes of the contract in terms of clause 1.1 (2) of the conditions of contract. In or about April/May 1985 the Applicant duly commenced work in terms of the sub-contract and moved equipment and personnel into the contract site. In addition, certain work was done by Applicant at its engineering works in Potchefstroom, such as the fabrication and assembly of certain items of equipment which were subsequently delivered to and erected on the contract site. The applicant proceeded with the execution of the sub-contract work in accordance with the agreed programme of works and in terms of the sub-contract.

However on 17th April 1986 1st Respondent wrongfully and unlawfully repudiated the sub-contract and gave applicant notice thereof by way of telex from its attorneys, Messrs Soller, Winner & Partners to the applicant and to the applicant's Johannesburg attorney, Mr. R.R. Carlisle. In terms of First Respondent's telex, the applicant and

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its workmen were instructed to remove themselves from the contract site by 12 noon on the 17th April, 1986 which they did. Applicant's endeavours to re-enter the contract site for purposes of taking inventory of its equipment on site was refused on 17th and 18th April 1986.

On 21st April 1986 applicant instructed Mr. R.R. Carlisle to inform 1st Respondent's attorneys that applicant accepted the unlawful repudiation of the sub-contract and that it was accordingly cancelled. Applicant further avers that it has suffered damages as a result of 1st Respondent's unlawful repudiation of the sub-contract arising from the cost of materials delivered and work performed and loss of profits in the sum of R631,565.00. In addition, applicant's equipment on site is conservatively valued at R80,000.00. and wherefor applicant intends instituting action against the 1st Respondent for payments of the amounts due to the applicant as set out above, return of its tools and equipment, and additional damages which it may suffer arising from the above-mentioned facts, interest and ancillary relief including costs.

I must however point out that when on 28/4/86 the parties appeared before me 1st Respondent intimated that there was no objection to applicant removing its equipment from the contract site and I subsequently granted an application for the removal of that equipment.

Applicant submitted that First Respondent has assets within the jurisdiction of this Court being the amounts due and owing to it by the Government of Lesotho. As 1st Respondent was a peregrinus having its principal place of business in Italy, applicant was entitled to attach the said amounts owing to confirm the jurisdiction of this Court.

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When on 19th May, 1986 the matter came for argument the First Respondent raised several points in limine, the most important of which was, in my opinion, that as the applicant sought the attachment of property ad fundandam jurisdictionem the provisions of Rule 6 of the High Court Rules 1980 applied. However the provisions of Rule 6(1) of the High Court Rules, supra, afforded relief to an incola as against a peregrinus-Rule 6(2) (c). Since the applicant was admittedly a peregrinus the relief contemplated under the provisions of Rule 6(1) of the High Court Rules above did not avail it. Wherefor the application ought not to succeed.

It was argued on behalf of the applicant that the purpose of the attachment in the present case was to confirm jurisdiction which the court already had, and not to found jurisdiction. I agree. Although the reading of Rule 6(1) of the High Court Rules does not make it very clear that the purpose of the attachment is also to confirm the jurisdiction of the court it should be observed, however, that the heading of this Rule as appear on the margin reads :

"Attachment of property or arrest of person to found or confirm jurisdiction" (my underlining).

If, therefore, Rule 6(1) is read in conjunction with the heading that appears on the margin thereof there can be no doubt that the purpose of Rule 6(1) of the Rules is not only to found but also to confirm jurisdiction of the court. Whether the purpose of the attachment is to found or confirm jurisdiction, Rule 6(2) (c) of the Rules makes it abundantly clear that the applicant must be an incola of the Kingdom of Lesotho, and not a peregrinus. I come to the conclusion therefore that the remedy contemplated under the provisions of Rule

6(1) of the Rules is not available to applicant. It follows that in my opinion, the point in limine was well taken and must be allowed. That, in my view, disposes of the matter and it will be purely academic to consider the other points raised in limine.

In the light of this decision it stands to reason that the application ought to be dismissed with costs and it is accordingly ordered. This order applies with equal force to CIV/APN/138/86 which is almost identical.

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J U D G E.

30th May, 1986.

For the Applicant : Mr Winstock  
For the Respondents: Mr. Sapire & Mr. Mr. Moiloo.