CIV\APN\96\94

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO HOTELS INTERNATIONAL (PROPRIETARY) LIMITED (IN JUDICIAL MANAGEMENT) — Applicant

and

MARC VAN HOOVELS — Respondent

RULING ON POINTS RAISED IN LIMINE

Delivered by the Honourable Chief Justice Mr. Justice J.L. Kheola on the 2nd June, 1994.

On the 30th March, 1994 the applicant moved an ex parte application and obtained a rule nisi couched in the following terms:-

1. The normal Rules of this Honourable Court relating to the service of process are dispensed with and this matter is heard as a matter of urgency.

2. The Deputy Sheriff of this Honourable Court is directed to attach the assets of the Respondent, a peregrinus of this Honourable Court, to give the Court jurisdiction in an action which the Applicant intends to bring against the Respondent.

3. The said Deputy Sheriff is authorised to hold such assets

pending the outcome of the action to be instituted.

4. The Deputy Sheriff of this Honourable Court is directed and authorised to attach and take into his possession the passport of the Respondent to prevent him from leaving the jurisdiction of this Honourable Court.

5. Alternatively, and in the event of the Registrar of this Honourable Court refusing to issue the warrant of Arrest in terms of Rule 7 of this Honourable Court, the Deputy Sheriff is directed and authorised to arrest, or bring to bail the Respondent by way of a Warrant of Arrest to be issued by the Registrar of this Honourable Court, and to hold the Respondent in his custody until such time as he, or any other person on his behalf, gives to the said Deputy Sheriff adequate security by Bond or obligation to satisfy the claim the Applicant intends to institute against the Respondent.

6. A Rule Nisi is issued calling upon the Respondent to show cause on the 11th day of April 1994 or in terms of the provisions of Rule 7 hereof, why this order should not be made a final Order of Court and why the Respondent should not be directed to pay the costs of this Application, only in the event of opposition.

7. Paragraphs 2, 3 and 4 operate with immediate effect.

8. Granting further and\or alternative relief.

To -day is the extended return day of that rule nisi.

Mr. Raubenheimer, S.C., counsel for the respondent, raised certain points in limine. One of such points was the suppression of material facts. He submitted that it is a well established rule that an applicant in an ex parte application should approach the court with utmost good faith and has a duty towards the court to disclose all material facts. He referred to Schlesinger v. Schelesinger, 1979 (4) S.A. 342 (W) at p. 350 where Le Roux , J. said:

> "It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant."

He submitted that if an order has been made upon an ex parte application and it appears that material facts have been kept back which might have influenced the decision of the court whether to make the order or not, the court has a discretion to set aside the order on the ground of non-disclosure. He referred to H.R. Holfeld (Africa) Ltd. v. Karl Walter & another (1)

1987 (4) S.A. 850 (W.L.D.) at p. 861 where Kirk - Cohen, J. said:

> "Applying the principles enunciated by Tindall JA in Nel v. Waterberb; Landbouvers Kooperatiewe Vereniging 1946 AD 597 at 607 I am of the opinion that there are special considerations in this matter arising from the conduct of the losing party which justify an order of attorney and client costs. As in the Schlesinger case supra, there was a reckless disregard of the need to place the full facts before this Court when seeking relief without notice. In all the circumstances I am of the view that attorney and ~~cobs~~, is awarded in Nel's case, should follow the event in this matter."

In The Civil Practice of the Superior Courts' in South Africa, 2nd ed. at p.94 the learned authors put this legal point in the following manner:

> "Although on the one hand, the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts, which might affect the granting or otherwise of an ex parte order;
>
> The utmost good faith must be observed by litigants making ex parte application in placing material facts before the court;

> so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure. It should, however, be noted that the court has a discretion and is not compelled even if the non-disclosure was material, to dismiss the application or to set aside the proceedings."

I now turn to the evidence in the present case. In paragraphs 13 and 14 of the founding affidavit the applicant makes the following allegations:

> "The latest Application against the Lesotho Electricity Corporation is the third Application in a series of actions the Applicant had to take against the Lesotho Electricity Corporation, The Respondent and various officials of the said Corporation. The first two Applications the Lesotho Electricity Corporation did not even bother to defend. Each time an Application was moved against it it either chose to settle the Application at the Court doors, or to allow the Order to be taken unopposed. It

is Clear from the Court documentation which has been filed in all the Applications referred to above that neither the Respondent, nor the officials of the Lesotho Electricity Corporation, ever denied the allegations made against them, and to this extent I respectfully refer the Honourable Court to the fact that some of these allegations are serious, indicate unlawful actions by the officials of the Corporation, and also of malice and personal vendettas."

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"I also allege that the documentation and affidavits will disclose that the Respondent took specific actions to prejudice the interests of the major shareholder of the Applicant at his industrial development at Ha Mabote, Maseru. Certain of the electricity installations at this complex were tampered with by the Respondent. When an Application was moved before this Honourable Court they immediately capitulated and reinstated the

installations. This Application was not opposed and the respondent, like the officials of the Lesotho Electricity Corporation, never opposed the Application and chose not to put his side of the story or to defend any of the allegations made."

The sweeping statement made by the applicant in paragraph 13 that it is clear from the court documentation which has been filed in all the applications referred to above that neither the respondent, nor officials of the respondent, ever denied the allegations made against them, was inaccurate and misleading. I have had the opportunity to read the opposing affidavit in CIV\APN\283\93 and I found that the present respondent and the Lesotho Electricity Corporation actually denied the allegations made against them. The rule in that matter was extended to the 23rd September, 1994. That is the date of hearing. It is clear that the matter is seriously contested and that every allegation of misdeed is denied.

Now the impression created by the applicant by its sweeping statement referred to above, was that the

respondent was a person who committed certain unlawful acts, such as tampering with the electricity installations which supply electricity to the premises of the applicant, when allegation are made against him he does not deny them. This allegation created a very bad impression of the respondent. I had no hesitation to grant the order sought in that ex parte application. I agree with the submission that this was a suppression of a material fact that might have influenced the decision of the Judge to grant the order.

Mr Ranbenheimer submitted that where the liberty of a person is concerned it is even more important that for applicant to put the full facts before the Court and to be meticulous in ensuring that the information before the Court was in all respects accurate (Reilly v. Renigno, 1982 (4) S.A. He further submitted that the basis of urgency on which the order was obtained on the 30th March, 1994 was false. In the founding affidavit the applicant alleged that

> "The respondent is to leave the jurisdiction of this Honourable Court any minute, is a peregrinus, has no assets within the jurisdiction of this Honourable Court." and

"it has just come to my knowledge that the respondent's contract has expired and that he intends to leave the Kingdom of Lesotho on the 31st March, 1994."

In **Southern Pride Foods (Pty) Ltd. v. Mohidien,** 1982 (3) S.A. 1068 (C.P.D.) at pp. 1071-1072 Odes, A.J. said:

"The Courts were not indulging in formalistic fantasies in requiring an affidavit or affirmation "of information and belief" for the admission of hearsay statements. Sound and practical reasons exist for the two-fold requirement. The source of information must be disclosed to enable a respondent confronted by an allegation normally inadmissible as hearsay, to check its accuracy. And when the Courts prescribe the disclosure of the source of information, they mean, in my view, a disclosure with a degree of particularity sufficient to enable the opposing party to make independent investigation of their own, including, if necessary verification of the

statement from the course itself. General statements as to source such as "one of the respondent's creditors" will not suffice to constitute an adequate compliance with the requirements. Such statements tell the opposing party nothing and are no more a disclosure of source than the well-known phrase. "I have been informed."

The statement on oath or the affirmation by a deponent that he believes the truth of the hearsay statement is equally essential for the reasons stated by Schreiner J in MIa's case supra and quoted above. If, moreover, the deponent is unable to state that he believes the truth of the hearsay information furnished to him, he can hardly be permitted to rely upon it for the relief which he seeks.

I am therefore unable to agree with the contention that the failure to comply with the above requirements for the admission of hearsay statements is a mere technicality."

It is correct that at pages 11 and 14 of the record the applicant makes the averments stated above. The deponent does not reveal the source of his information. It is quite clear from the decision in Southern Pride Foods' case supra that the deponent was under an obligation to reveal the source of his information because that statement is hearsay. Nor has the deponent stated that he has reason to believe the contents thereof. The two requirements stated above are not just mere formalities. The deponent is trying to cure the defect in his replying affidavit by saying that he had no reason to disbelieve that information. It seems to me that that allegation ought to have appeared in his founding affidavit. The information was apparently inaccurate because we now know that the respondent's contract with the Lesotho Electricity Corporation expires on the 17th August, 1994.

It seems to me that this is a proper case in which I should exercise my discretion in favour of the respondent by upholding the points raise in limine.

In the result the rule is discharged with costs.

J/L. KHEOLA
CHIEF JUSTICE

2nd June, 1994

For Applicant - Mr.Geldenhuys
For Respondent - Mr. Raubenheimer