C of A (CIV) 1/2005

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

MNM CONSTRUCTION COMPANY (PTY) LTD APPELLANT

and

SOUTHERN LESOTHO CONSTRUCTION COMPANY (PTY) LTD	1ST RESPONDENT
EDUCATION FACILITY UNIT	2ND RESPONDENT
MINISTRY OF EDUCTION	3RD RESPONDENT
ATTORNEY-GENERAL	4TH RESPONDENT

CORAM: STEYN, P
GROSSKOPF, JA
MELUNSKY, JA

SUMMARY

Confusion as to the identity of the appellant – unjustified urgent applications – failure to observe requirements for interdicts – factual dispute on papers fatal to applicant's case.

JUDGMENT

GROSSKOPF, JA

[1] The appellant was the first respondent in the court *a quo* and I shall refer to it as "the first respondent". The applicant in the court *a quo* is now the first respondent but I shall refer to it as "the applicant". There appears to be a confusion as far as the identity of the first respondent is concerned. The applicant's notice of motion cited the first respondent as MNM Construction Co. (Pty) Ltd ("MNM Construction"), but in paragraph 2.1 of its founding affidavit the applicant referred to the first respondent as MNM Development Company (Pty) Ltd ("MNM Development"). The deponent who deposed to the answering affidavit on behalf of the first respondent did so in his capacity as managing director of MNM Construction, but then proceeded to admit paragraph 2.1 of the founding affidavit which referred to the first respondent as MNM Development. The joint venture agreement which formed the basis of the applicant's case in the court *a quo* had been entered into between the applicant and MNM Development, and the tender for the construction of the Litsebe Primary School ("the school") was made in the name of MNM Development. The Government's building contract was however awarded to MNM Construction. The judgment of the court *a quo* was eventually given against MNM Construction. There is certainty on one point, viz. that MNM Construction and MNM Development are two separate *personae*.

[2] The parties did not clarify the position in the court *a quo* and they did not set the record straight in this connection. As the matter stands MNM Development was the party who had entered into the joint venture agreement with the applicant, but the court *a quo* ordered a third party, MNM Construction, to comply with the terms of that joint venture agreement. This problem was first raised by members of this court when the appeal was heard but counsel for the applicant was unable to suggest how the situation could be rectified at this stage. In my judgment the appeal should succeed on this ground alone. I shall, however, also deal briefly with other reasons why the appeal should be upheld in my view.

[3] This is once again one of those unfortunate cases where the applicant, without justification, brought an *ex parte* application on the ground that it was urgent. There was no reason in my view why the founding papers in this matter could not have been served on the respondents in the ordinary manner. This court has reiterated time and again that litigants should resort to this practice only in exceptional cases. If practitioners continue not to heed this warning this court will be obliged to award costs *de bonis propriis* in appropriate cases. See **Commander L.D.F. and Another vs Matela** L.A.C. 1995-1999, 799 at 804-805.

[4] A further practice which cannot be sustained is the indiscriminate granting of rules nisi. In the present matter the High Court granted a rule nisi on 30 July 2004 in the absence of the respondents. An interdict was granted against the first respondent restraining it from

proceeding with the building of a school and prohibiting it from receiving payment for its services. The applicant succeeded in obtaining the interdict without establishing the essential requirement that there was a well-grounded apprehension of irreparable harm to it if the interim relief is not granted. The applicant in my view failed to satisfy a further requirement for an interdict, namely that it has no other satisfactory remedy. (See generally Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed, 1065, for these requirements.)

[5] The court *a quo* confirmed the rule without observing the requirements for an interdict. The court accordingly granted the applicant an order in terms whereof the first respondent was "interdicted from continuing to build (the school) unilaterally against the spirit of the joint venture, …… pending the determination hereof". The first respondent was further ordered to "account and disclose all financial dealings in relation to the joint venture to the applicant". The second respondent, who was also the second respondent in the court *a quo*, was ordered in turn to "withhold all monies from first respondent in relation to the joint venture, pending the finalisation of this matter". The first respondent appealed against this order of the court *a quo*.

[6] It is common cause that MNM Development and the applicant entered into a joint venture agreement on 25 August 2003 to tender jointly under the name of MNM Development for the construction of certain primary schools. The parties further agreed that all expenses and all

profits would be shared equally by them. It is the applicant's case that the second respondent awarded a tender to the joint venture to build the school, but that the first respondent has failed to account to the applicant or to disclose to it any of its financial dealings in relation to the joint venture.

[7] The first respondent's version, as set out in its answering affidavit, is that the second respondent refused to accept a tender from the joint venture but insisted that each company should submit its own tender, which the first respondent then did. The first respondent's tender was accepted on 28 November 2003. What happened thereafter is explained as follows by the first respondent in its answering affidavit.

> "*Despite the attitude of the Ministry …(the) parties agreed verbally to give effect to their joint venture agreement by going into execution of the said contract jointly. In fact the parties immediately went to the site for purposes of excavation. When they had to deliver material to the site, applicant pulled out of the joint venture as a result of the inaccessibility of the site, which made the whole operation more expensive.*
>
> *Following applicant's withdrawal … 1st respondent proceeded with the contract between it and 2nd respondent and on or about 26th June 2004 applicant submitted its pro rata expenses prior to its withdrawal and 1st respondent duly paid*

with a bank cheque, a copy of which is hereto attached …"

[8] The applicant in its replying affidavit admitted that the first respondent had paid for expenses with a bank cheque but then went on to give the following explanation:

> "*this is the payment of the expenses that the applicant has incurred in trying to implement the offer of the 2nd respondent ….. Since the applicant had already incurred expenses it was entitled to the money as a share from the joint venture*."

This admission by the applicant lends some credence to the first respondent's version that despite the government's refusal to accept a tender from the joint venture the parties orally agreed to give effect to their joint venture agreement and in fact started with the work.

[9] The applicant does not explain why it dropped out of the joint venture. It does however deny that it ever withdrew or intended to withdraw from the joint venture and described the first respondent's allegations in this regard as "hearsay". There was therefore a clear and genuine dispute of fact that could not be resolved on the papers, i.e. whether the applicant had withdrawn from the joint venture or not. The court *a quo* however concluded that the first respondent's allegation that the applicant had in fact withdrawn from the joint venture agreement:-

> "*has just been an allegation as nothing was attached to the*

papers to show that in fact applicant withdrew from the contract. Since it was the first respondent who alleged the

withdrawal, he ought to prove it and in the absence of any such proof they must fail in their defence."

[10] In my judgment the learned judge in the court *a quo* erred in this respect. There was no *onus* on the first respondent in these circumstances. The legal position is clear. Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may only be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. (**Plascon–Evans Paints Ltd v Van Riebeeck (Pty) Ltd** 1984 (3) SA 623 (A) at 634 E-635 C; **Ramahata vs Ramahata LAC** (1985-1989) 184 at 185 E-H; **Makhutla and Another v Makhutla and Another** C OF A (CIV) No.7 of 2002). The facts averred by the applicant and admitted by the first respondent, together with the facts alleged by the first respondent, i.e. that the applicant withdrew from the joint venture, did not justify a final order. The order of the court *a quo* cannot therefore be sustained.

[11] In the result the following order is made:-

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and there is

substituted therefor the following order:

"The rule *nisi* is discharged and the application is dismissed with costs."

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F.H. GROSSKOPF

JUDGE OF APPEAL

I agree

_____

J.H. STEYN

PRESIDENT

I agree

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L.S. MELUNSKY

JUDGE OF APPEAL

Dated at Maseru this 20th day of April 2005.

For Appellant : **Mr M. Ntlhoki**

For 1st Respondent : **Miss Mapesela**