C OF A (CIV) NO.13/2006

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

LESOTHO REVENUE AUTHORITY	FIRST APPELLANT
COMMISSIONER GENERAL	SECOND APPELLANT
COMMISSIONER VALUE ADDED TAX	THIRD APPELLANT

and

OLYMPIC OFF SALES	RESPONDENT

HEARD : 12 October 2006
DELIVERED : 20 October 2006

CORAM: STEYN, P
GROSSKOPF, JA
SMALBERGER, JA

SUMMARY

Court a quo erred in holding that second appellant did not have authority to oppose the respondent's application, and it erred in granting the application without considering whether the relief claimed in the prayers was tenable. Court a quo should have upheld the appellants' objection to the respondent's locus standi. Respondent's prayer for a decree of perpetual

silence not tenable. No proof that distress action in terms of section 42 of the Value Added Tax Act, 2001, unlawful.

JUDGMENT

GROSSKOPF, JA

[1] This matter came before the court *a quo* by way of an urgent application for a *rule nisi.* It was in effect an application for a decree of perpetual silence against the Lesotho Revenue Authority as first respondent, its Commissioner General as second respondent and its Commissioner of Value Added Tax as third respondent. These respondents are now the appellants before us but I shall refer to them as first, second and third respondents respectively.

[2] Mrs Matšeliso Chi ("Mrs Chi") was registered for value added tax ("Vat") purposes as a sole trader, trading as Olympic Off Sales. Mrs Chi was notified in July 2005 that her Vat liability amounted to M173 513,58 and that this liability could attract penalties in terms of the Value Added Tax Act, 9 of 2001 ("the Vat Act"). She was invited to lodge an objection if she did not agree with the assessment but she failed to do so. An assessment amounting to M662 474,10, which

included penalties, was served on Mrs Chi in September 2005. She was informed that this amount was due and payable on or before 7 October 2005. She refused to pay the outstanding vat liability and also failed to lodge a proper objection to or appeal against the assessment raised. The third respondent addressed a letter to her on 29 March 2006 demanding payment of the outstanding tax liability within seven days-

> *"failing which there will be no other alternative but to invoke the provisions of section 42 of the Value Added Tax Act of 2001 and impose distress proceedings against your business."*

[3] In a letter dated 1 June 2006 the second respondent again invited Mrs Chi to lodge any objection to the assessment before close of business on 8 June 2006. She was however informed that any objection to the assessment, or appeal against any decision relating to that objection, would not suspend or stay her duty to settle the tax debt. Mrs Chi neither paid nor lodged a proper objection, whereupon the third respondent on 16 June 2006 issued a distress order in terms of section 42 of the Vat Act against her movable property. This distress order was executed on 6 July 2006.

[4] It is common cause that a meeting was held on 27 July 2006 between the third respondent and Mrs Chi, her legal adviser and her accountant. Mrs Chi was invited once again to lodge any objection she might wish to raise despite the fact that the time to do so had lapsed. Mrs Chi then paid an amount of M47 311,12 on 1August 2006, but the third respondent refused to accept this payment in full settlement of her Vat liability. The third respondent was accordingly not willing to release the distressed property.

[5] Mrs Chi thereupon brought an urgent application on 7 August 2006 against the three respondents in the name of an alleged company, Olympic Off Sales (Pty) Ltd., as applicant. The applicant sought an order against the respondents in the following terms:-

> *"1. Dispensing with the ordinary modes and periods of service due to the urgency of this application.*
>
> *2. A Rule Nisi be and it is issued returnable on the date and time to be determined by this Honourable court calling upon the Respondent to show cause (if any) why:-*

(a) Directing the respondent to sue the applicant herein within 14 days of the order (or any number of days to be determined by this court) of this Honourable Court hereof failing which they should be perpetually silenced from ever making the claim against the applicant in this regard.

(b) That the applicant shall not be authorized to gain access to its place of business and resume its daily business pending finalization hereof.

(c) Staying the operation of the distress order issued by the 3rd Respondent and/or any of the respondents.

(d) Declaring such distress order unlawful and/or not in accordance with the law.

(e) Cost of suit.

(f) Further and or alternative relief as this Honourable court may deem fit.

(g) That prayers 1 and 2 (b) and (c) operate with immediate effect as provisional relief and/or interim order."

[6] Mrs Chi is the deponent to the applicant's founding affidavit. She describes herself as the "managing director" of the applicant, "Olympic Off Sales a company duly registered in accordance with the laws of Lesotho." She attaches a resolution of "Olympic Off Sales (Pty) Ltd" authorizing her, as a director, to institute proceedings against the first respondent on behalf of "Olympic Off Sales (Pty)

Ltd." She further describes herself in the founding affidavit as the "2nd applicant", but there is no further reference in the papers to a second applicant.

[7] The respondents filed a notice of intention to oppose followed by an answering affidavit of the second respondent, Dr Charles Jenkins, the Commissioner General of the first respondent. The second respondent stated as follows in paragraph 1 of his answering affidavit:

> *"The 1st Respondent has duly resolved to oppose this application and [has] authorized me to file this answering affidavit on behalf of the Respondents herein."*

[8] Both sides raised points in limine. The respondents submitted that the applicant, Olympic Off Sales, is not registered as a company. The applicant company which brought the application is therefore non-existent. The applicant on the other hand submitted that there is no admissible evidence that the first respondent has duly resolved to oppose the application and to authorize the second respondent to file an answering affidavit on behalf of all the respondents.

[9] The court a quo in its ruling dealt only with the applicant's point in limine. The point in limine raised by the respondents was not considered at all. The court a quo came to the following conclusion in respect of the applicant's point in limine:

> *"2nd respondent's allegation in his answering affidavit at paragraph 1 that 1st respondent had duly resolved to oppose this application and has authorized him to file this answering affidavit on behalf of all the respondents herein is inadmissible hearsay evidence in the absence of a resolution of the 1st respondent's Board of Directors and also in the absence of a supporting affidavit by a person who was present in that meeting when the said Board so resolved. Indeed the issue as to the resolution of the said Board is a fact which should be proved by annexing the said minutes of the said Board of Directors of the 1st respondent."*

The court a quo accordingly upheld the applicant's point in limine and ruled that there was no proof that the first respondent had resolved to oppose the application. In the result the learned judge in the court a quo also granted prayers 2 (a), (b), (c), (d) and (e) of the applicant's notice of motion, but did so without considering the implications of such a ruling. She appeared to be under the impression that because she had upheld the point in limine, there was no opposition to the other relief claimed, and that she was obliged to grant these. Her reasoning was as follows:

> *"The 1st respondent's application to oppose the matter herein is therefore dismissed. For the same reasons prayers 2 (a), (b),*

(c), (d) and (e) of the applicant are granted as prayed with costs to the applicant."

She clearly did not apply her mind to the question whether the relief claimed in those prayers was at all tenable.

[10] The applicant (as respondent in the appeal) gave notice that it intended raising the same point in limine at the hearing of the appeal, namely that the first respondent (as first appellant in the appeal) had failed to file a resolution authorizing the noting and prosecution of the appeal by and on behalf of the first respondent. I should point out on the other hand that the resolution which authorizes the applicant to oppose the appeal and to prosecute this further point in limine is, quite ironically, not granted by the alleged applicant company, but by Olympic Off Sales, an entity which is not a party to the proceedings.

[11] The respondents have now placed the second respondent's authority beyond any doubt by annexing a copy of a general power of attorney granted by the first respondent's board of directors to the second respondent as from 1 March 2006. It appears that the second

respondent has been granted wide powers as the first respondent's attorney and agent in terms of this general power of attorney. He is authorized inter alia to prosecute and defend all actions, suits and claims before any court.

[12] I am nonetheless of the view that the applicant's point in limine in the court a quo was without substance and that the court a quo clearly erred in upholding this technical objection. The second respondent is not only the Commissioner General of the first respondent in terms of section 17 (1) of the Lesotho Revenue Authority Act, 14 of 2001 ("the Act"), he is also the chief executive of the first respondent (section 17 (1) of the Act) and the secretary of the board of the first respondent (section 8 (2) (c) of the Act). As secretary he is responsible for keeping minutes of board meetings (section 10 (7) of the Act). The second respondent is therefore pre-eminently the official who would have known at first hand of the first respondent's resolution to oppose the application. It is in any event inconceivable, in the light of the history of this matter, that the first respondent would not have opposed the application.

[13] The second respondent stated in his answering affidavit that the first respondent duly (i.e. properly) resolved to oppose the application and to authorize the second respondent to file an answering affidavit on behalf of all the respondents. There is no justification in my view for the court a quo to have labelled the second respondent's statement as "unsubstantiated allegations" or "inadmissible hearsay evidence". The second respondent's statement is made under oath and there is no evidence by or on behalf of the applicant to contradict it. The applicant's denial that the first respondent has duly resolved to oppose the application is nothing more than a bare denial. The full bench of the Cape Provincial Division of the Supreme Court of South Africa considered the question of proof of authority to institute motion proceedings on behalf of a company in the case of Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C), and observed as follows at 352 A-B:

> *"The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the*

> *Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the Court, then I consider that a minimum of evidence will be required from the applicant."*

[14] This Court has also considered the question whether a resolution to institute or oppose an application on behalf of a legal person should always be filed. Mahomed JA held as follows in the case of Central Bank of Lesotho v Phoofolo 1985-1989 LAC 253 at 258 J – 259 B:

> *"The respondent had contended in the Court a quo that there were two technical grounds on which the appellant's opposition should fail. The first technical ground was that no resolution, evidencing the authority of the Governor to depose to an affidavit on behalf of the appellant, or to represent the appellant in the proceedings, was filed. This objection was without substance, and was correctly dismissed by Molai, J. There is no invariable rule which requires a juristic person to file a formal resolution, manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts. In the present case the authority of the Governor to represent the appellant in the proceedings in the Court a quo appears amply from the circumstances of the case, including the filing of the notice of opposition to the application."*

See further Tattersall and Another v Nedcor Bank Ltd 1995 (3) SA 222 (A) where it was held at 228 G-H that a copy of the resolution of

a company authorizing the bringing of an application need not always be annexed. This is particularly so where there is sufficient aliunde evidence of authority and where the denial of authority is a bare one, like in the present case.

[15] In view of the aforegoing I have come to the conclusion that the second respondent has in fact proved that he had the necessary authority to oppose the application on behalf of the first respondent and to file an answering affidavit on behalf of all the respondents. I accordingly find that the court a quo erred in upholding the applicant's point in limine. The court a quo should in any case not have granted the applicant's application without first considering whether the relief claimed in the prayers was tenable. There are indeed two reasons why the applicant's application should have been refused, first because the respondents' point in limine regarding the applicant's lack of locus standi should have been considered and upheld by the court a quo, and secondly because the relief claimed in the applicant's notice of motion was untenable. I shall deal with these two aspects separately.

[16] I have pointed out in paragraphs [5] and [6] above that the applicant is described in its founding affidavit as "Olympic Off Sales, a company duly registered in accordance with the laws of Lesotho." Mrs Chi is said to be authorized in terms of a resolution of "Olympic Off Sales (Pty) Ltd" to institute proceedings against the first respondent on behalf of "Olympic Off Sales (Pty) Ltd". Mrs Chi is described as the "managing director" of the applicant. She calls herself the "2nd applicant" in paragraph 1 of the founding affidavit but she does not feature in the heading or elsewhere in the papers as an applicant.

[17] The second respondent pointed out in his answering affidavit that Olympic Off Sales is not a registered company and raised the lack of *locus standi* of the applicant as a point *in limine*. The matter became even more confused when the applicant in its replying affidavit sought to introduce a new applicant, namely "Olympic Enterprises (Pty) Ltd" but failed in terms of Rule 14 (2) of the High Court Rules to introduce this new party in substitution for the original applicant, Olympic Off Sales (Pty) Ltd. There is further no resolution by "Olympic

Enterprises (Pty) Ltd" authorizing Mrs Chi to proceed with the application on its behalf.

[18] The applicant went further in its replying affidavit and alleged that the name Olympic Off Sales is the applicant's firm name under which the first respondent has always dealt with the applicant, but there was no application to substitute this firm as the new applicant. The applicant in effect conceded that Olympic Off Sales has never been a company. The applicant company, Olympic Off Sales (Pty) Ltd, was therefore non-existent and accordingly had no locus standi to institute the present proceedings. The second respondent's point in limine should therefore have been upheld by the court a quo and the applicant's application should have been dismissed.

[19] I would next like to deal with the applicant's prayers and the question whether the relief claimed in those prayers was tenable. Prayer 2 (a) of the applicant's notice of motion is for a decree of perpetual silence. Such a decree is a recognized legal remedy in appropriate circumstances (see Van Winsen and Others, The Civil Practice of the

Supreme Court of South Africa, 4th edition 1997, at 1108 et seq.) It was however pointed out by a full bench in Brown v Simon 1905 TS 311 at 322 that this remedy-

> *"must be applied with great discretion and with due regard to the circumstances of the parties."*

The circumstances of the parties are set out below. It is common cause that an assessment of the applicant's Vat liability had been made on 9 September 2005 and that the Vat became due and payable on or before 7 October 2005. The applicant was granted several opportunities to lodge an objection to the assessment but failed to do so. The second respondent eventually advised the applicant on 1 June 2006 that failure to settle the tax debt –

> *"will leave us with no alternative to exercising our recovery powers under the Vat Act. This may entail execution of a distress action against your property or any other measure provided for in the said Act."*

[20] The applicant failed to settle its tax liability and the third respondent issued a so-called "distress order" on 16 June 2006 in terms of section 42 of the Vat Act. The distress order was executed on 6 July 2006. The applicant first instituted a spoliation application but withdrew it again.

The applicant then brought the present application, asking in prayer 2 (a) for an order directing the first respondent to sue the applicant within 14 days, failing which it should be "perpetually silenced from ever making the claim against the applicant". I do not know what legal action the first respondent was supposed to institute against the applicant within 14 days. The assessed Vat was already due and payable in terms of section 37 (1) of the Vat Act and the applicant could no longer contend that it did not owe the Vat. It was therefore not necessary for the first respondent to sue the applicant to prove its claim. There was further no threat of any action at the time of the application, as is usually required for a decree of perpetual silence. To ask for a decree of perpetual silence in those circumstances was wholly inappropriate in my opinion. It would have prevented the first respondent from recovering unpaid Vat which was due and payable.

[21] There is a further reason why a decree of perpetual silence should not have been granted. The action which had been taken by the first respondent, i.e. the issue of a distress order, clearly indicated that the first respondent intended to recover the Vat owed by the applicant and

it in fact proceeded to do so. The Appeal Court in South Africa held in the case of Cooper v Natal Law Society and Another 1949 (1) SA 785 (A) at 792 that there was no substance in an application for a decree of perpetual silence in circumstances such as the present where the first respondent had taken tangible steps to proceed with the case shortly before the applicant brought its application. For these reasons there was no justification in my view for the granting of a decree of perpetual silence.

[22] Paragraph 2 (b) of the notice of motion was for an order authorizing the applicant to enter its own business premises. The respondents submit that this prayer is misconceived inasmuch as the business premises were locked by consent of the manager of Olympic Off Sales who asked the officials of the first respondent not to remove the distressed property. This arrangement is borne out by the contents of annexure "E" to the applicant's founding affidavit. It sets out that a certain Zheng Yi Hiu, acting in his capacity as the manager of Olympic Off Sales, authorized the officers of the first respondent to use the Olympic Off Sales premises to keep the property attached in

pursuance of section 42 of the Vat Act, and to secure and lock all entrances to the said premises. There is therefore no merit in this prayer.

[23] The applicant further asked in prayers 2 (c) and (d) for an order staying the operation of the distress order and declaring such distress order unlawful. No reasons for the alleged unlawfulness were, however, set forth in the applicant's founding affidavit. The applicant's first submission in this regard before us is that the distress order is against section 17 (1) of the Constitution and therefore unlawful. This was not the case made out by the applicant in its application or in the court a quo. This court has made it clear once again in the case of Attorney General & Others v Michael M. Tekateka & Others C of A (CIV) No.7 of 2001 (unreported) that-

> *"It is trite that an applicant must make out his or her case in the founding affidavit and that a court will not allow an applicant to make out a different case in reply or, still less, in argument."*

(See further The National Executive Committee of the Lesotho National Olympic Committee and Others v P.M. Morolong C of A (CIV) No.26/2001.)

The respondents submitted that the distress action is in any event not unconstitutional inasmuch as section 17 (4) (a) (i) of the Constitution makes provision for the taking of property in satisfaction of any tax. We need not however decide this point.

[24] The applicant further submitted that the third respondent, who admittedly issued the distress order, no longer had the power to do so since the enactment of the Value Added Tax (Amendment) Act, 6 of 2003 ("the Amendment Act"). The effect of section 3 (b) of the Amendment Act was that the second respondent became the official who had the power inter alia to issue a distress order. The Amendment Act however provided in section 13 thereof that the second respondent may delegate to any officer any power or duty conferred or imposed on him by this Amendment Act. It is not disputed that the second respondent in fact delegated the power to issue the distress order to the

third respondent. It was accordingly not wrong for the third respondent to have said that she was exercising her powers under the Vat Act when she issued the distress order.

The applicant's submission that the third respondent acted illegally when she issued the distress order, and that the distress order was accordingly unlawful, cannot be sustained. Prayers 2(c) and (d) of the notice of motion should therefore not have been granted.

[25] Prayer 2 (e) was for a cost order which the court a quo granted. It is our view that the court a quo should have refused the application with costs for the reasons set out above. The question is, who should pay those costs? There is no doubt that Mrs Chi was the driving force behind this abortive application. When she applied for Vat registration she described herself as a "sole trader", trading as Olympic Off Sales, and she signed the registration form as "proprietor". I think it would only be fair if Mrs Chi is ordered to pay the costs of the appeal as well as the costs in the court a quo.

[26] The following order is accordingly made:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and the following order is made in the place thereof:

"The application is dismissed with costs".

3. Mrs Chi, the proprietor of Olympic Off Sales, is ordered to pay the costs in both the High Court and in the Court of Appeal.

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F H GROSSKOPF, JA

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I agree **J H STEYN, P**

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I agree **J W SMALBERGER, JA**

For Appellants : **Mr Mathaba**

For Respondent : **Mr Thoahlane**