C OF A (CIV) NO. 4/2008

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

STAR LION GOLD INVESTMENT CO. (PTY) LIMITED T/A MKM **APPELLANT**

And

CENTRAL BANK OF LESOTHO **1ST RESPONDENT**
NEDBANK LESOTHO LIMITED **2ND RESPONDENT**

CORAM:

Smalberger, JA
Melunsky, JA
Mofolo, AJA

Heard : 8 October, 2008
Delivered : 17 October, 2008

SUMMARY

Appeal against the discharge of a rule *nisi* and order of costs *de bonis propriis* – urgent relief sought in High Court in pending proceedings without notice to respondents – application ill-founded – appeal dismissed – costs *de bonis propriis* awarded against counsel – counsel not afforded opportunity to be heard – breach of *audi* principle – costs *de bonis propriis* not justified – order to that effect set aside.

JUDGMENT

SMALBERGER JA

[1] The appellant is one of eight companies whose business interests are allegedly interrelated, and which are not administered and operated as separate entities. It is common cause that on 27 November 2007, at the instance of the first respondent, a rule *nisi* returnable on 13 December 2007 was issued in the High Court by Majara J against the companies concerned and certain other interested parties, including a number of banks (the second respondent being one) holding funds on behalf of those companies ("the first application"). In addition a number of interim orders were made. The orders, *inter alia,* authorised an investigation into the affairs of the eight companies; authorised the search of premises and the seizure of documents; interdicted the companies concerned from conducting insurance and banking businesses without a licence; and interdicted them from receiving any money from, or making payments to, members of the public.

[2] There were two other provisions in the interim order which are of importance in the present instance. The first was paragraph 3 (e) (i) which directed the respondent banks not to allow any withdrawals or transfer of funds from any accounts held with them by the eight companies "without the leave of the Court or the written consent of the Governor of [the first respondent]". The second was paragraph 6 in terms of which the eight companies were given leave to anticipate the return day on not less than two days notice to the first respondent.

[3] On 30 November 2007 the appellant obtained an order from Majara J in the High Court against the respondents ("the second application") in terms of which a rule *nisi* was issued together with certain interim orders, one of which provisionally interdicted the second respondent "from interfering with the monies relating to the applicant herein in its capacity as a funeral undertaker…..". The second application was brought on an urgent basis, without notice to the respondents and under a different case number from that relating to the first application. The effect of the order was to release the appellant's account

with the second respondent from the operation of paragraph 3 (e) (i) of the interim order referred to in paragraph 2 above.

[4] Consequent upon the order in the second application, opposing and replying affidavits were duly filed. The matter came before Guni J, and on 29 February 2008 the learned judge discharged the rule *nisi* and ordered counsel for the appellant to pay the costs *de bonis propriis*. The appellant duly noted an appeal against the learned judge's judgment and order on 3 March 2008. On 6 June 2008 Guni J handed down her reasons for judgment.

[5] The appellant carries on the business of a funeral undertaker. It appears from the founding affidavit that the underlying purpose of the second application was to secure the release of funds, held by the second respondent, to enable the appellant to operate its mortuary, to provide transportation and to attend to the burial requirements of bodies in its care, in keeping with its obligations to the general public.

[6] The second application was clearly ill-advised and ill-founded. No proper case was made out for urgent relief without notice to the respondents. This Court has frequently warned against the launching of such applications – see *B.P. Lesotho (Pty) Ltd v Moloi and Another* C of A (CIV) No 1 of 2006 (unreported) at para [8]. The appellant could and should have availed itself of the opportunity afforded to it in terms of paragraph 3 (e) (i) of the interim order in the first application to request the consent of the Governor of the first respondent for the withdrawal of funds from the second respondent. This it failed to do; nor did it seek leave of the court to withdraw funds from the second respondent. According to the first respondent, the appellant had been informed that it was not the intention of the first respondent to prevent the appellant from carrying out burials. Nor did the appellant seek leave to anticipate the return day, the other permissible and appropriate course of action available to it.

[7] In the circumstances Guni J was justified in discharging the rule *nisi*. Mrs Khiba, who appeared for the appellant, was unable to

advance any cogent argument to the contrary. She mainly confined her submissions to the judge's order of costs *de bonis propriis,* a matter to which I now turn.

[8] When the matter was argued before Guni J the appellant was represented by three counsel – Mr. Nathane, Mrs Khiba and Mr. Makhetha. The judge's order that "the costs are to be borne by counsel and they are not recoverable from the client" (in other word, costs *de bonis propriis*) would appear to have been directed at all three counsel. As appears from her judgment, Guni J was clearly incensed by what she regarded as counsels' flagrant disregard of the rules in bringing the second application and their improper motive for doing so. In the course of her judgment she stated:

> "Mr Nathane convinced me that he deliberately considered and decided to proceed in that fashion specifically to deny the Central Bank and its attorney an opportunity to put their case before the court that was considering the issuance of that rule *nisi."*

The underlying reason advanced by Mr. Nathane for following this course was apparently that if the respondents had been

made aware of the second application they would have opposed it and caused delay. This Guni J held was "not acceptable." She further criticised counsel for in effect "snatching" the rule *nisi.* These are considerations which in an appropriate case could justify an award of costs *de bonis propriis* (see *Mahlakeng and Others v Southern Sky (Pty) Ltd and Others* LAC (2000 – 2004) 742 at 753 – 4).

[9] The costs order made against counsel has significant financial consequences for them. It was incumbent upon the judge *a quo* to have given counsel a proper opportunity of being heard before making such order – *cf Libuseng Lesesa v Lebalang Khutlisi and Another* C of A (CIV) No 18 of 2004 (unreported) para [10]. *Audi alteram partem* is a fundamental principle of our law. Failure to comply with it invalidates any decision where the principle applies. Mrs Khiba complained that counsel had not been given the required opportunity to be heard. This was confirmed by Mr. Ploos van Amstel for the respondents.

[10] The third ground of appeal in the appellant's Notice of Appeal dated 3 March 2008 reads as follows:-

> "The learned Judge erred and/or misdirected herself in law by making an adverse order of costs *de bonis propriis* without giving counsel and opportunity to be heard, contrary to the cardinal principles of *audi alteram partem*."

Guni J must be taken to have been aware of the complaint embodied in the quoted ground of appeal, but nowhere in her reasons for judgment handed down on 6 June 2008 does she seek to refute it, nor does it appear from such reasons that she afforded counsel an opportunity to address her on the issue. It can therefore safely be accepted that she overlooked or disregarded the *audi* principle, a serious oversight or omission on her part. Her costs order consequently cannot stand. The matter, however, does not end there. Now that we have heard counsel we may consider the question of costs afresh.

[11] Funerals are undoubtedly matters of considerable importance in the culture of the nation. The second application appears to have been prompted by genuine concern about the conditions pertaining at the appellant's mortuary, the preservation of the bodies in its care and the

need for suitable burial arrangements. It was the first respondent's declared intention that it did not intend to prevent the appellant from carrying out burials. That is why an approach to the Governor of the first respondent for the release of funds may have elicited a sympathetic response and rendered the second application unnecessary. In bringing the second application the appellant was hoping to prevent delay – its primary object was not to secure an unfair advantage over the respondents. It was ill-advised to bring the second application in the manner it did when there were other avenues it could have followed in accordance with the terms of the first order. This is also not a case of Majara J being deliberately misled to grant the second application. The learned judge had granted a rule *nisi* in the first application three days earlier and must have been aware of its provisions. Despite that she, somewhat surprisingly, was prepared to entertain the second application and grant the appellant relief.

[12] In the circumstances the second application would not appear to have been a wilful attempt to circumvent the orders made in the first application for an ulterior purpose. In *Mahlakengs'* case *(supra)* this Court (at 754 C) endorsed the dictum in *Waar v Louw* 1977 (3) SA

297 (0) at 304 G-H that a special costs order should only be resorted to for a reasonably serious infringement such as dishonesty, willfulness or negligence of a serious nature lest counsel's "vigorous presentation and the general conduct of his/her clients case" be inhibited (at 754 C – D). Counsel's conduct in the present matter did not in my view fall within the above category and an order of costs *de bonis propriis* would accordingly not be appropriate.

[13] In the result the following order is made:

(1) The appeal is allowed but only to the extent of the court a *quo's* order relating to costs. For the rest the appeal is dismissed with costs.

(2) The order of the court *a quo* is altered to read:

"The rule *nisi* is discharged with costs".

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J.W. SMALBERGER
JUSTICE OF APPEAL

I agree

_____
L.S. MELUNSKY
JUSTICE OF APPEAL

I agree

_____
G. N. MOFOLO
ACTING JUSTICE OF APPEAL

For Appellant : Adv. M.T. Khiba

For Respondent : Adv J. A. Ploos van Amstel SC.