IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 37/2010

In the matter between:

THABEX LIMITED	1ST APPELLANT
MARIUS WELTHAGEN	2ND APPELLANT
DR JOHN ANTHONY CRUISE	3RD APPELLANT
IZAK BENJAMIN VAN TONDER	4TH APPELLANT
JEFFREY RAYMOND RAPOO	5TH APPELLANT
DR JAN WALTERS KRUGER	6TH APPELLANT
MASANKISI KAMWANGA	7TH APPELLANT

and

TSOAKINYE PETER MOSEBO	1ST RESPONDENT
CORNELIUS JOHANNES ENGELBRECHT	2ND RESPONDENT

CORAM: SMALBERGER, JA
MELUNSKY, JA
HOWIE, JA

HEARD : 7 APRIL 2011
DELIVERED : 20 APRIL 2011

SUMMARY

Interlocutory application for dismissal of appellants' counter application and defence to respondents' main application on grounds of alleged failure of appellants to provide security for 1st respondent's costs of main and counter applications – such relief granted in High Court.

Held on appeal:

1) High Court Registrar's determination as to amount of security (M250 000) and form and manner (by way of payment into court) made on 2 August 2010;

2) Application for security launched on 20 August, not launched prematurely;

3) Appellants failing to provide security by way of payment into court but providing a bank guarantee out of time;

4) Registrar deciding to accept the guarantee as sufficient on 20 September, without reference to first respondent. Registrar functus officio in circumstances;

5) Moreover guarantee patently deficient and inadequate;

6) First respondent not obliged to pursue alternative remedies in terms of High Court Rules;

7) First respondent entitled to apply to Court for relief sought and granted by court a quo;

8) Court a quo nevertheless granting drastic remedies, highly prejudicial to appellants, without considering whether alternative relief should be in order.

9) Court on appeal ordering that appellants should be directed to lodge proper security for costs.

10) Despite substantial success in relation to the appeal, appellants nevertheless required to pay portion of first respondents' costs.

JUDGMENT

MELUNSKY, JA:

[1] On 15 June 2010 the respondents instituted motion proceedings against the appellants and other individuals and corporations. Also cited were Government officials and a bank. The application (hereinafter referred to as the main application) concerned the business of Angel Diamonds (Pty) Ltd ("the company"), certain share transactions relating to the company and the appointment of additional directors. The company was formed for the purpose of carrying out prospecting and mining operations in this Kingdom.

[2] In order to obtain additional capital needed to fund the company's business the respondents entered into an agreement with the first appellant (Thabex) in March 2006. At all material times Thabex was and still is, controlled by the second appellant (Welthagen). In terms of the agreement (the Shareholders Agreement) Thabex was to

receive a substantial shareholding in the company in return for providing the necessary capital. The respondents alleged in the main application that Thabex failed to provide the capital required and, moreover, that in breach of the Shareholders Agreement, it failed to satisfy the Government of Lesotho that it was able to provide the company with adequate financial resources to enable it to carry out effective mining operations. In the result the respondents claimed that they were entitled to cancel the Shareholders Agreement which they did with effect from 20 May 2010. The respondents also relied upon other irregularities and unlawful steps allegedly undertaken by Thabex and Welthagen but it is unnecessary to detail these. It is sufficient to say that in terms of the notice of motion the respondents in effect claimed, as ordinary relief, restoration to the status quo ante. This entailed, inter alia, return of the shares in the company, the termination of

Thabex's and Welthagen's authority to manage the company's affairs and the setting aside of certain resolutions passed by the company (illegally, it was alleged), including the appointments of additional directors by Thabex and its nominees.

[3] In the notice of motion the respondents also claimed interim relief by means of a rule nisi which was to operate as an interim interdict. The rule was duly granted on 21 June 2010 and its effect was, inter alia, to prohibit Thabex and Welthagen from acting on behalf of the company and to place the management of the company in the hands of the two respondents.

[4] The application was not only opposed but the appellants filed a counter application on 9 July 2010 in which they sought an order that the main application be

postponed; that the respondents provide them with transcripts and copies of a certain meeting; and that the rule nisi be discharged. The appellants accepted that the Shareholders Agreement had been cancelled but this, they maintained, had taken place with effect from 8 September 2009 and by mutual agreement. Although it was not denied that Thabex did not provide all the funding required by the company, the appellants alleged that it was not obliged to do so because at the relevant time there was no mining lease in existence.

[5] The aforegoing is nothing more than a brief summary of the principal contentions of the parties in the main application and the counter application. What this Court is now concerned with is an appeal by the appellants against an order made by Monapathi J in the High Court in respect of an interlocutory application brought by the first

respondent (Mosebo) on the grounds of the appellants' alleged failure to provide security for his costs of both the main and the counter applications. The learned judge granted the respondents the relief claimed in the interlocutory application and the substance of his order was to dismiss the counter application; to strike out the appellants' answering affidavits in opposition to the relief sought in the main application; to grant the respondents all the ordinary relief claimed in the main application; to confirm the rule nisi; and to order the appellants, jointly and severally, to pay the costs of the main application, the counter application and all ancillary and interlocutory applications. There is also a further matter before this Court, namely an application that the appeal be dismissed or struck off the roll on grounds unrelated to the merits of the interlocutory application. This application was based, in the main, on the appellants' admitted failure, and indeed

refusal, to provide the first respondent with security for costs of the appeal, notwithstanding the provisions of Rule 8(1) of the Court of Appeal Rules. Happily this application was settled, after some argument, and the agreement arrived at will be reflected in this judgment.

[6] It is now appropriate to consider the appeal. On 13 July 2010 Mosebo's attorneys delivered a notice in terms of Rule 48 (1) of the High Court Rules requiring the appellants to provide security for his costs in respect of the main and counter applications. The amount demanded was R50 000 in respect of each appellant. The appellants objected only to the amount of security demanded and requested that the Registrar should determine this. On 26 July an order of the High Court, made with the agreement of the parties, directed that the parties co-operate to achieve the Registrar's determination on the amount of

security by 2 August 2010 and that the appellants furnish the security for costs within seven days after such determination.

[7] According to Mosebo the parties' legal representatives did indeed appear before the Registrar on 2 August and he

> "….. there and then, after hearing argument and considering the representations from both sides determined that the [appellants were] to provide security for costs in the sum of M250 000 by way of payment of the said amount into Court."

Neil Fraser, Mosebo's attorney, appeared before the Registrar on 2 August and so did the appellants' legal representative. Fraser said that they both addressed the Registrar in full "both in relation to the amount and form of security" and the Registrar

> "….. advised that he had determined the amount of security at M250 000 in the form of a payment into Court."

[8] The answering affidavit was deposed to by Welthagen on his own behalf and on behalf of Thabex and confirmatory affidavits were filed by the other appellants. Welthagen contended that the Registrar's determination was made on 13 August in terms of an order signed by the Registrar on that day. This provided, under the Registrar's signature as follows:

> "The security for costs payable by the [appellants] is fixed at M250,000 …."

[9] This brings me to the first question that arises – was the interlocutory application launched prematurely? The application was issued and served on 20 August. If the Registrar's determination was made on 13 August, as Welthagen contends, then the application was launched before the lapse of the seven day period fixed by the High

Court on 26 July. This was Welthagen's contention and he accordingly submitted in limine that the application should be dismissed with a special award of costs against the respondents. Mosebo's averments as to what transpired before the Registrar on 2 August was met with a bare denial by Welthagen and an affirmation that the determination was made eleven days later but nothing is said about the events of 2 August. Welthagen's bland response does not give rise to a genuine dispute of fact and, perhaps more significantly, there is no affidavit from the appellants' legal representative. Moreover the Registrar, in his letters of 10 August and 20 September, confirms that he made an order on 2 August. There can be little doubt that on that day he determined the amount of security in the sum of R250 000, a sum that is not in issue in these proceedings. Purely for the purpose of the point in limine it is not necessary for me to deal with whether he

made any determination as to the form of the security. It is sufficient to say that the Registrar's determination of the amount of security was made on 2 August and that the application was not launched prematurely. It is only necessary to add that no attempt was made to deal with Fraser's account which, although made in a replying affidavit, was not specifically challenged, save for the appellants' persistent reliance on the so-called Order of Court which Fraser said

> "…. was delivered to me out of the blue and I have no knowledge how it was obtained."

In all events, a determination by the Registrar later than 2 August would have been contrary to the High Court's order of 26 July.

[10] It is convenient now to mention three other defences raised by the appellants. First, that Mosebo did not comply

with the procedure created in Rule 48(3); second, that he did not comply with the procedure created in Rule 48(5); third, that he did not comply with the procedure created in Rule 48(6). Rule 48(3) entitles a party, in whose favour security has been ordered, to apply to court for an order that security be given and that the proceedings be stayed until the order is complied with, if the party from whom security is demanded fails or refuses to furnish it. The Rule, however, is merely permissive and it was not obligatory for Mosebo to apply to court in terms thereof. In my view it would not have been appropriate for him to do so for the High Court had already made an order directing that security be furnished within seven days of 2 August and when the application was launched no security in any form had been furnished.

[11] The reference to Rule 48(5) is based on the appellants'

submission that security for costs had been given to the Registrar's satisfaction and that, in terms of the Rule, no further steps could be taken without reviewing the Registrar's decision. It may be noted that the Registrar purported to accept a payment guarantee as sufficient and adequate security on 20 September, more than a month after the proceedings were instituted. The appellants' argument regarding the alleged need for Mosebo to review is, however, dealt with in par [20] below. Rule 48(6), also relied upon by the appellants, is of no application in this appeal: it provides for the right of a party to apply for an increase in the amount of security in certain circumstances, a matter which does not arise at present.

[12] The appellants maintained that security for costs had to be provided on or before 24 August, based on the incorrect assumption that the determination of the amount

had been made on 13 August. Security, it was claimed, was in fact provided three days later – on 27 August – in the form of a guarantee. The appellants sought condonation for the late furnishing of security and this was incorporated in an application for security for costs of the main application against the second respondent (Engelbrecht). Two further events of some significance then occurred. These will be dealt with as economically as possible in the paragraphs that follow.

[13] On or about 25 August 2010 Fraser was informed by the appellants' attorney that security for costs would be provided by the appellants. Shortly thereafter he received an application to compel Engelbrecht to provide security for the appellants' costs. Attached to the application was a copy of a guarantee allegedly in compliance with the Registrar's ruling. Fraser said that he accepted the

guarantee "in good faith," but without authority or instructions, to be proper security for Mosebo's costs and he advised the appellants' attorney accordingly. Acting on subsequent instructions, he went to the Registrar's office on 2 September to inspect the original guarantee but was surprised to ascertain that the Registrar had no knowledge of any security having been provided and no guarantee was in his file.

[14] He reported these facts to Mosebo who instructed him to renew the applications (which he had previously advised the appellants' attorney would not be proceeded with, subject to the question of costs). He was also instructed to file Mosebo's supplementary affidavit which he did and he informed the appellants' attorney that the interlocutory application would be persisted in.

[15] In argument before us counsel for the appellants did not attempt to persuade us that Fraser's apparent acceptance of the guarantee precluded Mosebo from proceeding with the interlocutory application. I understood him to accept that Fraser did not have actual authority to accept the guarantee and there was no averment in the affidavits (or in submission on appeal) that he had implied or ostensible authority. What is also of some significance, in my view, is that implicit in Fraser's acceptance of the guarantee was the assumption that the original guarantee had been lodged with and approved by the Registrar, which was not the case. What is also important on this aspect of the case is that the original guarantee had not been delivered to the Registrar or the first respondent's attorney by 2 September, a month after the determination.

[16] The next event of significance was the Registrar's

purported acceptance of the guarantee which was confirmed in a letter addressed to Fraser on 20 September. The relevant part of the first paragraph reads:

> "Following the court order which I made on the 2nd August 2010 please be advised that Mr. Letsika [the appellants' attorney] furnished the court with security for the amount of M250 000.00 in the form of payment guarantee. The original payment guarantee has been submitted to me by Mr. Letsika and I managed to peruse it. If you are willing to see that original, please notify me."

The rest of the letter amounts to the Registrar's justification for accepting the guarantee instead of a payment into Court.

[17] In par [7] above I dealt with Mosebo's allegation, clearly and unambiguously confirmed by Fraser, that the Registrar had ruled on 2 August that security for costs would be provided by way of payment of the said amount into Court. I also referred to the appellants' inadequate response to this allegation and to the absence of an affidavit from the appellants' attorney who was

undoubtedly present when the ruling was made. In his supplementary affidavit Mosebo referred to the determination made by the Registrar on 2 August and stated that the appellants

> "….. were not entitled to provide the security required by way of a so-called Payment Guarantee…"

In Welthagen's response no mention was made of Mosebo's averments, save that they were noted. The essence of his reply was to refer to the Registrar's letter of 20 September and to rely on the failure of Mosebo to review the Registrar's decision. On a consideration of all the affidavits and other documents before this Court, I have no doubt that the Registrar's original ruling required the appellants to pay the amount of R250 000 into Court. The appellants' decision to furnish a payment guarantee was consequently unauthorized and irregular.

[18] The intention by the appellants to furnish a guarantee, instead of paying the amount determined by the Registrar into Court, came to the attention of Mosebo on 27 August in the separate application brought by the appellants to compel Engelbrecht to provide security for their costs in the main application. A copy of the payment guarantee was, as Fraser stated, attached to that application. Mosebo said in his supplementary affidavit that the guarantee had not been accepted by the Registrar and was not lodged in his file. The latter statement, as at 2 September, was confirmed by Fraser. All of the aforegoing resulted in Fraser raising a query with the Registrar concerning the guarantee as a form of security. This appears from the letter of 20 September which, Welthagen candidly admits, was "specifically obtained from the Registrar".

[19] Apart from the terms of the guarantee, which will be considered later, the procedures followed in obtaining it and in presenting it to the Registrar were improper. Moreover the Registrar's acceptance of the guarantee was irregular. Firstly, the determination by the Registrar did not authorize the appellants to furnish a guarantee without, at least, giving Mosebo notice of their intention to do so. Had the first respondent accepted the principle of a payment guarantee instead of a payment into Court, the appellants should have liaised with Mosebo's attorneys in relation to its terms. The appellants' further step in presenting the guarantee to the Registrar and, presumably requesting him to accept it, in the absence of Mosebo and without notice to him, was contrary to the basic principles of fairness. There is also a lack of information from the appellants as to what transpired between Letsika and the Registrar, whether orally or in writing. All that is before us

is Welthagen's admission that the letter was "specifically obtained from the Registrar". The circumstances under which this occurred are not disclosed but what is at least obvious is that the letter of 20 September was written by the Registrar at the request of the appellants or their attorney and without the knowledge of Mosebo.

[20] The Registrar's conduct in this process was certainly not blameless. On the contrary it is quite apparent that he reconsidered and purported to alter his previous decision without the consent, or even the knowledge, of Mosebo. Once the Registrar had made his determination on 2 August he was functus officio and was not entitled to alter it without the first respondent's consent. Whether it would have sufficed to have given Mosebo notice of his intention to reconsider his determination need not be decided here for he did not do so. It is also clear to me that the original

ruling of the Registrar was far more favourable to Mosebo than his decision to accept the guarantee in question. That the guarantee was objectionable in certain respects, if not entirely worthless, is, as I have indicated, a matter for later analysis. And the finding that the Registrar was functus officio requires no detailed discussion. This is because the law on this point is trite (see Miller v Commissioner for Inland Revenue (SWA) 1952 (1) SA 474 (A) at 483) but, perhaps more significantly, because the appellants' counsel eventually conceded not only that the Registrar was functus officio but also that his letter of 20 September could therefore be ignored. This concession, correctly made, also has the result that there was no need for Mosebo to review the Registrar's subsequent decision and set it aside, a matter that was raised persistently in Welthagen's opposing affidavit and also initially by counsel in argument.

[21] Finally, save for the order to be made, including the question of costs, I refer, but only briefly, to the terms of the guarantee which are justifiably unacceptable to Mosebo. The guarantee was given only on behalf of Thabex and not the other appellants and the beneficiary is expressed to be the High Court of Lesotho. Moreover it contemplates an amount which may be found to be due by Thabex to the High Court and provides that payment will be made on receipt of the High Court's demand. It also provides that the payment guarantee will expire on 30 September 2015 and is to be governed by South African Law and is subject to the jurisdiction of South African Courts.

[22] From the conclusions arrived at, it is evident that the appellants had no defence to the interlocutory application apart from requesting the Court a quo to give Mosebo less

drastic relief than that sought. There is no dispute that Mosebo was legally entitled to claim the relief which he did and that Monapathi J was entitled to grant it. His order as it stands, however, is plainly harsh and far-reaching, having the effect of shutting out the appellants' defence to the main action as well as dismissing the claims in the counter application. Had the learned judge furnished satisfactory reasons for issuing the drastic order, instead of giving the appellants a further opportunity to satisfy the Registrar's determination, we might well have simply dismissed the appeal. But in his judgment (which was prepared only a day or two before the hearing of the appeal) he did not indicate whether he had considered other options, and why he had decided to grant Mosebo the relief sought in the notice of motion as being more appropriate. Mosebo's counsel fairly conceded that it is not apparent from the judgment that the learned judge considered

granting his client a more lenient form of relief and that he consequently did not exercise a proper discretion in this regard. He nevertheless submitted that it is still open to us to dismiss the appeal and he urged us to do so.

[23] On giving this matter due consideration, however, it seems to us that we should give the appellants one more chance to furnish security in terms of the Registrar's original determination. We do so with considerable hesitation and because the appellants did make some attempt, however flimsy and unconvincing, to provide security. But because of the appellants' cavalier attitude to the original order of the High Court and due to their contemptuous disregard of the Registrar's determination, we are of the view that the appellants, despite obtaining substantial success on appeal, should nevertheless pay portion of the first respondent's costs. In particular we are

disturbed at Welthagen's evasive and disingenuous response to Mosebo's allegation that the determinations had been made on 2 August and to his persistent claim that this had occurred on 13 August; to the failure to provide any form of security until after the launch of the application; to the attempt to provide security by means of a guarantee contrary to the terms of the determination, without obtaining Mosebo's approval thereto or to the terms of the payment guarantee. In addition to the aforegoing the original guarantee was not lodged with the Registrar until some time after 2 September (the date is still uncertain) and its terms are at least patently inadequate, if not completely ineffectual. We are also concerned at the fact that the Registrar was obviously approached by the appellants or their attorney in order that he would write the letter of 20 September, without disclosing precisely what occurred on that occasion and

without notice to Mosebo. Finally in this regard the appellants had no real prospects of success in persisting in their submission that proper security had been furnished. This resulted in a record of almost 150 pages of affidavits and annexures, substantial heads of argument by both sides and an argument on the merits in this Court. Knowing what the attitude of Mosebo was, the appellants, even after the institution of the proceedings, should at least have paid the amount of R250 000 into Court and requested condonation for their failure to do so within the time fixed by the High Court.

[24] Pursuant to the application that the appeal be dismissed due to the appellants' failure to provide security for the costs of appeal, the parties reached the following agreement:

> 1. That the appellants provide security for the first respondent's costs of appeal in an amount of M60 000 (sixty thousand Maloti)

by means of a payment into Court by no later than 19 April 2011;

2. If the appellants fail to provide security as aforesaid the appeal will be dismissed with costs.

We have since been informed that the appellants duly complied with the terms of the agreement and there is no need for us to make any order in that regard.

[25] The following order is made:

1. Subject to paragraph 3 below the order of the Court a quo is set aside and is replaced with the following:

"1.1 The respondents are directed to provide security for the first applicant's costs of the application and counter application in an amount of M250 000.00 (two hundred and fifty thousand Maloti);

1.2 The said security is to be provided by means of a payment of the said sum into Court by no later than 11 May 2011;

1.3 The respondents are jointly and severally ordered to pay the first applicant's costs."

2. The appellants are directed to pay 50% of the first respondent's costs of appeal jointly and severally;

3. Should the appellants fail to comply with the terms of paragraphs 1.1 and 1.2 it is ordered:

3.1 Paragraphs 2 and 3 of this order will lapse; and

3.2 The appeal will ipso facto be dismissed with costs.

L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

C.T. HOWIE

JUSTICE OF APPEAL

For the Appellants : H. Louw

For the First Respondent: C. Edeling