C of A (CIV) 7/2011

IN THE COURT OF APPEAL OF LESOTHO

In the matter between

ZHAI FENG FU	**Appellant**
and	
LESOTHO STONE ENTERPRISES (PTY) LTD	**1st Respondent**
LU BEN LIU	**2nd Respondent**
WANG BIN	**3rd Respondent**
ZHUANG XIAOHUA	**4th Respondent**

CORAM: RAMODIBEDI, P
SCOTT, JA
FARLAM, JA

Heard: 7 APRIL 2011

Delivered: 20 APRIL 2011

Summary

Authority to represent company – resolution of company not ordinarily required – but if authority properly challenged onus on person alleging authority to meet the challenge and adequately prove such authority.

JUDGMENT

Scott, JA

[1] This appeal is one of three set down for hearing this session involving the same parties. All three are appeals against orders granted in motion proceedings. To avoid confusion I shall refer to the parties by their surnames unless it is convenient to do otherwise. Central to the subject matter of all three appeals is the company, Lesotho Enterprises (Pty) Ltd. I shall refer to it simply as "Stone".

[2] The order against which the present appeal lies has its origin in the order granted in one of the other applications ("the main application"). That application, ie the main application, was brought by Fu (the appellant in the present appeal) against Liu, Bin and Xiaohua and five others, one of whom was Stone. Fu was successful in the application and Liu, Bin and Xiaohua have appealed.

[3] The applicants in the application giving rise to the present appeal ("the second application") were Stone, Liu, Bin and Xiaohua. The respondents were Fu, three deputy sheriffs, one Phillip Mokhali, the Commissioner of Police and the Attorney General. The applicants were successful and Fu now appeals.

[4] The applicant in the third application was Fu. Respondents were Liu, Bin and Xiaohua. Fu was successful and the former have appealed.

[5] The primary relief sought in the main application was an order restraining Liu, Bin and Xiaohua from conducting the business of Stone pending the outcome of an application for its liquidation. This was refused. The order that was granted, shortly stated, interdicted Liu, Bin Xiaohua, Stone and others from excluding Fu from the business of Stone and directed them to afford Fu free access to its business management and to its financial records, books of account and other records and to permit Fu to make copies of such documents. It further directed Liu, Bin and Xiaohua to allow Fu and any of his duly authorised agents "free and undisturbed access to the offices, manufacturing factories and quarry of Stone." In addition, the order set aside "any management agreement" in regard to the business of Stone awarded to Liu, Bin and Xiaohua and set aside any appointments of directors of Stone made by some of the respondents and cancelled the appointment of Liu, Bin and Xiaohua as directors of Stone "in so far as they may claim to be directors" of Stone.

[6] The judgment was granted on 8 September 2010 and served on Liu, Bin and Xiaohua on 9 and 10 September 2010. A week later on 17 September the second application was brought ex parte and as a matter

of urgency. It was founded in essence on the allegation that Fu was abusing the process of the Court by using the order granted on 8 September 2010 to shut down the operation of Stone. The application was heard on the same day, ie 17 September, by Mahase J who granted a rule *nisi* which was subsequently made final on 21 January 2011.

[7] Also on 17 September 2010, Fu launched the third application in which he sought an order directing Liu, Bin and Xiaohau to be held in contempt of the order of 8 September 2010. Judgment in this application was granted on 15 December 2010. Liu, Bin and Xiaohau were held to be in contempt and each was sentenced to 30 days imprisonment.

[8] Against this background, I return to the present appeal which is against the order granted by Mahase J in the second application. The founding affidavit was made by Liu. In it he alleged that on 9 September 2010 Fu, accompanied by two deputy sheriffs, a policeman and Mokhali who was an employee of a rival company, went to the offices of Stone where, purporting to be acting in terms of the order of 8 September 2010, they removed money, invoice books, receipt books, delivery notes and other books of Stone. Thereafter they padlocked the office and placed a security person on guard. Liu said that they then went to "our home" where Fu pointed out certain objects which he said

were indicative of the place being an office. He said that one of the deputy sheriffs ordered Liu, Bin and Xiaohua to leave the house as they were not directors. In sum, Liu's complaint was that under the pretext of the court order Fu had shut down Stone's operation. In other words, he had implemented the very order which he had sought but had been refused by the Court.

[9] The relief sought by the applicant in the second application was far reaching. It was for a rule *nisi* calling upon the respondents to show cause why:

(a) Fu should be declared not to be a director of Stone;

(b) Fu and the other respondents in the court *a quo* should not be interdicted from carrying out any of the demands detailed in a letter dated 13 September 2010 written by Fu's attorney (I shall refer to this letter later in this judgment);

(c) The three deputy sheriffs and Phillip Mokhali (being the second to the fifth respondents in the court *a quo*) should not be interdicted from going to any of the business sites and / or offices of Stone;

(d) Fu should not be interdicted from holding himself out as a director of Stone;

(e) Fu and the other respondents in the court *a quo* should not be interdicted from going to the place of the residence of Liu, Bin and Xiaohua;

(f) Fu and the other respondents should not be interdicted from removing any of the property of Stone from its offices or place of business;

(g) Fu and the other respondents should not be ordered to pay the costs of the application on the attorney and client scale, the one paying the others to be absolved, such costs to include the costs of two counsel;

(h) The Commissioner of Police, being the sixth respondent in the court *a quo*, or her subordinates should not be directed to assist in the execution of the order.

The court *a quo* directed prayers (b), (c), (e), (f) and (h) to operate with immediate effect as interim orders. As I have previously said, the order in its entirety was made final on 21 January 2011.

[10] In his answering affidavit, Fu raised a number of issues which he chose to categorize as points *in limine*. As far as the events of 9 and 10 September 2010 are concerned, Fu simply denied the allegations made by Liu, contending they were distorted and untrue. He added: "I am not going to deal with each and every allegation contained in the founding affidavit. I attach hereto for the Honourable Court's attention a copy of the founding affidavit to the contempt application [the third application] which is sufficient to demonstrate the huge dispute of fact which exists in this application and which Liu and his legal representatives were fully

aware of at the time of the application." In the event, the founding affidavit in the third application was not attached to Fu's answering affidavit. In this Court Fu's counsel told us that a copy of the founding affidavit was attached to his heads of argument. He also said that it had been agreed that only the so-called points *in limine* would be argued. Counsel for the respondents who had not appeared in the Court below, was not prepared to confirm the agreement or the handing in of the founding affidavit in the third application. It appears from the judgment of the court a quo that it disposed of both the points *in limine* and the merits of the case without apparent reference to the affidavit that had not been attached to Fu's answering affidavit. That affidavit did not form part of the record and was not placed before us. We must accordingly decide the appeal on the record as it stands.

[11] The first and primary issue raised by Fu in his answering affidavit was that Liu had no authority to represent Stone and that Stone was accordingly not properly before the Court as a party to the proceedings. Counsel for Fu argued that since the relief claimed, or much of it, could only be claimed by Stone it could not be upheld and had to be set aside.

[12] The evidence on the issue was shortly as follows. In his founding affidavit Liu described himself, Bin and Xiaohua as no more than shareholders of Stone which, of course, was cited as the first applicant in

the court *a quo*. As to his authority to represent Stone, he confined himself to the statement:

> "I had (sic) been authorized by the co-applicants herein to depose to this affidavit on their behalf. I also depose to the same on my own behalf."

In his answering affidavit Fu referred to the fact that Liu was merely a shareholder, that he had no right to manage the affairs of Stone and he expressly denied that a resolution of Stone had been passed authorizing Liu, Bin or Xiaohua to represent Stone and contended that Liu accordingly had no authority "to engage [Stone] in this application". Liu in reply resorted to legal argument. He said:

> "I have been legally advised and believe the same to be true and correct that 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 my authority to represent [Stone] in these proceedings appears amply from the circumstances of the case, including the filing of the application."

What is conspicuous by its absence is an assertion that a resolution had been taken by the directors of Stone authorising Liu to bring the application on the company's behalf. In the absence of a copy of the resolution, such an assertion is the least that one would have expected to find in the replying affidavit in response to Fu's challenge of Liu's authority.

[13] In **Lesotho Revenue Authority and Others v Olympic Off Sales LAC (2005 – 2006) 535** this Court at 541 quoted with approval a passage in the judgment of **Watermeyer J** in **Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C) at 352 A–B** which reads as follows:

> "The best evidence that 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 and 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 by the applicant."

In similar vein **Mahomed JA in Central Bank of Lesotho v Phoofolo LAC (1985 – 89) 253 at 259B** said:

> "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."

[14] In this Court counsel for the respondents (Stone, Liu, Bin and Xiaohua) submitted that merely because a resolution had not been annexed to the papers did not mean that Liu was not authorized to represent Stone. He contended that Liu's authority appeared amply from the circumstances of the case and the inference that he was so authorized was not displaced by Fu's bare denial.

[15] It is no doubt so, as the cases quoted above make clear, that it is not ordinarily necessary to produce a resolution in motion proceedings in which a company is a party, and whether the company has authorized the litigation and is properly before the Court is a matter to be determined by having regard to the circumstances of the case. But in the present case Liu is not a director of Stone. He is no more than a shareholder. The same is true of Bin and Xiaohua. None of them hold a managerial position in the company. Even if they had previously done so, any agreement appointing them to such a position had been set aside by the Court on 8 September 2010 (see para 5 above). Furthermore, Fu's denial of Liu's authority was not a "bare denial" as counsel contended. It will be recalled that Fu referred to the fact that Liu was no more than a shareholder with no right to manage the affairs of Stone and he expressly denied that a resolution had been passed authorizing Liu to represent Stone.

[16] In **Wing On Garment (Pty) Ltd v LNDC and Another LAC (1995 – 1999) 752 Gauntlett JA**, after referring to **Mall (Cape) (Pty) Ltd v Merino Ko-operasie Beperk** (*supra*), had this to say at 755:

> "As that judgment explains, much depends on what a respondent's own answer to the assertion of authority is. If it is a bare denial, or otherwise not such as to cast particular doubt upon an applicant's assertion of authority, a Court will generally not be inclined to uphold the defence that the authority is not proven. It all depends on the affidavits as a whole ... The present case however is very different. The answering affidavit positively asserted that no relationship existed between the appellant and International – a contention to which the appellant chose not to reply."

In the present case, as I have indicated, Liu did not reply to Fu's express denial that a resolution had been passed. Instead of producing the resolution, which would have been the obvious thing to do if it existed or, at the least, asserting that such a resolution existed, Liu chose to "skirt around the issue" (**cf Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd 1972 (4) SA 249 (C)** at **253G).** Once the issue of authority had been properly raised, and in my view it had been so raised, Liu bore the onus of showing that he was authorized to represent Stone. See **Pretoria City Council v Meerlust Investments (Pty) Ltd 1962 (1) SA 321 (A)** at **325C.** In my view, Liu failed to discharge that onus. On the contrary, the probabilities would seem overwhelming that

no resolution was passed authorizing Liu to represent Stone.

[17] As stated by Fu in his answering affidavit, a shareholder has no right to manage and take control of the affairs of a company. The right to do so is that of the directors. It follows from this and the fact that Stone was not properly before the court *a quo* (and this Court) that a number of the prayers granted by the court *a quo* cannot stand. Counsel for the respondents in this Court (Liu, Bin and Xiaohua) submitted that even accepting this to be the case there were nonetheless prayers that this Court ought to uphold. However, before reverting to the order granted by the court *a quo*, it is necessary to mention a further point raised by Fu in his answering affidavit and that is that the court *a quo* had no jurisdiction to "overturn" a finding made in the judgment of the Court in the main application. That judgment was delivered on 8 September 2010, ie before the judgment of the court *a quo* in the present proceedings, and was a final judgment. In both Fu was on the one side and Liu, Bin and Xiaohua were on the other side. The point raised is correct provided that the finding in question was a finding relevant to the issue in the earlier case. See **Smith v Porritt and Others 2008 (6) SA 303 (SCA).**

[18] Against this background, I return to the prayers granted by the court *a quo* set out in paragraph 9 above. It was common cause that in

the event of it being found that Stone was not properly before the Court, the appeal in respect of prayers (c) and (f) had to be upheld. With regard to prayers (a) and (e) I shall assume that Liu, Bin and Xiaohua, as shareholders of Stone, would be entitled to seek an order declaring Fu not to be a director and an order interdicting him from holding himself out to be one.

[19] In his founding affidavit Liu made out a prima facie case that Fu was not a director of Stone, that he had been one but had ceased to be a director in 2008 and had not been re-elected on 28 January 2009 when the fourth and sixth respondents in the main application were elected to the board. Liu annexed to his affidavit a copy of the relevant company form (form L) in support of his averment. Fu's directorship of Stone was, however, an issue in the main application. In coming to the conclusion that Fu was entitled to certain of the relief claimed in that application (the relief granted is set out in para 5 above), Nomngcongo J said:

> "The first respondent [Liu] does not himself claim to be a director of the eighth respondent [Stone]. The only person who lays such claim is the applicant [Fu] and he has not been shaken in that regard. The attempt to do so only served to reinforce what he has always said. Now in terms of section 140 of the Companies Act:
> "Every company not being a private company shall have at least two directors and every private company shall have at least one director."

> I do not know how any of the respondents could conduct the affairs of [Stone] without a director who on the papers before me can only be the applicant herein [Fu]. *That being the case* the applicant [Fu] has made a case for prayers 3 to 7 and 11 to 13. To that extent the application succeeds with costs." (my emphasis)

It is apparent from the above that the finding that Fu was a director of Stone was the basis on which the learned Judge made the order he did. As I have indicated previously, there is an appeal pending against Nomngcongo J's judgment, but regardless of the outcome, the judgment was extant when the court *a quo* in the present proceedings gave judgment. The issue of Fu's directorship was accordingly *res judicata* at that stage and the court *a quo* was precluded from making the order it did in terms of prayers (a) and (e).

[20] I turn next to the appeal against prayers (b) and (e). It will be recalled that prayer (b) interdicted Fu and the other respondents from carrying out the demands detailed in a letter dated 13 September 2010. Save for one of them, the demands all related to the implementation of the relief sought against Stone and can accordingly be disregarded.
The demand that is still relevant reads:

> "To confirm to us in writing ... that our client [Fu] will have full and undisturbed access to the residence occupied by you and which is

> used as offices of the company and that you have instructed the occupants, security guards and personnel at the residence to allow our client free access to the property and access to the records contained in this property."

Prayer (e), it will be recalled, interdicted Fu and the other respondents from going to the place of the residence of Liu, Bin and Xiaohua.

[21] It is quite clear that regardless of their relationship to the company (Stone), Liu, Bin and Xiaohua would be entitled as individuals to approach the court for an order protecting them from an invasion of their home.

[22] The interdict sought in prayer (b) in respect of the demand quoted above and the interdict sought in prayer (e) have their origin in para 6 of the order granted in the main application which directed Liu, Bin and Xiaohua to allow Fu and any of his authorized agents "free and undisturbed access to the offices" of Stone. It is apparent from the founding affidavit of Liu that Fu contends that the residence was being used as an office for Stone and that he has some basis for that contention. But whether the residence is indeed being used as an office or not is a dispute of fact which cannot be resolved on the papers before us. Nonetheless, even if it is, Fu would not be entitled to "full and

undisturbed access to the residence". He would be entitled to no more than access to that part of the residence used as an office. By the same token, if the residence is being used as an office, the protection afforded to Liu, Bin and Xiaohua in prayer (e) cannot be justified. In all the circumstances, it seems to me that the prayer sought in para (b) should be refused and the order granted in terms of prayer (e) altered so as to afford Liu, Bin and Xiaohua some measure of protection. The order I propose to substitute will make provision for this.

[23] Prayer (h) does no more than authorise the Commissioner of Police or her subordinates to assist in the execution of the order in terms of prayer (e) as substituted. To that extent the order sought in prayer (h) can remain.

[24] As far as costs in the court below are concerned, the order granted in terms of prayer (g) must be set aside. In view of the very limited relief to which in my view Liu, Bin and Xiaohua were entitled I propose to make no order as to costs in the court *a quo*.

[25] In the result, the following order is made:

(1) The appeal to the extent set out below is upheld.

(2) The respondents, Liu, Bin and Xiaohua are ordered to pay the costs of the appeal, their liability for such costs

being joint and several. The Company, Lesotho Stone Enterprises (Pty) Ltd, not being a party to these proceedings, incurs no liability for costs.

(3) The order of the court *a quo* is set aside and the following order is substituted in its place:

"(a) Prayers (a), (b), (c), (d), (f) and (g) of the notice of motion are refused;

(b) Prayer (e) is refused but the following order is granted in its stead:

"In the event of it being established that Lesotho Stone Enterprises (Pty) Ltd has an office in the residence of the applicants, Liu, Bin and Xiaohua, the respondent, Fu and the other respondents will be entitled to access only to such portion or portions of the premises which are used as an office of the said company."

(c) Prayer (h) is granted.

(d) No order as to costs is made."

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D. G. SCOTT
JUSTICE OF APPEAL

I AGREE:

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M. M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I AGREE:

_____
I.G. FARLAM
JUSTICE OF APPEAL

For the Appellant: Adv. T. R. Mpaka

For the Respondent: Adv. K.E. Mosito KC