

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

**C of A (CIV) NO.45/2012
CCT/119/2009**

In the matter between:

**TUMO TLELAI t/a LESOTHO
MINERAL EXPLORATION CO**

APPELLANT

And

**SUNNY HARDWARE (PTY) LTD
t/a SUNNY BUILDWARE**

RESPONDENT

**CORAM: HOWIE JA
THRING JA
CLEAVER AJA**

**HEARD: 11 APRIL 2014
DELIVERED: 17 APRIL 2014**

SUMMARY

Appeal against a judgment of the High Court in favour of the plaintiff for payment of goods sold and delivered – Basis of appeal that goods were sold to a company and not to the defendant, a director of the company – Appeal dismissed as plaintiff's case had been proved.

JUDGMENT

CLEAVER AJA

[1] This is an appeal against the finding of the High Court which found for the plaintiff in respect of its claim for payment for goods sold and delivered to the defendant.

[2] The respondent in the appeal had sued the appellant for payment of the sum of M269,869.61 for goods sold and delivered during February to May 2008. The amount claimed was not disputed. All that was in issue was whether the appellant was liable for the debt or whether a registered company was liable.

For convenience I will refer to the appellant as the defendant and the respondent as the plaintiff.

[3] In the plaintiff's declaration the defendant was cited as

“Mr. Tumo Tlelai t/a Lesotho Mineral Exploration Company, an adult male Mosotho businessman residing within the Maseru district and Director or Manager of Lesotho Mineral Exploration Company whose further and better particulars are to plaintiff unknown and having its registered office and/or principal place of business at Khotsong Lodge, Maseru, Lesotho.”

[4] The plea is a model of brevity, although not necessarily of clarity. It reads:

“Mr. Tumo Tlelai is wrongly joined as Lesotho Mineral Exploration Company is a registered company.”

It records further that liability is denied.

[5] Mr. Yu, the marketing director of the plaintiff was the only witness called at the trial. After he had testified, the plaintiff's case was closed and the defendant's case was then also closed, without any witnesses being called to testify in support of his case. The case before the trial court accordingly had to be determined solely on an evaluation of Mr. Yu's evidence.

[6] Mr. Yu testified that during the period February to May 2008 the plaintiff had sold and delivered building material and plumbing ware

to the defendant. He testified that he knew the defendant when the sale to him was effected as he was an old customer of the plaintiff. Some of the goods sold to the defendant were delivered at Khotsong Lodge in Thaba-Khupa, which to his knowledge belonged to the defendant and some of the deliveries were made to the defendant's brickyard. Deliveries were also made to the defendant's private home. (It is not clear from the papers whether Khotsong Lodge is the defendant's private home.) Furthermore, deliveries were also made to the defendant's mother.

[7] As far as Mr. Yu was concerned the goods were ordered by the defendant personally because he was already his client, having been introduced to him by a company known as Manyokole Construction. He testified that the defendant had previously paid for goods he had purchased from the plaintiff by cheque and when asked who the "holder" [sic:drawer] of such cheques had been, his answer was: "Mr. Tumo Tlelai was the client." He identified the copy of a cheque deposit slip dated 31 January 2008 which was shown to him as being a deposit slip on which the name of Tumo Tlelai appeared. A similar deposit slip dated 28 February 2008 was also handed in. All the

cheques which he had received from the defendant prior to the sale of the goods from February to March 2008 had been personal cheques of the defendant. This evidence was not challenged in cross examination.

- [8] In the course of his evidence in chief, Mr. Yu testified that at a certain time (it is not clear from the evidence when this occurred) the defendant asked him “to put on the invoice the company name, Mr. Tumo Tlelai asked me to open a new account.” The company name he had been asked to use was Lesotho Mineral Exploration Company. In cross examination it was pointed out to him that in the plaintiff’s declaration the defendant was cited as being a director or manager of the Lesotho Mineral Company and that therefore he knew of the company and knew that the defendant was a director of it or its manager. His answer was that he “wasn’t exactly sure that he was working for the company or under the company. All I am saying is that Tumo Tlelai asked me to open an account.” Pressed further in cross examination he conceded that he now knew that Lesotho Exploration Company was a real company and that he now knew that

the defendant was acting for the company. It was on the strength of this evidence that the defendant moved for the dismissal of the claim.

[9] The court *a quo* found for the plaintiff on the ground that the defendant, by not testifying, had failed to counter the evidence led by the plaintiff which was sufficient to prove its case.

[10] The essence of Mr. Yu's evidence was the following: Previous dealings which he had had with defendant had been with the defendant personally, as evidenced by the exhibits handed in to court. As I have mentioned this was not challenged. When further purchases were made he accepted that the transactions were on the same basis. At some stage which may well have been after the goods referred to in the summons had been delivered, he was asked by the defendant to open an account in the name of the company. At no stage was it put to him that by agreeing to open a new account he had agreed that the transaction was between the plaintiff and the company. As the court *a quo* pointed out there was no evidence before it that such a company existed. The fact that he conceded that by the time he gave evidence he had come to know that the defendant had acted for the company

does not alter the position. What was important was his knowledge at the time the contract was concluded.

At no stage was it put to him that the request to open an account in the name of the company was made before the goods in question were ordered, nor was it put to him that the request had the effect of bringing about a contract for the sale of the goods to the company. Importantly it was never put to him that the goods sold to the defendant during the period from February to May 2008 were to be invoiced to the company. The court was accordingly left with Mr. Yu's evidence that he had contracted with the defendant personally. In my view the evidence of Mr. Yu, in the absence of any evidence to the contrary proved the plaintiff's case, on a balance of probabilities. The court *a quo* was accordingly correct in upholding the claim.

[11] The following order is made:

The appeal is dismissed with costs.

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree

C.T. HOWIE
JUSTICE OF APPEAL

I agree

W.G. THRING
JUSTICE OF APPEAL

Counsel for the appellant: T. Matooane

Counsel for the respondent: P.J.J. Zietsman