

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

31/2022

C of A (CIV)

CIV/APN/297/2021

In the matter between: -

**MICHAEL STEEL ENGINEERING PTY LTD
APPELLANT**

AND

SELEMELA CONSTRUCTION PTY LTD 1ST
RESPONDENT
MAHATANYE TŠILO
2NDRESPONDENT
OFFICER COMMANDING HOOHLO
POLICE STATION
3RDRESPONDENT
COMMISSIONER OF POLICE
4THRESPONDENT
ATTORNEY GENERAL
5THRESPONDENT

CORAM: K. E. MOSITO P
J VAN DER WESTHUIZEN AJA
NT MTSHIYA AJA

HEARD: 14 OCTOBER 2022
DELIVERED: 11 NOVEMBER 2022

SUMMARY

*Company - Proceedings by and against - Authority of person acting for company - Proof of resolution authorising proceedings - Rule that when challenge to authority weak minimum evidence sufficient applied - Copy of resolution authorising bringing of application not always necessary - Neither does the Companies Act, 2011 authorise the administration manager to institute the proceedings - Authority can be proved by evidence aliunde.
Appeal dismissed with no order as to costs*

JUDGMENT

K. E. MOSITO P

Background

[1] This is an appeal against the dismissal of an application brought by the administration manager of the first respondent. The application was instituted in the High Court (Khabo J). The respondents raised a point in *limine* that the administration manager of the applicant had no authority to institute the proceedings in the name of the applicant (appellant). The reason was that the appellant's sole director and shareholder, Mr Mutavdcic had passed on, and there was no one to authorise the institution of the proceedings. The learned Judge in the Court a quo upheld the point *in limine*, hence this appeal.

Facts

[2] The facts giving rise to this appeal are not material for the determination of this appeal. They are briefly that the respondents allegedly despoiled the appellant of certain property. The appellant approached the High Court for relief. At the date of the institution of the application, the appellant's sole director and shareholder, Mr Mutavdcic, had passed on. The company's administration manager then instituted the proceedings in the company's name. The respondents resisted the application on the basis, *inter alia*, that she had no authority to do so as there was no board of directors to authorise her to do so.

Issue for determination

[3] The central issue in this appeal is whether, in law and on the facts, the first appellant's administrative manager (second appellant) had the authority to institute the proceedings.

Law

[4] The authority to sue is central to the litigation. When one is concerned with the knowledge of a society or juristic person to institute proceedings in the names of that society or juristic person, it is essential to identify the natural persons whose knowledge is to be taken to be the knowledge of the entity.¹ This is a search for what Lord Hoffmann once termed 'the rules of attribution' by which courts determine '[w]hose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company.'² Thus, where the proper authority to sue is not directly questioned (for example, where a bare denial of authority is raised or where it is neither admitted nor denied) and where surrounding circumstances clearly or at least, *prima facie*, confirm the existence of authority to sue, the minimum formal evidence is required to establish same.

Consideration of the appeal

[5] The appellant's ground of appeal is that the learned Judge erred and misdirected herself in dismissing the appellants' application on the basis that the deponent to the founding affidavit does not have the necessary authority to sign the

¹ *Tlhoriso Lekatsa and 14 Others v Marematlou Freedom Party and Another* C of A (CIV) 42/20222 at para 11.

² *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (P.C.) at 507F.

founding affidavit on behalf of the appellant and at the same time hearing the merits of the application and making a finding that the merits of the case are in favour of the appellant.

[6] It is trite 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.³ Indeed, a copy of the resolution of a company authorising the bringing of an application need not always be annexed.⁴ This is particularly so where there is sufficient evidence of authority, and the denial of authority is bare. In the **Lesotho Revenue Authority and Others v Olympic Off Sales**⁵ This Court stated that:

"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 who is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence to suggest that the applicant is not properly before the Court, I consider that the applicant will require a minimum of evidence."

[7] When the matter proceeded before us, it became clear that the appellants had misconceived the issue. The learned Judge

³ Central Bank of Lesotho v. Phoofolo 1985 – 1989 LAC 253 at 258J – 259B.

⁴ Tattersall and Another v. Nedcor Bank LTD 1995 (3) S.A. 222 (A).

⁵ Lesotho Revenue Authority and Others v Olympic Off Sales LAC (2005 –2006)535.

dismissed the application based on a lack of authority to institute the proceedings and to depose to an affidavit. Confronted with this challenge, Advocate Molapo for the appellant applied from the bar that the appellant be permitted to amend its ground of appeal to read that the learned Judge erred in dismissing the application based on lack of authority to institute the proceedings no longer to depose to an affidavit.

[8] Advocate Maqakachane for the respondent agreed that it be so amended. He, however, argued that, even in its amended form, the ground could not stand because the facts could not sustain the ground. In my view, two things must first of all be put straight. First that it cannot be but common ground that whatever power the administration manager had to act on behalf of the appellant as far as legal proceedings are concerned must be found either in the Companies Act, 2011 itself or a resolution of the company. The intention of the Act can only be gathered from the language of the Act and by reading it as a whole. Even when so read, the facts could not support this newly formulated ground.

[9] Secondly, there was no evidence by an affidavit made by an official of the company annexing a copy of the resolution supporting such a claim. Even if the resolution did not exist, it was clear that the sole director and shareholder of the company had passed on and could not have authorised the proceedings. There was not enough placed before the Court to

warrant the conclusion that it is the applicant company litigating and not some unauthorised person on its behalf.

Disposition

[10] Where, as in the present case, the respondent had not offered evidence at all to suggest that the applicant company had instituted the proceedings correctly and was properly before the Court, the appeal could not stand. In so far as the appellant's manager is concerned, we hold that he had no authority to institute the proceedings in the name and on behalf of the appellant. Therefore, it is evident that the appeal cannot succeed.

Finally, dealing with the question of costs, both parties asked this Court to award them the costs of appeal.

[11] The administration manager probably had some good intentions to rescue the property of the company from the perceived spoliators. For this, she is to be commended. Should she be ordered to pay the costs of this appeal? While I appreciate that an award of costs is within the discretion of the Court, the peculiar challenge here is that the appellant was drawn into this battle without the involvement of its duly constituted board of directors. Should the Court order the administration manager to pay the costs out of her own pocket? We were not addressed on this point.

Order

[12] In the result:

- (a) The appeal is dismissed.
- (b) There will be no order as to costs.



K. E. MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



NT MTSIHIYA
ACTING JUSTICE OF APPEAL

I agree:



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

FOR THE APPELLANTS: ADV L.D. MOLAPO

FOR THE RESPONDENT: ADV T. MAQAKACHANE