CIV/T/598/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY — **PLAINTIFF**

and

MASUPHA EPHRAIM SOLE — **DEFENDANT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On 3rd day of February, 1997.

On the 4th day of November, 1996 which significantly was the first day of the trial in the above mentioned matter the Defendant filed a Notice of Motion with this Honourable court for an order couched in the following terms:-

"1. Dispensing with the forms and service provided for in the Rules and dealing with the matter as one of urgency, as contemplated in terms of Rule 8 (22) of the Rules of Court.

2. Directing the Plaintiff (Respondent) to make discovery as contemplated in terms of Rule 34 (3), as well as make available for inspection and copying, as contemplated in terms of Rule 34 (6) and (8), within 3 (three) days of the date of this Order, the following documents:-

2.1 All board minutes and agendas for such board minutes from the 1st January 1988 to date hereof;

2.2 All memoranda, management accounts, budgets and reports emanating from the Plaintiffs finance department from 1st January 1988 to date hereof;

2.3 All memoranda, internal correspondence, budgets, and minutes pertaining to the LHDA Home Ownership Scheme, in respect of Plot 12281-046, Arrival Centre, Maseru;

2.4 All memoranda, reports, budgets and correspondence in respect of the Lease Agreements referred to in Claim 1 of Plaintiff's Particulars of Claim;

2.5 All memoranda, internal and external correspondence, opinions and reports from the consultants, arising from Contract 129B, minutes and reports of the Negotiating Committee in respect thereof, prior to July 1994 and furthermore all correspondence, memoranda and documentation relating to the calculation of both present and estimated costs in respect of Contract 129B.

2.6 All documentation, internal and external, relating to the renewal of the Lease in respect of 184 Cinez Road.

3. Costs of this Application;

4. Further and/or alternative relief."

The founding affidavit in this matter has been filed by Defendant's attorney Mr. Seymour Clyde Harley. At the hearing of the matter on the 4th November 1996, however, I directed that Mr. Harley give viva voce evidence in the matter particularly on whether the documents sought to be discovered were relevant. I did so in the interests of justice as I considered that there was need for his allegations contained in his founding affidavit to be put to test by cross examination. This was duly done both on the 4th November 1996 and the 5th November 1996 respectively.

After having heard both counsel in the matter I reserved my ruling in the matter until after I had heard the opening address by Mr. Penzhorn S.C for the Plaintiff and until after I had heard the evidence in chief of the accountant in the matter. I was assured by Plaintiff's counsel that the said accountant would be the first witness for the plaintiff.

The main reason why I decided to defer my decision in the matter was simply to give myself enough opportunity to familiarise myself with the issues in the matter in order to arrive at a just decision. In adopting this approach I drew comfort from the decision of Margo J in Continental Ore v Highveld & Vanadium Ltd. 1971(4) S.A. 589 (W.L.D.) AT 595G.

Then on 20th January, 1997 and 21st January 1997 respectively I duly heard the evidence of the aforesaid accountant PW1 Dereck Andrew Davey and the following is now my ruling on Defendant's application made in terms of Rule 34 (3) (6) and (8) of the High Court Rules 1980 as aforesaid.

I deem it necessary however to give a brief outline of the material facts in this matter in order to fully appreciate the issues involved therein.

On the 6th day of November, 1995 the Plaintiff issued summons against the Defendant claiming about M5 Million arising out of the latter's alleged wrongful conduct and/or unjust enrichment at the expense of the former. The Defendant was at all material times employed by the plaintiff as its Chief Executive.

Defendant's plea in the matter was duly filed on the 23rd day of February, 1996 and on 26th April 1996 the matter was duly set down by mutual consent of

both attorneys on either side for hearing starting on the 4th day of November, 1996.

On 17th April, 1996 the Defendant addressed a "Notice to Discover Rule 34 (1)" to Plaintiff's attorneys. This notice was apparently served upon the latter on the 18th day of April, 1996.

Then on 30th May 1996 one Makase Marumo who is the current Chief Executive of Plaintiff filed a discovery affidavit on behalf of the latter. The material aspect of his affidavit is that he states under oath in paragraph 5 thereof as follows:

"5

> According to the best of my knowledge and belief, the plaintiff does not now have, and never had, in its possession, custody or power or in the possession, custody or power of its attorney or agent or any other person on its behalf, any document or copy of or extract from any document relating to any matters in question in this cause other than the documents set forth in the First and Second Schedules hereto."

Then I observe that the defendant simply sat back and did nothing about plaintiff's aforesaid discovery for almost four (4) months. He did not raise any complaint that the plaintiff had not fully complied with the discovery notice. This coupled with the delay in responding to plaintiff's discovery of 30th May 1996 is certainly an aspect to which this court must inevitably have regard in exercising its discretion in the matter.

It was only on 23rd September 1996 with only six (6) weeks remaining before the trial actually started that Defendant's attorneys gave notice to plaintiff's attorneys in terms of Rule 34 (6) of the High Court rules. I observe that the said

notice is basically in the same terms as the order sought for in the application before me.

Then on 11th October, 1996 Plaintiff's attorneys wrote to Defendants' attorney as follows:

> "I refer also to our telephonic discussion of today as well as your letter of 11th October 1996 relating to the discovery of further documents and confirm that it is agreed that this would be done informally."

Although this informal arrangement for discovery is denied by Defendant's attorney in his letter of the 18th October 1996 wherein he insists that the required discovery be made under oath I am satisfied that following the aforesaid invitation of Plaintiff's attorney contained in his letter of the 11th October, 1996 Defendant's attorney duly perused and/or inspected Plaintiff's Board Minutes on 14th October 1996 a fact which Defendant's attorney himself acknowledges in his letters of 18th and 25th October 1996 respectively addressed to Plaintiff's attorney.

As I stated in my ruling against an application for postponement of the matter on the 2nd December 1996 I am further satisfied on a balance of probabilities that it was because of the denial of defendant's attorney of the alleged agreement to make informal discovery that plaintiff's attorney filed a Supplementary Discovery affidavit on 25th October 1996. I have accordingly admitted this affidavit as part of the proceedings before me in the interests of justice.

In the said supplementary affidavit the Chief Executive of the Plaintiff Makase Marumo once more deposes in paragraph 5 thereof as follows:-

"5

To the best of my knowledge and belief, the Plaintiff does not now have, and never had, in its possession, custody or power or in the possession, custody or power of its attorney or agent or any other person on its behalf, any document or copy of or extract from any document relating to any mattes in question in this cause other than the documents set forth in the First and Second Schedules hereto."

In forwarding the said documents to Defendant's attorney Mr.Moiloa attorney for the Plaintiff wrote to the former on the 25th October 1996 as follows:-

"25 October 1996

Messrs. Harley & Morris
3rd Flor
Christie House
Orpen Road
Maseru.

Dear Sir

re: Lesotho Highlands Development Authority/ME Sole

Your letter of 18 October 1996 refers. Herewith extracts from the Minutes you requested.

Although in our view none of the material in these extracts is relevant to the issues in the trial we have made them available so as to avoid an unnecessary dispute.

We have withheld all the remaining material in these Minutes on the basis that it is obviously irrelevant. It so happens that a lot of it is also sensitive.

We also place on record that when we allowed your Mr. Harley to view the Minutes we did so on the understanding that the privilege would not be abused.

Can we now have a copy of your bundle please.
Yours faithfully
Webber Newdigate."

Since the documents referred to in Mr. Moiloa's letter of 25th October 1996 were in fact supplied before the launching of the application before me I deem it unnecessary for me therefore to determine whether they were relevant and whether they should have been discovered on the 30th May 1996. I consider that such a determination would only be academic and serve no purpose in the present matter. In any event there is no evidence before me at this stage that such documents were in the possession of the plaintiff on 30th May 1996 when Makase Marumo filed the discovery affidavit.

Again as I stated in my ruling on postponement on the 2nd day of December 1996 the Defendant's legal representatives did not raise the question of further discovery at the pre trial conference held on the 1st day of November 1996. One would have thought that if Mr. Harley for the defendant had seen any documents of relevance in the matter in his inspection of plaintiff's documents on 14th October 1996 as aforesaid then defendant's legal representatives would certainly have brought up this issue at the pre trial conference on 1/11/96. In the circumstances I have no hesitation in drawing an adverse inference against the defendant based on the attitude of his legal representatives on this issue.

The crisp question for determination by this court is whether the documents called to be produced are relevant to any matter in the action. As earlier stated

Makase Marumo's discovery affidavit is to the effect that the documents sought do not relate to the matter in question and are therefore not relevant.

It is settled law that prima facie the oath of a person who deposes to an affidavit of discovery is taken as being conclusive and that it is for the party who seeks further discovery to make the running and show on a balance of probabilities that such documents are relevant. The onus is clearly on the latter.

See Tractor & Excavator Spares (Pty) Ltd. V Groenedijk 1976 (4) S.A. 359 (WLD) at 361.

In Federal Wine and Brandy Co Ltd v Kantor 1958 (4) S.A. 735 (Eastern Cape Division) at 749G Wynne J stated the principle succinctly as follows:-

> "An affidavit of discovery is conclusive save where it can be shown either (i) from the discovery affidavit itself or (ii) from the documents referred to in the discovery affidavit or (iii) from the pleadings in the action or (iv) from any admissions made by the party making the discovery affidavit, that there are reasonable grounds for supposing that the party has or has had other relevant documents in his possession or power, or had misconceived the principles upon which the affidavit should be made."

The Learned Judge therein referred to Compagne Financiere et Commerciale du Pacifigue v Peruvian Guano Company (1882) 11 Q.B.D. 55 in which Brett LJ stated the following at pp 61-62:

"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences."

Mr. Fischer for the Defendant has found solace and a source of inspiration in the last sentence from the above mentioned quotation. He submits then that the plaintiff is obliged to discover any document which may fairly lead the defendant to a train of enquiry which may either advance his own case or damage the case of his adversary.

I do not however think that Brett LJ in the case of Compagne Financierer et Commerciale du Pacifigue (supra) meant to introduce speculation as a test here. In my judgment relevance remains the singular test in a matter such as the one before me. In this regard I am mainly attracted by the remarks of Margo J in Continental Ore's case (supra) at page 600 wherein he states as follows:-

"But, where relevance has been denied on oath, it would not be proper to order further discovery unless the basic premises, from which the inference of relevance is to be drawn, appear sufficiently from the

information before the court. Though the Rule as to relevance is stated in wide terms, as I understand the practice, the court cannot go behind the oath of the party objecting to discovery merely because there is a speculative possibility that the documents in question may lead to a train of enquiry in the sense stated above." (My underlining).

I respectfully agree and it is on this principle that I approach the matter before me.

As earlier stated Mr. Harley gave viva voce evidence before me on the question of relevancy of the documents sought to be discovered. He concedes that he duly inspected Plaintiff's Board Minutes and budgets. This was on the 15th October, 1996. He further concedes that after receipt of Makase Marumo's discovery affidavit of the 25th October, 1996 he never complained about lack of discovery in relation to any other documents besides the Board Minutes which he however inspected his only complaint being that he wasn't allowed to make copies thereof. He confirms that even in his letter of the 28th October 1996 addressed to Plaintiff's attorneys he never mentioned any other documents except the said Board Minutes. I was certainly left with the distinct impression that Mr. Harley's insistence on the so called other documentation was nothing but an afterthought.

At any rate I observed that Mr. Harley could not even say of what relevance the documents sought for discovery were. Even in his affidavit he failed to state what relevance those documents were.

Indeed I gained the impression as I listened to Mr. Harley giving evidence that he was on a fishing expedition and did not see any documents or Board Minutes

which might have had any relevance or bearing on the case before me at all. In this regard this is what he states at page 145 of the record of proceedings under cross examination from Mr. Penzhorn S.C mainly on the Board's Minutes:

"Q: You told His Lordship yesterday that these documents are crucial, each and every one of them is crucial to your client's defence. You come across a document like this that has got nothing to do with the case at all.

A: Yes well, you see, Mr. Penzhorn, the position is this. I need to see whether there are any documents or board papers or any other material emerging from the board up to the recent past to determine the board's attitude in regard to this case which may be relevant to my client. I need to eliminate, I need to by process of elimination, I need to eliminate the meetings as they, as I peruse them as to whether they are relevant or not."

Again on page 147 of the record of proceedings Mr. Penzhorn, S.C. confronted Mr. Harley with his fishing expedition in the following terms:-

"Q: Section 34 (6) still gives the opposing party that cover. If they are not relevant you are not allowed to go on a fishing expedition. The Rules never provided for that.

A: Mr. Penzhorn, allow me to answer your question, I am trying to assist. How do I know whether a document is relevant or not if I have not had the time to consider a copy thereof? It may be part of agendas or documents, very important documents such

> as the minutes which I need to see. At the time of making the request or raising a notice in terms of Rule 34 (6), how do I know whether the document which I have never seen before is relevant? I can only know that it is relevant when I briefly perused it and a copy is made available to me to then consider its weight or otherwise and its relevance in the proceedings."

Regrettably Mr. Harley made a very poor impression on me as a witness. Indeed he was finally driven to concede that at the stage when he went on oath on the issue of further discovery he did not even know whether the documents sought to be discovered were relevant or not. He has thus failed to assist the defendant to discharge the onus as set out above.

Mr. Harley further conceded, and this is common cause, that at the disciplinary inquiry in which the defendant faced charges forming the subject matter of the claim in this matter defendant never called for the Board Minutes and the other documents now sought to be discovered. Again throughout the pleadings there is no reference to such documents.

Mr. Harley was then confronted with the contents of paragraph 4 of the supplementary discovery affidavit of Makase Marumo in which he states on oath as follows:-

"4

> To the best of my knowledge and belief there are no other documents which the Plaintiff has had but does not now have in its possession or

power relating to the matters in question in this action."

Mr. Harley was asked:-

"Q: Apart from the board minutes you have seen, do you have any basis for doubting that?

A: I must assume that what I read is correct. It is under oath, I have no other alternative than to accept it."

That in my view then disposes of the matter and I really wish that I could say no more.

But then there is the aspect of the nature of the relief sought in the Notice of Motion. This calls for comment.

As earlier stated the application before me is made in terms of Rule 34 (3) (6) and (8) of the High Court Rules 1980.

In order to appreciate the full import of the whole of Rule 34 it is necessary to have regard to subsection 1 thereof which is to the following effect:-

"34 (1) Any party to an action may, by notice in writing, require any other party thereto to make discovery on oath within twenty -one days, of all documents relating to any matter in question in such action, which are or have at any time been in the possession or control of such other party."

As I see it, it was pursuant to this subsection that Plaintiff furnished a discovery affidavit on 30th May 1996 as earlier stated.

Subsection 3 of Rule 34 merely provides that "the party required to make discovery shall within twenty-one days from receipt of such notice, or within the time stated in any order of a Judge make discovery of such documents on affidavit which must be in a form as near as possible with form "O" of the First Schedule."

It seems to me that the defendant does not complain about late discovery as such nor does he complain that such discovery was not made on oath. It is therefore not clear to me why reliance was made upon this part of the rule altogether. In my view the real complaint by the defendant is directed at subsections 6 and 8 of Rule 34 which provide as follows:-

> "(6) If any party has reason to believe that, in addition to documents disclosed as aforesaid, documents or copies of such, which may be relevant to any matter in question, are in the possession of any party thereto, the former party may give notice to the latter requiring him to make such documents available for inspection in accordance with sub-rule (8) **infra,** or to state on oath within fourteen days that such documents are not in his possession, in which case he shall if known to him, state their whereabout.
>
> (8) Any party may at any time by notice, which shall as near as possible be in accordance with Form "P" of the First Schedule hereto, require any party who has made discovery to make available for inspection any documents disclosed in terms of

sub-rule (3) and (4) herein. Such notice shall require the party to whom notice is given to deliver to him within seven days a notice which shall, as near as may be, in accordance with form "Q" of the First Schedule hereto, which notice shall state a time, within three days from the delivery of such latter notice, when such documents may be inspected at the office of his attorney, or, if not represented by an attorney, at some convenient place stated in the notice, or in the case of banker's books or other books of account or books for the purposes of any trade or undertaking, at their usual place of custody. In cases where the documents are to be inspected at the office of an attorney such office must be that of an attorney within five kilometres from the office of the Registrar.

The party receiving the notice allowing him to inspect shall be entitled at the time therein stated, and for a period of seven days thereafter during normal business hours or on any one or more of such days, to inspect such documents and to take copies thereof. A party's failure to produce any such document for inspection shall preclude him from using such document at the trial unless the court, on good cause shown, otherwise orders."

As I read these subsections 34 (6) (8) it is clear to me that they are meant to give notice to the party who has not made full discovery to make available for inspection and copying the documents which the other party has reason to believe were not disclosed in the discovery affidavit made in terms of Rule 34 (1) (3).

More importantly subsections 34 (6) (8) do not provide a remedy in themselves in a situation whereby a party against whom the Notice for inspection is made fails to comply with the notice other than that he may not use the documents complained of at the trial unless the court orders otherwise on good cause shown.

The real remedy to a party giving notice in terms of subsections 34 (6) (8) therefore is provided for under Rule 34 (9) which reads as follows:-

> "(9) If any party fails to give discovery as aforesaid, or having been served with a notice under sub-rule (8) omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that sub-rule, the party desiring discovery or inspection may apply to court which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence."

It is significant however that this application is not made in terms of Rule 34 (9) of the High Court Rules. The Notice of Motion as fully reproduced above bears testimony to that effect and no amendment thereto was ever sought by the defendant to bring the application under Rule 34 (9). I accordingly find that by proceeding under Rule 34 (3) (6) (8) and not under Rule 34 (9) the defendant has misconceived his remedy and on that ground alone this application stands to be dismissed.

It is further common cause that on the 30th October, 1996 the defendant was duly ordered by the Chief Justice to make discovery of certain documents in this matter within three (3) days of the order. The defendant has failed to comply with the said order and on the 5th November 1996 this court made it clear to the

defendant that he was prima facie in contempt and gave him additional time within which to comply. He has not done so to date and I accordingly feel that this is one of the factors that this court should take into account in refusing the application before me as in general a party should not be heard before he has purged his contempt. I feel that the circumstances of this case and the conduct of the defendant in the matter warrant this approach.

In this regard I have considered the timing of this application as amounting to delaying tactics. This is because as earlier stated the Plaintiff's discovery affidavit was filed as long ago as the 30th May 1996 yet the defendant sat back for an inordinate length of time and only filed Rule 34 (6) Notice on 23rd September 1996 with the actual date of hearing just around the corner.

Then the actual application itself was moved on the actual date of trial itself namely the 4th November 1996. I have since had to deal with a series of applications by the defendant in an attempt to postpone the matter. Indeed such is the defendant's determination to put every spanner in the progress of this trial that it has now been intimated to the court on his behalf that Plaintiff's resolution authorising this claim before court will now be challenged at this stage of the proceedings.

In dealing with a similar situation Browde JA in Pitso Phakisi Makhoza v Lesotho Liquor Distributors C of A (Civ) No.34 of 1995 had occasion to remark as follows at page 10 of the judgment:-

> "As respondent made discovery on 17 July 1995 i.e. a month before the trial was to start the complaint raised at the trial that the affidavit

of discovery was defective for the reason set out above can only be regarded as one of many examples of the appellant's efforts to take every technical point in order to prolong the matter."

I respectfully find that these remarks are apposite to the case before me.

There is also need to comment on the fact that the defendant has not filed any affidavit in this application. The board minutes in the matter indicate that the defendant as the Chief Executive of Plaintiff sat on the board meetings of Plaintiff. I consider therefore that he is in a better position than his attorney Mr. Harley to know if there were any relevant documents left out in Plaintiff's discovery affidavit of 25th October 1996.

In my view, probabilities are that the defendant himself would have said so if there were such documents. It is for that reason that courts have insisted as a general principle that parties and not attorneys should file discovery affidavits.

See Rellams (Pty) Ltd v James Brown & Harmer Ltd 1983 (1) S.A. 556 at 558 per Van Heerden J.

Having heard Mr. Harley's evidence, PW1 Dereck Andrew Davey's evidence in chief, having also listened to counsel's submissions as well as having perused the pleadings and the board minutes in question I remain unpersuaded that there is any need to go behind the Plaintiff's discovery affidavit filed by Makase Marumo in the matter on 25th October 1996.

In the result therefore the application is dismissed with costs.

M.M. Ramodibedi

JUDGE

3rd February 1997

For Applicant/Defendant: Mr. Fischer

For Respondent/Plaintiff: Mr. Penzhorn S.C.
Assisted by Mr. Woker