CIV/APN/124/09

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:-

ISING-SA INVESTMENTS (PTY) LTD **APPLICANT**

AND

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **1ST RESPONDENT**

ISAAC JOSEPH **2ND RESPONDENT**

JUDGEMENT

Delivered by the Honourable Mr. Justice T. Nomngcongo

On the 11th December 2009

On the 21st March 2006 an application was brought as a matter of urgency in the following terms:

1. Dispensing with the normal rules and periods relating to the mode of service on the grounds of urgency hereof.
2. That a rule nisi issue calling upon the Respondents to show cause, if any, on a date to be determined by the Honourable Court why
    a) The First Respondent shall not be restrained and interdicted from paying the 2nd Respondent money due to and payable in pursuance of a certain contract between the parties pending the finalization hereof;
    b) The first Respondent shall not be directed and ordered to pay all moneys due and payable to the 2nd Respondent in pursuance of a certain contract between the parties to the Applicant forthwith;
3. That the prayers 1 and 2(a) operate with immediate effect pending finalization hereof.
4. Granting Applicant costs of suit in the event of opposition.
5. Granting Applicants further and/or alternative relief.

An interim order was obtained on the 22nd March and prayers 1 and 2 (a) were ordered to operate with immediate effect.

A founding affidavit to this application was deposed to by a certain Dr. Ntombikayise Tercia Giba (hereinafter referred to as Giba) she initially claimed to be the Managing Director and only shareholder of the Applicant, a company registered in terms of the laws South African. She changed this in her replying affidavit and said that "only" had been a typographical error for "also".

She deposed to the following facts which are largely common cause.

1. On the 5th April 2005 the 1st Respondent, the Lesotho Highlands Development Authority, entered into a sub-contract with the second Respondent for the supply and transport of a substantial amount of building blocks and sand. The contract would be for three years ending around 30th March 2008. She testifies that contract in hand the 2nd Respondent, Isaac Joseph (hereinafter referred to as Isaac) approached her for assistance in securing finance for the project. The project looked attractive and she was taken on. She through her company (Chrims Petroleum Investments (Pty) (Ltd) approached a financial institution Wesbank. Wesbank was reluctant to do business with a Lesotho project with the result that the Applicant company was incorporated in South Africa. Giba and Isaac became shareholders of the company. Both then agreed that Isaac would cede his rights to the sub-contract according to Giba, to the Applicant. A

document styled "ASSIGNMENT AND CESSION AGREEMENT was signed by Joseph describing himself therein as a director duly authorized thereto, on behalf of the "authority" presumably the 1st Respondent, duly authorized thereto and on behalf of Ising by Giba duly authorized thereto. Giba says Wesbank then agreed to give a loan to the Applicant because she was a shareholder in the two companies and she stood as surety. The amount of the loan is not disclosed. Not disclosed also in what happened thereafter to the Lesotho Project except that Giba says she came to realize that Isaac was not accounting to the Applicant and was about to receive monies from the 1st Respondent on his own behalf notwithstanding that he (Isaac) had ceded his rights to the Applicant.

In his answer Isaac does not dispute the broad facts deposed to by Giba. He however points out that Giba was not the sole director of Applicant which then solicited a retraction from her that "only" was an error for "also". Isaac took it from there and raised a point **in limine** that Giba had not been properly authorized by the company, that the Applicant had failed to disclose that he and his wife had made repayment to Chrims Petroleum & Investment (Pty) Ltd, that the Applicant has not performed under the agreement (Assignment and Cession) and therefore that there was no cause action and finally that the matter was not urgent.

I. AUTHORITY TO SUE

The Deponent to the founding affidavit has filed a resolution authorizing her to bring these proceedings. Normally, this is sufficient evidence of such authority unless the contrary is proved. There is no evidence here that Giba was not properly authorized because the resolution appears from what is termed "Extracts from the minutes of the meeting of the Board of Directors". Now as pointed out in **Company Law 4th Ed. by Achers Benade p.292/**

> "If minutes have been made as prescribed the meeting is deemed to have duly convened and held, the proceedings to have been duly had….."

The point taken therefore cannot stand in the absence of evidence that Giba was not properly authorized.

II. URGENCY

The application was brought urgently because Isaac was just about to receive payment which Applicant thought was not due to him but itself. The Applicant could not be expected to wait until 2nd Respondent had received it for money already in the pocket is not easy to retrieve. Urgency has been established here.

II. NON-DISCLOSURE

The second Respondent Isaac has brought undisputed evidence that he paid more than M300,000 to Giba and her company as repayment of the undisclosed loan by Wesbank. Giba claims that this was not material. It seems to me that at the center of the relationship between the Applicant and the second Respondent was the loan to financing the Lesotho project. They met to secure financing of a contract between 1st Respondent and second Respondents and for that purpose a loan was secured from Wesbank. 2nd Respondent poured in a substantial amount of money towards servicing this loan. How can this not be material especially when Giba wants to potray the 2nd Respondent as a scoundrel and fraudster who has to be stopped in his tracks by this Court. In ex parte applications the Applicant has a duty to disclose everything that might influence the court in coming to its decision. Failure to do so may lead to the dismissal of that application (see **Herbstein and Van Winisen** : **The Civil Practice of the Supreme Court of South Africa p.367**)

CAUSE OF ACTION.

The relationship between the Applicant and second Respondent as well as the first Respondent is based on an agreement encapsulated in the document style "Assignment and Cession Agreement". The agreement in so far as it is relevant reads:

> "WHEREAS:
>
> Joseph and the Authority have signed a sub-contract agreement in terms of which Joseph agreed and undertook to supply 6 (six) inches cement blocks, fine sand transportation to the authority….
>
> Joseph hereby assigns and cede (sic) to bring all its rights, title and interest to the Agreement and Ising hereby accept the assignment of the Agreement and undertakes to fulfill all Joseph's obligations in the terms of the Agreement.
>
> Joseph shall upon execution of this assignment deliver any and all documentation relevant to the Agreement to Ising, which shall from the

effective date hereof assume all responsibilities of Joseph in terms of the Agreement.

Ising hereby accepts the foregoing agreement and agrees to perform all duties and obligations to be performed by Joseph under the Agreement to the same extent as if it had been an original party thereto.

Subject to the terms and conditions set out above, the authority hereby consents to the foregoing assignment. By signing below the authority further represents and warrants that it will effect from the effective date of this assignment meeting and perform all its obligations in terms of the Agreement".

What is clear no matter what the parties called their agreement (and the heading "assignment and cession" serves only to confuse) placed reciprocal obligations on parties. Josephwas to cede his rights and the Applicant in return had to perform all the duties of Joseph under his contract with the 1st Respondent. The first Respondent would perform to the Applicant subject to the terms and conditions of the Agreement i.e that, that it had carried out the duties of Joseph. This is a crystal clear Agreement. Payment is dependent upon both Applicant and Joseph having fulfilled their obligations to each other.

Now the Applicant in face of these clear terms of the agreement did not perform his part of the Agreement. In fact he goes as to say he did not have to. All the work was done by Joseph on his own, at his own expense yet Applicant demands payment and dares to say that he is a fraudster who wants to unjustly enrich himself. In my view the converse is true and this Court cannot countenance it.

The application is dismissed and the rule nisi discharged with costs.

NOMNGCONGO

JUDGE

For Applicant: Mr. Suhr

For Respondent: Mr. Teele K.C