

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

CIV/T/250/09

In the matter between:-

BASOTHO ENTERPRISES DEVELOPMENT CO-OP

APPLICANT

and

**SAO SAO INTERNATIONAL (PTY) LTD.
THABO NKHAHLE**

**1ST DEFENDANT
2ND DEFENDANT**

Date of hearing : 26th of April 2010.

JUDGMENT

Delivered by the Honourable Mr. Acting Justice J.D. Lyons
On the 28th day of April,2010

This is an application for a decision of a judgment entered on 24 August 2009.

The plaintiff commenced these proceedings by way of summons on 10 August 2009. Its Declaration was annexed to the Summons.

The second defendant (Thabo Nkhahle) entered a notice to oppose. The first defendant (Sao Sao International Pty. Ltd.), though served, made no appearance.

By notice filed 11th of August 2009, the plaintiff applied for "Summary

Judgment to be granted against (sic) **Defendant** in terms of prayers in Plaintiff's Summons as amplified by the Declaration", (my emphasis).

An affidavit by Thabiso Moletsane was used in support of this Summons. That affidavit set out the evidence on which the Plaintiff relied to support its action.

On 24 August 2009 Mr. Justice Mofolo (Agt) ordered that the "application for Summary Judgment is granted and prayers set out in the Summons are granted as prayed".

A writ of execution was subsequently issued. The deputy sheriff executed this as against the goods of the second defendant and/or his parents. The second defendant now comes before the court to have the judgment (on which the writ of execution was based) rescinded.

The question for the court is whether there is a judgment against the second defendant.

Clearly there is not. The plaintiff's action involves a lease between it and the first defendant. Nowhere in the declaration, nor in the affidavit accompanying the summons for summary judgment, is there a pleading or any evidence that would support a case against the second defendant. The plaintiff's own case is that the second

defendant at all times was acting as an agent (as managing director) of the first defendant. The second defendant may well be the beneficial owner of the first defendant, but that, of itself, does not make the second defendant liable for debts of the first defendant company. (See generally: *Salomon v Salomon Co. Ltd* (1897) AC 22).

That the judgment was against the first defendant only is supported by the fact that the summons itself seeks only judgment against 'Defendant' (singular). Furthermore the writ of execution was issued only at the goods of the first defendant company. That is evident on the face of the writ itself.

Obviously therefore this application is redundant. There can be no recession of the judgment that does not exist, and on the plaintiff's own material (pleadings and evidence), cannot exist as no case is made out against the second defendant. The Summary Judgment of my brother Judge can only be read as a judgment against the first defendant company. It cannot be interpreted as against the second defendant, Thabo Nkhahle.

Counsel's submissions are typical of too many I see in courts. They are loaded with theory, as if answering a university exam or preparing for a student moot, but they are bereft of practical fundamentals. This is the wrong approach.

The practical problem facing counsel here is a judgment. First its

terms must be looked at. Having done that, it can be discovered that it is expressed in terms of 'judgment as prayed in the Summons. Therefore the Summons seeking judgment must be examined to see what is in the prayer.

Once this is done, it can be readily seen that the prayer for relief seeks judgment against 'Defendant' – singular. There are two defendants in this action. The Summons does not nominate which defendant. To decide this point, the Summons refers to the originating pleading – the Declaration. It is to the Declaration that one must turn one's attention. In so doing, it can be seen that no case is pleaded against the second defendant. As pleadings must embody the material evidence alleged by the plaintiff, and as the evidence alleged must be put before the court in that affidavit which accompanied the Summons for judgment, it is to this that counsel must turn their attention. On reading this affidavit, it is clear that no facts are alleged against the second defendant that would support a finding at law against the second defendant. It does, however, allege sufficient evidence as against the first defendant.

By logical deduction (an essential tool for any lawyer), the 'Defendant' nominated in the Summons seeking judgment must be the first defendant. It is therefore only as against the first defendant that judgment has been granted. This is confirmed when counsel look (as they should have, but clearly did not), at the subsequently issued writ of execution. That writ was issued solely on the basis of a judgment having been issued. That writ of execution names only one party

against whom the supporting judgment must have issued – the first defendant.

This examination of pleadings and evidence and the application of logic thereto, is the thought process that must be undertaken by a counsel equipped with the fundamentals of the actual practice of law.

The application must be dismissed. I make order as the costs.

The plaintiff may wish to amend the judgment order of 24 August 2009 to reflect the obvious fact that the judgment is only against the first defendant company Sao Sao International Pty Ltd, as was applied for.

J.D. LYONS
ACTING JUDGE

For Applicant : Mr. 'Mopa
For Respondent : Mr. Malefane