IN THE HIGH COURT OF LESOTHO

CIV/ APN/ 139/ 2011

In the matter between:-

AFRICAN CAMP MANAGEMENT SERVICES (PTY) LTD APPLICANT

And

MOTHAE DIAMONDS (PTY) LTD RESPONDENT

JUDGMENT

Delivered by the Honourable Acting Judge L.A. Molete on the 12th July 2011.

This matter is brought before this Court in terms of an agreement of settlement between the parties which was made an order of Court on the 30th March 2011 in what I shall refer to as the main application.

The main application was brought on an urgent basis by Applicant seeking to enforce the Award of Contract No P1231-

PPM-MOT-001 for the provision and operation of the Respondent's mining Contractors accommodation facilities and yard and catering management services at the Mothae Diamond Mine Lesotho ("the contract"). It was awarded by the Respondent to the Applicant on the 12th February 2010 as a valid and binding agreement, but Respondent later sought to repudiate and put it back to tender for various reasons. Consequently, the Applicant sought interim relief interdicting and restraining respondent from any acts in breach of such contract, including the Award of the Contract to any other party.

The Application was opposed on number of ground alleged by Respondent. A time table was agreed upon by the parties for the filing of Affidavits and the matter was postponed for hearing by this Court to the 30th March 2011.

On the 30th March 2011 the Parties filed a Deed of Settlement which was made an order of Court by Consent. The Settlement was to the effect that contract P1231-PPM-MOT-001 would be cancelled; and the Applicant agreed to vacate Respondent's premises on 30 April 2011.

The Parties further agreed that as compensation for the cancellation certain payments would be made by the Respondent. They agreed to settle the matter as follows;

> "1. the Respondent will pay out the Applicant the balance of the Contract price of the Contract between the Parties under reference P1231-PPM-MOT-001.
>
> 2. the amount payable is to be calculated on the projected balance of the Contract Value over the total Contract period of 28 months from 1 February 2010, calculated on the amounts payable to date in terms of the contract."

The Amount Payable in terms of the above provisions was to be agreed between accountants nominated by each of the Parties; failing that to be agreed by the Parties' Counsel by not later than 12 April 2011 and in the event that they do not agree the Parties asked for the intervention of the Court to fix the amount on the basis of the figures placed before it by the accountants and counsel.

Both the Accountants and Counsel failed to agree; and the matter was therefore referred back to the Court to fix the amount. This was on the 10th May 2011.

The Court was unable to make a determination on that day; and granted an Application for postponement by Respondent. The Court also directed that further Affidavits be filed to clarify each Party's stand and interpretation of their agreement. This was because the amounts submitted and calculated by the accountants of the parties were substantially at variance. The applicant calculated that the balance owing is in the amount of M3 792 280-08; while Respondent insisted that the settlement amount should be the sum of M663,000-00. They disagreed on the correct formula to be used to arrive at the amount payable.

It was clear at that stage that the court required further clarification on how the parties understood and interpreted their Agreement, specifically Clauses 1 and 2 thereof. The matter was consequently postponed to 14th June 2011 for hearing; while the parties were ordered to file their Affidavits and submissions by the 10th June 2011 regarding their specific calculations.

On the hearing date and with the further Affidavits filed; the matter was argued before me.

The Affidavit of the Respondents Managing Director Nyakallo Mpatuoa referred to some disputes relating to the contract, prior to the settlement agreement which was made an order of Court.

Mr Penzhorn for the Applicant submitted that the terms of the original Contract and alleged breaches as well as motivation by Respondent in entering into the settlement agreement were irrelevant. That the Court ought to disregard any averments in that regard because the settlement agreement had to be interpreted independently.

On the authority of *Hamilton v van Zyl 1983 (4) 379 (SCD) and Wilson Bably Holmes (Pty) ltd v Maeyane and others* 1995 (4) SA 340 (TPD) the Court agreed with that proposition.

As a result the allegations by Respondent which pointed to the fact that the Applicant was unable to comply with the contract because no operating licence had been granted by the Department of Trade, were not given much consideration, with the result that the Court ignored the apparent violation of the

Trading Enterprises Order 1993. The matter before me was therefore to make a determination based only on the settlement agreement of the Parties.

The Applicant submitted that the intention of the Parties was clearly set out in the settlement. That the compromise meant that Applicant would be paid an amount "to be calculated on the projected balance of the contract value" and that the further provision that such amount would be "calculated on the amounts payable to date in terms of the contract" meant the payments made to date would simply be projected over the balance of the 28 months of the contract. That is how Applicant arrived at the amount of M3 792 280-00. In its calculations; Applicant took no account of the estimated costs of the business and consequently did not deduct any amounts that would have been expenses and costs of the operation by Applicant company.

The Respondent on the other hand approached the matter differently, and calculated the settlement sum and arrived at M663,000-00. It represented a net profit of 25% for the Applicant which was set out in annexure "A1". The formula used by Respondent was based on the monthly costs and expenses in its business with the Applicant in the previous

months of February 2010 to March 2011. It came to a figure representing a net profit margin of 25% for Applicant after deducting all costs and expenses.

The submission of Mr Malebanye on behalf of Respondent was that the calculation based on these considerations by the Respondent, arrives at a fair and equitable amount and is adequate compensation for early termination of the Agreement. The Respondent maintained that such was the agreement contemplated by the parties and any other interpretation would be untenable and not intended by the Parties because it meant Applicant could be paid amounts over and above what it would be entitled to, including amounts it would have incurred but for the termination of the agreement. These included direct food costs and staff costs as well as functions which were referred to as *ad-hoc*, which would normally require separate orders.

The Applicant insisted that it was the intention of the Parties and the correct interpretation of the settlement agreement. It was submitted that the outcome and amount arrived at was correct notwithstanding the apparent over payment. It was clear that they were at loggerheads as regards the formula to be used to arrive at the correct amount due to Applicant and the

meaning of the phrase "being the balance of the contract price which is to be calculated on the projected contract value."

The Court is therefore called upon to "fix an amount on the basis of the figures placed before it by the parties." In doing so, it was necessary to also make a finding as to which of the Parties' interpretation of the settlement agreement was the correct one. The Court had no alternative but to consider the transaction as a whole and decide what the Parties must have intended.

It goes without saying that the transaction must have business-like efficacy; be reasonable and fair to both parties, regard being had to the fact that it is a settlement resulting from an agreed termination. I agree with Respondent that the transaction must be looked at as a whole and the Court may imply terms which only serve to give the contract a reasonable and businesslike manner:

1. *SA mutual Aid Society v Capetown Chamber of Commerce 1962(1) SA 598 AD.*

2. *Hamlyn & Co v Wood & Co. 1891 (2) QB 488.*

I therefore agree with the approach of the Respondent that the calculation should not include Capital expenditure amounts and direct staff and food costs for the balance of the period. This would result in paying over to the Applicant monies which would be part of its expenses and for services which may not have been rendered even if the contract had been fully discharged and its terms complied with in all respects. That interpretation would not be equitable and could not be fairly contemplated by the Parties. The Court must assume that none of the parties sought to use the agreement of Settlement to gain more that what would have accrued to them after complete and successful implementation. That would be unjustifiable.

I have however observed that the calculation of respondent confined itself to profit at 25%, but failed to take into account additional costs that Applicant would incur as a result of the termination; these would include but not necessarily limited to

(a) Repatriation; transport and related costs of removal.
(b) Staff retrenchment costs and expenses.
(c) Possible losses incurred in making expenditure specifically in contemplation of the contract under reference P1231-PPM-MOT-001.

In the circumstances the Court Order is that the Applicant be paid the amount of M663,000-00 in respect of the profit as calculated by Respondent; and that in addition Application will be entitled to calculate and add any another reasonable expenses as stipulated above. In the event that the parties do not agree on the additional amounts they can similarly approach the Court for final determination.

The respondent will also be liable to pay Value Added Tax (VAT) to the Lesotho Revenue Authority (LRA) on behalf of Applicant if the tax authority demands or determines that such VAT is payable. This was conceded by the Respondent.

The parties agreed that there be no order as to costs and it is also so ordered.

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L. A. MOLETE
ACTING J UDGE

For the applicant : Adv G Penzhorn SC
For the respondent : Adv S Malebanye