

**IN THE HIGH COURT OF LESOTHO**

**(Commercial Division)**

**CCT/84/2012**

**CCA/32/2012**

In the matter between:-

**NEDBANK LESOTHO LIMITED**

**PLAINTIFF**

**And**

**ULTIMATE EXCELLENCE (PTY)LTD  
PUSELETSO THITE  
KOPANO EDWIN MAKOTJE  
'MAHLOMPHO LEROTHOLI MAKOTJE  
THABANG MPHAHAMA THITE  
MANTSANE THITE**

**1ST DEFENDANT  
2ND DEFENDANT  
3RD DEFENDANT  
4TH DEFENDANT  
5TH DEFENDANT  
6TH DEFENDANT**

**AND**

**NEDBANK LESOTHO LIMITED**

**PLAINTIFF**

**And**

**ULTIMATE EXCELLENCE (PTY)LTD  
PUSELETSO THITE  
KOPANO EDWIN MAKOTJE  
'MAHLOMPHO LEROTHOLI MAKOTJE  
THABANG MPHAHAMA THITE  
MANTSANE THITE**

**1ST DEFENDANT  
2ND DEFENDANT  
3RD DEFENDANT  
4TH DEFENDANT  
5TH DEFENDANT  
6TH DEFENDANT**

**JUDGMENT**

**Coram** : Honourable Justice J.D. Lyons (Acg)  
**Date of Hearing** : 15 August, 2012  
**Date of Judgment** : 15 August, 2012

### Summary

Interim interdict (Injunction) general principles –

CITED CASES: **American Cyanamid Co vs Ethicon Ltd** 1975 AC 396

#### LYONS J. (AGT)

- [1] Counsel have put the cart slightly before the horse in this case. What is argued is a mareeva injunction. By its very nature a mareeva injunction (or interdict) is interim relief only. It is designed to preserve the *status quo* relating to any disputed assets and to guard against any such assets leaving the reach of the court pending final resolution of the dispute.
- [2] We are talking of interim relief only. The applicable general principles are well-known. They stem from the speech of Diplock L. In **American Cyanamid Co. V Ethicon Ltd.** 1975 AC 396.
- [3] On such an application the court considers (a) if there is a substantive cause of action; (b) if damages will be a suitable remedy in lieu of the relief sought and (c) it considers the balance of convenience.
- [4] The relief sought seeks to call on the court's equitable jurisdiction.
- [5] The plaintiff bank loaned money on an overdraft facility to Ultimate Excellence (Pty)Ltd. The bank pleads that the defendants Puseletso Thite, Kopano Makoetje, 'Mahlompho Makoetje, Thabang Thite and

Mantsane Thite gave it a surety for the overdraft debt. Thabang Thite and Mantsane Thite are husband and wife.

- [6]** Ultimate Excellence (Pty) Ltd failed to meet the bank's demand to repay the overdraft. The bank sued it and the alleged sureties.
- [7]** Ultimate Excellence (Pty) Ltd, P. Thite, K and M Makoetje have accepted liability and offered settlement. Judgment has been entered against them. However they were unable to complete the settlement. The bank now wishes to continue its claim against T. and M. Thite.
- [8]** I understand that Thabang Thite has signed a surety/guarantee. I also understand that the assets the bank seeks to claim are in Thabang Thite's name. However it claims that these assets may be seen as communal property to which Mrs M. Thite may have access. Its concern is that either Mr or Mrs Thite may be tempted to remove these assets from the reach of the Court leaving the bank (if it succeeds) with an empty judgment.
- [9]** Mr. and Mrs Thite's denial is based on the provisions of the Legal Capacity of Married Persons' Act 2006. Although counsel's submissions are centered on this point, it is inappropriate for the court (at this interim juncture) to consider it. That would have the effect of making the final determination at an interim point without having all issues fully canvassed before it.
- [10]** I need only consider the interim injunction and the applicable principles.

- [11]** Firstly I will consolidate CCA32/2012 and CCT84 of 2012. As CCT84 of 2012 is the main action, the matter will now proceed under that title. I will say in passing that the practice of an application for interim relief and the related main action having separate files is incompatible with the individual docket case management system. The registrar should take note of this.
- [12]** Turning to the applicable principles, there is obviously a substantive issue to be argued here. Also the question of damages being a suitable remedy is not an issue. Any damages, should the plaintiff succeed, are, by the very surety alleged, to be satisfied from the asset sought to be enjoined.
- [13]** The question really revolves around the balance of convenience.
- [14]** In my view the balance of convenience is best served by maintaining the assets within the reach of the court. The bank alleges that it was the disclosure of these assets that satisfied it that the surety offered was sufficient to support the grant of an overdraft facility. It makes good sense then that the asset remain conveniently within reach. This is done by the grant of an injunction/interdict.
- [15]** I therefore grant an interim injunction until 29 September 2012 (or until further ordered) as is prayed against Mr and Mrs Thite in prayers 2 and 3 of the Notice of Motion.

**[16]** Having granted interim relief, the parties (and the court) must move swiftly to a final hearing where all matters can be fully canvassed.

**[17]** I order the following:

(1) The defendants Thabang Thite and Mantsane Thite fully plead to the allegations raised in the Notice of Motion. Although the action was started by Notice of Motion, there is one important issue of fact raised in the plaintiffs' founding affidavit that is crucially relevant to the defendants position. That is found in paragraph 21 of the founding affidavit. I don't see it as a dispute of fact sufficient to strike out the motion and have the plaintiff commence a summons action. It is, however, an evidential matter that needs to be determined before moving to consider the legal point raised here. The defendants are to plead (presumably by way of affidavit) by 23 August.

(2) Discovery is to be done by 6 September.

(3) Witness statements and bundle of documents by 20 September.

(4) Trial (hearing) will be on 27 September. I have reserved the 28 September should it flow over beyond one day.

**[18]** Counsel should hand Heads of Argument to any associate/clerk by 4p.m. Monday 24 September to allow me time to read them and prepare for the hearing. I should add that the written submissions currently before the court are somewhat unimaginative and lacking in substance. The Act argued is at least 5 years old – are there no decided cases in that time? The draftsman probably drew the legislation from somewhere or other. Is

there similar legislation in other jurisdictions from which decided cases can be drawn?

**[19]** The argument seems to be raising a question of the validity of the contract/surety between the bank and Mr. Thite. Is not the matter of parliament's intent an issue to be raised?

**[20]** These are doubtless other issues that counsel need to consider.

**[21]** The Heads of argument and/or submissions must, as a matter of correct form, set out the pleadings, affidavits, statements relied on. They must (as the evidence is by affidavit/witness statements) refer to the evidence and, importantly, analyse that evidence. The submissions should then contrast the evidence and, if seeking to have the court prefer some evidence to some other, should say why.

**[22]** Then, after that is done, the applicable law should be referred to, including cases that may be against the point argued. These conflicting cases need to be properly distinguished.

**[23]** All too frequently (arguably, invariably) the judge is belatedly confronted with unsuitable submissions hurriedly drawn from a text book that more resemble note-form answers to a university exam question than to considered and relevant submissions of a competent advocate practicing in the real world.

**[24]** injunction ordered as stated.

**[25]** Court adjourned to 27 September for trial.

**[26]** Costs reserved for trial judge.

**J.D. LYONS**  
**JUDGE (AGT)**

For Applicant	:	Mr. Mpaka
For Defendant/Respondent	:	Ms. Mokheseng