IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

CCA/19/2012

In the matter between:-

SANYATI ENGINEERING GENERAL (PTY)LTD APPLICANT

and

ROAD-LUX CONSTRUCTION 1ST RESPONDENT

M.RAMALEFANE N.O. 2ND RESPONDENT

JUDGMENT

Coram : Honourable Justice J.D. Lyons (Agt)
Date of Hearing : 13 April,2012
Date of Judgment : 13 April,2012

LYONS J (AGT)

[1] In action CCA/9/2012 (filed 7 March 2012), the 1st respondent filed proceedings against the applicant herein.

The purpose of these proceedings was to found jurisdiction and to secure certain plant and equipment of the applicant against the payment of money due and owing to the 1st respondent by the applicant herein. A third party was also sued as further security,

In the founding affidavit in CCA/9/2012 the 1st respondent herein deposed.

*6.1 On or about the 11th day of September 2011 until the 22nd day of February 2012 Applicant herein was engaged by 1st Respondent to supply it with various earth moving equipment namely two TLB machines, Roller, Water tanker, two truck and aggregates, in return for money as evidenced by invoices given to 1st Respondent. The said invoices are hereunto annexed and collectively march "**KMMI**".*

6.2 The aforementioned agreement was made verbally and through telephonic devices. Applicant duly performed its duty as agreed, but to day 1st Respondent has never paid Applicant despite several demands. It should be mentioned

that the aforesaid agreement between the parties herein is still continuing.

[2] *10. As already indicated that 1st Respondent have contracted with 2nd Respondent for the work being done at Lepereng, upon which we have been subcontracted by 1st Respondent we request that 2nd Respondent be ordered to not to pay 1st Respondent the moneys owed to it by 2nd Respondent only to the tune of M487,292.35 pending finalisation hereof and an action to be instituted by Applicant against 1st Respondent*

[3] On the application then before the court the 1st respondent herein claimed against the applicant herein the sum of **M487,292.23** in action CCA9/2012.

[4] The 1st respondent herein obtained an *ex parte* order rule nisi against the applicant herein. The plant and equipment of the applicant were seized by the sheriff resultant upon this rule nisi.

[5] The applicant herein decided to pay the full amount claimed rather than contest the rule nisi.

[6] Payment in full of the sum of M487,292.35 has been made. Not surprisingly the applicant now wants its plant and equipment relased. The 1st respondent refuses to release the plant and equipment.

[7] In this action the applicant seeks an order releasing the plant and equipment. It quite rightly says that the seizure was made upon evidence that M487,292.35 and only this sum, was due and owing. That has been paid. The action before the court is finished. It is entitled to the return of its property.

[8] Other than the usual time-wasting technical objections in limine, the 1st respondent says that as the contract between the applicant was on-going and there will be further invoices and further sums owing, it claims that it should be allowed to keep the plant and equipment as ‘security’ for payment of those sums.

[9] The applicant is correct. It has paid the full amount alleged owing in action CCA/9/2012. It is entitled to return of its goods.

[10] There is no evidence before this court that supports the 1st respondents argument.

[11] There are no invoices, no evidence that anything is owing at all. The 1st respondent has no right at law to refuse to return the goods. As was pleaded (and evidenced) in CCA/9/2012, the amount sued for was M487,292.35. That has been paid. There is no legal basis for withholding the goods.

[12] The 1st respondent made two points in limine.

[13] First is claimed there was no urgency. I disagree. I am satisfied that the applicant needs an immediate return of its plant and equipment so it can continue its contractaral

obligations with the third party cited in CCA/9/2012. If it does not get it back, it will suffer substantial losses.

[14] I can find no merit in the 1st respondents' argument that there is a lack of urgency. Further what the applicant is seeking is return of its goods due to its compliance with a court order. There is no despute it has complied with the court order in CCA/9/2012. The 1st respondent, on the other hand, is not acting in compliance with the spirit of that order. As a matter of public policy the courts must act swiftly to see to it that its orders are complied with both is form and spirit.

[15] The 1st respondent also threw up the old chestnut about want of authority. This was abandoned once the applicant filed a board resolution confirming authority.

Costs

[16] The applicant has applied for attorney and client costs. I make this order. The 1st respodnent took up a hopeless and wrongful position. Having been paid it tried to hold a

gun at the applicant's head by wrongfully retaining the goods.

[17] By letter sent by e-mail on 28 March 2012, the applicant put the 1st respondent on notice. It wrote in the final paragraph.

[18] *In light of the aforementioned and specifically the fact that the total amount of M487,292.35 was paid by the 1st Respondent to the Applicant we herewith request the immediate release of the 1st Respondents property currently under attachment. Should the property not be released on or before 12:00 on the 29th of March 2012 we have instructions to launch an urgent application in order for the assets under attachment to be released. In such application we shall also request a punitive cost order against yourselves at it is clear that the cause of action upon which the applicaiton to find jurisdiction relied, had been extinguished.*

Yours faithfully

[19] The 1st respondent ignored this at its peril.

[20] Cost orders are compensatory not punitive. The applicant should not have had to bring this application. The 1st respondent ignored a proper request to hand over the goods once payment in full was made. This forced the applicant to make this application. It should be fully compensated in costs for this.

[21] I also allow the applicants' application in limine to extend the order returning the goods as against the 2nd respondent (but not the costs order). This is procedural good sense. It will prevent any confusion.

J.D. LYONS
JUDGE (AGT)

For Applicant :Mr. Zietsman (Instructed by Webber Newdigate)
For Respondents : Mr. Lekobane