IN THE HIGH COURT OF LESOTHO

(Commercial Division)

CIV/APN/601/2011

In the matter between:-

SEROMA SANDSTONE PRODUCTION (PTY)LTD **1 APPLICANT**

And

KENETH KOTELO **1 RESPONDENT**
KOBUS BRENDENKAMP **2 RESPONDENT**
STANDARD LESOTHO BANK **3 RESPONDENT**

JUDGMENT

Coram : Honourable Justice J.D. Lyons (Acg)

Date of Hearing : 29 February,2012

Date of Judgment : 29 February,2012

Summary

Rule nisi – principles on ex parte application – need for full disclosure – company – want of authority – non-denial of essential allegation – costs – against company officers where want of authority present – allegation of serious criminal conduct with no supporting evidence is improper - court entitled a finding adverse to the party making the allegation – counsel's duty regarding client allegations of fraud.

ANNOTATIONS

CITED CASES: **M & V Tractor & Implement Agencies CC v Vennootskap DSU Cilliers & Seuns and Others (2000) 1 ALL SA 249 (NC); Estate Logie v Priest 1926 (AD) 312; Rosenberg v Mbanga 1992 (4) SA 331 (E); Ex Parte Madikiza Et Uxor**

1995 (4) SA 433 (TKSC). White Industries (Qld) Pty. Ltd V Flower and Hart (a firm) [1998[806 FCA; Tamarillo (PTY) Ltd vs BN Aitek (PTY) Ltd 1982 (1) SA 398 (A) at p 430-431; Plascon-Evans Paints Ltd v Van Riebeeck Paints (PTY) Ltd 1984 (3) SA 623 (A) at p 634; Ramahata v Ramahata LAC (1985-1989) 184 at p185.)

LYONS J. (AGT)

[1] This matter came before me during the time of a boycott by legal practitioners. Prior to commencing counsel advised they held instructions to proceed.

[2] The applicant is a Lesotho company engaged in the mining of Sandstone. The shareholders are Man Quarry (Pty) Ltd (Lesotho company) as to 30%, and Seroto Investment Holdings Limited (a South African Company) as to 70%.

[3] The 1st and 2nd respondents are directors of the applicant. They are also associated with Seroto.

[4] There is a shareholders agreement. Clause 8.3 of that requires a 60% ratio of all the directors present at a meeting to constitute a quorum and thus to likewise constitute proper authority.

[5] The Sandstone mining venture required investment in machines. By a loan agreement Seroto agreed to loan to the applicant R12 million for this purpose.

[6] Sometime in 2010 the applicant purchased a cutting machine from Italy. It was expected that there would an exemption granted from paying VAT. Unfortunately when the machine amved at the border the exemption formalities had not been completed. To get the machine over the border and working Seroto agreed to furnish the VAT (approximately M2 million). It says that it was agreed with the applicant that the M2 million would be repaid when the LRA refunded the VAT.

[7] The VAT was paid to the LRA.

[8] In about November 2011 the LRA, completed the exemption. It refunded M2,088,510.79 to the applicant. This was banked in the applicant's account with the 3rd respondent.

[9] On being advised of the refund the 1st and 2nd respondents requested the 3rd respondent to forward M2 million to Seroto's bank in South Africa.

[10] On 6 December 2011 three directions of the applicant, Mr. Namane, Mr. Jessie and Mr. Qobo, filed an ex-parte application to interdict the transfer of M2 million. They represented to the Court that they possessed the requisite authority.

[11] On that day Hlajoane J, as duty Judge, granted such an order. The return date for an inter parties hearing was 29 February 2012.

[12] This application is dismissed. The applicant's case is fundamentally flawed.

[13] The number of directors of the applicant is 6 or 7 (one appointment is disputed). That in itself is not a problem for whichever way it is calculated 3 directors does not constitute a quorum of 60%. The 3 directors cannot have proper authority to act an behalf of the company. This authority is essential to the company's case and proof of proper authority must be provided in the founding papers. If not then any act by the company will be invalid for want of proper authority. (**See: M & V Tractor & Implement Agencies CC v Vennootskap DSU cilliers & Seuns and Others (2000) 1 ALL SA 249 (NC)**

[14] The shareholders agreement and the requirement of the 60% quorum should have been disclosed to the court on the bringing of the ex parte applicaiton. That it was not constitutes a material non-disclosure.

[15] The applicant also failed to disclose the loan agreement with Seroto. It also failed to disclose that the M2 million VAT was advanced by Seroto. It also failed to disclose that Seroto were likely to say that an agreement existed whereby it would be repaid on refund of the VAT. This was set out in the minutes of the meeting of the Board of directors of 26 October 2011. These were material facts. Also when bringing an exparte application a party must declare to the court any likely defences the respondent may raise. Failure to do so dooms the application to failure.

See: Estate Logie v Priest 1926 (AD) 312; Rosenberg v Mbanga 1992 (4) SA 331 (E); Ex Parte Madikiza Et Uxor 1995 (4) SA 433 (TKSC).

[16] The applicants also failed to properly establish urgency to bring an ex parte application. In para 10 of his founding affidavit, Mr. Namane deposes that the 3rd respondent was written to and asked to hold the transfer. This letter is exhibited. It is signed by Messrs Jessie, Qobo and Namane. This is no evidence that the 3rd respodnent refused to do as requested and hold the transfer.

[17] The application must fail on these fundamented points alone.

[18] As to matters of factual merit, the applicant fails there also.

[19] In para 11.3 of the answering affidavit, it is claimed that Seroto and the applicant agreed that on refund of the VAT, it would be repaid to Seroto.

[20] Mr. Namane's response to this is merely to 'note' the content. He fails to deny it. He fails to transverse the claim in any manner.

[21] Looking at this failure, treating it as an admission and weighing up further evidence such as the minutes of 26 October 2011 and the letter from Seroto to the LRA of 6 June 2011, I accept that it was agreed to repay the M2 million refund from the LRA.

[22] The applicant claims that the refund should be interdicted because of want of proper authority by the directors to repay it.

[23] This too must fail. The facts indicate otherwise.

[24] The board minutes of 26 October 2011 (attended by all directors) states that the M2 million VAT constitutes Seroto funds and on refund "will be returned to South Africa". That constitues proper authority by the Board to repay Seroto on refund. Nothing else is necessary.

[25] Faced with these minutes, Mr. Namane simply claims that the minutes must be a fraudulent document. That is insufficient and is rejected. I add that an allegation of fraud is a serious claim to make. The person making such an allegation is required to present the evidence (to the required degree – see the **White Industries** case referenced below) that supports the allegation. In the absence of any supporting evidence the allegation must be rejected.

[26] It is grossly improper to simply make such a serious allegation of what constitutes a criminal offence, yet provide no supporting evidence.

[27] The UK Bar Rules (R704 (c) – http://www.barcouncil.org.uk - link Bar Standards Board) mandate that before pleading a fraud allegation counsel must be satisfied that prima facie evidence exists to support it. It is useful for counsel to remember this. The decision of the Full Court of the Federal Court of Australia in **White Industries (Qld) Pty. Ltd V Flower &Hart (a firm) [1998[806 FCA** (***http://www.austlii.edu.au/au/cases/cth/FCA/1998/806.html***) is a very interesting case on this area. This is mentioned for interest of all counsel at the Lesotho Bar. I am aware that sometimes clients forget themselves,

make wild allegations and are difficult to control. Quite properly both Adv. Ntsatsi and Adv. Loubser did not pursue this allegation other than draw the court's attention to it.

[28] The above note aside, the non-denial and unsupported claim of fraud do nothing to bolster the applicant's case. In fact it is the poorer for it. As I said I reject this allegation out of hand.

[29] Unhesitatingly I find that on the merits the applicant's case fails. The respondent's case is accepted. Accordingly the applican't prayer for an interdict is dismissed. The rule nisi is dissolved. (**See: Tamarillo (PTY) Ltd vs BN Aitek (PTY) Ltd 1982 (1) SA 398 (A) at p 430-431; Plascon-Evans Paints Ltd v Van Riebeeck Paints (PTY) Ltd 1984 (3) SA 623 (A) at p 634; Ramahata v Ramahata LAC (1985-1989) 184 at p185.)**

[30] On the question of costs, I order that full indemnity costs be paid by the directors Mr. Namane, Mr. Qobo and Mr. Jessie personally. They acted without proper authority. Neither the applicant company nor the respondents should be out of pocket because of these unauthorised actions.

J.D. LYONS
JUDGE (AGT)

For Applicant : Adv. M.J. Ntsatsi
For Respondents: Adv. P.J. Loubser (Inst. By Webber Newdigate)