CCA/0017/13

IN THE HIGH COURT OF LESOTHO

In the matter between:

SEQHIBOLLA LETSIE t/a KPM SOLAR ENERGY ENGINEERING	**APPLICANT**

AND

LSP CONSTRUCTION	**1ST RESPONDENT**
TRENCON CONSTRUCTN / BUILDING WORLD BELELA JV (In Liquidation**)**	**2ND RESPONDENT**
MILLENIUM CHALLENGE ACCOUNT LESOTHO	**3RD RESPONDENT**
PRINCIPAL SECRETARY MINISTRY OF HEALTH	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**
DANIEL GERHARDUS ROBERTS N.O	**6TH RESPONDENT**
CHAVONNES BADENHORST ST. CLAIR COOPER N.O	**7TH RESPONDENT**
MOKHELE MATSAU N.O	**8TH RESPONDENT**
MOROESI TAU – THABANE N.O	**9TH RESPONDENT**

JUDGMENT

Coram	**:**	**L. Chaka - Makhooane J**
Date of hearing	**:**	**4th November, 2013**
Date of Ruling	**:**	**13th March, 2014**

SUMMURY

Application for an interdict – Whether supply agreement between applicant and the sequestrated 2nd respondent, gave applicant exclusive rights – Failure by applicant to establish a clear right against the respondents – Applicant further failing to convince the court that the Trustees had elected to continue with the incomplete sub-contract – No general principle that exercise of election to abide by executory main contact necessarily carrying with it election to abide by executory sub-contract whether nominated or not – Application dismissed with costs.

ANNOTATIONS

CITED CASES

1. Attorney General & Another v Swissbourgh Diamond mines LAC (1995 – 1999)
2. Consolidated Agencies v Agjee 1948 (4) SA 179.
3. Du Plessis v Rolfes Ltd 1997 (2) SA 354 (A).
4. Lutoro v NUL, LLR (1999 – 2000).
5. Makakole v LEPSSA CCT/91/2011 unreported.
6. Open Bibile Minstries & Ano. V Nkoroane & Ano. 1991 – 1992 LLR & LB 112.
7. Setlogelo v Setlogelo 1914 AD 221

[1] The applicant approached the court on an argent basis for a relief couched in the following terms:

1. *That the rule Nisi be issued and returnable on the date and time to be determined by this Honourable court calling upon the respondents to show cause if any why the following orders shall not be made final;*
2.
   (a) *The rules of this Honourable Court pertaining to the mode of service and prescribed periods shall not be dispensed with due to the urgency of this matter.*

   (b) *That the first respondent be interdicted and restrained from purchasing and installing solar system and geysers in all, MCA's clinics, they are working on namely;*

1. *POPA CLINIC*
2. *SION CLINIC*
3. *LITTLE FLOWER CLINI*
4. *KOALI CLINIC*
5. *ST MAGDALENA CLINIC*
6. *KATSE CLINIC*
7. *SEPINARE CLINIC*
8. *ST MONICAS CLINIC*
9. *PONT MAIN CLINIC*
10. *MATLAMENG CLINIC*
24. *LEPHOI CLINIC*
25. *MOLIKALIKO CLINIC*
26. *MAPHOLANENG CLINIC*
27. *PHAMONG CLINIC*
28. *ST GABRIEL CLINIC*
29. *BETHANI CLINIC*
30. *MAQHOKHO CLINIC*
31. *NKAU CLINIC*
32. *CHRIEST THE KING CLINIC*
33. *MOHLAPISO CLINIC*

11.THABA- BOSIU CLINIC
12.ST FRANCIS CLINIC
13.KHOHLO NTS'O
14.GOODSHERPHAD CLINIC
15.RAMPAI CLINIC
16.ST ROSE CLINIC
17.MALEALEA CLINIC
18.MASEMOUSO CLINIC
19.MPHARANE CLINIC
20.THABA-PHATSOA CLINIC
21.MOEKETSANE CLINIC
22.KHABO CLINIC
23.ST MARTIN CLINIC
34. MELIKANE CLINIC
35. MALEFILOANE CLINI
36. ST BENEDICT
37. SESHOTE CLINIC
38. MAHOBONG RCC CLINIC
39. HA PALAMA CLINIC
40. ST ANDREW CLINIC
41. MATELILE CLINIC
42. MAPUTSOE CLINIC
43. HA SEETSA CLINIC
44. LINAKANENG CLINIC
45. PILOT CLINIC
46. HA MOKOTO CLINIC

Pending finalization of this matter.

(c)That the respondents be ordered and directed to honour / and or abide bythe contract they have with the applicant.

(d) That the respondent be ordered to pay client scale in the event of opposition of this matter.

(e) Further and /or alternative relief

2. That prayers 1 (a) and (b) operate with immediate effect as an interim relief.

[2] It seems there are what could be termed common facts and the first one is that the applicant is a sub-contractor, who it appears was appointed by the 2nd respondent, confirming the applicant's;

"appointment as the domestic sub-contractor for the supply, delivery and installation of solar geysers…"[1]

The geysers were to be installed at all of the 3rd respondent's clinics as listed in prayer 1 (b) of the Notice of Motion.

[3] The other fact that is common cause is that the 6th to 9th respondents are Provisional Trustees ("Trustees") of the 2nd respondent and have been joined because the 2nd respondent is in provisional sequestration. It is surprising that no mention has been made anywhere about the 4th and 5th respondents.

[4] The facts as gleaned from the record show that on the 11th June 2013, a meeting was held between the Trustees (the 6th to the 9th respondents) and the Master of the High Court ("Master"), where the Master authorised the Trustees to carry on business of the 2nd respondent, subject to certain conditions.[2]

[5] The first assignment following the meeting with the Master, was that on the 25th October, 2013 the applicant was requested by the 1st respondent to furnish a quote of twenty one (21) geysers. On the 4th November, 2013 the applicant was advised by the 1st respondent that the 21 geysers were to be collected on the following day, the 5th November, 2013. When the geysers were not available on the 6th November, 2013, the 1st respondent further advised the applicant that it could no longer wait for the geysers and that it had accordingly placed an order for the twenty one (21) geysers elsewhere. This is what led to the current application, which was brought to court on the 15th November, 2013.

[1] See Annexure "KPM1" at page 10 of the record

[2] See letter from the Master of the High Court at page 75 of the record.

[6] **Ms Kao** applicant's Counsel contends that the applicant has a contract with the 2nd respondent. Even though it was not a written contract, it was still in force when the 2nd respondent was placed under provisional sequestration. She further argues that the letter of appointment, annexure "KPM1", was recognised by the applicant and the 2nd respondent as the contract binding between them. **Ms Kao** submits that they have an exclusive and an enforceable right against all other sub-contractors based on the original agreement, as evidenced in paragraph three (3) of "KPM1", which reads;

> *"The contractor may employ others to execute work of a similar nature and this shall in no way vitiate this sub-contract and the sub-contractor shall co-operate with the contractor and other sub-contractors in performing the work".*

[7] The applicant's understanding of this paragraph is that the employment of other sub-contractors shall in no way annul the binding force of the contract between itself and the contractor. **Ms Kao** contends that the trustees should not be allowed to rely on annexure "SMR1"[3] and cannot be heard to say that they have temporary powers, seeing that provisional trustees in terms of the law have the same powers as the final trustees. The court was referred to the cases of **Makakole v LEPSSA**[4] and **Consolidated Agencies v Agjee**.[5]

[3] See letter from the Master of the High Court, titled "Directions to carry on Business"
[4] CCT/91/2011 unreported
[5] 1948 (4) SA 179

[8] As far as the applicant is concerned, the allegation that it was unable to supply the twenty one (21) geysers ordered at some point, was not true, in as much as no proof was provided. According to the applicant, the correct position is that the respondent decided to order solar geysers elsewhere in total disregard of the contract they had with it.

[9] The 1st respondent's counsel, **Mr Loubser**, the 2nd and the 6th to 9th respondents' Counsel **Mr Mpaka** and the 3rd respondent's Counsel **Mr Edeling** are in agreement that the applicant's claim is, in essence, a final interdict (mandamus), as read from prayer 1(c) in the Notice of Motion. It reads:

> *"That the Respondents be ordered and directed to honour and / or abide by the contract they have with the Applicant."*

[10] It is argued on behalf of the 1st respondent that for the court to grant the applicant the final interdict it seeks, the following ought to have been satisfied as outlined in the case of **Setlogelo V Setlogelo**[6];

> *"The requisites to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by ordinary remedy."*

[11] **Mr Loubser** for the 1st respondent argues that the applicant has not established a clear right and is thus not entitled to the relief being claimed Counsel argues that the 1st respondent's contract was not with the applicant but it was with the trustees as such the 1st respondent denies that there is any contractual link between the 1st respondent and the applicant. It is to be noted most importantly

[6] 1914 AD 221 at 226 -227

that, the same sentiment is shared also by **Mr Edeling** Counsel for the 3rd respondent and **Mr Mpaka** on behalf of the 2nd and for the 6th to the 9th respondents, that no contract is alleged between the applicant and any of the 1st, 3rd, 4th or 5th respondents.

[12] **Mr Loubser** further argues that it would be of no effect for the applicant to rely on the letter of appointment ("KMP1") which the applicant wants us to believe was still, "in force and all new contractors were bound to carry it out.."[7] The respondents particularly deny that KPM1 entitles the applicant to the relief being claimed, in that it (KPM1) does not provide an exclusive right as alleged by the applicant. In other words the applicant has not established a clear right.

[13] The other requirement for the final interdict is that the applicant should have no alternative remedy. The applicant in his founding affidavit avers that he has no alternative remedy. Paragraph 16 of the founding affidavit reads in part that;

> *"…he has no alternative remedy in the circumstances as all the mediations held were fruitless because the first respondent had informed the applicant's supplier that they no longer require the solar geysers and that they have opted for another brand of geysers so he humbly submit* (Sic) *that this is the only available remedy for now regardless of the fact that he has filed summons for breach of contract simultaneously with this application."*[8]

[7] Founding Affidavit paragraph 11 at page 8 of the record.
[8] Page 9 of the record.

[14] The 2nd respondent denies that the applicant has no alternative remedy and points out that the real remedy is for the applicant to institute action for damages based on the alleged breach of contract between itself and /or the (insolvent) 2nd respondent. Since the applicant has already chosen this route, it is submitted by **Mr Loubser** that, that is a fatal blow to the current application. The court was referred to the case of **Attorney General and Another v Swissbourgh Diamond Mines**[9].

[15] Basically the other respondents were in agreement that, the agreement the applicant had, was clearly not a sole or exclusive supplier agreement. The 2nd respondent thus retained the right to use other sub-contractors for similar work. It is further argued that there is no evidence that the 2nd and 6th to 9th respondents made any purchases after the sequestration. The allegation is that the 1st respondent purchased from another supplier.

[16] As an alternative argument, **Mr Mpaka** submits that after sequestration an uncompleted or executory contract cannot be enforced against the trustee unless he has elected to abide by and continue with the contract.[10] *In casu* there was never any such election, as such the alleged agreement cannot be enforced against the provisional trustees.

[17] It is trite law that there be a substantial cause of action or a claim of right before an interdict is granted. The applicant must also satisfy the court that there is no other remedy, available especially in the form of damages. The applicant

[9] LAC (1995 – 1999) 87 at p 100
[10] Du Plessis v Rolfes Ltd 1997 (2) SA 354 (A)

must make out a case from the word go in its founding affidavit and not along the way, as in its answering affidavit for instance.[11]

[18] The applicant shows that it entered into a supply sub-contract agreement with the 2nd respondent and no one else. At some point the 2nd respondent was sequestrated while the agreement was still in force. The applicant has however, failed to satisfy me that it has made out a claim of right against the 1st, 3rd 4th or 5th respondents. No contract is even alleged between the applicant and these respondents yet it prays for an interdict against them also. As for the 6th to the 9th respondents they were joined in this matter because it is common cause that the 2nd respondent was in provisional sequestration and as such they are provisional trustees.

[19] I am not convinced that the applicant has a case against the trustees (6th to 9th respondents) either. There is no evidence that the trustees categorically elected to carry on with the alleged incomplete sub-contract against the sequestrated estate.[12] Zulman AJA in the case of Du Plessis[13] held *inter alia*:

> *"that there was no general principle which supported the proposition that the exercise of an election to abide by any executory main contract necessarily carried with it an election to abide by any executory subcontracts (whether nominated or not): notwithstanding the fact that the*

[11] See Open Bible Ministries & Ano. V Nkoroane & Ano. 1991 – 1992 LLR &LB 112
[12] See Du Plessis v Rolfes (Supra) and Consolidated Agencies Agjee (Supra) referred to the court.
[13] Du Plessis V Rolfes (supra) at 355

subcontracts made reference to the main contract and that there were references in the main contract to the subcontract, the respective contracts remained separate and independent of each other."

Furthermore I am unconvinced that the letter of appointment, "KPM1", was an exclusive appointment as the applicant would have us believe, (see paragraph three (3) of KPM1). To me it appears that the 2nd respondent retained the right to use other sub-contractors for work similar to that of the applicant. In this regard, the applicant's argument that it had an exclusive right falls away.

[20] I now came to the issue of whether the applicant has no alternative remedy. I am persuaded by **Mr Loubser's** submission that the proper remedy would be for the applicant to institute action for damages, based on a breach of contract. This the applicant by its own admission, has already done.[14] This means that the applicant already knew that it does have damages as an alternative remedy.[15] It boggles my mind why the applicant opted to pursue this application simultaneously with the action for damages. I find that the application does not succeed on this point.

[14] Founding Affidavit para 16 at page 9 of the record.
[15] Attorney General v Swissbrurgh Diamond Mines (supra).

[21] It is for the forgoing reasons that I make the following order, the application is dismissed with costs.

L. CHAKA-MAKHOOANE
JUDGE

For Applicant	:	**Ms Kao-Theoha**
For 1st Respondent	:	**Mr Loubser**
For 2nd and 6th to 9th Respondents	:	**Mr Mpaka**
For 3rd Respondent	:	**Mr Edeling assisted by Mr Mathe**