

IN THE HIGH COURT OF LESOTHO

In the matter between:

STANDARD LESOTHO BANK

Applicant

and

TJ CONSTRUCTION (PTY) LTD

1st Respondent

THABANG THAKASO

2nd Respondent

THABISO THAKASO

3rd Respondent

‘MAMOHAU THAKASO

4th Respondent

**ABI LITEBOHO SEROBANYANA t/a
ABI SUPPLY AND SERVICES**

5th Respondent

**MOEKETSI DENNIS TSOEU t/a
GOODYEAR TYRE**

6th Respondent

DEPUTY SHERIFF

7th Respondent

COMMISSIONER OF POLICE

8th Respondent

**COMMISSIONER OF TRANSPORT
AND TRAFFIC**

9th Respondent

REGISTRAR OF DEEDS

10th Respondent

REGISTRAR OF COMPANIES

11th Respondent

ATTORNEY GENERAL

12th Respondent

NEDBANK LESOTHO LTD

13th Respondent

FIRST NAIONAL BANK OF LESOTHO LIMITED

14th Respondent

JUDGMENT

Coram: Hon. A. M. Hlajoane

Date of Hearing: 19th February, 2014.

Date of Judgment: 28th May, 2014.

Summary

Application for granting Mareva Injunction – Whether was proper to have proceeded against some of the respondents as companies without application to lift the corporate veil.

Held: That where fraud is alleged the Court in the exercise of its judicial discretion can in the interest of justice lift the corporate veil – Application granted with costs.

Annotations

Statutes

Books

Cases

- 1. Concrete Roots (Pty) Ltd vs Lebakeng Tigeli C of A (CIV) No.10/2010**
- 2. African Oxygen Limited v STM Marketing Agencies Ltd 1999-2000 LLR & LB 396 at 403-404**
- 3. Open Bible Ministries and Another v Ralitsie Nkoroane and Another 1991-92 LLR & LB 112**

- [1] This is an application pendent lite for an interdict referred to as *mareva injunction*. As already indicated in the ruling on points *in limine* that were raised, one of Applicant's customers, a company known as Nien Hsing International Lesotho (Pty) Ltd (the company) complained about its funds held in its current account with the applicant. The complaint being on letters purporting to originate from the company authorizing transfer of its funds into 1st respondent's account and that of the 6th respondent.
- [2] Applicant further alleged that as a result of that complaint it had to reimburse the company in the amounts claimed. Applicant has thus approached the Court for an interdict to secure respondents asserts as is intending to bring an action for the recovery of such monies. Applicant has shown that through some investigations it had has traced the funds of the company to the 1st to the 6th respondents.
- [3] Applicant feels that he had made out a case to meet the requirements of *mareva injunction* for the Court to turn the interim court order into a final order pending an action about to be instituted. To support his case to show that even the signatories to the company's funds were not even available, copies of their passports have been attached to the replying

papers to show that they were not even in the country when the transactions were made.

- [4] In response, respondents' counsel confirmed that a claim has already been lodged against the 1st to the 5th respondents only. She therefore argued that the *mareva injunction* should not apply to the 6th respondent. Also that requirements for such remedy have not been met as person defrauded has not even brought an action. That it was wrong for Nien Hsing to have filed an affidavit in reply.
- [5] It would at this stage be important to state instances where *mareva injunction* relief becomes applicable. This would be where applicant seeks for an order interdicting the respondent in order to restrain him from concealing assets in an attempt to evade possible or pending action proceedings against him. And in *casu* the respondents' counsel has confirmed that a claim has already been lodged against the 1st and 5th respondents.
- [6] Respondents argued that the applicant has not established a clear right of recovery in so much that there has been no proof that Nien Hsing was even reimbursed of the money alleged defrauded.

- [7] Respondents even relied on the case of **Rodaro v Royal Bank of Canada (2002) 59 OR**, (and was promised to get a copy which promise was never fulfilled) where it was held that since the bank had made unsupported allegations of fraud, their application for *mareva injunction* was denied.
- [8] Respondents therefore argued that since the bank has produced no evidence in this case to substantiate its allegations they are therefore not entitled to *mareva injunction*.
- [9] In response the applicant submitted that it has attached transactions from the bank using what it considered as forged Nien Hsing's letter heads for transferring monies for Nien's account to some of the respondents as in Annexures "A" and "B" to the founding papers.
- [10] Second respondent has not denied such transfers on Nien's letter head, but only argued that the transactions were authorized by Nien with clear instruction and Nien's signature.
- [11] In the case of **Concrete Roots (Pty) Ltd v Lebakeng Tigeli**¹ the Court granted *mareva injunction* even after it had commented that "even without regard to the question whether money was being siphoned off from Pile to the appellant."

¹ Concrete Roots (Pty) Ltd vs Lebakeng Tigeli C of A (CIV) No.10/2010

[12] The Court further observed that the bank statements attached did not paint the full picture of Pile's accounts and did not even relate to the same dates, but all the same granted *mareva injunction*.

[13] Respondents have admitted the transactions, their defence being that they were authorized and were genuine as were done in the ordinary course of business. But the nature of such business has not been disclosed. But applicant has denied the authenticity of such business.

[14] Applicant therefore submitted that respondents' defence lacked particularity, thus constituting a bare denial, **African Oxygen Limited v STM Marketing & Agencies Ltd²**.

[15] Applicant attached the affidavit of Nien in reply and respondents challenged that as making out a case in reply. But the applicant responded by showing that it was responding to what was said in the answering papers. The case was made in the founding papers. That being the case applicant could therefore not be said to have directed respondents to one issue through pleadings and subsequently canvassed a different issue

² African Oxygen Limited v STM Marketing Agencies Ltd 1999-2000 LLR & LB 396 at 403-404

which was not pleaded. The affidavit was a reply to what was said by the respondents in answer.

[16] Respondents further argued that since there has been an allegation of fraud at least proof of the alleged crime ought to have been filed by the applicant against 1st to 6th respondents. That in the absence of such the fraud allegation remains unsupported disqualifying the applicant for a *mereva injunctio*.

[17] Applicant responded by showing that even in the absence of any proof from the police there still remains an irresistible and compelling circumstantial evidence to show that the transfers and withdrawals as evidenced by the annexures were not in the normal course of legitimate business and as such were fraudulent.

[18] The above, applicant said, has been fortified by the respondents' lack of particularity as to the nature of the business relationship with Nien Hsing. Also that the swift migration of such huge sums of monies during the period that Nien Hsing was defrauded, involving people unknown to him to accounts which never had such credits balances before must be considered enough proof justifying the remedy asked for.

[19] In this case the Court has to exercise its discretion upon the consideration of probabilities of success in the action which there is no dispute that it has been instituted already. The Court will only grant an interdict where it feels that the balance of convenience is strongly in favour of doing so.

[20] This being motion proceedings the affidavits constitute not only evidence but pleadings, so that the answering affidavit ought to have captured all that would be set out in a plea plus evidence that would be led in Court, see **Open Bible Ministries and Another vs Ralitsie Nkoroane and Another**³.

[21] The respondent sought in argument to show that some of the respondents being companies were still covered by the corporate veil and there has been no application for lifting the veil. This was not contained in the papers but was only advanced in argument. On the authority of **Open Bible Ministries** case the Court realize that the other side did not even bother to respond fully to it was taken by surprise on that point. He simply argued that where fraud is alleged for a director there would not be any need for lifting of veil.

[22] But in Company Law a company is a corporate body distinct and separate from its shareholders. The veil of incorporation

³ Open Bible Ministries and Another v Ralitsie Nkoroane and Another 1991-92 LLR &LB 112

refers to the consequences of separate legal personality. And the lifting of the veil means that the Court ignores or sets aside the company's separate legal personality by making the shareholders personally liable.

[23] The lifting of the corporate veil is usually considered as an exception. Consideration of this exception would only be taken where the Court is of the feeling that a person subject to a legal obligation has employed a company to evade an obligation.

[24] In the case of **Jones and Another v Lipman and Another**⁴, the Court found the defendant company, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. In *casu* as pointed out by counsel for the applicant since there are allegations of fraud the Court in the exercise of its judicial discretion feels that it can in the interest of justice safely lift the respondents' veil.

[25] The rule is thus confirmed with costs.

A. M. HLAJOANE
JUDGE

⁴ Jones and Another v Lipman and Another [1962] 1 All ER 442

For Applicant: Mr Mpaka

For Respondents: Ms Molapo