IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

HELD AT MASERU **CCT/0418/2022**

In the matter between

LECHESA PHILEMON NTHULENYANE
t/a CHEEZE GENERAL DEALER **PLAINTIFF**

And

BROOM OF AFRICA **1ST DEFENDANT**
THABO JUSTICE MOTABA **2ND DEFENDANT**
TAKATSO ALICE RMATSIE **3RD DEFENDANT**
LESOTHO MILLENIUMDEVELOPMENT
AGENCY **4TH DEFENDANT**

Neutral Citation: Lechesa Philemon Nthulenyane t/a Cheeze General Dealer v. Broom of Africa and 3 others No. 1 [2022] LSHC 233 Comm. (16 September 2022)

CORAM: M. S. KOPO, J
HEARD: 31st AUGUST 2022
DELIVERED: 16th SEPTEMBER 2022

SUMMARY

Civil Procedure – Interim Application – Requirements for Temporary Interdict re-stated -Urgency – Rules Applicable therein

ANNOTATION

Books

Erasmus H J, *et al*. *Erasmus Superior Courts Practice*. *1997.* Juta and Co. Ltd

Cases

Lesotho

B.P Lesotho (PTY) Ltd v. Moloi and AnotherLAC (2005-2006) 429

Chobokoane v Solicitor-General 1985-1989 64 at 65 para G-1

Honourable Minister ER Sekhonyana v Mazenod Printing Works (Pty) Ltd and Others (CIV/ APN/ 109 of 90) [1991] LSCA 115

Lesotho Medical Dental and Pharmacy Council V Musoke (CIV/APN/06/93) [1993] LSCA 41

South Africa

Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and others [2014] 4 All SA 67 (GP)

Statutes

High Court Rules No. 9 of 1980

RULING

[A] Introduction

[1] Broom of Africa, a company duly incorporated under the laws of this land, entered into a contract with the Lesotho Millennium Development Agency (LMDA). In terms of that agreement, Broom of Africa was to provide cleaning services to six (6) hospitals and forty-five (45) Health Clinics in the country in return for payment by said LMDA.

[2] Realising that due to the magnitude of the contract, it may not be able to deliver as it agreed, Broom of Africa then approached a business man by the name of Lechesa Philemon Nthulenyane Trading under the style name Cheeze General Dealer requesting financial assistance for the said project. The said meeting bore a contract between the parties in which Lechesa Philemon Nthulenyane agreed to finance the project with an unlimited amount of money for the procurement of what was needed for implementation of the contract between Broom of Africa and LMDA.

[3] It was also a term of the said contract that the parties therein will share the profits resulting from the main contract between LMDA and Broom of Africa on a seventy percent (70%) to thirty percent (30%) ratio; Broom of Africa taking the bigger share. Moreover, the parties to the contract agreed that they will jointly be signatories of the bank account in which LMDA will pay Broom of Africa.

[4] Later in the course of this agreement, Broom of Africa removed Lechesa Philemon Nthulenyane as the signatory of the said bank account. According to Nthulenyane, this was done fraudulently and for no reason at all but to divest him of his share of the profits. It is as a result of this removal that he (Lechesa Philemon Nthulenyane herein after called Applicant) instituted an action against Broom of Africa, Thabo Justice Motaba, Takatso Alice Ramatsie and Lesotho Millennium Development Agency (1st, 2nd, 3rd, and 4th Respondents respectively). Simultaneously, he instituted this application on an urgent basis for the following prayers:

1. *That the rules of this Honourable Court pertaining to normal modes and periods of service be dispensed with on account of urgency hereof.*

2. *A rule nisi be and it is hereby issued returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause (if any) why, an order in these terms shall not be made absolute:*

a) *That pending the finalisation of this application, the 4th respondent be and is hereby ordered to withhold and preserve 30% of all amount pending payment of the 1st respondent for the remaining duration (of) contract;*

b) *That the 4th respondent be interdicted from paying the 1st respondent the 30% of the preserved amount pending an order in the action proceedings herein and the funds be released only on the basis of the order from action proceedings herein;*

c) *That the respondents pay costs of suit in the event of opposition.*

d) *That applicant be granted further and/or alternative relief;*

3. *That prayers **1, 2, 2(a)** should operate with immediate effect as interim relief.*

[5] The application is vehemently opposed by the 1st to the 3rd respondents. Firstly, the respondents attacked the application by raising preliminary points of law as follows:

a) That there is **no cause of action** as Applicant is not a party to the contract

b) That there has been a **material non-disclosure** in that firstly, Applicant failed to disclose that he had not complied with the terms of the contract by only contributing two Hundred and Ninety Thousand, Four Hundred and Eighty-Eight Maloti and Sixty Lisente (290, 488.60). Secondly, Applicant did not disclose that he subsequently entered into another agreement with the 1st Respondent in which he accepted the repayment of the above-mentioned money and did receive same.

c) **Lack of urgency** as there is no reason advanced as to why the matter is urgent. Secondly, Applicant knew as far back as 09th June that his agreement with 1st Respondent was no more.

d) **No requirements for granting of an interdict** as firstly, Applicant does not have *prima facie* right nor a real right as he is not contracted to 4th Respondent. Secondly, the entitlement of thirty percent (30%) of the overall contract is legally flawed as it was conditional upon Applicant injecting funds continuously.

And finally, the rights of ordinary members of the public outweigh those of the Applicant.

e) There is a **public interest** issue as the prayers being sought can affect the delivery of services to the public. Moreover, the demand to freeze the entire thirty percent (30%) has no legal foundation because applicant is no longer a party to the financing agreement.

f) There is no basis for a **Mareva Injunction** as there is no basis for fraud. Moreover, there has not been any averment that the assets will be disposed of to defeat the judgment

[6] On merits, the first three (3) respondents argue that, as Applicant breached the contract and failed to finance the project, 1st Respondent cancelled the contract lawfully due to the repudiation occasioned by Applicant. As a result, Applicant was also correctly removed as a signatory to the relevant bank account.

[B] ANALYSIS OF THE MATTER

[7] When the matter was argued, I directed that the matter be argued holistically as opposed to dealing with preliminary points first. I will follow the same pattern in this ruling. Instead of dealing with points *in limine,* I will analyse the entire matter without compartmentalising the judgment and pronounce a ruling.

[8] Upon perusal of the papers, it becomes apparent that the parties entered into another contract after there was a disagreement in their initial contract. On the papers, the parties seem to disagree on the disagreement. However, it is apposite

to mention that the said disagreement does not raise any dispute of fact to the effect that it could prevent this court from getting to the bottom of the matter. All the Applicant does is to make a bare denial. Moreover, in **paragraph 17** of its Replying Affidavit, addressing paragraph 3.18, Applicant seems to admit the contents of the said paragraph of the answering affidavit. In that paragraph, Applicant says;

> *"I aver that any information that may have been inadvertently been left out was not omitted deliberately, to that extent the indulgence of this Honourable Court is prayed for. The deponent does not wish to invite the attention of this court to the Financing Agreement. Contents are denied"*

While the last sentence reads that the contents of the paragraph are denied, the preceding text suggests that the Applicant agrees that something was left out but inadvertently. The paragraph that was being addressed by the Applicant mentioned that the parties ended up entering into another agreement in the midst of their disagreement concerning their main contract. Per that agreement (which is attached as **annexure BOA 6** to the Answering Affidavit) Applicant paid Two Hundred and Ninety Thousand, Four Hundred and Eighty-Eight Maloti and Sixty Lisente (290, 488.60). In the subsequent paragraph, the Respondent shows that it was agreed that per the agreement reflected in **Annexure BOA 6**, the parties agreed that the initial agreement would be terminated once the Applicant gets the money mentioned. Even to this, Applicant makes a bare denial.

[9] I have no reason to not find that this is what the parties agreed to. The bare denial by Applicant does not advance its case at all. I agree with the argument by Mr. Rasekoai that just saying "contents therein are denied" without making

necessary averments, does not help the court nor the case of the Applicant. This is trite (see **Chobokoane v Solicitor-General**[1]). A litigant cannot expect an arbiter of fact to ignore the evidence put forward by another by just saying contents therein are denied and ends there without showing how such cannot be accepted. This is such a material fact in the dispute between the parties (that the parties entered into another agreement to terminate the initial one) that if it was inadvertently left out by Applicant, it was simultaneously reckless and as a result amounts to a material none-disclosure. I therefore conclude that the parties had terminated their financing agreement. Whether this has been correctly done, it is neither here nor there. The importance of coming to that conclusion is that the balance of convenience does not favour the Applicant for him to get any temporary interdict.

[10] Prior to the meeting that gave birth to BOA 6, 1st Respondent averred that it had already communicated the termination of the contract due to the breach by Applicant occasioned by none payment of the funds to buy necessary material for the project. To this, Applicant avers that it had not received any communication. However, among the letters that Respondents say they wrote to Applicant and delivered in a similar manner to all the other ones, there is one that Applicant answered. This is per **annexure BOA 2**. If indeed Applicant answered one of the letters, how could it not have received all the other letters? I will lean towards Respondents that indeed the contract had already been terminated and Applicant was privy to this communication. The removal of the Applicant as the signatory to the account in question therefore became a necessary result of the said termination. Applicant knew of the termination and he ought to have expected that his rights in the account will be terminated. For that reason, therefore, Applicant cannot allege fraud on the part of the 1st Respondent and its directors.

[1] 1985-1989 64 at 65 para G-1

[11] The preceding conclusion is important to make as Applicant had averred in his Founding Affidavit that the 1st Respondent and its directors had fraudulently removed him as the signatory and therefore the corporate veil must be pierced. This was probably the reason why he had cited 2nd and 3rd Respondents in their personal capacity in this matter or the action proceedings (the main matter). I find no reason why Applicant cited the 2nd and 3rd Respondents as I have already found that there cannot be any fraud in their action. 1st Respondent notified Applicant of their action and did not do anything behind his back. Moreover, there is not as cintilla of evidence that the Respondents (1st, 2nd and 3rd) are dissipating the funds in the account in question.

[12] Having made the conclusion that there is no evidence that the 1st Respondent and its directors are making away with the funds, it is now an opportune time to deal with the issue of urgency. The preceding three (3) conclusions are necessary in tackling the issue of urgency. The 1st respondent had terminated the contract and entered into another one on payment, Applicant knew about the termination and there is no fraud. At the time of Applicant instituting the action in the main and the present Application, he had already sat with 1st Respondent and its directors before the 4th respondent. The result of that meeting was, among others, the re-payment to him of the funds he had injected in the project by the 1st Respondent. What remains the issue is whether he should not have been paid that amount with the thirty percent (30%) share of the profits as they had agreed initially. **Annexure BOA 7** is of reference. This was on the 26th May 2022 when this annexure was penned. Three (3) months later, Applicant instituted the action in the main and the present application simultaneously. There is no evidence of dissipation, the money injected into the project by Applicant has been returned, the parties had agreed that the contract

is terminated and what is only left is whether Applicant gets thirty percent (30%). All these established facts say there is no urgency. It is apposite to quote the relevant rule dealing with urgency under the High Court Rules 1980[2]. Rule 8 (13) (b) reads thus:

> *"In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial relief in a hearing in due course if the periods presented by this Rule were followed"*

[13] I have quoted with approval before the South African Judgment of Tuchten J in **Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and others**[3], where the learned judge was dealing with a rule similar to our Rule 8. He put it thus:

> *"It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency*

[2]Legal Notice No. 9 of 1980
[3][2014] 4 All SA 67 (GP)

[14] Having come to the conclusion that Applicant has failed to show that the funds are being dissipated, and having come to the conclusion that it is clear on papers that there is evidence that the parties had agreed that their initial agreement was terminated and Applicant repaid his part of the contribution, I see no proof or averment that Applicant could not be afforded relief in the proper trial in due course. (See also **Lesotho Medical Dental and Pharmacy Council V Musok**[4])

[15] On temporary interdict, it is my opinion that the facts put forth in the preceding paragraphs show that the balance of convenience does not favour Applicant for him to get it.The case of **B.P Lesotho (PTY) Ltd v. Moloi and Another**[5] was relied upon by Mr. Rasekoai on the requirement of a temporary interdict. I agree that that case is applicable in the present matter with others cited in his heads of argument. It is indeed now trite that Applicant seeking a temporary interdict must establish the following prerequisites:

a. *A well-grounded apprehension of irreparable harm if interim relief is not granted*
b. *The balance of convenience favours the granting of an interdict*
c. *There is no other suitable alternative remedy*

If therefore, there is greatest possibility that the initial contract of the parties was cancelled, that Applicant got his contribution to the project, then there is no reason advanced why he cannot get the disputed share of the profits if he succeeds in the normal course of the proceedings. There is no need to jump the

[4](CIV/APN/06/93)
[5]LAC (2005-2006) 429

que on unsubstantiated urgency. He has not proved that the balance of convenience favours him too.

[16] I indeed agree with the law as argued by Advocate Molati that:

> *"…the right to be set up by applicant for a temporary interdict need not be shown by a balance of probabilities. If it is prima facie established though open to doubt that is enough" (see* ***Honourable Minister Sekhonyana v Mazenod Printing Works (Pty) Ltd and Others****).*

Be that as it may, Applicant has not even established *prima facie* on a balance of probabilities that he has a right for a temporary interdict. Let alone anything, even if doubtful.

[C] CONCLUSION

[17] The analysis shown above leave us with only one conclusion; Applicant has failed in its case. Applicant has not been *bona fide* or at the least has been reckless in not disclosing some of the material facts in this matter, the matter is not urgent as mostly, the parties had already reached some agreement in terminating the initial agreement, and finally, there is no ground upon which the applicant should get a temporary relief, especially a temporary interdict.

[18] Mr. Rasekoai argued that this is a case fitting for punitive costs. I agree. The none disclosure of the facts in issue painted a disturbing picture in the Applicants case. At first glance, it appeared that there may be an issue just because Applicant had left out some of the facts. This matter was heard urgently

due that fact. This should not be allowed. In the process, Applicant jumped the que in a case that should not have been afforded that status.

ORDER

The application is dismissed with costs on attorney and client scale.

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M.S. Kopo J.
Judge of the High Court

For Plaintiff: **Adv. Molati**

For Defendant: **Adv. Rasekoai**