IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU **CCA/0095/20**

In the matter between –

PROAID HOLDINGS LESOTHO (PTY) LTD **APPLICANT**

And

ALIMELA THUTO FINANCIALS LTD **1ST RESPONDENT**

NYANE STEPHEN MOETI **2ND RESPONDENT**

'MAMONYAKE GLADYS KENALEMANG MOKEBE **3RD RESPONDENT**

PULE MOKEBE **4TH RESPONDENT**

Neutral Citation: Proaid Holdings Lesotho (Pty) Ltd v. Alimela Thuto Financials L and 3 others No.1 [2022] LSHC 262 Comm. (29th September 2022)

CORAM: **M. S. KOPO, J**

HEARD: **11TH AUGUST 2022**

DELIVERED: **29th SEPTEMBER 2022**

SUMMARY

Procedure – points of law in limine – lis pendens – procedure for raising it – non-joinder and misjoinder – dispute of fact in motion proceedings – material non-disclosure.

ANNOTATION

Books

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

Cases

Lesotho

Khabo v Khabo (C of A (CIV) 72/18) [2019] LSCA 56 (01 November 2019)

Mahlakeng and Others v Southern Sky (Pty) Ltd and Others LAC 2000 -2004) 742

Matime and Others v Moruthoane and Another C of A (CIV) No. 4 of 1986 [1986]LSCA 99(25 July 1986)

Ntoa Abel Bushman v Lesotho Development and Construction (Pty) Ltd and Others C of A (CIV) No.3 of 2015 [2015] LSCA (07 August 2015)

South Africa

Caesar stone Sdol-Yam Ltd. v. The World of Marble and Granite 2000 CC 2013 All SA 509 (SCA)

Frank v. Ohlsson's Cape Breweries Ltd1924 A.D. 289

Loader v. Dursot Bros (Pty) Ltd1948 (3) SA 136

Statutes

Central Bank of Lesotho Act of 2000

Financial Institutions Act of 2012

High Court Rules No. 9 of 1980

Interpretation Act of 1977

JUDGMENT

[A] Introduction

[1] This is an interlocutory ruling on points of law raised by the Respondent. The Applicant in this matter instituted motion proceedings moving this court for an order in the following terms:

> 1. *Declaring that the second, third and fourth respondents have been lawfully removed from the office as Directors of the first respondent with effect from 17 June 2020;*
> 2. *That the second, third and fourth respondents be and are hereby retrained and interdicted with immediate effect from, in any away, taking part as Directors in the management or the running of the affairs of the first respondent;*
> 3. *That the second, third and fourth respondents are ordered to pay the costs of this application jointly and severally;*
> 4. *Further and/or alternative relief.*

[2] The respondents oppose the application in its entirety but first raised points *in limine*. The said points in *limine* are:

a. Non-joinder of the Central bank of Lesotho;
b. Mis-joinder of Alimela
c. Dispute of fact;
d. Non-disclosure of material facts; and
e. No locus standi and clear right.

[3] Over and above the points mentioned in paragraph [2] above, respondents also filed a notice to raise the issue of *lis pendens* at the hearing of this application. Mr. Matooane duly raised and argued the point at the hearing.

[B] BACKGROUND

[4] Alimela Thuto Financials Limited (it will herein after be referred to as 1st Respondent or Alimela interchangeably) is a public limited company that was constituted as such in November 2012 to among others, lend money for profit. It is therefore regulated by the Central Bank of Lesotho (the Bank).When Alimela was constituted, its share capital was M1000 divided into 1000 shares of 1 loti (M1.00) each).

[5] One can safely say that these are all the facts that are common cause in this matter in as far as the status and ownership of Alimela is concerned. The rest seem to be disputed facts. I will attempt to lay down the said disputed facts in an attempt to show the background of this matter and in trying to untangle the wrangle that is this matter.

[6] According to Applicant, Alimela's one thousand (1000) shares were owned by Edu-Loan (Pty) Ltd (Edu-loan) and one 'Mamonyake Gladys Kenalemang Mokebe (3rd Respondent) at the ratio of eight hundred (800) and two hundred (200) respectively at the time of its constitution. According to 3rd Respondent, Alimela was solely owned by her (3rd Respondent) at inception. At paragraph 5 of her Answering Affidavit, she state as follows

> *"I had a plan with Edu-loan (Pty) Ltd in terms of which they promised (to) contribute its share capital including sourcing of funding required to start the micro financing operations. If*

> *they were to oblige, they would be allotted 80% of the available equity shares. During this time I had already registered 1st respondent herein and had license as well. I must make it clear that I was 100% shareholder of 1st Respondent following its inception at my instance".*

[7] Applicant goes on to mention that on the 15th day of November, 2012, a contract of purchase and sale of the eight hundred (800) shares owned by Edu-loan in Alimela was concluded between Applicant and Edu-loan. As a result of this agreement, Applicant says it now owns eight hundred (800) majority shares in Alimela while the two hundred remaining shares are owned by 3rd Respondent herein.

[8] On the other hand, 3rd Respondent mentions that while she was in the middle of preparations to conclude an agreement mentioned in paragraph [7] above with Edu-loan Applicant came into the picture and proposed an agreement with it and abandonment of the impeding agreement with Edu-loan. Moreover, she mentions that Applicant injected funds into Alimela only as a loan and not purchase of the shares.

[9] The disputed ownership of Alimela is the subject of the litigation between some of the parties herein in **CCT/0209/2020.** This is common cause.

[C] ISSUES AND ANALYSIS

[10] The issues that stand for determination in this matter therefore stand as follows:

a) Is there Non-joinder of the Central bank of Lesotho?

b) Has Alimela been wrongly joined in this matter?

c) Is there a Dispute of fact or facts that can prevent this court from determining this matter on papers?

d) It there a material non-disclosure of material facts?

e) Does Applicant have locus standi and clear right?

f) Is the matter pending in another court (*lis pendens*)?

[C] a) NON-JOINDER

[11] The Respondents argue that the Bank is an interested party in these proceedings and therefore should have been joined. Their argument is based on the fact that in reading **section 47 of the Central Bank of Lesotho Act**[1] read with **section 49 of the Financial Institutions Act**[2], the bank is the Commissioner and as the commissioner shall be the supervisor of the Financial Institutions. The argument goes further to mention that the Bank, therefore, has control and supervisory powers over the operations of the Financial Institutions.

[12] The respondents went further to show that section 19 of the Financial Institution Act shows that the Bank is directly and substantially interested in the matter since it mentions that no one can acquire or hold any interest in the capital share in the financial institution if it confers upon him a voting share that exceeds 10% of the total without the approval of the Commissioner.

[13] Applicant on the other hand argues firstly that the Bank only comes into play after there has been a change in the directorship or management of the licenced institution. This is per section 48(2) of the Financial Institution

[1]Act No. 2 of 2000

[2]Act No. 3 of 2012

Act. Even at that stage, it is argued, the bank is only notified and therefore that does not make the Bank an interested party.

[14] The provision that both counsel spent some time on during written and oral submission on this point is section 19 of the Financial Institution Act. It is vital to reproduce the said section herein. It says:

> *(1) All shares endowed with voting rights, which are issued by a local financial institution shall be in a registered form.*
> *(2) without prior approval of the Commissioner, a person may not acquire or hold either directly or indirectly, acting alone or through or in concert with other persons, any interest in the capital share of a local financial institution which would confer upon him a voting share that reaches or exceeds ten per cent of the total.*
> *…*
> *(8) without the prior approval of the Commissioner, no local financial institution shall-*
> *(a) Enter into a merger or consolidation*
> *(b) …*
> *(c) …effect an increase or reduction of its authorised share capital or a reduction of its paid-up capital*

[15] Section 19 (2) is the one that is worth looking into more than the others. Advocate Woker argues that the shares were acquired in the year 2013 but the challenge is only coming now or some six (6) years thereafter. This, argues Advocate Woker, entitles Applicant to assume that the Bank has no issue with it having acquired the said shares. He supports his argument by referring the court to page 102 and 23 of the paginated record wherein it (the record) evidences an attempt by Applicant to liquidate Alimela. His argument is that, since the Bank did not, in its letter denying the request that Alimela be liquidated, disown the knowledge of Applicant, Applicant

is entitled to assume that the bank had no issue with the acquisition of the shares in Alimela.

[16] The said letter on page 102 of the paginated record and marked annexure "I" seem to talk of an arrangement between Applicant and Alimela. It does not specifically refer to shares. This does not prove, at least on a balance of probabilities that the Bank knew of the acquired shares by Applicant in Alimela or that it acquiesced to the acquisition of the said shares. I therefore do not agree that this court should take it that this raises a presumption that indeed the bank had accepted that Proaid has indeed acquired the shares.

[17] Section 19 (2) does seem to create a requirement that it has to have a prior notification of shares conferring on an individual (natural or artificial) votes equal or exceeding 10%. It is true that it uses the word "May" which according to section 14 of the **Interpretation Act**[3] is permissive. However, this says the discretion stays with the Bank. I believe the word "may" therein used does not necessarily confer discretion on financial institutions but confers a discretion on the Bank to allow voting right that are equal or more than 10%. This I believe makes the bank a substantially and directly interested party to these proceedings. This is because the order that this court can pass in this matter will and can affect the legal and administrative mandate of the Bank in the supervision of Alimela[4]. This is therefore dispositive of the non-joinder point and therefore no need to consider other arguments raised on it.

[C] b) MIS-JOINDER ALIMELA

[3] Act No. 19 of 1977

[4]Matime and Others v Moruthoane and Another C of A (CIV) No. 4 of 1986 [1986] LSCA 99(25 July 1986)

[18] It has been argued for respondents that since no order is sought against Alimela, it has been wrongly sued. Advocate Kuoane argued that this has just burdened Alimela with costs unnecessarily since no relief is sought against it.

[19] Advocate Woker on the other hand has called this point an "extremely long shot". I agree. Alimela is directly and substantially interested in the proceedings. It is in fact in the heart of this dispute. This point *in limine* is dismissed

[C] c) DISPUTE OF FACT

[20] Respondents argue that there is a myriad of disputes in this matter that can prevent this court from determining this matter on papers. They argued that it is disputed that; Applicant is the lawful shareholder in Alimela, Applicant paid for the 800 shares that it alleges to have acquired, the purported removal of 2nd, 3rd and 4th respondents was lawful, the M46,089.71 was not consideration for shares but a loan.

[21] I will from the onset deal with the last but one point in the listed points considered to be disputed. A point that is the very issue of the case at hand cannot be raised as a dispute of fact. This is in fact, a legal issue this court has to rule on but not a fact upon which the court has to consider to get to the decision. This court is called upon to declare that the 2nd to 4th respondents were lawfully removed from the directorship of Alimela. In doing so, this court (in the main, if this Application ever gets to that stage) is called upon to rule if in law, the 2nd to 4th respondents were lawfully removed and declare so if indeed it finds so. That is a point of law that was

envisaged in **Frank v. Ohlsson's Cape Breweries Ltd**[5] by Innes CJ when he said

> *"… But where the facts are really not in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion."*

Be that as it may, all the other facts raised as being in dispute need to be looked into.

[22] Advocate Woker argues that there is no real dispute of fact that can prevent this court from determining this matter on papers. He argues that the points that are said to be in dispute are just superficial. First of all, he argues that respondents cannot argue that Applicant ever bought the shares. Secondly, to show that there is no dispute on this issue, Advocate Woker referred the court to the heads of argument for respondents showing points that are considered to be common cause. In that page, among the points listed as being common cause, there is one in particular saying "the 800 shares which were owned by Edu-loans were duly transferred to Proaid on the 19th February 2014." This should not be looked at in isolation. Just overleaf, there is a list of disputed facts. The first point in that list says "it is disputed that Proaid bought shares from Net loans Pty limited thus denying that Applicant is a lawful 80% shareholder." (And it was clarified during oral arguments that wherever Net Loans appears, it is a typing mistake. The reference was to Edu-loan). Respondents, other than this assertion that appears in the list of common cause issues, have been consistent that Applicant has not acquired the shares. However, this baffles me as to how respondents admit that shares were transferred but at the

[5] 1924 A.D. 289

same time deny that Applicant owns them. This in my view is a superficial dispute. Which does not need any oral evidence to solve.

[23] Advocate Woker referred the court to a number of documents that *prima facie* show that indeed Applicant acquired the 800 shares. One of those documents is an agreement that shows that Applicant bought 80% shares from Edu-loan and 3rd Respondent even signed that agreement. That agreement is annexure "D" to the Founding Affidavit. To this the respondents agree that indeed there was that agreement but the shares were never paid for. This says it is still disputed that the Applicant bought the shares. However, there can be no dispute that the shares were transferred to Applicant per that agreement. Even on the issue of the email that Applicant says is proof of its payment for the shares to Edu-loan and respondents deny as proofing that it shows payment for shares, the odds are stacked against respondents that this court cannot solve that issue on papers.

[24] There are disputes on papers. However, they do not seem to be genuine dispute of facts. I wish to borrow the words of the court of Appeal in **Khabo v Khabo**[6] in which Chinhengo AJA (Damaseb AJA and Musonda AJA concurring) said;

> *"A real dispute of fact arises when respondent denies material allegations made by the applicant and produces positive evidence to the contrary."*

[25] *In casu*, the respondents were faced with a serious *prima facies* evidence that the shares were indeed transferred to Applicant but have not reciprocated enough to create a genuine *bona fide* dispute of fact on this issue that this court cannot ably solve the matter on papers.

[6](C of A (CIV) 72/18) [2019] LSCA 56 (01 November 2019)

[C] d)MATERIAL NON-DISCLOSURE OF MATERIAL FACTS AND *LIS PENDENS*?

[26] The respondents raised a point *in limine* arguing that Applicant has not disclosed to this court that there are other matters on similar grounds pending before this court between the parties. Respondents also filed a Notice to raise *lis pendens* on the ground that there is a matter pending before this court on the same grounds or cause of action. Applicant opposes this application and also argued that the other pending matters are on different issues. I thought it better to tackle these two issues together as they are very closely related.

[27] It is my considered view that Advocate Woker is correct in as far the law on *lis pendens* and how it has to be raised procedurally is concerned. It is indeed a special plea that has to be pleaded just as *res judicata* is pleaded[7] and the other proceedings must be pending between the same parties[8].

[28] While respondents had not raised *lis pendens* as a special plea, the opposing affidavit clearly raised the issue that there is another matter pending before the parties on the same issues. Strictly speaking, this is not raising it procedurally. However, the Applicant cannot be prejudiced as it even addressed the question as to whether CCT/0209/20 concerned the same issue. Moreover, summons and declaration to CCT/0209/20 have been annexed to the Answering Affidavit by 3rd Respondent. This court is therefore at a position to look at the issue placed before court in that matter. It is therefore apposite to consider the defence of *lis pendens* in this matter.

---

[7]Ntoa Abel Bushman v Lesotho Development and Construction (Pty) ltd and Others C of A (CIV) No.3 of 2015 [2015]LSCA(07 August 2015)

[8]ibid

[29] In CCT/0209/20 the present 1st and 3rd Respondents are the plaintiffs. The present Applicant is the defendant together with the Bank, deponent and director to Applicant herein as well as Ministry of Trade and Industry and Standard Lesotho bank. The prayers are:

> *(a) An order of cancellation by reversing the 1st Plaintiff and 1st Defendant to the position in which they were before making verbal arrangement that the 1st Defendant would have a shareholding in the 2nd Plaintiff's Company (Status Quo Ante)*
> *(b) An order declaring the 1st and 2nd defendants as non-shareholders in the 2nd Plaintiff Company.*
> *(c) An order declaring 1st Plaintiff as 100% shareholder in the 2nd Plaintiffs Company by virtue of being its founder*
> *(d) Ordering payment in the amount of M1.438 million for the loss incurred by 2nd Plaintiff Company, against 1st and 2nd Defendants jointly and severally liable one paying the other being absolved, in favour of 1st and 2nd Plaintiff*
> *(e) Ten (10%) per cent collection commission*
> *(f) Interest at the ordinary rate per annum from date of judgment to the date of payment*
> *(g) Costs of suits at an ordinary scale*
> *(h) Further and/or alternative relief as this Honourable Court may deem fit.*

[30] Prayers b) and c) specifically are in a direct collision course with the prayers being sought is the present Application. In this Application, Applicant wants 2nd to 4th respondents to be declared as having been lawfully removed as directors by virtue of having it has majority shareholding. In CCT/0209/20, the tables are turned. The present 1st Respondent and 3rd Respondents want Applicant to be declared as a non-

shareholder in Alimela. In making a decision in this matter, this court risks orders that may collide.

[31] Advocate Woker argued that *lis pendens* is not dispositive of the matter but only a dilatory defence. That is indeed so. However, the overriding principle is to avoid multiplicity of cases and to have finality on the dispute between the parties. In **Caesarstone Sdol-Yam Ltd. v. The World of Marble and Granite 2000 CC**[9] and Others, the Supreme court of Appeal of South Africa elucidated on the reason behind the defence of *lis pendens* as follows:

> *"…a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere, and therefore it is inappropriate for it to be litigated in the same court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties, and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions."*

[32] Indeed, the court has a discretion on deciding if it allows the matter to proceed amidst the *lis pendens* if the balance of convenience favours the plaintiff or applicant as the case may be (see **Loader v. Dursot Bros (Pty) Ltd**[10]). Be that as it may, I do not believe that this is a case fitting for this court to exercise such a discretion. There is a risk that in trying to expedite justice, the opposite may happen. The earlier matter is an action and probably, *viva voce* evidence may reveal what is not present in these proceedings.

[9] 2013 All SA 509 (SCA)
[10] 1948 (3) SA 136

[33] On the point of a material non-disclosure, I do not think in Applications on Notice it has the same effect as in *exparte* applications. In *exparte* applications it is understandable that a party has to disclose all. Even those facts that may be against his case[11]. In the present matter, the respondents had an opportunity to raise the issues left out by the applicant and therefore have not suffered any prejudice. However, as to why Applicants left out such a vital piece of information is very questionable. This risks the court coming up with a judgement or ruling that could conflict with that of CCT/209/2020. This is what the court should always eschew.

[34] The non-disclosure of this information will however have a bearing on costs. While I was tempted not to award costs on this matter and leave such for the main, such non-disclosure has attracted costs against the Applicant

[D] CONCLUSION AND ORDER

[35] Having concluded that there has been non-joinder of Central Bank of Lesotho, That Alimela Thuto (1st Respondent) has been correctly joined, that there is no material dispute of fact on material facts and that the issue in this matter are pending in CCT/0209/20, the following order is made:

I. The point *in limine* on non-joinder of Central Bank of Lesotho is upheld.
II. The point *in limine* on mis-joinder of 1st Respondent is dismissed.
III. The Point of law *in limine* of dispute of fact is dismissed.
IV. *Lis pendens* is upheld and application is dismissed with costs.

_____

M.S.Kopo J.

[11]Mahlakeng and Others v Southern Sky (Pty) Ltd and Others LAC 2000 -2004) 742

Judge of the High Court

For Applicant: **Adv. Woker**

For Respondent: **Attorney Matooane Assisted by Advocate Kuoane**