IN THE HIGH COURT OF LESOTHO

(Commercial Court Division)

HELD AT MASERU	**CCA/ 0013/2022**
THOLO ENERGY (PTY) LTD	**APPLICANT**
AND	
LETŠENG DIAMONDS (PTY) LTD	**1ST RESPONDENT**
ARBITRATOR (ADV.P.V. TŠENOLI)	**2ND RESPONDENT**

Neutral Citation: Tholo Energy (Pty) Ltd v Letšeng Diamonds (Pty) Ltd and 1 Other [2022] LSHC 92 COM (29thApril, 2022)

CORAM:	**MATHABA J**
Heard on:	**14th and 15th February 2022**
Order Pronounced on:	**15th February 2022**
Argument on costs:	**14th April 2022**
Reasons provided on:	**29th April 2022.**

Summary

Urgent applications – self created urgency – application for temporary interdict without proper notice – litigation involving termination of fuel supply agreement – applicant being aware of the impugned notice of termination of the agreement three months before institution of urgent application – applicant failing to account for the delay in the founding papers – elements of interdict discussed – failure to satisfy elements of interdict - interim relief refused.

Costs on attorney and client scale – Institution of urgent application on one court day notice despite the request for proper notice by the respondent two months before the urgent application was instituted – Applicant's conduct objectionable – Costs on attorney and client scale ordered.

Costs de bonis propriis – grounds discussed – the notice of motion in breach of rule 8(7) and 8(8) of High Court Rules 1980 without justification and despite repeated warnings from the Court of Appeal and the High Court – Court file having countless blank pages, thus making reading experience cumbersome – Legal practitioners negligent in a serious degree by abdicating their responsibility to ensure the file was court ready – legal practitioners conducted themselves in a manner deserving of punitive costs. .

Annotations:

Cited Cases:

Lesotho

Abel Moupo Mathaba & Others v Enoch Matlaselo Lehema & Others 1993 – 1994 LLR & LB 402

Afro-Asia Engineering v MPP Holdings (Pty) Ltd [2021] LSHC 116

Bataung Chabeli Construction (Pty) Ltd v Road Fund (C of A (CIV) 34/2020 [2021] LSCA 17

Felleng 'Mamakeka Makeka v Africa Media Holdings C/O Lesotho Times and 2 Others CCA/0085/2021 [2021] LSHC 8

Highlands Water Venture v D.NC Construction (Pty) Ltd CIV/APN/ 123 and 124 of 1994

Hippo Transport (Pty) Ltd v Afrisam Lesotho (Pty) Ltd and Others (C of A (CIV) No. 44/2016) [2017] LSCA

Hippo Transport (Pty) Ltd v The Commissioner of Customs and Excise and One C of A (CIV) No. 06/2017

Leloli Trading (Pty) Ltd v Mafeteng District Council and 5 others CCA/0074/2021 [2022] LSHC 11

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

Makoala v Makoala (C of A (CIV) 04/09) [2009] LSCA 3

Selemela Construction (Pty) Ltd v Road Fund & 2 Others CCA/0084/2021 [2021] LSHC 136

South Africa

Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd 1993 (1) SA 853(C)

Eriksens Motors (Welkom) Pty Ltd v Protea Motors (Warrenton) 1973 (3) SA 685 (A)

Gool v Minister of Justice and Another 1955 (2) SA 682 (C)

Luna Meubel Vervaardigers (Edms) V Makin and Another (t/a) Makin's Furniture Manufacturers) 1977 (4) SA 135 (W)

Port Nolith Municipality v Xhalisa and Others 1991 (3) SA 98 (C)

Rautenbath v Symington 1995 (4) SA 583 (O).

Scriven Bros v Rhodesian Hides & Produce Co. Ltd and Others 1993 (1) SA 393

Setlogelo v Setlogelo 1914 AD 221

Simon No v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA)

South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board and Others 2009 (1) SA 565 (CC)

Stern and Ruskin, NO v Appleson1951 (3) SA 800

Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic f South Africa and Others 1992 (2) SA 279 (T)

V & A Waterfront Properties (Pty) Ltd and One v Helicoper & Marine Services (Pty) Ltd and Others Case No. 392/2004 [2006] 3 All SA 523 (SCA)

V & A Waterfront Properties (Pty) Ltd and One v Helicoper & Marine Services (Pty) Ltd and Others Case No.818/2004 [2004] 2 All SA 664 (C)

Webster v Mitchell 1948 (1) SA 1186 (W)

REASONS FOR JUDGMENT

INTRODUCTION:

[1] The applicant approached this Court on an urgent basis for the following reliefs: -

> *"1. Dispensing with the ordinary Rules that govern the modes and times of service in the proceedings before this Honourable Court.*
>
> *2. A rule nisi be issued and made returnable on the time and date to be determined by the Honourable Court, calling upon the Respondents to show cause if any, why the following prayers shall not be made final or absolute to wit: -*
>
> *2.1 Declaring that clause 18.5 of the Fuel Supply Agreement be declared invalid, unenforceable, unreasonable and unconscionable.*
>
> *2.2 That the First Respondent's decision to terminate the Fuel Supply Agreement be stayed and/or held in abeyance pending finalization of the Arbitration proceedings pending before the Second Respondent or any appointed Arbitrator.*
>
> *2.3 That the First Respondent be interdicted and restrained from engaging another supplier pending finalization of the Arbitration*

proceedings pending before the Second Respondent or any other Arbitrator.

2.4 Interdicting and restraining the First Respondent from purchasing or receiving fuel from any party other than Applicant pending finalization of the Arbitration proceedings pending before the Second Respondent or any other Arbitrator in line with Clause 21.4 of the Fuel Supply Agreement.

3. Costs of suit at an attorney and client scale.

4. Granting Applicant such further and/or alternative relief.

5. That prayers 1, 2, 2.1, 2.2, 2.3 and 2.4 herein should operate with immediate effect as interim relief pending finalization hereof."

[2] The application was lodged on the 10th February 2022 and set down to be moved on the 14th February 2022. The first respondent strenuously opposed the application. The applicant was represented by Adv. *T. Tsabeha* who appeared with Mr. *A. Kleingeld.* The first respondent was represented by Adv. *J. Roux SC.*

[3] The application was heard on the 14th and the 15th February 2022 where the applicant pursued all the prayers except prayer 2.1. Having heard the parties, I made the following *ex tempore* judgment at 22h30 on the 15th February 2022:

3.1 that prayers 1, 2.2, 2.3, 2.4 are refused and the application is dismissed as far as it relates to interim relief;

3.2 that the application is removed from the roll of urgent matters;

3.3 that since the first respondent's Counsel was insisting on punitive costs and had already addressed the Court, a date will be arranged for the applicant 's Counsel to address the Court on the same issue.

[4] I gave brief reasons underlying my decision and promised to provide comprehensive reasons once I have heard the parties on costs. Adv. *Roux* had addressed me extensively on why I should impose costs *de bonis*. Mr. *Kleingeld* and Adv. *Tsabeha* needed sufficient opportunity as well to address me. Argument on costs was therefore arranged to proceed on the 10th March 2022 at 14h30.

[5] However, just before the matter could proceed on the 10th March 2022, the applicant terminated the mandate of Kleingeld Mayet Attorneys and appointed K.J Nthontho Attorneys. The latter instructed Adv. *M. Ramaili SC* who was not ready to proceed with the matter and asked for a postponement. I was told that besides the applicant, Adv. *Ramaili* was also going to represent Adv. *Tsabeha*. Attorney Kleingeld had appointed Adv.*A. Bester SC*. The matter was postponed to the 28th March 2022 with costs of the day being awarded to the first respondent against the applicant.

[6] In the meantime, the applicant filed a notice of withdrawal of the application indicating that it will abide the decision of the Court on costs. Argument on costs was eventually heard on the 14th April 2022 with attorney Kleingeld represented by Adv. *Bester SC*, Mr. *Tsabeha* appeared for himself while Adv. *Roux SC* represented the first respondent. With the withdrawal of the application, K.J Nthontho Attorneys as well as Adv. *Ramaili* disappeared from the picture.

BACKGROUND:

[7] I must at the outset indicate that the founding affidavit has been awfully prepared. It is characterised by serious omissions of material dates when events relevant to this application took place. These dates only appear in the annexures without having been set out in the founding affidavit. As a result,I only refer to the dates for completeness of this judgement. It is trite that a litigant in motion proceedings must rely on facts alleged in the affidavit and not on annexures only.

[8] The applicant and first respondent entered into a written fuel supply agreement dated May 2018. The agreement was for the supply and delivery of fuel by the applicant to the first respondent. There were three addendums to the agreement, the latest being signed by the parties on the 10th February 2020.

[9] The duration of the contract was four years. However, according to the applicant ‘s heads of argument, the period of four years was changed to five years by the parties. This fact does not appear in the founding affidavit.

[10] The first respondent discovered massive theft of diesel during the subsistence of the agreement. The location where theft occurred and who the suspects were can only be gathered from the annexures to the founding affidavit. The first respondent commissioned forensic investigations during or about July 2021 and later roped in Ernst & Young to carry over the investigations.

[11] On the 22nd October 2021 the first respondent suspended the services of the applicant with effect from midnight on Sunday the 24th October 2021. The reason for the suspension is not disclosed in the founding affidavit. It can only

be gathered from the annexures to the founding affidavit. The suspension was uplifted on the 5th November 2021 following engagement of the parties through their attorneys. Further information was requested from the applicant by the respondent to enable investigations.

[12] On the 9th November 2021 the first respondent terminated the fuel supply agreement by invoking clause 18.5 of the agreement. The clause makes provision for no fault termination on three months written notice. As a result, the applicant was given three months written notice of termination which was to end on the 15th February 2022.

[13] In terms of the notice of termination the applicant was notified that "the remaining three – month period of the Agreement will commence on 15 November 2021, thus meaning that the Agreement shall terminate, as a result of this notice, at midnight, 15 February 2022". It is for this reason that I had to give my decision on the interim reliefs at 22h30 on the 15th November 2022. This date signified the end of the contract between the parties.

[14] The applicant wrote a letter to the President of the Law Society asking him to appoint the arbitrator to deal with the dispute between the parties regarding termination of the fuel supply agreement.

[15] Two material dates have not been disclosed in the founding affidavit. That is the date on which the notice of termination was received by the applicant from the respondent and the date when the letter requesting the appointment of arbitrator was written to the President of the Law Society. The dates are the 9th November 2021 and the 28th January 2022, respectively, but they only appear in the annexures.

[16] The second respondent was appointed as arbitrator and the first respondent was notified of the appointment. According to the applicant, the first respondent objected to the appointment of the second respondent as well as the pre – arbitration meeting which the latter proposed. However, this is not borne out by evidence. Rather the first respondent sought clarification on the appointment of the second respondent as it contended that the appointment ought to follow AFSA Commercial Rules of Arbitration and it also queried a one-day notice to attend pre-arbitration meeting.

[17] On the 10th February 2022 the applicant instituted the instant proceedings on the ground that the first respondent acted with mala fide when it invoked no fault termination clause and asserts that the clause is unenforceable, unjust and unreasonable. The applicant wanted the Court to suspend the termination of the agreement pending finalisation of the arbitration and give full effect to clause 21.4 of the agreement. Once again, the applicant had not explained in the founding affidavit what clause 21.4 was all about or even disclosed its import.

[18] Before I deal with points *in limine* that were raise by the first respondent, the following must be said. The founding affidavit, inclusive of annexures, in *casu* is 221 pages long. Since the application was lodged on the 10th February 2022, I was only able to consider the founding papers during the weekend preceding the date of hearing. However, just before the case was called at 09h30 on the 14th February 2022, I was presented with 176 pages long answering affidavit. This necessitated the matter to be stood down to 15h00 the same day to enable me to consider the answering papers.

[19] However, before the matter was stood down, Mr.*Kleingeld* sought a postponement to the 16th February 2022 for the applicant to file its replying affidavit. When I pointed out to him that the agreement between the parties

would have terminated by then, he moved the court to grant the interim interdict in the meantime.

[20] The request for interim interdict was opposed by Mr. *Roux.* He argued that the Court should first consider the answering affidavit. He emphasized that horses would have bolted by the 16th February 2022. Mr. *Tsabeha* weighed in and stated that the applicant was no longer insisting on the interim relief in terms of prayer 5 in the notice of motion. However, realizing the risk the applicant was running if the Court would not have pronounced itself on the interim reliefs by the 15th February 2022, Mr. *Tsabeha* backtracked and indicated that the only prayer which the applicant was not going to pursue in the interim was prayer 2.1 in the notice of motion. This is the prayer in terms of which the Court was asked to declare clause 18.5 of the fuel supply agreement invalid, unenforceable, unreasonable and unconscionable.

POINTS IN *LIMINE:*

[21] I now turn to the points in *limine* that were raised by the first respondent. The appropriate procedural step is to first consider the point relating to jurisdiction. However, a different approach was adopted in *casu*. I was pressed for time to deliver my ruling on the interim relief before twelve midnight. As a result, the point relating to jurisdiction was not considered.

[22] There was not enough time to research and consider this point for immediate determination. Both parties called my attention to the decision of the Court of Appeal in **BataungChabeli Construction (Pty) Ltd v Road Fund** (C of A (CIV) 34/2020 [2021] LSCA 17 (14 May 2021). However, I am also aware that, the agreement between the parties to resolve their dispute through arbitration does not necessarily mean that this Court will invariably stay the proceedings in order to give arbitration a chance. *See:* **Afro-Asia Engineering**

v MPP Holdings (Pty) Ltd [2021] LSHC 116 Com (26 October 2021). I therefore assumed, without necessarily deciding, that this Court has jurisdiction over this matter, especially to consider the interim relief.

URGENCY AND LEGALLY UNTERNABLE RELIEFS:

[23] Mr. *Roux* submitted that this is a case of self – created urgency in that, since 9th November 2021 when the notice of termination was issued, the applicant only approached the Court on an urgent basis on the 10th February 2022, three months after notice of termination was issued. The first respondent was served with the application approximately at mid-afternoon on Thursday the 10th February 2022, to be heard on Monday the 14th February 2022, thus leaving the first respondent with one court day notice within which to consider, investigate and properly prepare its case, so Mr. *Roux* contended.

[24] It was further argued that the timelines were unreasonably truncated as a result of which it was humanly impossible to comprehensively deal with such a voluminous application with far reaching relief being sought. According to Mr. *Roux*, that is tantamount to giving the other party no notice. He submitted that the first respondent had previously warned the applicant that if urgent proceedings were envisaged, it required timeous notice and ample time within which to oppose and properly respond to avoid undue prejudice. As a result, so it was argued, failure to give the first respondent reasonable time to prepare its opposition was tantamount to abuse of court process and must attract costs at a punitive scale.

[25] Mr. *Roux* proceeded further to attack prayers 2.2, 2.3 and 2.4 on the ground that they were legally untenable. He strenuously argued that prayer 2.2 is untenable because the decision to terminate the agreement had already been made and that once the decision to terminate is taken, it is final. Consequently,

so it was argued, the Court cannot substitute a decision to terminate with a stay of such termination. He submitted further that prayers 2.3 and 2.4 were ancillary to prayer 2.2 which is not only legally untenable, but which is not within the jurisdiction of this Court.

[26] For his part, Mr. *Tsabeha* argued that the matter is urgent. In a meticulous and chronological order, Mr. *Tsabeha* provided a chain of events, with clear dates when those events happened, from the time the applicant received the termination letter until the 9th February 2022. He submitted that the applicant took reasonable steps to invoke dispute resolution mechanism provided for in the agreement before coming to Court, but the first respondent was not cooperative. Based on the decision in **Makoala v Makoala** (C of A (Civ) 04/09) [2009] LSCA 3 (09 April 2009), Mr. *Tsabeha* argued that in determining the points in *limine* raised by the respondents, the Court should only consider the applicant's affidavit.

[27] Mr. *Tsabeha* dealt with the requirements of temporary interdict which he submitted were met. He asserted that interdict sought by the applicant was in line with clause 21.4 of the agreement which does not relieve parties of their obligations when there is a dispute. Since there was arbitrable dispute referred to arbitration, so Mr. *Tsabeha* contended, clause 21.4 of the agreement was applicable, thus justifying prayer 2.4 in the notice of motion.

ANALYSIS:

URGENCY

[28] The requirements attendant upon the bringing of an urgent application in our jurisdiction are not controversial. However, notwithstanding repeated warnings from this Court, as well as the Court of Appeal, non – compliance with these requirements remains rampant. It seems that when it comes to urgent

applications, some legal practitioners completely forget that there are rules still to be observed.

[29] In this regard, rule 8(22) becomes important. The Rule provides as follows:

> *"(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure as the court or judge may deem fit.*
>
> *(b) 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 an hearing in due course if the periods presented by this Rule were followed."*

[30] The question whether the matter has to be enrolled and heard as an urgent application is underpinned by two considerations, (a) a factual finding that the matter is indeed urgent, not only because the applicant says so, and (b) the issue of absence of substantial relief in a hearing in due course. The import therefore is that the procedure set out in rule 8(22)(b) is not there for the taking. The applicant must provide details of the circumstances which he avers render the application urgent as well as demonstrating the absence of a substantial relief in a hearing in due course.

[31] The applicant is generally still required in terms of rule 8(8) to give notice of his application to the respondent and indicate within which period, not being less than five days, when the respondent must notify the applicant of his intention to oppose the matter. Again, in terms of rule 8(7), the applicant is

required to use form J of the first schedule to the rules, unless when the application is brought *ex parte*. Urgency *per se* does not relieve a party from following the rules and using appropriate forms. In the result, the applicant is therefore allowed, even before instituting his case, to consider the degree of urgency accompanying its case and thereafter to design a timetable for the filing of papers which is commensurate with the degree of urgency.

[32] In **Luna MeubelVervaardigers (Edms) V Makin and Another (t/a) Makin's Furniture Manufacturers)** 1977 (4) SA 135 (W) at page 137 E- G the Court said that:

> *"Practitioners should carefully analyse the facts of each case to determine, for the purpose of setting the case down for hearing, whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. ... [A]n applicant must make out a case in the founding affidavits to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."*

[33] It means that in truncating time period for filing a notice of intention to oppose and answering affidavits, the applicant may only deviate from the form of service provided for in the rules to the extend necessary. Taking into account the harm that he wants to forestall, the applicant must strike a balance between his interest to have the matter heard on urgent basis and the respondent's right to be heard before prejudicial orders are issued against him.

[34] The applicant must therefore ask himself why his case is more deserving of being heard urgently *vis a vis* other cases that are already in the queue and consider that judicial officers are already overburdened. This

therefore requires rigorous consideration of the facts and balancing of varying interests. It does not end there – facts justifying urgency must then be presented in detail for the court to appreciate that the matter indeed warrants its urgent intervention.

[35] Without belaboring the point, a feature of this application is that rule 8(7) was not followed inasmuch as form J has not been used. Again, contrary to rule 8(8) nowhere does the applicant make a provision for the respondent to notify it of its intention to oppose the matter. A complaint by the respondent that it was given only one court day within which to consider, consult and properly prepare its case is justifiable. For practical purposes, the extremely short notice given to the respondent in *casu* amounts to no notice at all.

[36] The respondent had one court day to go through 221 pages long affidavit and be ready to argue at 09h30 on the 14th February 2022. I agree with the deponent to the answering affidavit that it could not have been humanly possible for the respondent to comprehensively deal with the application. The situation is exacerbated by the fact that the respondent had asked the applicant to give it sufficient notice in the event of it approaching courts of law.

[37] In **Mahlakeng and Others v Southern Sky (Pty) Ltd and Others** LAC (2000 -2004) 742 at 749 *Steyn P* said the following in circumstances where the respondents were given unjustifiably short notice just like in the instant case:

> *"The Court of Appeal has in numerous judgments given over the past two decades, deprecated the practice of seeking and granting orders which affect the rights of others in the absence of timeous and proper notice to those affected by such an order. The granting of such orders*

without timeous notice is a serious breach of the audi alteram partem principle for which there is no justification. (See Khaketla v Malahleha and Others LAC (1990 -94) 275 at pp 279 I – 281 A, perAckermann JA. See also Lesotho University Teachers' and Researchers' Union v National University of Lesotho LAC (1995 – 99) 661 at pp 670H-672C; 1999-2000 LLR – LB 52 (CA) at pp. 60-63. (A punitive costs order was made because of the improper procedures adopted.)"

[38] There is no explanation why a proper form was not used. Neither is there explanation why the respondent was not given proper and sufficient notice to consider the case and prepare itself. I have gathered from the annexed notice of termination that it was issued on the 9th November 2021. The applicant does not explain in the founding affidavit why it only came to this Court on the 10th February 2022, three months after the notice of termination was issued. Instead, the applicant dedicated its time and energy in telling the Court about its interaction with the respondent concerning the forensic investigations and not on the steps it took since it received the notice of termination. Important and relevant facts that should have been pleaded in the founding affidavit only surfaced in Mr. *Tsabeha*'s heads of argument. That is clearly not evidence.

[39] I pointed out to Mr. *Tsabeha* during argument that the first material omission in the founding papers is that the applicant does not disclose the date when it received the notice of termination. Neither is the date when the applicant approached the President of Law Society to appoint arbitrator disclosed in the affidavit. The relevant annexure in this regard is dated the 28th January 2022. Indeed, it was only during argument and absent factual allegations in the founding affidavit that the applicant sought to rely on the annexures.

[40] The applicant must justify its claim based on the facts alleged in the founding affidavit. It is not permissible for the applicant to rely on the contents of an annexure without any factual basis laid in the founding affidavit. An annexure to an affidavit is not an integral part thereof. *See*: **Hippo Transport (Pty) Ltd v Afrisam Lesotho (Pty) Ltd and Others** (C of A (CIV) No. 44/2016) [2017] LSCA page 4; **Port Nolith Municipality v Xhalisa and Others** 1991 (3) SA 98 (C) at 111A-E; **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic Of South Africa and Others** 1992 (2) SA 279 (T) at 324F-G.

[41] I accept that the delay in instituting proceedings is not, on its own, a ground for refusing to regard the matter as urgent. Though the delay may indicate that the matter is not urgent, it is not a decisive factor. However, viewed objectively, I agree with the respondent that this is a case of self – created urgency. The applicant was clearly dilatory in instituting this case and no explanation has been provided for the delay. It bears emphasizing that this Court cannot rely on facts that emerge only in the annexures and applicant ‘s heads of argument when those facts have not been alleged and set out in the founding affidavit. The hearing of this matter on Monday the 14th and the 15th February 2022 was a material inconvenience to the Court and the respondent. This was due to its timing and the manner in which it was prepared and handled. I had to prepare for the motion court for Tuesday the 15th February 2022 as well as for this case. I am not even sure how the respondent managed to go through the voluminous founding papers and ensured that its answering affidavit and heads of argument were filed on time.

[42] Again, it is not even clear why the applicant will not be afforded a substantial redress in a hearing in due course or at the arbitration proceedings, particularly when arbitration provisions survive termination. See: **Scriven Bros**

v Rhodesian Hides & Produce Co. Ltd and Others 1993 (1) SA 393. The applicant will be free to claim damages. The applicant has failed to meet the relevant requirements for urgency under rule 8(22)(b) of High Court Rules 1980. For this reason and the reasons set out above, I am not in inclined to grant the prayer that the matter be heard of an urgent basis.Given that I allowed the parties to argue the issue of urgency as well as interim interdict, my finding relevant to urgency will have significance on the outstanding prayer which the applicant deferred.

TEMPORARY INTERDICT:

[43] Prayers 2.2, 2.3 and 2.4 are about interim interdict. It is trite that the requirements for an interim interdict are the following:

i. a prima facie right, although open to some doubt;
ii. a well -grounded apprehension of irreparable harm if interim relief is not granted and ultimate relief is eventually granted;
iii. the balance of convenience favours the granting of the interim interdict; and
v. the applicant has no other satisfactory remedy.

See: **Webster v Mitchell 1948** (1) SA 1186 (W);**Smally Trading Company t/a Smally Uniform & Protective Clothing v Lekhotla Matsaba and Ten Others** C of A (CIV) 17/2016;**Attorney General & Another v Swissbourgh Diamonds Mines (Pty) Ltd and Others** LLR & LB 1995 – 1996 173 at 183

[44] These requirements must not be assessed separately or in isolation, but in conjunction with one another. *See*: **Eriksens Motors (Welkom) Pty Ltd v Protea Motors (Warrenton**) 1973 (3) SA 685 (A) at 691 (F); **Selemela Construction (Pty) Ltd v Road Fund & 2 Others** CCA/0084/2021 [2021]

LSHC 136 COM (26 November,2021). Given the outcome I reach in this matter, I need not discuss the requirements in detail.

[45] Mr. *Tsabeha* made a vain attempt to convince me that the applicant has established a clear right to the relief sought as set out in clause 21.4 of the agreement between the parties. As a result, so it was argued, the applicant was not required to establish other requirements of temporary interdict since the applicant was in essence seeking specific performance. Reliance was placed in this regard on **V & A Waterfront Properties (Pty) Ltd and One v Helicoper& Marine Services (Pty) Ltd and Others** Case No. 392/2004 [2006] 3 ALL SA 523 (SCA) and **V & A Waterfront Properties (Pty) Ltd and One v Helicoper& Marine Services (Pty) Ltd and Others** Case No.818/2004. [2004] 2 ALL SA664 (C).

[46] The argument that in a case for prohibitory interdict based on a clear contractual right an applicant is in reality seeking specific performance and is not required to establish other requirements of interdict was first raised when leave to appeal was applied for in the latter case. The point was not decided. Equally, the point was not determined on appeal in the former case because it was unnecessary to do so with the Supreme Court of Appeal having found that the appellant met the requirements for interdict.

[47] Conversely, relying on **Stern and Ruskin, NO v Appleson**1951 (3) SA 800 at 813, Mr. *Roux* submitted that it was only in claims for vindicatory or quasi – vindicatory that the applicant is not required to prove for instance actual or well-grounded apprehension of irreparable loss. Again, even in the seminal case **of Setlogelo v Setlogelo**1914 AD 221 at page 227 all that the Court said was that –

> *"The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well – known passage in Van der Linden's Institutes where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt."*

[48] In the context of interim interdict what the applicant is required to establish is *prima facie* right in addition to other requirements. The correct test in adjudicating *prima facie* right is to take the facts averred by the applicant, together with those facts put up by the respondent that are not or cannot be disputed and consider whether, having regard to inherent probabilities, the applicant should obtain a final relief on those facts at the trial. The facts set up in contradiction by the respondent should be considered and if serious doubt is thrown upon the case of the applicant, he cannot succeed. *See*: **Gool v Minister of Justice and Another** 1955 (2) SA 682 (C) at 688B-F; **Simon No v Air Operations of Europe AB and Others** 1999 (1) SA 217 (SCA) at 228 G.

[49] The requirement was demystified even further in **Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd** 1993 (1) SA 853(C) at 856 where the Court said that "*is the expectation of securing relief which, if it prima facie appears to be legitimate, is entitled to protection*".

[50] I am of the view that the applicant has failed to establish even a *prima facie* right, though open to some doubt. The applicant relies on clause 21.4 of the agreement for its *prima facie* right. The main obstacle for the applicant is that it has not, in its founding affidavit, pleaded this clause or told this Court what the clause is all about, neither has it quoted the clause. The clause only

appears in the annexed agreement between the parties, but its content has not been provided in the founding affidavit.

[51] Even if I were wrong in concluding that the applicant cannot rely on this clause when it has not been pleaded, the clause does not support the applicant ‘s case. It reads as follows:

> *“The existence of any Dispute under this Agreement or the pendency of the dispute settlement or resolution procedures set forth herein shall not in and of themselves relieve or excuse either Party from its ongoing duties and obligations under this Agreement, and Supplier shall nevertheless proceed with the performance of the Services*”.

[52] I am of the view that once the agreement is terminated, clause 21.4 also falls by the wayside. Granting the prayers sought on the strength of clause 21.4 would have the effect of forcing the respondent to buy fuel from the applicant even when the parties no longer have a contractual relationship. This will render clause 18.5, the clause under which the agreement was terminated, nugatory. The relationship between the parties is coming to an end on the 15th February 2022 at midnight. Clause 21.4 only remains applicable and relevant when the contract is still intact.

[53] Besides, in terms of clause 2.2 of addendum No. 2 of 2019 of the agreement, the respondent has a right, in its sole discretion, to buy two million five hundred thousand litres of fuel per annum from other suppliers. Forcing it to buy fuel only from the applicant would be contrary to this clause.

[54] Another insurmountable hurdle is that I do not see the applicant being successful in obtaining a final relief before this Court. The applicant wants clause 18.5 to be declared invalid, unenforceable, unreasonable and unconscionable, without providing detailed facts on the basis of which this

Court could infer these abstract legal terms and arrive at a conclusion. In short, no factual basis has been laid by the applicant to sustain its case in this regard. It was the applicant ‘s duty to establish facts from which such abstract legal terms could be inferred. It is common cause that the parties had agreed on a no-fault termination clause. It is not the applicant ‘s case that the respondent’s right to terminate the agreement under clause 18.5 was subject to certain qualifications or procedural steps that were not observed by the respondent. I therefore have serious doubt about the applicant ‘s case in the main or at the arbitration. Its prospects of success are slim.

[55] As far as the absence of other satisfactory remedy is concerned, all that the the applicant says is that it does not have alternative remedies. As a prelude to this conclusion, the applicant indicated that the arbitration process envisaged in the agreement cannot commence before the anticipated termination date of the 15th February 2022.

[56] Firstly, I do not agree with the conclusion that the applicant does not have alternative remedies simply because the contract would have terminated by the time arbitration proceedings commence. Secondly, if the applicant is successful in its attack on the termination of the agreement, it will have no difficulty in quantifying the damages it suffered as a result of termination. This will be in a form of profits it would have made had the agreement not been terminated. I was not told why it would not be possible to sue for damages and to recover them from the first respondent. It followed therefore that the application for interim reliefs had to fail. These are therefore my reasons for the order I made on the 15th February 2022 as it appears in paragraph 3 above.

ARGUMENTS ON COSTS:

[57] The first respondent first moved the Court in its answering affidavit to dismiss the application with punitive costs on a scale as between attorney and own client *de bonis propriis*, alternatively punitive costs on the scale as between attorney and own client including those costs consequent upon employment of senior counsel.

[58] The main complaint was that the applicant abused court process in that when it launched the application three months after the notice of termination, it unreasonably truncated timelines for the respondents to oppose the application. The applicant's legal representatives had been on record since the early parts of the impasse between the parties, they are a part of this abusive process, so contended the first respondent.

[59] The grounds were expanded to include the following:

59.1 the first respondent had advised the applicant of proper interpretation of the no fault termination clause and had its advised been heeded, litigation would have been avoided;

59.2 the applicant lacked bona fide in that it did not disclose certain correspondence by the respondent or its attorney, directed at either the applicant or its legal representative;

59.3 Mr. *Tsabeha* mislead the Court by creating the impression that the first respondent was obstructive to arbitration inasmuch as it refused to attend the first hearing called by the arbitrator whereas the true position is that the first respondent was not obstructive, it only sought clarification

on the appointment of the second respondent and queried one day notice to attend the meeting. In addition, the meeting was instigated by Kleingeld & Mayet and it was pre-arbitration meeting.

59.4 Heads of argument filed by Mr. *Tsabeha* were not compliant with the directives of this Court in that at the back of repetitive invitations by the Court to counsel to deal with the case made out in the affidavit and not the annexures, counsel still relied on annexures and the heads were repetitive of arguments already advanced on day one;

59.5 During argument Mr. *Tsabeha* misled the Court in relying on **V & A Waterfront Properties (Pty) Ltd and One v Helicoper& Marine Services (Pty) Ltd and Others,** *supra*, and **V & A Waterfront Properties (Pty) Ltd and One v Helicoper& Marine Services (Pty) Ltd and Others**, *supra*, to advance the proposition that once clear right was establish, the applicant was not required to demonstrate other requirements of interdict as in essence, its claim was that of specific performance, while that point was not decided in both decisions.

Costs at attorney and client scale

60. In **Hippo Transport (Pty) Ltd v The Commissioner of Customs and Excise and One** C of A (CIV) No. 06/2017, the Court of Appeal quoted with approval the decision in *Ward v Sulzer 1973 (3) SA 701 (A)* where at pages 706 to 707 *Holmes JA*, as he then was said the following:

"In general, the basic relevant principles in regard to costs may be summarised as follows:

1. *In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides. See Gelb v Hawkins, 1960 (3) SA 687 (AD) at p. 694A; and Graham v Odendaal, 1972 (2) SA 611 (AD) at p. 616. Ethical considerations may also enter into the exercise of the discretion; see Mahomed v Nagdee, 1952 (1) SA 410 (AD) at p. 420 in fin.*

2. *The same basic principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs; see Nel v Waterberg Landbouers Ko-operatieweVereniging, 1946 AD 597 at p. 607, second paragraph. Moreover, in such cases the Court's hand is not shortened in the visitation of its displeasure; see Jewish Colonial Trust, Ltd. v Estate Nathan, 1940 AD 163 at p. 184, lines 1 - 3.*

2. *In appeals against costs the question is whether there was an improper exercise of judicial discretion, i.e., whether the award is vitiated by irregularity or misdirection or is disquietingly inappropriate. The Court will not interfere merely because it might have taken a different view.*

3. *An unsuccessful appeal against an order involving costs on the basis of attorney and client does not necessarily entitle the respondent to the costs of appeal on the same basis. A Court of appeal must guard against inhibiting a legitimate right of appeal, and it requires the existence of very special circumstances before awarding costs of appeal on an attorney and client basis; see Herold v Sinclair and Others, 1954 (2) SA*

531 (AD) at p. 537. The decision also indicated the undesirability, in that case, of elaborating on the generality of the expression 'very special circumstances'. Without seeking to limit it, I think it safe to say that relevant considerations could include, amongst others, the degree of reprehensibility of the appellant's conduct, the amount at stake, and his prospects of success in noting an appeal, whether against the main order or against the special award of costs with its censorious implications."

[61] Again, costs at attorney and client scale are granted in instances where proceedings are an abuse of court process, where there is no bona fides in conducting the litigation or for litigant's objectionable behaviour. *See:* **Abel Moupo Mathaba & Others v Enoch MatlaseloLehema& Others** 1993 – 1994 LLR & LB 402 at 452.

[62] Applying the above principles to the facts in *casu*, it is my considered view that the applicant was not only dilatory, but it exhibited objectionable behaviour in instituting this case. When it so instituted the case after three months from the time it was served with notice of termination, the applicant gave the respondent one court day to deal with 221 pages long founding papers. This is exacerbated by the fact once it sensed that the dispute might escalate into litigation, the respondent had asked the applicant to afford it proper notice. There are no facts from which to infer *mala fide* stratagem by the applicant and his legal team as suggested by Mr. *Roux*. However, the applicant 's conduct was clearly objectionable and should not be countenanced.

[63] I am convinced that this is a matter warranting costs on attorney and client scale including those consequent upon the employment of senior counsel. It was not contested that the employment senior counsel was not necessary. In

fact, the matter was of a serious nature for the parties so as to justify employment of senior counsel.

Costs de bonispropriis against Counsel and Attorney

[64] In **South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board and Others** 2009 (1) SA 565 (CC) at para 54, the court indicated that –

> *"An order of costs de bonispropriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs de bonispropriis on the scale as between attorney and client. The order is made against the office of the State attorney, not personally against the attorney concerned. This court's displeasure is primarily directed against the office of the State Attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate".*

[65] The Court 's discretion to award costs *de bonis propriis* is not restricted to cases of dishonest, improper or fraudulent conduct and that no exhaustive list existed. The discretion includes all cases where special circumstances or considerations justify such an order. *See*: **Rautenbath v Symington** 1995 (4) SA 583 (O).

[66] I have not found the basis for the suggestion that the legal practitioners were complicit in a stratagem to delay institution of these proceedings and then give the respondent one court day notice when the proceedings were so instituted. Neither have I found that there was such a

stratagem. I accept that it could not have taken the applicant a day or two to prepare its founding papers.

[67] In fact, according to Mr. *Kleingeld*, he was informed by the applicant's representatives on the 7th February 2022 when he had a meeting with them that the application was already being prepared by another legal team which he was instructed to join. Be that as it may, there are no facts to support an inference that the founding papers in this matter were already prepared on the 28th January 2022 when the dispute was referred to arbitration as suggested by Mr. *Roux*. Mr. *Kleingeld* explained in his affidavit that he only got engaged in the matter on the 7th February 2022 when Messrs *Tsabeha* and *Molapo* had already prepared the founding papers. Again, the exact stage at which Mr. *Tsabeha* got engaged in the matter is not known to this Court for it to infer that he then devised the devious stratagem with the applicant or joined it.

[68] I am not able to find an improper conduct or any special consideration to warrant imposition of a costs order against the legal representatives regarding the delayed institution of these proceedings. I accept that that the application was poorly prepared and presented as the legal practitioners sought to rely on facts that were not canvased in the founding papers but appear only in the annexures. Again, nothing better demonstrates inexperience than counsel commissioning his own client's affidavit as Mr. *Tsabeha* did. I have also not found any malice or bad faith on the side of the applicant itself in the institution of these proceedings. Again, this was not a meritless or sterile application. I have already explained the reasons why it is nonetheless appropriate to impose costs at attorney and client scale on the applicant.

[69] Again, I cannot readily find that that Mr. *Tsabeha* wanted to mislead this Court when he relied on **V & A Waterfront Properties (Pty) Ltd and One v**

Helicoper& Marine Services (Pty) Ltd and Others, *supra,* and **V & A Waterfront Properties (Pty) Ltd and One v Helicoper& Marine Services (Pty) Ltd and Others**, *supra,* to advance the proposition that once a clear right was establish, the applicant was not required to demonstrate other requirements of interdict as in essence, its claim was that of specific performance. In both cases the point was discussed but not decided. I am prepared to accept that due to the excessive pressure under which he had to prepare for argument, Mr. *Tsabeha* did not read the cases properly to appreciate that though the point was discussed in both cases, it was not decided. This is not the kind of negligence warranting special costs against counsel.

[70] Just to demonstrate that mistakes do happen when counsel work under excessive pressure. In his concluding remarks on costs *de bonis* on the 15th February 2022 around 18h00, Mr. *Roux* relied on two decisions which were made by this Court on the 9th February 2022, **Felleng 'Mamakeka Makeka v Africa Media Holdings C/O Lesotho Times and 2 Others** CCA/0085/2021 [2021] LSHC 8 COM (9th February, 2022) and **Leloli Trading (Pty) Ltd v Mafeteng District Council and 5 others** CCA/0074/2021 [2022] LSHC 11 COM (9thFebruary, 2022).

[71] Counsel did not provide full citation, but he clearly mentioned both decisions and the date on which they were made by this Court. I have no doubt that he was referring to the two cases. While counsel was correct that the first case dealt with costs *de bonis*, the latter case did not deal with costs *de bonis* at all. In fact, the order I made there was that "costs of this application be costs in the cause". I am not going to adopt armchair critic approach and readily assume that Mr. *Roux* wanted to mislead me. It is highly likely that he simply relied on the person who he said was getting him the cases as he was addressing me. Inasmuch as there is an element of negligence on the part of Mr. *Roux* in this

regard, I have to take into account the circumstances under which submissions were made and resist even the slightest temptation to impose cost *de bonis* on him. More tellingly, unlike with Mr. *Tsabeha*, the case did not discuss the point at all.

[72] I am aware of the interpretation that the respondent gave clause 18.5 of the agreement and that this was shared and explained in detail to the applicant. The applicant and its legal practitioners may have not heeded the interpretation. It could be that is the correct interpretation, but should the legal representatives be punished for holding a different view simply because they were advised of the 'correct' interpretation of the law? I think not. That would not be a correct precedence. While the contested point in this regard was not decided, I do not think the applicant had unarguable case to adopt the suggested approach. I need to clarify, I am not saying the applicant had a good case, but I am saying it was not meritless or sterile.

[73] Misrepresentation regarding the position of the respondent in relation to mediation. I accepted the invitation to play audio of these proceedings, in particular to hear what Mr. *Tsabeha* said on this issue. It is correct that what Mr. *Tsabeha* said regarding the reaction of the respondent to arbitration proceedings was likely to create the impression that the respondent was obstructive to the process. Mr. *Tsabeha* was clearly not cautious with the use of words in this regard. Luckily, sufficient information was placed before me to make my own judgment and appreciate the exact nature of the respondent's queries. I am not prepared to accept that Mr. *Tsabeha*'s conduct deserves punitive costs. He may have not accurately described the situation, but I did not discern any motive on his part to mislead the Court.

[74] Failure to disclose certain information. The requirement for disclosure of all material facts, even those that support the respondent, is more rigorous in *ex parte* proceedings. I would have no difficulty to impose cost *de bonis* if these were *ex part*e proceedings. But the respondent in this matter had an opportunity to present its case and brought those factors to the Court's attention. I have already accepted that the respondent was not given adequate opportunity to prepare and present its case, but it had an opportunity to place its case as well as the information that was not provided in the founding affidavit to this Court.

[75] I must comment about the use of wrong form, form I instead of form J, an issue that I brought to the attention of the respondent's legal representative. Mr. *Kleingeld*'s explanation in his affidavit on costs is that this was an oversight due to the urgency of the matter. The Court of Appeal and the High Court of Lesotho have previously warned legal practitioners about the use of wrong forms. *See*: **Mahlakeng and Others v Southern Sky (Pty) Ltd and Others**, *supra* **and Highlands Water Venture v D.NC Construction (Pty) Ltd** CIV/APN/ 123 and 124 of 1994. I maintain that had the proper form been used, which requires applicant to make provision for the respondent to give notice of his intention to oppose, the applicant would have realized that the time given to the respondent to be in court was hopelessly inadequate taking into account that, in addition to the notice of intention to oppose, the respondent would have to file answering papers. Forms and templates are used for a purpose, to guide and force people to do the right thing.

[76] Again, I complained about the preparation of the court file to the applicant 's legal representatives on the first date of hearing. It had been a cumbersome reading experiencing going through the founding papers. On the other hand, it was non optional to consider the papers over the weekend

preceding the 14th February 2022. If I had the option, I could have rejected them, but for the sake of the applicant, I had to endure and consider the papers nonetheless. There were numerous letters attached to the founding papers, but I hardly read one to completion without coming across a blank page in between. Mr. *Kleingeld* 's initial reaction was that blank pages were used as dividers to separate the annexures to make the record reader friendly. I demonstrated to Mr. *Kleigeld* that his explanation was not correct. The explanation which he later provided in the affidavit on costs is that he did not attend to the processing of the founding papers and their filing as the applicant's representatives had promised to attend to that with Mr. *Tsabeha*'s office. This is the reason he did not see that the affidavit was commissioned by Mr. *Tsabeha*, explains Mr. *Kleigeld.*

[77] I am of the view that the legal representatives clearly abdicated their responsibility towards this Court. They remain accountable for ensuring that their files are properly paginated and in order. This, the legal representatives did not do. Again, had they prepared for the date of hearing, they would have realised that the file was not in order and corrected it well before the case was called. Alternately, they would have realised the deficiencies and apologised immediately they address the Court. I had to raise the issue myself.

[78] Taking into account the last two issues, I will be shrinking my responsibilities if I were to let this behaviour slide and not to impose cost *de bonis* on the legal representatives. They were negligent in a serious degree as far as these issues are concerned. As I said, they abdicated their responsibilities. Giving me a new set of founding papers as it was suggested was not going to help as I had already read the papers. Filing papers without ensuring that they are in order is deplorable.

[79] In the light of the conclusions reached above, I make the following order with respect to costs:

ORDER

79.1 That the applicant pays costs of this application on attorney and client scale including those costs consequent upon the employment of senior counsel.

79.2 That Kleingeld Mayet Attorneys and advocate Tsabeha, jointly and severally, the one paying and the other to be absolved, pay 20% of the costs in para 79.1 above

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A.R. MATHABA J
Judge of the High Court

For Applicant: **Adv. T. Tsabeha with Mr. A. Kleingeld.**

For First Respondent: **Adv. J. Roux SC**

For Kleingeld Mayet Attorneys (argument on costs): Adv. A Bester SC