

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0110/2020

In the matter between:

SYMANTECH HOLDINGS

APPLICANT

AND

MACHAI CONSTRUCTION (PTY) LTD

1ST RESPONDENT

**LESOTHO NATIONAL DEVELOPMENT
CORPORATION**

2ND RESPONDENT

`MAMAHE MACHAI

3RD RESPONDENT

MAHE MACHAI

4TH RESPONDENT

Neutral Citation: Symantech Holdings v Machai Construction (Pty) Ltd & Others
[2023] LSHC 54 Comm. (04TH MAY 2023)

CORAM: MOKHESI J
HEARD: 28TH FEBRUARY 2023
DELIVERED: 04TH MAY 2023

SUMMARY

CIVIL PRACTICE AND PROCEDURE: *The applicant failing to make out a case for the reliefs sought- Despite such failure the court relying on the Prayer for ‘Further and/ or alternative relief’ to do justice between the parties ordered that the proceeds be shared equally between the parties in view of the circumstances of the matter- Each party to bear its own costs.*

ANNOTATIONS

Cases

Galp v Tansley, N.O and Another 1966 (4) SA 555 (C.P.D)

Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP)

Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279

JUDGMENT

[1] **Introduction**

The applicant approached this court on an urgent and *ex parte* basis praying for the following reliefs:

“1. Dispensing with the Rules of Court pertaining to periods and modes of service of process owing to the urgency of this matter.

2. That Rule Nisi be and is hereby issued and made returnable on a date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:

(a) The 2nd Respondent shall not withhold any payment due to the 1st Respondent in connection with purchase order 2914 pending final determination.

(b) The 2nd Respondent shall not be ordered to pay to the Applicant a claim in connection with order 2914 to the tune of M245,553.63 (TWO HUNDRED and FORTY-FIVE THOUSAND, FIVE HUNDRED and FIFTY-THREE MALOTI SIXTY-THREE LISENTE).

(c) The 2nd Respondent shall not be ordered to pay to the Applicant M245,553.63 (TWO HUDRED and FORTY-FIVE THOUSAND, FIVE HUNDRED and FIFTY-THREE MALOTI, SIXTY-THREE LISENTE into account number 10278406000010 held with Lesotho Post Bank.

(d) Interest at rate of 18% per annum

(e) Costs of suit on Attorney and Client Scale.”

[2] **Background**

This application is opposed. The applicant and the 1st respondent had a verbal agreement in terms of which the applicant would finance the 1st respondent in carrying out the works at the 2nd respondent after winning the tender. The 1st respondent was represented by the late Mr Ntšepe Machai while the applicant was represented by Mr Neo Theko. Mr Ntšepe Machai passed away on 7 September 2022 before the 1st respondent could be paid for work done. The applicant claims all the money payable from the project. It is common cause that the contract was terminated by the 2nd respondent prematurely due to failure by the 1st respondent to meet certain completion milestones. The parties are in agreement that there was a contract between the 1st respondent and the applicant for the latter to finance the project.

[3] **Respective Parties' Cases**

The applicant contends that he advanced a loan to the 1st respondent to finance the works it had been awarded. The applicant attached a bundle of receipts which seem to originate from different suppliers and other expenses relating to payments of staff salaries. The applicant avers that it faces a loss of M61,560.00 (Sixty-One Thousand, Five Hundred and Sixty Maloti) as a result of the termination of the purchase order 2914. The applicant avers that the 3rd respondent who is the widow of Ntšepe Machai, signed the power of attorney authorizing the 2nd respondent to make payment into applicant's bank account, following the meeting its director

held with the family of the deceased. It is the applicant's case that it financed the entire project alone with the agreement between the parties being that losses and profits would be shared equally, and this is said for the first time in reply. Replying to the 1st respondent contention that the receipts it attached as proof do not bear its name, the applicant acknowledges that some receipts bear reference to the 1st respondent. The applicant, however, maintain that even though some receipts bear the names of the 1st respondent, they were paid for by it and that the other receipts "bear the names of other suppliers who had export licence and were used to avoid paying tax twice."

[4] **Respondents' Case**

The 1st respondent does not deny the late Mr Ntšepe Machai approached the applicant for a loan to finance the works of the project it had with the 2nd respondent because the money it had was not enough to cover the expenses necessary for completion of the project. The 1st respondent's answering affidavit is deposed to by one Khatebe Leche who says he is the remaining director of the 1st respondent. Mr Leche was not present when the agreement was concluded. He says he was told by the late Mr Machai that they did not agree on a specific amount but rather that the applicant would buy materials to be used and depending on how much the applicant would have spent, they would agree on the latter's percentage share of profits. The 1st respondent points to the fact that the applicant has attached some receipts which are in its names as proof that the 1st respondent bought the materials itself. The 1st respondent avers that the agreement was that the applicant's is entitled to be paid only its contribution. Mr Leche and Mrs Machai (3rd respondent) deny that Mrs Machai ever signed the power

of attorney. Mrs Machai goes further to say that the signature which is supposedly on the said power of attorney was forged.

[5] **Issues for determination**

(i) Whether the applicant has made out a case for the relief sought.

[6] At the outset it is critical to note that 1st respondent's answering deposed to on its behalf by its co-director Mr Khatebe Leche is largely based on hearsay as he states that he spends a lot of time in the Republic of South Africa and was not present when Mr Ntšepe Machai concluded a verbal agreement with the applicant. He states that he was informed about the details of the verbal agreement by the late Mr Ntšepe Machai. It is not in dispute that Mr Machai negotiated with the officials of the applicant alone. He alone knew the finer details of the agreement he concluded. In my judgment Mr Leche is deposing to hearsay evidence. His affidavit is based on hearsay, except insofar as it relates to the 3rd and 4th respondents who have had an opportunity to deny the allegations levelled against them. That hearsay is inadmissible even in motion proceedings is trite. In **Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP)** the court persuasively said the following:

“The requirement that the founding affidavit [any affidavit] be deposed to by the applicant or some other person who can swear positively to the facts precludes the affidavit being deposed to by someone whose knowledge of facts is purely a matter of hearsay. Thus, a person who deposes to such an affidavit on the basis that their information comes

from another source, whether another person or from documents, is not a person who can swear positively to the facts giving rise to the claim...”

- [7] In **Galp v Tansley, N.O and Another 1966 (4) SA 555 (C.P.D)** at 559 G – H, the court said:

“But one important point emerging from the cases which I have enumerated in the preceding paragraph is this, viz, that our courts have consistently refused to countenance the admission as evidence – of any purpose whatever – of any statement embodying hearsay materials, save where such statement has properly been made the subject of an affidavit (or solemn affirmation) of information and belief, i.e., save where the deponent (or affirmer) has not revealed the source of the information concerned but in addition has sworn (or solemnly affirmed) that he believes such information to be true and furnished the grounds for his belief...”

In the present matter there are no special circumstances permitting admission of hearsay evidence.

- [8] The anterior question to be answered is whether notwithstanding the deficiency in the respondent’s defence, the applicant has made out a case for the relief sought. It is a trite principle our law that in motion proceedings affidavits combine both pleadings and evidence. Therefore, it is important that the applicant must clearly define the issues it wishes to be adjudicated upon and set out the evidence upon which it relies in order to discharge the onus which rests on it in respect of the relief sought (**Swissborough**

Diamond Mines v Government of the RSA 1999 (2) SA 279 at 323 F – 324 A).

[9] The applicant's case is predicated, in its founding affidavit, on the averment that there was a loan agreement between it and 1st respondent. However, in reply it says it was a term of the agreement that all profits and losses would be shared equally. Although the latter assertion, which should have been in the founding affidavit appears for the first time, impermissibly, in reply, its significance will become clear in due course. From the evidence of the applicant, even though it relies for its relief on a loan between the parties, the amount advanced is not stated or at least how much was advanced at the time of Mr Machai's passing. The way the applicant has pleaded its case seems to suggest that there was a cession agreement between Mr Machai's widow and it in respect of the amount due to be paid by the 2nd respondent, however, the anomaly of this suggestion is that the agreement was supposedly concluded on the basis of the power of attorney which is disputed by Mrs Machai (3rd respondent) as being fraudulent. The applicant's counsel resisted all the suggestions that there are disputes of fact in this matter, and this is one of those issues which are disputed. Given that the 3rd respondent's defence cannot be rejected as false, bald or far-fetched, I proceed on the basis of its correctness. Even further problematic for the applicant is the fact that the power of attorney would have been made by a person who does not have *locus standi* in respect of the affairs of the company. The company, through its remaining director Mr Leche, would have been the rightful person to conclude such a supposed cession agreement.

[10] It is important to note that the applicant relies on receipts which do not bear its name. It relies further on the 1st respondent's invoice to the 2nd respondent which includes its labour costs. My understanding of the situation is that the 1st respondent was the one who won the tender to do the works in issue and not the applicant. It would therefore be perplexing that the applicant would claim even labour expenses without providing the basis for doing so. My considered view is that the applicant has failed to make a case for the reliefs sought.

[11] However, I do not think that dismissal of the case should be the only fate to befall this matter. The court must do justice as between the parties, and towards that goal, I am prepared to invoke my powers under the prayer for "further and or alternative relief". I am following this route in light of the applicant's stance as appear in its replying affidavit that the parties had agreed to share profits and losses contrary to its initial stance as framed in the founding affidavit. As I read the 1st respondent's counsel's head of argument, the 1st respondent is amenable to the position that profits and losses be shared equally between the parties.

[12] **Costs**

The applicant has succeeded in proving that it is entitled to be paid by the 1st respondent, and on the one hand, the 1st respondent has been successful in showing that at least the applicant should not be paid all the amount owing by the 2nd respondent. In the exercise of my discretion in awarding costs, this reality will be reflected.

[13] In the result, the following order is made.

- (i) The 2nd Respondent is directed to pay to the Applicant and 1st Respondent in equal shares the amount of M245,553.63 (Two Hundred and Forty-Five Thousand, Five Hundred and Fifty-Three Maloti Sixty-Three Lisente)
- (ii) The amounts in (i) above should be paid into the bank accounts to be provided by each party.
- (iii) Each party should bear its own costs.

MOKHESI J

For the Applicant: **Adv. R. G Makara instructed by
Lephatsa Attorneys**

For the 1st, 3rd and 4th Respondents: **Adv. Masoeu instructed by T. Matooane
& Co. Attorneys**

For 2nd Respondent: **No Appearance**

