

**IN THE LABOUR APPEAL COURT OF LESOTHO****HELD AT MASERU**

LAC/REV/08/13

LC/ENF/ /12

DDPR: A0887/12

**In the matter between:****CHEN YUN BO**

APPLICANT

**AND****PABALLO MARTIN THEKO & 2 OTHERS**

RESPONDENTS

CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.

ASSESSORS : MR. L.O. MATELA

MRS. L. RAMASHAMOLE

Heard on : 30 OCTOBER 2013

Delivered on : 7 NOVEMBER 2013

**SUMMARY**

*Application for review of the decision of the Labour Court – the applicant challenging the warrant of arrest against him and demanding the return of a cheque in the sum of M53,128.20 deposited into the coffers of the DDPR as security in the matter.*

*Applicant claiming that neither he nor his father are liable to pay the said amount as none of them is an officer of the Chen Feng International (Pty) Ltd – 1<sup>st</sup> respondent alleging in her answering affidavit that the father of the applicant is the managing director.*

*Dispute of fact arising as to whether applicant's father or applicant himself is the person liable as an officer of Chen Feng International (Pty) Ltd to pay – court holding that since there is a dispute of fact the correctness of the version of the respondent should be assumed – that therefore prayers (e) and (f) be granted by agreement – that prayer (g) be refused.*

*Since both parties have succeeded, there be no order as to costs.*

**JUDGEMENT**

## **MOSITO AJ**

### **1. INTRODUCTION**

1.1 This is an application brought initially for some urgent and substantive reliefs. In this matter, and as detailed out in the Notice of Motion, the applicant sought prayers in the following terms:

#### **“URGENT RELIEF**

- (a) The rules of court pertaining to the mode of service and time limits shall not be dispensed with due to the urgency of the matter.
- (b) An order of court by the 2<sup>nd</sup> respondent for the arrest of applicant shall not be stayed pending the final determination of this application.
- (c) The 2<sup>nd</sup> respondent shall not be restrained from effecting payment of the sum of fifty three thousand one hundred and twenty eight Maloti and twenty Lisente (M53, 128.20) to the 1<sup>st</sup> respondent pending the final determination of this application for review.
- (d) The Registrar of Labour Court shall not be ordered to dispatch the record of proceedings in LC/ENF/177/12, DDPR AO887/12 to this Honourable Court within 14 days of the order herein.

#### **SUBSTANTIVE RELIEF**

- (e) The order of Court granted by the 2<sup>nd</sup> respondent for the arrest of applicant shall not be reviewed and set aside.
  - (f) The warrant of arrest issued against applicant shall not be set aside.
  - (g) The 3<sup>rd</sup> respondent shall not return to applicant or his father the sum of fifty three thousand one hundred and twenty eight Maloti and twenty Lisente (M53, 128.20) deposited into its coffers as security in this matter.
  - (h) 1<sup>st</sup> respondent shall not be ordered to pay costs of suit and the other respondents only in the event of opposition.
2. That prayers 1(a), (b),(c) & (d) are to operate with immediate effect as interim interdict.”

1.2 Before considering the prayers as outlined above, it is necessary to have a glance at the facts as pleaded by the parties.

## 2. **FACTUAL BACKGROUND**

- 2.1 The facts of this case as deposed to by the applicant, are that 1<sup>st</sup> respondent had instituted a claim for underpayments against a company called Chen Feng International (Pty) Ltd in the 3<sup>rd</sup> respondent. The matter was heard on the 23<sup>rd</sup> November 2011, 1<sup>st</sup> February 2012, 21<sup>st</sup> March 2012 and 21<sup>st</sup> June 2012 and an award was issued on the 19<sup>th</sup> July 2012. At the time of the institution of the proceedings of this matter he avers that he was an employee of the Company.
- 2.2 During the proceedings of the matter, he avers that the directors of the Company left for China and their business was closed. This led to the withdrawal of the legal representatives of the company from the matter. The matter still proceeded to finality and the award was granted by default. Deponent further avers that after the closure of the business and the departure of the directors of the Company, he registered his own Company, JIE RUE SUPERMARKET (PTY) LTD on the 05<sup>th</sup> November 2010, and opened his own business. He attaches a copy of his company's trader's licence.
- 2.4 He further on deposes that in October 2012, his father CHEN YONG BIAO was served with the summons addressed to a certain Mr Abum or Adum of Cheng Fen International (Pty) Ltd for him to appear before the Labour Court in terms of section 34 of the Labour Code Order 1992 on the 29<sup>th</sup> October 2012, to give reasons why he had not complied with the award of the 3<sup>rd</sup> respondent. He avers that his father told the messenger of court who was serving him that he was not Abum or Adum and that he had nothing to do with CHEN FEN INTERNATIONAL (PTY) LTD. The

messenger of court advised him to appear in court to explain before the 2<sup>nd</sup> respondent that he was not the person summoned.

- 2.5 His father did appear before the President on that date and explained that he knew nothing about the matter that he was not ADUM or ABUM, and that CHEN FEN INTERNATIONAL (PTY) LTD was not his Company. Deponent avers further that his father explained further that deponent used to work at that Company but had since opened his own business after CHEN FEN INTERNATIONAL (PTY) LTD business was closed down.
- 2.6 The deponent further avers that 1<sup>st</sup> respondent informed the President that the deponent was the managing director of CHEN FENG INTERNATIONAL (PTY) LTD and not his father. Therefore, his father told court that deponent was liable to pay his benefits. Deponent goes on to aver that his father was asked to give proof that he had no relations with this company and he produced the Memorandum of Association for his own company Furong Supermarket (Pty) Ltd.
- 2.7 Deponent deposes that he was only surprised on the 29<sup>th</sup> November 2012 when he was arrested and taken into custody on the allegation that he had failed to comply with the Award of the 3<sup>rd</sup> respondent of the 19<sup>th</sup> July 2012. Deponent went on to say that he had no relations with the said CHEN FENG INTERNATIONAL (PTY) LTD except being an employee like anybody else.
- 2.8 He further deposes that his father had to issue a cheque in the sum of fifty three thousand one hundred and twenty eight Maloti and twenty Lisente (M53, 128.20) and paid it to 3<sup>rd</sup> respondent in order to get the deponent released from custody. He therefore alleges that his arrest

was not justified because he had nothing to do with the company Chen Feng International (Pty) Ltd. He complains therefore that the execution of the warrant against him was wrong.

- 2.9 Deponent does not stop there. He goes on to say that 3<sup>rd</sup> respondent should be restrained from making payment of the sum of fifty three thousand one hundred and twenty eight Maloti and twenty Lisente (M53,128.20) to 1<sup>st</sup> respondent pending the application for review of the order of the 2<sup>nd</sup> respondent filed hereto.
- 2.10 His father Cheng Yong Biao has filed a supporting affidavit in which he deposes that he has read and understood the contents of the founding affidavit and that he confirms the same to the extent that they relate to him.
- 2.11 The respondent filed an opposing affidavit wrongly styled “replying affidavit” and raises two issues under the points *in limine*. The first issue is one of non-joinder. She alleges that the applicant has failed to join his father whose cheque the applicant applied to the court to have it kept in custody by the 2<sup>nd</sup> respondent as the court had made an interim court order that the said cheque be returned and that instead cash in the sum of fifty three thousand one hundred and twenty eight Maloti and twenty Lisente (M53, 128.20) should be paid. I observe that the person in respect of whom non-joinder has been raised has filed a supporting affidavit to the applicant’s affidavit. He is clearly aware of the proceedings and I do not understand how such a person can be prejudiced by an order in this matter if given.

2.12 The second issue that she raises is the non-disclosure of material fact in that deponent had failed to disclose that his father is the managing director of Chen Feng International (Pty) Ltd. Deponent goes further to indicate in this regard that the applicant has not presented any document before the court to proof that the said company has been dissolved. Respondent goes further to complain that applicant and his father have intentionally withheld the information as to how the warrant of arrest was issued against him and how he features in these proceedings. The issue that applicant was guilty of non-disclosure, was not a proper point *in limine* at all, should not have been raised as such by the respondent.

2.12 The sum total of the foregoing is that there is not one granule of doubt in my mind that there are genuine and substantial disputes of facts on the material aspects on the papers. In view of the magnitude of the dispute of fact identified below, there is no need to determine any further issues arising.

### 3. **PROCEEDINGS IN THE LABOUR APPEAL COURT**

3.1 The parties started as being far apart on the facts but as the case progressed, advocate Khumalo conceded that the warrant of arrest ought not have been issued against the applicant. In this regard he informed the court that he did not insist on the need to enforce the warrant.

3.2 It follows therefore that there was no longer any need to determine paragraphs (e) and (f) of the substantive relief sought in the Notice of Motion and as outlined in the first paragraph of this judgment. The

only issue that remained related to prayer (g) as well as the issue as to costs. This is so because the parties were agreed that that particular issue of arrest of the applicant was not justified in this particular case.

3.3 The first issue to be determined therefore is as to whether CHEN YONG BIAO or his son CHEN YUN BO are liable to abide by the award from the DDPB to pay the 1<sup>st</sup> respondent. It is clear that there is a dispute of fact on the issue whether the father or the son is the managing director of Chen Feng International (Pty) Ltd. In the answering affidavit of the first respondent, she alleges that the applicant's father informed the court a quo that he was the director of Chen Feng International (Pty) Ltd. It was on the basis of that information that the court a quo found that indeed the applicant was liable. In the matter before us, the applicant alleges that he is not the director and his father has not explained away the averments by the respondent that he had informed the Labour Court that the applicant was the director. It is also clear that in the answering affidavit of the 1<sup>st</sup> respondent, she alleges that the director of the Chen Feng International (Pty) Ltd was the applicant's father. The applicant disputes that his father is the director.

3.4 In our view there is therefore a dispute of fact in this matter as to who of the two is responsible as the managing director of Chen Feng International (Pty) Ltd. Is it the father or is it the son? A litigant desirous of obtaining judicial relief by way of notice of motion and affidavits takes a risk. There can be no cross-examination of affidavits and, therefore, an assessment of credibility of witnesses is hardly possible. A principle which is fundamental to all notice of motion proceedings is that if a litigant knows in advance that there will be a material dispute of fact,

the litigant cannot go by way of motion and affidavit. If he or she nevertheless proceeds by way of motion he or she runs the risk of having his or her case being dismissed with costs. (***Mineworkers Union of Namibia v Rössing Uranium Limited 1991 NR 299; Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A)***)

- 3.5 The dispute as to whether CHEN YONG BIAO or his son CHEN YUN BO are liable to abide by the award from the DDPR to pay the 1<sup>st</sup> respondent cannot be resolved on paper. In my view the proper approach where a dispute of this nature exists as *in casu* is to assume the correctness of the version of the respondent. In the present case, the applicant has opted to approach the Court by Notice of Motion and affidavits. But from the papers I find that there is a substantial and genuine dispute of facts on the material aspects which go to the root of the *lis* between the applicant and the first respondent. If such approach is adopted then the application by the applicant cannot succeed.

#### 4. **CONCLUSION AND ORDER**

- 4.1 In conclusion the application by the applicant in respect of prayer (g) must fail on account of there being a dispute of fact on the matter and it is accordingly so ordered.
- 4.2 As far as relates to costs of this matter, I have already indicated above that the 1<sup>st</sup> respondent has accepted that the warrant of arrest issued against the applicant was not justified and in that regard the applicant has succeeded. The applicant has however lost in respect of prayer (g) in the substantive relief. In the exercise of our discretion therefore, and



on the facts as discussed above, it seems fair to order that there will be no order as to costs in this matter.

4.3 For avoidance of doubt therefore, the order of this court is as follows:

1. Prayers (e) and (f) are by agreement granted.
2. Prayer (g) of the Notice of Motion fails.
3. There will be no order as to costs.

4.4 This is an unanimous decision of the court.

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DR K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For the applicant : ADV. A.M. CHOBOKOANE

For the 1<sup>ST</sup> Respondent : ADV. M.A.KHUMALO