

Not reportable

**IN THE NORTH GAUTENG HIGH COURT
(HELD AT PRETORIA)**

CASE NO: 39736/09

DATE: 22/09/2010

In the matter between:

PASCAL MONKAM (SENIOR)

APPLICANT

And

MONKAM HOLDINGS (PTY) LTD

FIRST RESPONDENT

PASCAL MONKAM (JUNIOR)

SECOND RESPONDENT

FUSIE TRUST

THIRD RESPONDENT

PASCAL MONKAM (JUNIOR) N.O

FOURTH RESPONDENT

DIEUDONNE TEJEU KADJI N.O

FIFTH RESPONDENT

JUDGMENT

TOLMAY, J:

BACKGROUND

The applicant brought an application and asked that the transfer of 100% shares of Hoopstraat Beleggings (Pty) Ltd (“Hoopstraat”) and Monkam Investment Properties (Pty) Ltd (in liquidation) (“MIP”) be set aside and be declared to be of no force and effect. He also asks the Court to declare that he is the owner of 100% shares in Hoopstraat and MIP and that the share certificates of both aforesaid companies be delivered to him.

I set out a short summary of the background of this application.

The applicant who is a citizen of Cameroon, and who has permanent residence in South Africa, decided to invest in South Africa. In this process the applicant *inter alia* bought the entire issued share capital in Hoopstraat. Hoopstraat also purchased certain immovable properties. Applicant also bought the entire issued share capital in Cresta Properties (Pty) Ltd (“Cresta”). Cresta’s name was in due course changed to MIP. MIP also bought a residential property. The applicant acquired the entire share capital of Madeleine Properties (Pty) Ltd (“Madeleine”). The applicant and fourth respondent managed the applicant’s affairs in South Africa.

This relationship between applicant and fourth respondent in due course went sour as the applicant alleges that fourth respondent divested him of his assets. It would seem that fourth respondent *inter alia* established first respondent and transferred the entire share capital in Hoopstraat and MIP to first respondent. Fourth respondent claims that he transferred the shares in Hoopstraat and MIP in accordance with an oral mandate of the applicant. The applicant denies the existence of such a mandate. Apparently all the assets in MIP were transferred to Madeleine and the shares in Madeleine was according to fourth respondent donated to him by applicant. This is categorically denied by applicant.

The aforesaid set of circumstances led to a protracted legal battle between the applicant and the respondent.

At the outset of the hearing an application to strike out was brought by the applicant regarding certain offending material contained in the answering affidavit. In the light of my conclusion I need not deal with this application.

On 16 August 2007 an order was made in this Court in an application between applicant and second respondent that the dispute regarding the ownership and directorship of *inter alia* Hoopstraat and MIP be referred to arbitration.

The arbitration proceedings commenced and the particulars of claim was served during June 2008. On a perusal of the particulars of claim the disputes between

the parties were substantially the same as that contained in this application. The prayers sought in the particulars of claims were also substantially the same than those which are sought in this application.

The arbitration proceedings commenced during February 2009. Apparently the second and third respondents were in default regarding the applicant's claims against Hoopstraat and MIP and applicant obtained an award by the arbitrator by default. The arbitrator's award is yet again substantially the same as the prayers sought in this application.

The trustees of the second and third respondent brought an application for review of the arbitration proceedings, as well as interim relief, pending the outcome of the review.

CONCLUSION

It was argued on behalf of the respondents that this court is not competent to deal with the application as the applicant chose the road of arbitration and a review of the arbitrator's award is pending. Consequently it was argued that the dispute cannot be revisited by this court. It was also argued that as a result of the dispute of facts between the parties this matter cannot be decided by way of application.

The applicant argued that the first respondent was not a party to the arbitration and consequently this court can entertain this application, and also submitted

that on a proper analysis of the alleged factual dispute the court is well able to determine the disputes by way of application.

It is to be noted that the substantially same relief is requested in this application than what was granted in the arbitration award. If this court grant an order that order may be in conflict with the arbitration award or the review judgment. Certainly such a position will be untenable.

The applicants' legal representative indicated that they may not execute the arbitration award. In correspondence that was attached to respondent's supplementary heads of argument it would seem that the applicant did at the very least attempt to execute the arbitration award. This court can in any event not merely ignore the arbitrator's award and pending review application.

The fact that the first respondent was not a party to the arbitration proceedings does not save the application. Even if the defense does not strictly constitute a defence of *lis alibi pendens* a Court can, in the exercise of its discretion debar a person from ventilating a dispute already decided under the guise of an action against another party.

In this regard the see **Cook and Others v Muller 1973(2) SA 241 NPD on 245.**

Consequently I find that the dispute before me cannot be determined pending the finalization of the review application. In my view the decision to approach this

court knowing that the arbitrator already made an order and that there is a pending review constitutes an abuse of process.

I am furthermore not convinced that the disputes between the parties can be determined by way of application due to the considerable factual disputes. The parties must have envisaged such a factual dispute when the route of arbitrate was chosen. This dispute was foreseeable and this must lead to a dismissal the application.

The parties referred me to the fact that the costs of the joinder application we reserved for determination by this Court. As the court granted the joinder I am willing to revisit the question of joinder and those costs should follow the result this matter.

I make the following order:

1. The application is dismissed,
2. The applicant is to pay the costs which include the costs of joinder application and which furthermore include the costs senior counsel.

PASCAL MONKAM (SENIOR VS MONKAM HOLDINGS AND OTHERS

CASE NO: 39736/09

JUDGE: TOLMAY

DATE OF HEARING: 24 AUGUST 2010

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DATE OF JUDGMENT: 22 SEPTEMBER 2010