IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Application no.1092/2016

In the matter between:

ELDARO TRADING (PTY) LTD) **APPLICANT**

and

MERAKA LESOTHO (PTY) LTD **RESPONDENT**

JUDGMENT BY: MBHELE, J

DELIVERED ON: 19 MAY 2016

Introduction

[1] The Respondent seeks an order for reconsideration and setting aside of the order granted by Chesiwe. A.J dated **8th March 2016** authorising the attachment of the respondent's property to confirm jurisdiction of this Court and grant leave to the Applicant to serve the summons

issued under case number **1093/2016** on the Respondent, in Lesotho at its principal offices.

[2] The application was brought on an urgent basis in terms of Rule **6**(**12**)**c** of the uniform Rules of Court.

Background:

[3] The Applicant is a company duly registered and incorporated as such in terms of the company laws of South Africa with its registered head offices at Bloemfontein.

[4] Respondent is a company registered in terms of the Laws of the Kingdom of Lesotho with its principal place of business in Maseru, Lesotho.

[5] On the **16th February 2015** in Maseru, the parties signed a written agreement in terms whereof the Applicant was appointed the sole agent, representative and supplier of livestock to the respondent for an indefinite period. The nature of the relationship between the parties was that the applicant would identify and purchase cattle and sheep on behalf of the respondent in South Africa.

[6] Respondent would at all times be liable for the payment of the costs per kilogram of all livestock ordered which costs would be due and payable upon an invoice issued by the applicant.

[7] The Respondent ceased to order livestock from the Applicant and entered into a relationship with a new supplier known as **Sorour Mine Industrial**. The new supplier would fulfill the role performed by the applicant.

[8] On **8 March 2016** the applicant approached this Court with an urgent ex parte application to found or confirm jurisdiction of this Court to entertain an action the applicant instituted against the respondent as *peregrini* under case no 1093/2016. The applicant also sought relief to serve such papers on the respondent at its principal place of business in Maseru through Sheriff.

[9] The order was duly granted by Chesiwe. A.J. with, no return date, as follows:

(i) This application is heard as an urgent application and non-compliance pertaining to form, service and time limits are condoned as envisaged by Rule **6**(**12**).

(ii) In order to find jurisdiction, confirm jurisdiction leave is granted to the applicant to attach any movable property belonging to the respondent in the Republic of South Africa (wherever it is found) and more in particular leave is granted to attach a trailer with registration number: **M4323** as well as any livestock therein belonging to the respondent wherever same might be found in the Republic of South Africa. Such attachment to be effected by the appropriate sheriff, such sheriff to keep same pending the outcome of action number: **1093/2016** wherein applicant seeks judgment against the respondent for the amount of **R651 282.64** (**Six Million Five Hundred and Thirty One Thousand Two Hundred and Eighty two Rand and sixty four cents**) together with ancillary orders.

3. Leave is granted to the Applicant to serve the said summons number **1093/2016**, as well as this application together with the order on the respondent in Lesotho at its principal offices at 30 Lights Building, Moshoeshoe Road, Maseru, such service to be effected by the duly appointed Sheriff in Maseru.

4. Respondents to pay the costs only if opposed (in future or at all).

[10] The applicant now requests the court to amend the order to the effect that the assets attached be substituted with the R650 000.00 held in the Trust account of the Respondent's Attorneys.

Rule **6**(**12**) (**c**) provides:

> "a person against whom an order was granted in his absence in an urgent application may by notice, set down the matter for consideration of the order "**.**

Issues not in dispute:

[11] Parties are in agreement that at the time when the order was granted, the assets that were subsequently attached, were not owned by the respondent.

[12] It is common cause that the property that was attached was substituted with cash to the tune of **R650 000.00** which amount is kept in the trust account of the respondent's Attorneys in Bloemfontein.

Contentions of the parties:

[13] The respondent contends that the granting of the order by Chesiwe. A.J. on **8 March 2016** was wrong in law for the following reasons:

(i) The deponent was not authorized by the Applicant to launch the application.

(ii) The applicant failed to show that the property sought to be attached was within the jurisdiction of the Court or within the Republic of South Africa at the time the application was brought.

(iii) The applicant brought this application after summons was issued.

(iv) The applicant failed to display the utmost good faith to the Court when bringing the application ***ex parte*** and failed to disclose material facts which might have influenced the Court not to grant the relief claimed.

(v) The applicant failed to make out prima facie case against the respondent.

[14] Mr. Louw, on behalf of the respondent, in oral argument submits that the mere allegation by the deponent that he has authority to depose to an affidavit is not sufficient in the absence of a resolution giving him the necessary authority to litigate on behalf of the applicant. Mr. Zietsman, on behalf of the applicant, contends that the only other director in the company confirmed the Deponent's affidavit and the argument that the requisite authority was not obtained, is without basis. It is clear from the papers that the director who would have authorized the application had knowledge of the application and has aligned himself thereof. I am satisfied that the necessary authority was obtained.

[15] In ***ex parte*** applications the applicant must disclose all material facts to the Court. It is incumbent upon a litigant approaching Court ***ex parte*** to bring to light all factors that may influence the Court to grant or refuse the order sought. In **ex parte** applications Courts often do not have the benefit of hearing the other party, it is therefore of utmost importance for the applicant to disclose all relevant factors in the matter.

[16] The applicant failed to disclose that it applied for the liquidation of the respondent in the Lesotho High Court, which application, if granted, would have resulted in the liquidators taking over the respondent's assets.

[17] Mr Zietsman, on behalf of the applicant, argued that Liquidation proceedings pending in the Lesotho High Court are irrelevant to these proceeding. He further contended that even if a liquidation order had been granted in Lesotho, the liquidators of the estate would have no powers in South Africa until such time as the foreign liquidation order has been recognized in South Africa.

[18] The applicant requested the Lesotho High Court to appoint liquidators to run the business activities of the respondent in the interest of creditors and had the order been granted the decision to continue purchasing livestock from South Africa would have vested with the liquidators. This would have had a bearing in the enforcement of the attachment order.

[19] It was incumbent on the Applicant to disclose to Chesiwe. A.J that liquidation proceedings were pending in the Lesotho High Court. I am doubtful whether the Court would have granted the order had this information been brought to light.

[20] It is argued on behalf of the respondent that the applicant failed to show that it has a good of cause of action against the respondent.

[21] The respondent disputes that it is indebted to the applicant in the amount of **R6 531 282.64** for livestock sales. The respondent admits indebtedness to the applicant in the amount of **R2 315 061.01**. **Mr Louw** argued that the said amount was not due and payable as the applicant had not sent a written demand to the respondent.

[22] It is not in dispute that the Applicant rendered invoices. Respondent in its own version admits indebtedness to the Applicant in the amount of **R2 315 061.01**. The respondent conducted itself in a manner that indicates that it has no intentions to consider material terms of the contract binding. Respondent cannot choose to selectively honor some parts of the contract and disregard others. Respondent in its own version made it clear that the contract is not binding due to failure on the part of the applicant to meet the demand for supply.

[23] It is common cause that at the time the Applicant obtained this order there was no proof that the assets sought to be attached were a property of the respondent and within the Republic of South Africa. From the founding affidavit it is clear that the said assets would only be a property of the respondent in a future undetermined date.

[24] It was argued on behalf of the applicant that although the respondent was not the owner of the said property, the property was always in the Court’s jurisdiction, and the respondent later became the owner.

[25] In order to succeed with an application to found or confirm jurisdiction, the Applicant must satisfy the following requirements:

(i) ***A prima facie*** cause of action against the Defendant.

(ii) That the Defendant is a *peregrinus*.

(iii) That the cause of action arose within the area of jurisdiction of the Court.

(iv) That the property in which the *peregrini* Defendant has a beneficial interest is within the jurisdiction of the Court or Republic of South Africa. The Applicant must prove that the property sought to be attached is within the area of jurisdiction of the Court.

[26] In **<u>Longman Distillers v Drop Inn Group Of Liquor Supermarkets (Pty) Ltd</u>** 1990 (2) SA 906 it was held as follows:

> "in our law, once an incola applicant establishes that, prima facie, he has a good cause of action against the *peregrini* Respondent (Defendant), the Court must, if other requirements are satisfied, grant an order for the attachment ad *fundandam* of the property of the *peregrine r*espondent (Defendant)".

[27] In casu the Respondent did not own the property within the area of jurisdiction of the Court nor within the Republic.

[28] It is clear that the order as granted was incapable of being given effect to. Courts generally shy away from giving orders that are academic

and futile in nature. The applicant requested and order while hoping that in future the respondent would become the owner of the property within the Republic.

[29] I am of the view that the requirements for an order for the attachment of property to found or confirm jurisdiction were not met when the order was granted.

[30] The argument that the Respondent later became the owner of an amount of **R650 000.00** held in its Attorneys' trust account is misplaced as that amount came into the Attorneys' trust account as a direct consequence of the attachment order which, in my view, lacked basis.

<u>Costs</u>

[31] Having considered all of the aforegoing I am of the view that the order granted by Chesiwe. A.J on **8 March 2016**, must be reconsidered, and set aside. The order sought by the Applicant is refused. The Applicant to pay the costs of the Respondent.

<u>The following order is made:</u>

1. The order of this Court dated **8th March 2016** under case number: **1092/2016** is set aside.

2. The Applicant to pay the costs of this application including the costs

of one Counsel.

N.M. MBHELE. J

On behalf of the applicant:	Adv. P. J. J. Zietsman Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of the respondent:	Adv. Louw Instructed by: Bezuidenhouts Inc BLOEMFONTEIN