



**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

Case no: 3539/2012

In the matter between:

MSC LOGISTICS (PTY) LTD

Plaintiff

and

THAPELO DAVID KHITSANE

Defendant

CORAM: EBRAHIM, J

JUDGMENT BY: EBRAHIM, J

HEARD ON: 17 MAY 2016

DELIVERED ON: 2 JUNE 2016

- [1] The defendant, Thapelo David Khitsane, an adult male whose permanent residence and place of domicile is situate at Portion 4, Erf [...], O. S., Ladybrand, Free State Province, was employed by the plaintiff, a limited liability company, carrying

on the principal business of the shipment of goods, in the position of Manager, at Maseru, in the Kingdom of Lesotho. He was responsible for all the shipping related functions for the Lesotho region.

- [2] His contract of employment was recorded on a letterhead of the plaintiff's company, reflecting its address as [...] W. S., Durban. It confirmed his appointment as of the 1 February 2002 and it was common cause between the plaintiff and defendant that defendant would be entrusted with the overall day to day running of the office in Maseru as well as the marketing of the company in Lesotho.
- [3] On the 21 February 2012, the defendant resigned his employment with immediate effect for reasons not necessary to set out in this judgment. This resignation precipitated an arbitration hearing concerning monies he alleged plaintiff owed to him and the institution of an action in this court in August 2012 by the plaintiff claiming from him payment of the sum of R679 477,56 on the grounds of the breach of a duty care which plaintiff alleged was owed to it by defendant in respect of the custody and care of monies received by defendant on account of services rendered by plaintiff in Maseru and the surrounding Lesotho region, and which monies defendant failed to account for to plaintiff.
- [4] The defendant has disputed the *causa* of the plaintiff's claim by denying that he owed any duty of care to the plaintiff and that he caused the plaintiff loss in the sum claimed. In addition the

defendant has raised 2 special pleas to the plaintiff's summons being the plaintiff's lack of *locus standi* and this court's lack of jurisdiction to adjudicate the claim. Mr Marais, who represents the defendant in these proceedings, has pressed the defendant's case on the special plea on 2 main grounds: Firstly as to the plaintiff's *locus standi*, that defendant was employed by an independent Foreign Shipping Company registered in Lesotho called MSC Logistics (Pty) Ltd (Lesotho), a Lesotho Company, distinct in legal persona from the plaintiff. And secondly that since the plaintiff's cause of action arose in Maseru, Lesotho, the Lesotho court and not the South African court, has jurisdiction.

[5] In support of its case on the special pleas the plaintiff called the evidence of 2 witnesses. Megendhran Reddy, who was previously employed by the plaintiff as an operations manager, and Gail Hart-Jones, who at the time the cause of action arose, was employed by the plaintiff as a financial manager. It was common cause that, although plaintiff elected to call its witnesses first, the defendant carried the onus in respect of both pleas.

[6] Both these witnesses testified:

- (a) The defendant was employed by MSC Logistics (Pty) Ltd SA and not MSC Logistics (Pty) Ltd Lesotho.
- (b) That there is no separate and distinct company called MSC Logistics (Pty) Ltd Lesotho.

- (c) MSC Logistics (Pty) Ltd (SA) and MSC Logistics (Pty) Ltd Lesotho are not two separate legal and economic entities.
- (d) MSC Logistics (Pty) Ltd (Lesotho) is merely a branch of MSC Logistics (Pty) Ltd (SA) – they are one and the same juristic person.
- (e) MSC Logistics (Pty) Ltd (SA) carries the financial risk and cost of MSC Logistics (Pty) Ltd (Lesotho).
- (f) MSC Logistics (Pty) Ltd (SA) employed and paid the employees of MSC Logistics (Pty) Ltd (Lesotho).
- (g) The defendant was employed as branch manager of MSC Logistics (Pty) Ltd (SA) at its Lesotho branch, MSC Logistics (Pty) Ltd (Lesotho).
- (h) MSC Logistics (Pty) Ltd (SA) is a subsidiary of the parent company, the Mediterranean Shipping Company and MSC Logistics (Pty) Ltd (Lesotho) is its branch.

[7] Gail Hart-Jones testified, in addition, that:

- (a) The assets and liabilities of MSC Logistics (Pty) Ltd (Lesotho) is owned by MSC Logistics (Pty) Ltd (SA).
- (b) MSC Logistics (Pty) Ltd (SA) elects the directors of MSC Logistics (Pty) Ltd (Lesotho).
- (c) MSC Logistics (Pty) Ltd (Lesotho) does not have an independent shareholding because it is not a separate legal persona.
- (d) Employees of MSC Logistics (Pty) Ltd (Lesotho) are paid out of the bank account of MSC Logistics (Pty) Ltd (SA).
- (e) The defendant was paid out of the South African bank account of MSC Logistics (Pty) Ltd (SA) by electronic funds transfer.

- (f) On the 11 February 1999, MSC Logistics (Pty) Ltd (SA) (the plaintiff) registered itself in Lesotho at the office of the registration of companies in Maseru, as an external company in order to trade in Lesotho in compliance with the provisions of section 286 of the Lesotho Companies Act, 25 of 1967. She confirmed that pursuant to such registration, the plaintiff obtained a licence to trade in Lesotho through the Lesotho Ministry of Trade and Industry.
- (g) The licence to trade clearly demonstrates that the company MSC Logistics, operating from the 4th Floor Christie House Orpen Road, Old Europa Maseru was owned by the plaintiff.

[8] Ms Hart-Jones made reference to documentary exhibits as proof of her testimony. She was challenged in cross examination by Mr Marais that since the licence issued did not reflect a company registration number, it was open to some doubt as to whether it had in fact been issued to the South African Company (the plaintiff). She replied that there could be no doubt as only one company (the plaintiff) had been incorporated and registered, and that there was no separate and distinct company of MSC Logistics incorporated and registered in Lesotho. It was clear to me from her testimony as well as the documentary exhibits she relied upon (the certificate of registration of the external company at p 65 of plaintiff's trial bundle – and the trading licence at p 69 of plaintiff's trial bundle) that the licence had been issued to the plaintiff to trade as a foreign company in the Kingdom of

Lesotho. No other inference is possible because the defendant was unable to challenge her evidence that no company such as MSC Logistics (Pty) Ltd (Lesotho) had been incorporated and registered as such in the Kingdom of Lesotho with supporting documentary exhibits. The fact that the licence bears the address in Maseru was additional corroboration for plaintiff's case that the company was operating as a branch office at that address and in order to do so it needed a trading licence.

[9] It was clear to this court from the testimony of the defendant that it was only the existence of the following circumstances which had convinced him that MSC Logistics (Pty) Ltd (Lesotho) was a separate juristic entity:

- (a) He was based in Lesotho and dealt only with Lesotho customers.
- (b) He paid taxes in Lesotho.
- (c) The laws of Lesotho were applicable to this company.
- (d) He submitted annual tax returns to the Lesotho Revenue Authority in the name of MSC Logistics (Pty) Ltd (Lesotho).
- (e) MSC Logistics (Pty) Ltd was registered as an external company in Lesotho and the licence to trade in Lesotho was issued with the Lesotho address.

[10] The defendant called as his only witness, Ms M P Tohlang, an attorney employed by the firm Webber Newdigate, in Maseru whose testimony supported the plaintiff's case. She testified as follows:-

- (a) The Mediterranean Shipping Company is the parent company of its subsidiary, the plaintiff company, and MSC Logistics (Pty) Ltd (Lesotho) is a branch of the plaintiff.
- (b) MSC Logistics (Pty) Ltd (SA) (the plaintiff) carries the financial risk of MSC Logistics (Pty) Ltd (Lesotho).
- (c) MSC Logistics (Pty) Ltd (SA) and MSC Logistics (Pty) Ltd (Lesotho) are one and the same juristic entity.
- (d) The certificate of registration of an external company at p 65 of the trial bundle clearly indicates that MSC Logistics (Pty) Ltd (Lesotho) is registered as a branch of the plaintiff in Lesotho for the purposes of trading in Lesotho. The two are one and the same legal persona registered in 2 different countries.

[11] Ms Tohlang's evidence effectively sounded the death knell to the defendant's case on the issue of the plaintiff's *locus standi* and there can be no doubt that registration as an external company did not adorn the business of MSC Logistics in Lesotho with juristic personality so that it became a separate legal entity.

See **Wiseman v Ace Table Soccer (Pty) Ltd** 1991 (4) SA 171 W at 173E; **Peerson v Sheerbonnet SA (Pty) Ltd** (1999) 7 BLLR 793 LC.

[12] The defendant has admitted in both his plea as well as in his testimony that he resides within this court's jurisdiction and

consequently Mr Marais's persistence with the second special plea is difficult to comprehend.

[13] The two special pleas are dismissed with costs.

S. EBRAHIM, J

On behalf of the plaintiff:

Adv. D. de Kock
Instructed by:
Webbers Attorneys
BLOEMFONTEIN

On behalf of the defendant:

Mr. Marais
Instructed by:
E G Cooper Majiedt Inc.
BLOEMFONTEIN

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