CASE NO.: SA

24/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MAHE CONSTRUCTION (PTY) LTD

APPELLANT

And

SEASONAIRE

RESPONDENT

CORAM: STRYDOM, C.J., O'LINN, A.J.A. *et* CHOMBA, A.J.A.

HEARD ON: 17/06/2002

DELIVERED ON: 03/10/2002

APPEAL JUDGMENT

STRYDOM, C.J.: In the above matter the respondent, the applicant in the Court *a quo*, was granted a declaratory order against the appellant, respondent in the Court *a quo*, in the following terms:

> "(a) Declaring that the Sub-Contract Agreement entered into between the applicant and the respondent on the 19th October 1999 in respect of the air-conditioning installation in the extensions to the

Windhoek Medi Clinic is binding between the applicant and the respondent and of full force and effect between them.

(b) Declaring that any amounts due to the applicant in terms of the Sub-Contract Agreement are the responsibility of the respondent to the applicant in terms of such Sub-Contract Agreement.

(c) That the respondent pays the costs of this application."

The appellant was not satisfied with this outcome and appealed to this Court on various grounds. Mr. Heathcote represented the appellant and Mr. Trisk, assisted by Mr. Tötemeyer, appeared for the respondent. For the sake of convenience I shall further herein refer to the parties, as they appeared in the Court *a quo.*

The applicant, which is a partnership and which deals, supplies and provides services for refrigeration equipment, approached the Court *a quo* on Notice of Motion for a declaratory order in substantially the same form as set out above. The deponent on behalf of the applicant, one William Jacobus Fourie, explained that a company, known as Medi Clinic Corporation Limited, (Medi Clinic), which carries on the operation, management and control of hospitals, decided to substantially extend and enlarge their existing hospital in Windhoek.

Fourie further stated that as far as he could establish Medi Clinic, which is incorporated in South Africa, had a contractual arrangement with a company, Lofty's Construction (Pty) Ltd., (Lofty's), also incorporated in South Africa, in terms of which Lofty's carried out building operations on behalf of Medi Clinic in regard to their hospitals in South Africa and elsewhere. Applicant is however not sure what the precise arrangement is between Medi Clinic and Lofty's. As far as the building operations in Windhoek were concerned, the applicant

believed that Lofty's entered into an agreement with the respondent to carry out the construction of the work necessary for the extension of the hospital. Also in regard to this arrangement, applicant stated that the full details are unknown to it.

On the 19th October 1999 the applicant, as sub-contractor, entered into a written agreement with the respondent, as contractor, to carry out extensions to the Windhoek Medi Clinic and to provide the air-conditioning installations for the hospital. To this extent, and as evidence to substantiate its allegations, the applicant annexed a letter from the respondent, dated the 11th October 1999, as well as the written agreement, signed by the respective parties. Fourie further stated that during the building operations, which took place over a period of nearly a year, the applicant submitted various invoices to the respondent which were then paid by it without any objection. According to Fourie, once the Consultants, BWK Engineering Services CC, had issued certificates for payment Medi Clinic would pay Lofty's who would thereafter pay the respondent who would in turn then effect payment to the applicant.

Fourie said that although the applicant was never able to establish the relationship between the respondent and Lofty's, its belief that there was a joint venture agreement in force between the two companies was strengthened when they, after making enquiries, was informed by the law firm E.G. Cooper & Sons, of Bloemfontein, that the latter's' investigations showed that the relationship was one of a joint venture.

The deponent further stated that all went well until Lofty's was placed under provisional liquidation in South Africa during March 2001. As a result thereof

all building operations were suspended, also the operations at the Windhoek Medi Clinic. At the time the amount owed by the respondent to the applicant was N$433,364-90. However, on the 24th April 2001 the applicant received a letter from the attorneys of the respondent in which they denied any liability to sub-contractors in respect of work done or equipment delivered in connection with the Medi Clinic project in Windhoek. This letter reads as follows:

> "1. We advise that we act on behalf of Mahe Construction (Pty) Ltd.
>
> 2. Our client's instructions are that the main contractor for the Medi-Clinic project, Lofty's Construction (Pty) Ltd., was placed under provisional liquidation during March 2001 in South Africa, and that further building activities on behalf of Lofty's Construction (Pty) Ltd., regarding the Medi-Clinic project have been suspended. The services of numerous sub-contractors were originally employed by Lofty's Construction (Pty) Ltd. for the Medi-Clinic project, including our client, who in addition was also requested to perform various building management duties, and to supply the labour and building material, etc.
>
> 3. It has recently come to the knowledge of our client that Lofty's Construction (Pty) Ltd. at the commencement of the construction concluded "nominated/selected sub-contract agreements" with sub-contractors and that such agreements state that Mahe Construction (Pty) Ltd. functioned as a "contractor", thereby having the result that numerous sub-contractors now request payment for their services rendered

directly from our client. However, it is quite evident from the aforesaid sub-contract agreements that our client was never a party to these agreements, as these agreements were never concluded by our client with any sub-contractor, never signed by our client or its agent, and was our client not even aware of these agreements until recently.

4. We are presently investigating the cause, which lead to the conclusion of these sub-contracts agreements in the name of our client with the sub-contractors involved with the Medi-Clinic project.

5. Our client's instructions are further that he is continuously contacted by various sub-contractors now demanding payment from Mahe Construction (Pty) Ltd directly, probably as a result of these sub-contract agreements. It is worth mentioning that payments which were made in the past to sub-contractors by Mahe Construction (Pty) Ltd in respect of services rendered were made on the instructions of Lofty's Construction (Pty) Ltd, as our client only functioned as a representative of Lofty's Construction (Pty) Ltd in Namibia, and once lump sums were received from Lofty's Construction (Pty) Ltd., our client had instructions to pay each and every sub-contractor its share, but at no stage did our client assume any payment obligation from Lofty's Construction (Pty) Ltd.

6. In view of the above, our client cannot accept liability for the outstanding amounts payable by Lofty's Construction (Pty) Ltd to the sub-contractors concerned. All sub-contractors are therefore hereby requested to claim payment directly from the liquidators, who can be contacted at the following address:

7. E J Cooper & Sons

Bloemfontein
South Africa
Tel: 0027-51-4473374
Fax: 0027-51-4470795
Contact Person: Mr. C. Cooper.

8. You are furthermore advised to address all future correspondence and queries concerning the Medi-Clinic project to the liquidators."

It is in the light of the specific denial by the respondent of any liability concerning the operations carried out in regard to the Medi Clinic project that applicant said that it became necessary to come to Court to determine its rights in terms of the contract concluded between the parties.

The respondent did not file any answering affidavit but availed itself of the provisions of Rule 6(5)(d)(iii) of the High Court Rules and gave notice of its intention to raise a number of questions of law and wherein it reserved the right to reply to the merits should the questions of law, or any of them, not be resolved in its favour.

I think that before dealing with the various points raised by Counsel for the respondent, it is necessary to look at the agreement on which the applicant

based its case and in respect of which the respondent denied liability, because this is relevant to many of the issues argued by Counsel.

In terms of the definition clause, clause 1.1.6 of the contract, the contractor is defined as the contracting party so named in the sub-contract schedule. According to clause 39.1.1 of the sub-contract schedule the contractor named is the respondent, Mahe Construction (Pty) Ltd. with address at P.O. Box 166, Windhoek. Clause 39.1.2 describes the respondent as the Sub-contractor. The employer is given as Medi Clinic Corporation Ltd. Clause 39.1.3. Although the schedule sets out all other interested parties such as the architect, the engineer etc. no mention whatsoever is made of Lofty's Construction (Pty) Ltd. The contract at the end is signed by one J. Jacobs for and on behalf of the Contractor who, in terms of the contract, further warranted by his signature that he was authorized to do so and the same was done for and on behalf of the applicant. Various provisions clearly spell out the rights and obligations of the respective parties. A few examples would suffice.

Clause 2.1 states that the agreement is made between the contractor and the sub-contractor in respect of the sub-contract works. As far as the execution of the works are concerned clause 15 provides that the contractor may issue instructions to the sub-contractor. Clause 30 provides for application by the contractor for payment in respect of sub-contract works and clause 31 provides for payment of the sub-contractor by the contractor in respect of the work executed by the latter and provides for a pay as paid clause when such amount was included in the payment certificate as due from the employer. The obligation to pay the sub-contractor is that of the contractor. Clause 35

sets out the circumstances under which the contractor may cancel the agreement and the rights of the contractor under such circumstances. Of importance is clause 36 which deals with a cancellation of the principal contract because of a default by the contractor and spells out the obligations of the contractor vis-à-vis the sub-contractor as well as cancellation due to other events not attributed to the fault of the contractor. Clause 38 provides for the mediation of disputes and, if unsuccessful, for arbitration.

For all intents and purposes the contract between the parties is a complete contract providing for the execution of the work, and other auxiliary issues, and regulates the position of the parties in the event of a termination of the contract as well as the termination of the principal contract. A reading of the contract leaves no room for the claim, set out in the respondent's attorney's letter of the 24th April 2001, that the respondent was merely a sub-contractor with no liability financially or otherwise, towards the applicant with which it entered into the agreement. What is more there is no denial by the respondent that that is not so.

This brings me to the argument of Mr. Heathcote. Counsel did not address all the grounds of appeal as set out in the Notice of Appeal and, although Counsel did not formally abandon those grounds, the fact that argument was not further developed is an indication that the respondent itself does not put great store in the cogency of those grounds. I shall,
if necessary, deal with those grounds at a later stage.

The first issue is the citing of the respondent in the founding affidavit of the applicant. One would have thought that by now legal practitioners would

know how this should be done and that in the case of a company incorporated with limited liability the now stock phraseology whereby the status of such a company is indicated would follow as a matter of course. This was not to be and the respondent was cited as follows:

> " RESPONDENT is Mahe Construction (Pty) Ltd. a company carrying on business as building contractors at Erf 6986, Newcastle Street, Northern Industrial Area, Windhoek, which company is hereinafter referred to as MAHE."

Mr. Heathcote submitted that in general a party must set out sufficient information so that *ex facie* its pleadings (in this case the affidavits*)* it is clear that the parties thereto have the necessary *locus standi in judicio* to sue or to be sued. In this regard Counsel relied on Amler's Precedents of Pleadings, 5th ed. p 8O where the following was stated:

> "A company is a legal entity separate and distinct of its members and directors and must sue and be sued in its corporate name. Full particulars as to the nature of the company must be stated; also, the country of incorporation and its registered address or principal place of business within the jurisdiction of the court"

The general rule is further that the party instituting the proceedings bears the onus to establish such *locus standi.* See in this regard Mars Incorporated v Candy World (Pty) Ltd. 1991 (1) SA 567 (A) at p. 575H.

Counsel further submitted that in the absence of any allegation that the respondent was duly registered and incorporated there was no indication what the legal entity of the respondent was. And even if this hurdle was overcome it was impossible to determine whether the Court *a quo* had jurisdiction to hear the matter as it was not certain whether the company was an internal or

external company. The fact that it does some business within the Court's jurisdiction does not render it amenable to the Court's jurisdiction where its registered office and principal place of business is outside the jurisdiction of the Court. In this regard Counsel relied on Kruger NO v. Boland Bank Bpk. 1991 (4) SA 107(T) at p 112.

Mr. Trisk, on the other hand, pointed out that it was not the complaint that the respondent was incorrectly cited. Counsel referred the Court to the cases of Durban City Council v Jamnadas, NO, 1972 (1) SA 460 (D) and Divisional Council, Cape v Mohr, 1973 (2) SA 310 (C). In these cases the respective respondents took the point that the applicants were not properly before the Court. In the Durban City Council-case, *supra*, the following was stated in this regard, namely:

> "…where the respondent offers no evidence at all that the applicant is not properly before the Court, a minimum of evidence might be sufficient to discharge the *onus*, particularly where there is an express allegation by the person making the petition that he has been duly authorized."

The above excerpt from the Durban City Council-case was cited with approval in the Divisional Council-case, *supra*, at p 314H. In the latter case it was argued by the respondent that the resolution taken by the Council did not properly authorize the application. Dealing with this objection, Corbett, J. (as he then was) resolved this problem by looking at the surrounding circumstances. The learned Judge expressed himself as follows on p. 313H:

> "The resolution does not state expressly upon what legal grounds or authority it is taken. Any ambiguity in this regard would justify a

> consideration of the surrounding circumstances, including the content of a report on the matter by the secretary which, according to the minutes, was laid before the Council. Unfortunately this report is not before the Court. There are, however, among the papers a number of letters, written both before and after the resolution was taken, which help to throw some light upon the position."

The learned Judge, after having regard to all the circumstances and correspondence referred to, was satisfied that the applicant, in that instance, was properly authorized. Although in both these cases it was the *locus standi* of the applicant that was challenged Mr. Trisk submitted that the same principles should apply in the present instance where it was alleged by the respondent that it was not properly before Court. I can think of no reason why that should not be so. As previously stated, the *onus* is on the applicant to prove on a balance of probability that the respondent has *locus standi* to be sued. Where, as was submitted by the respondent, there is an ambiguity which affects its status to be sued, this Court is entitled to look at the surrounding circumstances in order to decide whether the applicant has acquitted itself of the *onus.*

In this regard the use of the words (Pty) Ltd. in the description of the respondent is not without significance. These words form an essential part of the description of a company with limited liability and are an essential part of the name of the company. That is spelled out by sec. 49(1)(b) of the Companies Act, Act No. 61 of 1973. Sub-section (8) provides that it shall be an offence for a company to use a name in contravention of any of the provisions of section 49. Furthermore documents emanating from the respondent, and forming part of the application of the applicant, indicate that the respondent is a company duly registered as such. I refer in this regard to

the letter written by the respondent dated the 11th October 1999 on a letterhead of the respondent where the name of the respondent and its status as a (Pty) Ltd. company are set out. See annexure "B". See also annexure "E-12". In the sub-contract Agreement the contractor is described as Mahe Construction (Pty) Ltd. and this description is repeated in the sub-contract schedule and is signed at the end where it is warranted that signatory was authorized to do so on behalf of the contractor. Furthermore the address of the respondent on these documents is given as P.O. Box 166, Windhoek and their bank is described as First National Bank, Ausspannplatz, Windhoek. To this must be added the fact that no evidence was presented by the respondent to gainsay any of the above facts. Under the circumstances it seems to me that the applicant proved on a balance of probabilities that the respondent is incorporated and that it is registered in terms of the laws of Namibia.

If this conclusion is wrong then it seems to me that in any event the applicant has shown that the respondent is resident in Namibia and that the High Court, and consequently also this Court, has jurisdiction to deal with the matter. In the description of the respondent by the applicant it stated that the respondent carried on business as building contractors at Erf 6986, Newcastle Street, Northern Industrial Area, Windhoek. This, in my opinion, signifies that the respondent has at least offices from which it carries out its operations. This is confirmed by the letter of 11 October 1999, annexure "B", wherein the applicant's attention is drawn to certain clauses of the contract concerning claims to be submitted for payment. The applicant was then informed that the claims must be sent to the 'head office' of the respondent at the address stated in the letter. The reference in the letter to the head office of the respondent is in my opinion significant and further indicates that the

respondent is not merely carrying on some of its business within the Court's jurisdiction but, in the event that it is a foreign company, that it has substantial operations in Namibia. The operations in regard to the present instance were carried out for the better part of a year and the respondent found it necessary to open a bank account with First National Bank, Ausspannplatz, Windhoek.

In the Court *a quo*, and bearing in mind the facts set out above, the learned Judge, with reference to Sec. 16 of the High Court Act, Act No. 16 of 1990, and the law as set out in the case of Appleby (Pty) Ltd v Dundas Ltd, 1948 (2) SA 905 (E), came to the conclusion that the respondent, if it were a foreign company, was sufficiently resident in Namibia to make it amenable to the jurisdiction of the High Court in respect of causes of action arising out of the business conducted by it. In my opinion the finding of the Court *a quo* is correct.

Section 16 of the High Court Act provides as follows:

> "The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising…" within Namibia…"

In the Appleby-case, *supra*, the plaintiff, who was an *incola* of the Court, sued the defendant, who was a company registered in England, but with branch offices in Johannesburg, for payment of orders received and executed within the Court's jurisdiction. Exception was taken on the basis that the Court did not have jurisdiction to adjudicate the matter. The Court, Hoexter, J, (as he then was), came to the conclusion that on the facts stated the defendant, *quoad* its business in the Union of South Africa, was indeed residing there within the meaning of sec. 5 of Act 27 of 1912, and dismissed the exception.

The Court discussed various cases and accepted the principle laid down by Solomon, J, in Wallis v. The Gordon Diamond Mining Co. Ltd.(6 H.C.G. 43), namely that where a foreign company registered in England, carried on mining operations in Griqualand West, it was sufficiently resident there to be amenable to the jurisdiction of that High Court in respect of causes of action arising out of contracts concluded in the course of its business in Griqualand West. (See p. 910.) In regard to this principle the Court in the Appleby-case, *supra*, stated on p. 911 as follows:

> "The principle is founded largely on commercial convenience, a point which is stressed in most of the decided cases. So, for instance GUTSCHE, J., in the case of *Ochs v. Kolmanskop Diamond Mines Ltd.* (1921, S.W.A. 8), gave the following reasons for accepting it:
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> > 'If it were held otherwise great inconveniences would arise and commercial dealings might, in consequence, become restricted. There might be companies whose head offices are in Berlin, but whose business is carried out in this country. It might not be in the best interests of such companies themselves, and it would be a hardship on those who had dealings with such companies, if the latter could not be sued in respect of transactions that arose wholly in this jurisdiction, until their property had been attached *ad fundandam jurisdictionem* and leave be granted to sue by edictal citation.'
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> Again, in the case of *Wright v. Stuttaford & Co.* (1929, E.D.L. 10 at p. 37), PITTMAN, J., referred to the important consideration of convenience as follows:
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> > 'Now it would seem that the consideration which above all others has hitherto determined this question of separate jurisdiction has been one founded on convenience. It is that, which prompted English Courts to entertain suits against foreign corporations carrying on business in England – *vide* the decisions referred to in *Beckett's* case at page 337, and the reason why the fiction of separate residence has never been applied by those Courts to proceedings against domestic companies, has been stated to be one equally of convenience, for, 'where the defendant is domiciled in England there is always a forum to which suitors having claims against it, may speedily and conveniently resort'-

> *per* Innes, J.A., at p. 338, and the learned Judge went on to justify the non-application of the fiction to the circumstances of the case before him, upon the same consideration.'
>
> It is this consideration of convenience, so strong in the present case, which impels me to come to the conclusion that the defendant resides in the Union *quoad* its business in the Union."

The principle enunciated in the above cases was followed in many South African cases, (See e.g. Bisonboard Ltd. v K Braun Woodworking Machinery (Pty) Ltd, 1991 (1) SA 482 (AD) at p 496F – 497F) and also in South West Africa/Namibia as is clear form the Ochs-case, *supra.*

Mr. Heathcote, however, referred the Court to the case of Kruger N.O. v Boland Bank, 1991 (4) SA 107 (TPD). That case is however distinguishable from the present instance. In that case the Court was asked to find that domestic companies registered in one province in South Africa were capable of "residing" in various other jurisdictions where they may have branch offices. The Court rejected this argument and based its finding on the case of T.W. Beckett & Co Ltd v H Kroomer Ltd, 1912 AD 324 where Innes, J., accepted the principle set out in the Wallis-case, *supra*, in regard to foreign companies but expressed reservations in regard to the application of that principle so far as domestic companies were concerned. (See however the discussion of the Beckett-case by Hoexter, JA., in the Bisonboard-case, *supra.*)

I have therefore come to the conclusion that even if the respondent was a foreign company, that the High Court had jurisdiction to entertain the application as the relief claimed also arose from the contract which was entered into and which was to be executed in Namibia. The respondent's

grounds of appeal based on the description of the respondent must therefore be rejected.

Mr. Heathcote further argued that the Court *a quo* should have dismissed the application on the basis that the documents before the Court raised a material factual dispute. Counsel submitted that it was clear from the letter written by the attorney of the respondent, which was annexed to applicant's application, that the respondent denied the existence of the agreement between the parties. That was the very agreement on which the applicant relied upon. Counsel referred to Rule of Court 6(5)(g) which provides that where an application cannot properly be decided on affidavit the Court may, *inter alia*, dismiss the application. Referring to the case of Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1153 (T), Counsel submitted that a Court would dismiss an application if the applicant should have realized, when launching his application, that a serious dispute of fact, incapable of resolution on the papers, was bound to develop.

I have no quarrel with the law as set out by Counsel. Of course where an applicant was forewarned or he foresaw that a serious dispute of fact would develop which could not be resolved on the papers and such an applicant persisted in motion proceedings, he ran the risk that the Court might dismiss the application. However in the present instance this did not happen and the only evidence put before the Court was that of the applicant. The letter unsubstantiated by evidence did in my opinion not create any dispute. The Court must judge the application on what it has before it and not on what might have happened. Obviously the cases stress the fact that an applicant must be so aware at the launching of the application because that is a factor

which the Court would consider in the exercise of its discretion in regard to what further steps should be taken and could also possibly influence the order of costs made by the Court. If an applicant was not so aware at the launching of the application and could also not reasonably foresee that a serious dispute of fact would develop then an applicant cannot be blamed for proceeding by way of motion and the Court, instead of dismissing the application, may take other steps. In any event, if a dispute is raised by the letter, that would, in the light of all the factual evidence placed before the Court by the applicant, and as further substantiated by the contract between the parties and the other documentation, not have raised a *bona fide* dispute. I also agree with Mr. Trisk that in the absence of any alternative version placed before the Court, which could possibly give rise to a dispute of fact, no consideration for a referral of the matter under the provisions of Rule 6(5)(g) ought to take place.

Mr. Heathcote further submitted that this was in any event a matter which should have been referred for evidence and in order to strengthen his argument Counsel referred the Court to the case of Moosa Bros & Sons (Pty) Ltd v Rajah, 1975 (4) SA 87 (D) where it was decided that the said rule can also be invoked even when the application is unopposed. Mr. Trisk's answer to this submission was that the Court would only do so in circumstances where the contents of the founding affidavit were such as to leave the Court in doubt as to whether or not the relief sought by the applicant in question ought to be granted, given the facts disclosed in the founding affidavit. Counsel further submitted that Moosa's-case was no authority for the proposition that a dispute of fact could arise in an unopposed application. I agree with Counsel and further agree that such a situation did not arise in this case.

I am therefore of the opinion that this ground of appeal must also be rejected.

A further ground of appeal raised by Mr. Heathcote concerns the non-joinder of the liquidator in the insolvent estate of Lofty's. In this regard Mr. Heathcote submitted that the liquidator had a material interest in this application and should therefore have been joined. Counsel said that this was so because the applicant itself alleged that the respondent and Lofty's were in a joint venture and because a joint venture could be a partnership. Counsel then accepted that this was indeed the position and pointed out the consequences that the liquidation of Lofty's would have on the rights of the parties and on the sub-contract itself.

Mr. Trisk pointed out that an interested party would be a party "against whom or in whose favour the declaration will operate" and who would consequently be bound thereby. (See Anglo-Transvaal Collieries v SA Mutual Life Assurance, 1977 (3) SA 631 (DCLD) at 636D).

In my opinion it was not established on the papers that Lofty's was an interested party as set out above and as was indeed also found not to be the case by the Judge *a quo.* The applicant throughout stated that it believed that there was a joint venture between the respondent and Lofty's or that it suspected that that was the case. It further also stated that it was never in a position to determine what the full details of the contractual arrangements between the respondent and Lofty's were. It ended off by saying that whether respondent and Lofty's were partners or parties to a joint venture or had some other contractual arrangement was not its concern. It further seems that the legal practitioner of the respondent was also not able to shed any further light

on the situation. In his letter to the applicant dated 23 April 2001 (annexure H-1) he stated that the respondent was itself only a sub-contractor to the Medi-Clinic project who was in addition also requested to perform certain managerial duties and to supply labour and building material. Later in the letter the legal practitioner stated that the respondent only functioned as a representative of Lofty's in Namibia. To establish on these allegations that Lofty's was an interested party in the sense, as set out above, seems to me impossible. There was no factual basis put before the Court on which such a finding, that Lofty's was an interested party, could be made. The fact of the matter is that in terms of the contract between the parties it is clear that the respondent was the contractor and the applicant the sub-contractor with no indication of any involvement from Lofty's.

Mr. Trisk further submitted that it would in any event not have advanced the respondent's case assuming that there was a partnership subsisting between it and Lofty's as the existence of that relationship was never disclosed to the applicant and as far as the applicant was concerned it contracted with the respondent and no one else. Counsel consequently submitted that the principles applicable to the so-called undisclosed principal are applicable in such a situation. See Kerr: The Law of Agency, 3rd Edition p. 267: Natal Trading & Milling Co. Ltd v Inglis, 1925 TPD 724 at p727 and O'Leary & Another v Harbord, (1888) 5 HCJ 1 at p 11.) Because of the conclusion to which I have come herein before, it is not necessary for me to decide this issue.

As part of his argument concerning the joinder of Lofty's as an interested party, and the consequences of Lofty's liquidation on the respective rights of the parties, Mr. Heathcote also referred to clause 31(1) of the contract in terms

of which the sub-contractor would only receive payment for the sub-contract works once the contractor was paid by the employer. Counsel referred the Court to the book Construction Insolvency, by Richard Davis who, at p 243 states that the "pay when paid" clause was devised to cover the Contractor against the risk of insolvency at the instance of the employer. On the strength of the above clause Mr. Heathcote submitted that part (b) of the Court Order, which declared "…amounts due to the applicant in terms of this sub-contract agreement are the responsibility of the respondent" is effectively barred by the liquidation of Lofty's. Counsel gave two reasons why this was so. Firstly he argued that no allegation was made that the contractor had been paid and that certain amounts were therefore due. Secondly Counsel argued that what the applicant sought was a declarator that the respondent was liable to it for payment and that the same relief could have been obtained by instituting proceedings for payment. In this regard respondent referred the Court to the case of Naptosa and Others v Minister of Education, Western Cape and Others, 2001 (2) SA 112 (C) at p 125.

As far as the first submission is concerned I have found that Lofty's or its liquidation is not relevant to the present proceedings. However, if I understood the argument of the respondent correctly, then it must follow that the same contention would apply also to the respondent, Mahe Construction (Pty) Ltd. In my opinion Mr. Heathcote misconstrued the meaning of paragraph (b) of the order. The Court *a quo* did not by its order declare that amounts were due. Although paragraph (a) barred the respondent from contending, in any proceedings which may follow, that it is not a party to the sub-contract agreement the words "any amounts due" mean in my opinion

amounts found to be due in terms of the said agreement. If necessary the order can be amended to ensure greater clarity.

Regarding the second submission made by Mr. Heathcote, the requirements for a declaratory order was discussed in the case of Shoba v Officer Commanding, Tempory Police Camp, Wagendrift Dam and Another; Maphanga v. Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others, 1995 (4) SA 1 (A).

With reference to sec. 19(1)(a)(iii) of the Supreme Court Act of South Africa, which is similar to our sec. 16(d) of the High Court Act, Act No 16 of 1990, Corbett CJ, said the following at page 14F-I, namely:

> "Generally speaking the Courts will not, in terms of s 19(1)(a)(iii), deal with or pronounce upon abstract or academic points of law. An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case (see *Ex parte Nell* 1963 (1) SA 754(A) at 759H-760B). But because it is not the function of the Court to act as adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (*Nell's* case at 760B-C). In *Nell's* case *supra* at 759A-B, Steyn CJ referred with approval to the following statement by Watermeyer JA in *Durban City Council v Association of Building Societies 1942 AD 27 at 32, with reference to the identically worded* s 102 of the General Law Amendment Act 46 of 1935:
>
> > 'The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and, then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'"

As far as the two-stage examination is concerned there cannot be any doubt that the applicant is interested in an existing right and that the order granted

by the Court *a quo* is binding on the parties. Furthermore it was demonstrated that a dispute exists and that any pronouncement by the Court will not be abstract or academic.

The second leg of the enquiry is whether this is a proper case where the Court will exercise its discretion in favour of the granting of the declaratory order. The problem that the respondent faces in this regard is that the Court *a quo* was satisfied that this was such a case and it therefore exercised its discretion in favour of the granting of the order. The power of this Court to interfere with the exercise of such discretion by the Court *a quo* is limited. In my opinion it was not shown that the Judge *a quo* failed to exercise his discretion judicially. (See *inter alia* Lawson and Kirk (Pty) Ltd v Phil Morkel Ltd., 1953 (3) SA 324 (AD) at 332A-C).

In the present instance the agreement between the parties provides for the settlement of any disputes for mediation and if that is unsuccessful for reference to arbitration. (Clause 38). The dispute between the parties concerns the validity of the agreement which provides for arbitration. In the case of Allied Mineral Development Co. (Pty) Ltd. v Gemsbok Vlei Kwartsiet (Edms.) Bpk., 1968 (1) SA 7 (CPD) at p 14B-H it was held that the clauses providing for arbitration in that instance did not provide for a dispute concerning the validity of the agreement to be referred to arbitration. That, in my opinion is also the effect of clause 38 of the agreement although clause 38.8 provides that a cancellation of the agreement in terms of clauses 35 to 37 shall not affect clause 38. These clauses deal respectively with cancellation of the agreement due to default by the sub-contractor, (clause 35), cancellation of the principal agreement, (clause 36), and cancellation of the sub-contract

due to certain defaults by the contractor or employer, (clause 38). These clauses do not cover the present dispute. The parties could however by separate agreement confer such jurisdiction on the arbitrator. Consequently Mr. Heathcote argued that if proceedings were instituted in a Court of Law the matter would have run its course and no plea for a stay would have been made. That may be so but the fact that other remedies, other than a declaration of rights, are available is only one factor which a Court can take into consideration in order to decide whether to exercise its discretion in favour of the granting of a declaration of rights. It does however not bar the granting of such an order. (See Safari Reservations Ltd. v Zululand Safaris (Pty) Ltd., 1966 (4) SA 165 (DCLD) at p 171F.) The above case also decided that a consequential claim for relief is not a bar to a declaratory order.

I am satisfied that this is a proper instance for an application for a declaratory order. The dispute between the parties were precise and limited to the issue of the validity of the agreement. The declaration of rights in this regard also took care of the uncertainty created by the denial of the respondent on the basis that Lofty's was the real contracting party and not itself, notwithstanding that it signed the agreement and is styled by it as the contractor. The declaration would obviate lengthy and costly litigation and now also enables the parties to go to arbitration, which, so it seems, was their first choice. Had the applicant been unsuccessful in obtaining the order that may very well have been the end of litigation. See in this regard Nkadia v Mahlazi and Others, 1982 (2) SA 441 (TPD) at p 449H to 450. In my opinion the Court *a quo* correctly found that this was an instance where it should grant a declaratory order.

As previously stated Counsel did not further develop some of the grounds of appeal in argument for the respondent. These were the grounds set out in paragraphs 1, 2 and 9 of the Notice of Appeal. In the first ground it was alleged that the learned Judge erred in granting the declarator. In paragraph 2 it was alleged that the Court did not deal with the matter on the basis that the applicant had to prove its case on a balance of probabilities and, if it did, it wrongly came to the conclusion that the applicant acquitted itself of the *onus.* In the last paragraph it was alleged that the learned Judge erred in giving a different weight in respect of different legal issues raised by the respondent in the letter of his attorney. It seems to me that there is no substance in these grounds of appeal. The first two grounds are directly or indirectly dealt with in the judgment. In regard to the last ground the learned Judge was in my opinion entitled to look at the letter in the light of all the evidence placed before him and to give weight, if any, to the content where it coincided with the evidence and to deal otherwise with those parts that were clearly not consistent with such evidence.

In regard to paragraph (b) of the order made by the Court *a quo*, Mr. Trisk conceded that this order was not strictly speaking necessary. I agree. It seems to me that what is set out therein would flow, by operation of law, from the order made in terms of paragraph (a) and that it is not necessary to spell out the obligation to pay such amounts found to be due by the respondent in terms of the Sub-Contract.

Mr. Trisk further submitted that this is an instance where the Court should allow the costs of the appeal to include the costs of two Counsel. Most of the

different issues argued by Counsel raised difficult questions of law and in my opinion this is a matter where such an order would be appropriate.

In the result the following order is made:

1. Paragraph (b) of the order made by the Court *a quo* is deleted.

2. Otherwise the appeal is dismissed with costs, such costs to include the costs consequent upon the instructing of two Counsel.

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STRYDOM C.J.

I agree.

_____
O'LINN A.J.A.

I agree.

_____
CHOMBA A.J.A.

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