

CTH CHEADLE THOMPSON
& HAYSON INC.
ATTORNEYS

The Cape Law Society
29th & 30th Floors
ABSA Centre
2 Riebeeck Street
Cape Town

Copy received

DATE: 07 SEP 2011 BY HAND

CAPE LAW SOCIETY

1. Further to your letters dated 5 July and 18 August enclosing Mr Lewis' complaint in the form of a covering letter and an affidavit attested to by him on 25 January 2011, I hereby file the following response to the complaint.

2. I was an acting judge of the Labour Court from December 2009 to May 2010 during which I presided over the matter between Mr Lewis and Media 24 Ltd (Media 24). Judgment was handed down on 4 May 2010 dismissing the application with costs. A copy of the judgment is attached ("A"). Mr Lewis applied for leave to appeal. The application was refused because he filed it 71 days late and had not applied for condonation in accordance with the rules. In any event, I considered his grounds of appeal and concluded that there was no prospect of another court coming to a different conclusion. I have been advised by the Registrar that he has subsequently filed a petition to the Labour Appeal Court for leave to appeal.

3. The complaint against me is described in his covering letter as 'wilful and/or grossly negligent conduct that is incompatible with or unbecoming the holding of judicial office, including conduct that is prejudicial to the independence, impartiality, dignity and accessibility of the courts'. The facts on which the complaint is made are set out in the accompanying affidavit. Those facts attack my failure to disclose the alleged chains of association between my shareholding in Resolve (Pty) Ltd and Media 24 (and presumably my failure to recuse myself

on the grounds of a reasonable apprehension of bias flowing from those alleged chains of association).

4. The nub of his complaint is that I failed to disclose the fact that I was a director and shareholder in Resolve (Pty) Ltd, a human resource consultancy, and the fact that other shareholders of Resolve (Kagiso linked companies) had links with other companies (Metropolitan and the Lagardere Group) that had links with Sanlam Ltd, which had an interest in Naspers Ltd, which owns Media 24.
5. Apart from the fact that I had no knowledge of the equity holdings of the other Resolve shareholders and their commercial inter-relationships with other companies at the time, the connections between me and the owners of Media 24 are so tenuous that no reasonable person would consider there to be any realistic possibility that the outcome of the proceedings would affect my interest in Resolve, which is the test developed by the Constitutional Court in *Bernert v ABSA Ltd* 2011 (3) SA 92 (CC) to decide whether a judicial officer with shareholding has an interest in the outcome of the case or that a reasonable person would apprehend that the judicial officer had such an interest.

Allegations in paragraphs 2 to 6

6. Because these allegations do not form the basis of the complaint, it is unnecessary to traverse them in any detail. It is correct that Mr Lewis had approached the law firm for assistance at an early stage of the proceedings and that the firm had advised him that Media 24 had been a client (as it turned out, the firm had only been briefed once for an opinion). It is also correct that when these issues were raised in chambers with Mr Lewis and Adv Kahnovitz, and his instructing attorney Glen Cassells of Maseremule Inc, representing Media 24, I offered to recuse myself. In the discussion that followed, I do recall stating that I had no part in the brief from Media 24 and that I felt that I would be able to preside impartially. Both parties agreed to my presiding over the matter.

Four alleged chains of 'relationship' – paragraph 7

7. Mr Lewis alleges four chains of 'relationship' with Media 24 which demonstrate, he says, that I had a material interest in the outcome of the case and a manifest lack of impartiality. These chains of alleged 'relationship' were not disclosed during the proceedings because I was not aware of the shareholdings and commercial relationships that the other shareholders of

Resolve had with other companies at the time. Moreover, even if I did know, they would not have constituted grounds for either disclosure or recusal because they do not demonstrate that I had a material interest in the outcome of the case or that I might be perceived as having such an interest.

8. The chains begin with my directorship and shareholding (6.046%) of Resolve and the fact that Kagiso Trust Enterprises (Pty) Ltd (KTE), Mr David Storey and Mr Max Sisulu have approximately 25.9%, 17.2% and 5.7% shares respectively in the company.
9. In so far as what follows demonstrates some knowledge of the shareholding and interrelationships between the different companies, this is because I have had to research the different claims made by Mr Lewis in order to respond to his claims. I might add that it has taken several hours of internet research to get the information of the associations that form the basis of his complaint.

The Kagiso chain – paragraph 7.2

10. It is alleged that KTE has 'several partnerships' with Media 24, the details of which are that KTE owns 10% of Metropolitan Holdings Ltd. That 10% share constituted a 'joint venture' with Sanlam Ltd. Sanlam Ltd has a controlling interest in Naspers Ltd, which owns Media 24.
11. It is clear from the Kagiso website that KTE does not hold 10% of the Metropolitan Holdings Ltd. Its two holdings are Resolve and SATI Container Services.
12. It is also evident from its website that Kagiso Trust Investments (which appears to be the holding trust or a company) owns KTE and the 10% share in Metropolitan. The size and complexity of the company structure of Kagiso is demonstrated in the attached structure ("B").
13. The 10% share in Metropolitan did not constitute a 'joint venture' with Sanlam Ltd. Metropolitan was a public company and it issued the shares to Kagiso Trust Investments. The full details of the transaction in 2004 are set out on the Kagiso website (<http://www.kagiso.co.za>)
14. I have no knowledge of Sanlam's shareholding in Metropolitan – I did a search on both Sanlam and Metropolitan websites but could find no information on Sanlam's shareholding in

Metropolitan. Nevertheless the fact that it may have shares in Metropolitan does not make it a 'joint venture' or that Kagiso Trust Investments, as a result, acquires an interest in the outcome of Sanlam's other investments. Sanlam Ltd is itself a complex system of companies and businesses as its website demonstrates (<http://www.sanlam.co.za>).

15. I have no knowledge that Sanlam Ltd has a controlling interest in Naspers Ltd, a publicly listed company, although it would not surprise me. Naspers Ltd is itself made up of a complex system of subsidiaries, only one of which is Media 24.
16. There are five links in this chain: the link between shareholders in Resolve; the link between different companies and businesses in Kagiso Trust Investments; the link between shareholders in Metropolitan; and the link between companies owned or controlled by Sanlam. Other than Sanlam's alleged control over Naspers and Media 24, not one of the links constitutes a 'partnership' or involves any control of one company over another.

The Kagiso/Lagardere chain – paragraph 7.2.3

17. The second example of an alleged 'partnership' between KTE and Media 24 is KTE's 50% interest in Acceleration Media, a strategic digital marketing consultancy, with Lagardere Active Radio International, a division of the Lagardere Group, a French multi-national based in Paris. Media 24 is, Mr Lewis claims, in 'partnership' with a division of Lagardere because it publishes a magazine belonging to the Lagarde Group.
18. KTE does not own a 50% share in Acceleration Media (Pty) Ltd. The 50% shareholding in Acceleration Media is held by Kagiso Media (Pty) Ltd, which is not only a different company in the group but a different business from the one engaged in by KTE. Kagiso Media is itself a complex group of companies as the attached structure demonstrates.
19. I have no knowledge of the commercial arrangements between Media 24 and the Lagardere Group arising from its publication of the magazine Psychologies and I question whether the arrangements constitute a 'partnership'.
20. Again it seems extraordinarily tenuous to suggest that I would have a material interest in the outcome of Mr Lewis' claim if all that links me to Media 24 is its publication of a magazine for a French multi-national, the fact that another Kagiso company has a 50% stake together with a subsidiary of that multi-national in respect of a business that has nothing to do with the

printing of newspapers and magazines or that Media 24 publishes a magazine for that multi-national.

The Discovery chain – paragraph 7.3

21. This chain begins with the fact that Resolve has the Discovery Group as a client. It is alleged that Discovery is a 'unit' of Rand Merchant Bank Holdings Ltd (now owned by Metropolitan Momentum Holdings Ltd) and that Discovery and Rand Merchant Bank are clients of Psytech SA. Mr Lewis claims that Psytech SA and Resolve are in an alliance or 'appear to be in negotiations over a potential merger'.
22. Quite apart from the inaccuracy of the equity structure between Discovery, Rand Merchant Bank and Metropolitan Momentum Holdings Ltd, I have been informed by the Chief Executive Officer of Resolve that there have never been any negotiations over a merger between Psytech and Resolve.
23. Psytech develops and conducts psychometric tests and supplies certain psychometric tools to Resolve Encounter Consulting, a subsidiary of the Resolve Group. As such it is just one, and a small one at that, of a number of service providers that supply services to Resolve. I had no knowledge of this fact until I asked the Chief Executive Officer in order to respond to the allegations made by Mr Lewis. Moreover, I was not aware at the time (or now) who Psytech's other clients are. They may well be Sanlam and Media24.
24. The factual basis for much of what is said in respect of this alleged 'partnership' is just wrong. But even if it was true, the tenuous nature of the relationships would not require either disclosure (if known) or recusal. No reasonable person would apprehend bias on account of these alleged relationships.

The Sisulu chain – paragraph 7.5


25. This chain begins again with the fact that I and Mr Max Sisulu are shareholders of Resolve. It is then claimed that the 'Sisulu family has extensive holdings in Kagiso' and that Mr Max Sisulu's brother, Mr Zwelakhe Sisulu, is a director of one of the companies. Quite apart from the fact that I do not have knowledge of the Sisulu family's shareholding in Kagiso, the links are again so tenuous as to be rejected out of hand.

26. I do not understand the allegation made in paragraph 7.5.2 and how it bears on my hearing of his case. I was never aware of Mr Lewis's membership of the associations or his views on nuclear energy. I am advised that Resolve provided HR advice in 2005 and since then has had no further dealings with Koeberg.

Conclusion

27. Mr Lewis' complaint is that I failed to disclose my alleged association via several chains of intermediaries and Media 24 and accordingly that, had he known, he would have had a reasonable apprehension of bias.
28. In *Bernert v ABSA Bank Ltd*, the Constitutional Court had to decide among other things whether a judge with a small but direct shareholding in the Respondent Bank constituted grounds for recusal. Applying the test that there must be a realistic possibility that the outcome of the proceedings would affect the judicial officer's stake in the Respondent Bank, the Court held that there was no such realistic possibility given the size of the shareholding and accordingly that judge concerned did not have an interest in the outcome of the case and no reasonable person would have apprehended that he had such an interest.
29. Applying that test in respect of this complaint, it is manifestly clear that that the links are so indirect that there was no realistic possibility that the outcome of the litigation between Mr Lewis and Media 24 could have any effect on the value of my shares in Resolve. It follows that no reasonable person would have apprehended that I had such an interest in the outcome of litigation.

Yours faithfully


Halton Cheadle
Cheadle Thompson & Haysom Inc.



CHEADLE, AJ

Date of Hearing : 4-6 November 2009 & 20-21 January 2010

Date of Judgment : 4 May 2010

Appearances

For the Applicant : David Robert Lewis (in person)

For the Respondent : Adv C S Kahanovitz SC

Instructed by : Maserumule Inc Attorneys

