CIV/APN/138/84

IN THE HIGH COURT OF LESOTHO

In the Application of :

EXECUTRIX OF THE ESTATE OF THE LATE E.M. NQOKO	1st Applicant
'MATHABANG ALRINA NQOKO	2nd Applicant

V

VALENA (PTY) LIMITED	1st Respondent
ENNIO LAMPANI	2nd Respondent

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice J.L. Kheola on the 29th June, 1984.

This is an application in which the Applicant seeks an order in the following terms:

1. That a Rule Nisi do hereby issue calling upon Respondents on a date to be determined by the above Honourable Court to show cause why:-

   (a) The Respondents shall not be restrained from removing any movable property from the premises of Valena (Pty) Ltd., trading as Lesotho Nissan at Maseru East, Maseru;

   (b) The Respondent shall not be directed to state the place where some of the movable property to wit: a number of motor vehicles, have been removed or caused to be removed.

   (c) The Respondents shall not be ordered to bring or cause to be brought back to the

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company premises the movable property as aforesaid removed or caused to be removed on or about the 20th June, 1984.

2. Directing the Respondents to pay the costs of this application.

3. Granting Applicant such further/or alternative relief as this Honourable Court may deem fit.

4. That prayer 1 (a), (b) and (c) should operate with immediate effect.

On the evening of the 23rd June, 1984 Mr. Mphutlane, for the Applicants, accompanied by the Registrar of this Court appeared before me at my residence and moved this application as a matter of extreme urgency. Having read the papers and heard Mr. Mphutlane I granted the Rule Nisi applied for and the return day was the 29th June, 1984.

In her founding affidavit the 2nd Applicant states that on or about the 20th June, 1984 she learned that some of the movable property of 1st Respondent had been removed from 1st Respondent's warehouse at Lesotho Nissan, Maseru East and on making inquiries she found that the warehouse was almost empty. She says that on or about the 28th May, 1984, summons was issued against the Respondents in CIV/T/266/84 and were served on the 5th June, 1984 upon Valerie Noelle Yeats, one of the Directors of the Respondent and an appearance to defend has since been filed. She fears that the removal of motor vehicles from 1st Respondent's warehouse was

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carried out in contemplation of a possible attachment or execution against the assets of the 1st Respondent. If the removals continue and the property which has already been removed is not brought back the actions against the Respondents are likely to be prejudiced.

In his answering affidavit the 2nd Respondent denies that any movable property belonging to 1st Respondent was removed from 1st Respondent's warehouse. What were removed are four new vehicles from 1st Respondent's show-room which vehicles are the property of Nissan (South Africa (Pty) Ltd., its makers and supplied to 1st Respondent to sell by Nissan (South Africa) (Pty) Ltd. upon guarantee signed by persons who have, by agreement with 1st Respondent and the said Nissan withdrawn their guarantees. Arrangements are being made with the said Nissan for the supply of other vehicles upon a guarantee signed by other persons. The vehicles removed were never the property of 1st Respondent. They were supplied on consignment as is the practice in the trade. He further says that it is impossible for him and the 1st Respondent to retrieve the motor vehicles from Nissan (South Africa) (Pty) Ltd. as they do not belong to them and had been supplied to 1st Respondent purely on consignment to be paid for only after being sold.

In an application of this nature the applicant must establish that the respondent has no <u>bona fide</u> defence to the action and that, objectively considered, there are good grounds for fearing that he intends to

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remove or sell the movable property in order to defeat the applicant's prospective judgment. In other words, the applicant must show that he has a prima facie cause against the respondent. In Yamomoto v. Rand Canvas Company 1919 W.L.D. 100 at p. 104 De Villiers, J.P. said:

> "The applicant does not claim as his property any part of the assets to be transferred, but he says they are being transferred in order to defeat the judgment he hopes to get in his action for damages. Before he can succeed in getting an interdict he must show that there is no bona fide defence to the action and that the object of the sale of the assets is to defeat the claim."

I agree with the learned judge and I wish to add that in the present application the applicants have made no attempt whatsoever to disclose to this Court what kind of claim they have against the respondents. All they had done is to attach a copy of return of service in CIV/T/266/84 and a notice of intention to defend the action. It was their duty to show that they have a prima facie cause of action against the respondents; and that the respondents have no bona fide defence to the claim. When this matter was argued before me this morning I asked Mr. Mphutlane the nature of claim they had against the respondents. He referred to an amount of M77,000 but his answer from the bar is not the sort of evidence the Court can rely upon.

In Mcitiki and Another v. Maweni 1913 C.P.D. 684 at 686, Hopley, J., remarked as follows:

"The practice of the Court is to do justice between

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> people according to the circumstances that may arise. It has, of course, long been the practice of this Court that if the respondent, although an incola, were in fuga, the Court would in such circumstances restrain him from parting with certain property pending the result of an action; and that doctrine has been extended a little further where the respondent is a prodigal wasting his m money or is purposely making away with funds although remaining an incola of the country, so that eventually when his creditor gets a judgment it may be a barren one; and, to use a graphic phrase, in one of our old law cases, where he went there with his writ of execution, such creditor would find he was 'fishing behind the net'. It is to protect the aa bona fide plaintiff against a defeat of justice in such a case that such orders are given."

I have no doubt in my mind that the respondents had a right to bring this application despite the fact that they had earlier in another application failed to have the 2nd Respondent arrested as a peregrinus in terms of Rule 6 of the High Court Rules 1980, but their evidence falls for short of proving that they have a prima facie claim against the respondents. The 2nd Respondent has shown that the four vehicles removed from the warehouse of the 1st Respondent were the property of Nissan (South Africa) (Pty) Ltd. and that they had been supplied on consignment to be paid for only after being sold. He said that people who signed as guarantors have now withdrawn their guarantee and for that reason Nissan was justified to have its vehicles returned to it. Mr. Mphutlane submitted that the allegation by the 2nd Respondent amounted to a bare denial. I do not agree with him because

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the 2nd Respondent says that it is a common practice in the business of selling motor vehicles to have motor vehicles supplied on consignment and only pay the supplier after the vehicles have been sold. No replying affidavit was filed to rebut that that was not the practice in motor vehicle dealing.

There is no evidence that besides the removal of the four vehicles, for reasons which appear to be genuine to me, the 2nd respondent is dissipating the moneys of the 1st Respondent. If the applicants could prove that other property is also being sold or removed from the warehouse that would objectively show that the 2nd Respondent is doing all these things with the intention of defeating the applicant's prospective judgment. There is no evidence to that effect.

For the reasons I have stated above I formed the opinion that the apprehension by the applicants is unfounded.

The rule was discharged with costs to the Respondents.

ACTING JUDGE.
29th June, 1984.

For the Applicants : Mr. Mphutlane
For the Respondents: Mr. Sello.