CIV/APN/288/89

IN THE HIGH COURT OF LESOTHO

In the Application of :

ABDUL RAUF ABUBAKER — Applicant

V

ELLERINES FURNISHERS (LESOTHO) Pty Ltd — 1st Respondent
TOWN TALK FURNISHERS (LESOTHO) Pty Ltd — 2nd Respondent

R U L I N G

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 5th day of February, 1990.

The applicant approached this Court on short notice and urgent basis in terms of a Notice of Motion wherein an order is sought in the following terms :-

1. That a Rule Nisi be issued calling upon the respondents to show cause (if any) on a date to be determined by this Court why the Order in the following terms should not be made absolute:-

   (a) That the respondents be ejected (sic) in respect of the properties occupied by them (sic) in respect of business premises situated at Teyateyaneng and Butha-Buthe (sic) occupied by the 1st respondent and in respect of the property situate at Maputsoe occupied (sic) by the 2nd respondent;

   (b) That this Court should make an order that the leases in respect of the properties as (sic) aforementioned are null and void and of no force and effect in terms of Provisions of section 24 of the Deeds Registry Act of 1967;

/(c)

(c) That the respondents be ordered to pay the costs of this application;

2. That prayer 1(a) should operate with immediate effect.

3. Dispensing with the periods of service of this application on the grounds of its urgency as provided by the Rules of this Court.

4. Granting such further and/or alternative relief as this court may deem fit.

The properties in respect of which the order of ejectment is sought purport to be sub-leases.

Section 16(1)(c) of the Subordinate Courts (Amendment) Proclamation of 1964 says:

"Subject to the provisions of this Proclamation the Court, with regard to causes of action, shall have jurisdiction -

(a) .....

(b) .....

(c) in any action of ejectment against the occupier of any house, land or premises to such property."

The 1988 Subordinate Courts Order does not depart from the above view.

The High Court Act provides that the High Court can entertain such application in chambers and on notice to the other side.

It would seem therefore that what this contemplates is that an applicant can proceed on such application with leave to do so granted by this Court. Further that it seems that irrespective of the value of property from which ejectment is sought the Subordinate Court has jurisdiction to entertain an application relating to ejectment.

However in the instant application no leave has been sought to move it before this court. Neither has sufficient cause been shown why the application was not

/moved

moved before the Subordinate Courts in which the respective properties from which ejectment is sought are situated. I am not unmindful of the salutary remarks made in Golube vs Oosthuizen and Another 1955(3) 1 SA at headnote 1 and Liassou vs Pretoria City Council 1979(3) 217 wherein the question of exhuasting domestic remedies was discussed in conjunction with the fact that there would be an ouster only if the conclusion that domestic remedies have not been exhuasted flows by necessary implication from the particular provisions under consideration. I am of the view though that the instant matter does not call for any detailed consideration to that end.

Mr Buys for the respondents raised preliminary points of law with a view to avoiding delving into the merits of the main application in the event that the points in limine raised are upheld at the end of the day.

He premised his argument by praying that the main application should not be heard and that if heard, it should be dismissed; alternatively that the respondents be afforded an opportunity to file their opposing affidavits. He submitted that it is not necessary to file opposing affidavits if a respondent relies on a point of law.

In this regard he relied on page 90 of The Civil Practice of Superior Courts in South Africa 3rd Ed. by Van Winsen et al where it is stated :

"If any party wishes to oppose he must, save where he relies solely upon a point of law, file and serve answering affidavits in which his defence is set out."

It was pointed out that if the applicant proceeds by way of motion then he must comply with the rules. It was submitted that the applicant ought to have first obtained an order of nullity with respect to the leases and afterwards prayed for ejectment.

Having submitted that if a party adopts an incorrect procedure the court is entitled to refuse to hear him he

/referred

referred me to the importance of the rule requiring that a party bringing an application at short notice should carefully consider options open to him together with the relevant forms.

At page 59 Van Winsen et al say

> "When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person."

But in the instant application the notice of motion is addressed to none.

Emphasising that observance of forms is of the first magnitude Schutz P. in C of A (CIV) No. 16 of 1984 Kutloano Building Construction vs 'Maseele Matsoso & 2 Others (unreported) at 7 said:-

> "I am afraid that my decision may smack of the triumph of formalism over substance. But forms are often important and the requirements of the sub-rule are such ...."

It is to be noted that motion proceedings are authorised in certain types of proceedings such as insolvency where the statute so requires. On the other hand certain classes of cases such as matrimonial causes and claims for damages admit of no motion proceedings before court. With respect to all other forms of cases the party wishing to bring his matter to court is confronted with a choice either to proceed by way of action or by way of motion. The yardstick to apply in making this choice in favour of proceeding by way of motion, resides in making a determination even before coming to court whether there is a real dispute of fact involved. If there is; then an action is the preferable mode of proceeding.

I am thus inclined to accept the view expressed by Mr Buys that

> "It is common knowledge that motion proceedings are normally used in cases where there is no danger of

/real

real dispute of fact and where urgent and quick relief is sought or needed."

Mr Buys refers to this application as ex parte. Mr Mphalane says it is not ex parte but on notice. He goes further to pray that the omission to address the application to both the Registrar and the other parties should be condoned in terms of Rule 59. Mr Buys opposes this prayer for condonation of the omission and submits that the respondents would be prejudiced if condonation were granted: Further that the respondents would be inconvenienced on grounds of being dragged before court on one leg.

Despite argument to the contrary it seems to me that in effect this application is ex parte. It required that a rule nisi should be granted and rendered returnable the following day i.e. 10th November 1989. I have observed that an alteration from the printed 10th to handwritten 16th November has been effected but not initialled.

Applying the rule that a dubious disposition should be interpreted against the author it would seem that within the time when cause was required to be shown the respondents could hardly have been ready to oppose the matter even if they so desired at the initial hearing before the intended rule would have been obtained. Thus the purported service was but a farce.

Because the papers were addressed neither to the Registrar nor to the parties they should not have been received by the office of the Registrar in the first place but rejected even as an attempt was being made to file them. I have been told that instead of being brought to the office of the Registrar these papers were taken straight from the Registry by a filing clerk to the Chief Justice's secretary for purposes of being placed before the Chief Justice for allocation.

I maintain that the procedure adopted was not only

/irregular

irregular but totally wrong. The High Court Act No.5 of 1978 says in section 12 :-

> "The Chief Justice shall regulate the distribution of business in the court, and all actions and proceedings before the court shall be heard and determined by a single judge, unless the Chief Justice otherwise directs."

This section does not say that the Chief Justice shall distribute the business in the court. The fact that it says he shall regulate the distribution presupposes that the distribution is to be effected by someone else: in this regard the Registrar. If the Legislature intended the Chief Justice to distribute the business then there would have been no need to have used the elaborate phrase "shall regulate the distribution of the business ...". The purpose would have been adequately served by saying the Chief Justice "shall distribute the business of the Court." The failure to follow the strict terms of the Act has the unfortunate effect of clothing with an aura of acceptability documents which have otherwise been irregularly received.

Mr Buys invited the Court to appreciate that the order sought by the applicant is to the following effect and requires:

1. an immediate ejectment from the properties being occupied by the respondents,
2. a rule to show cause why the respondents should not be ejected,
3. a declaration that the agreements are null and void.

He accordingly submitted that the first two prayers are absurd because to comply with them the respondents would have to be evicted before they could show cause why they should not be ejected. He criticised the rule nisi sought because in effect it requires that the respondents should on the return day show why they should be reinstated.

He submitted that the procedure used by the applicant

/is

is wrong and that the application should not have been brought ex parte in the present circumstances because there is no urgency in the matter.

Indeed the rule is that the applicant must prove in the founding affidavit that the matter is urgent. It is not enough for the applicant merely to make an allegation that the matter is urgent without proving how. See page 57 of Uniform Rules of Court by Nathan, Barnet and Brink. C/F Mangala vs Mangala 1967(2) SA 415.

In the present application the applicant merely contents himself at page 9 para 16 with making the allegation that

> "In the interests of justice the application calls for urgent relief because there has been no compliance with the law."

I have not been told that there is a chance of damage to the properties in question or any financial loss.

Besides the allegation that

> "the respondents are adamant that they are not prepared to comply with the requirements that the leases be registered"

the applicant gives no reason why he should have immediate vacant possession of the premises.

It was only at the replying stage during arguments that I heard for the first time that if the premises catch fire the applicant would not be able to claim from the insurance companies because the premises are illegally occupied in the first place in that the leases have neither been registered nor the Ministerial consent obtained. See Deeds Registry Act 1967 section 24 subsections (2) (3) and (4).

Mr Buys charged that the applicant does not say why he could not have used the normal notice periods or even action proceedings in bringing this matter to Court.

/In

In Republic Motors vs Lytton Road Service Station 1971(2) 516 at 518 Beck J. said:-

> "The procedure of approaching the Court ex parte for relief that affects the rights of other persons is one which ... is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of audi alteram partem. It is accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or of well-grounded apprehension of perverse conduct on the part of a respondent who if informed beforehand that resort will be had to the assistance of the Court, that the course of justice stands in danger of frustration unless temporary curial intervention can be unilaterally obtained."

I accordingly agree with the submission that it is essential for this kind of application that the applicant must give reasons why the normal periods for service should not be adhered to or that it would damage or harm his case if he gave notice for that notice would precipitate the apprehended harm.

There seems therefore to be substance in the submission that on the applicant's own papers it is clear that the matter has been dragging on since March 1989 to the end of September 1989. See Annexure M M 9.

Annexure M M 6 29.9.89 shows that it was during a course of negotiations when it occurred to the applicant that the provisions of the Deeds Registry Act were overlooked with the result that he feared the leases were of no legal effect. The tenor of the letter clearly shows that the applicant wished to re-negotiate the terms of the leases. To what end? Mr Buys says the renegotiations were intended primarily for renewal of rentals. In other words the applicant's eagerness to regularise the registration of the leases was but a smoke-screen.

I tend to agree with this view because I fail to see why it is only then that, when the negotiations which had been

/going

going on for a long time fail, the applicant should suddenly be of the view that the matter is urgent.

The applicant alleges on page 4 of the founding affidavit that he first took legal advice in this matter during the end of September 1989. This allegation stands in stark contrast with contents of Annexure N M 9 and N M 10 written in May 1989 and June 1989 respectively.

On this basis it seems nothing of note justified this matter being brought to Court as a matter of urgency. It thus follows that the applicant only chose to proceed by way of urgency to avoid taking his turn at the end of the list of matters already in the pipeline awaiting consideration by the court in due course.

The fact that in the eyes of the law the leases were a nullity does not warrant a precipitate flight to this Court first because the agreement of the leases is binding inter partes notwithstanding the nullity; secondly because the parties were entitled to rectify whatever defects were discernable in the leases.

The fear that the leases have the blemish of lex in turpe causa and therefore unenforceable is not warranted because the turpis causa doctrine relates to base and vile undertakings which are tainted with either criminality or immorality. None of these prevails in the instant application. An application for the ministerial consent can still be made even at this late hour.

The applicant's counsel pointed out that the points of law raised did not accord with the procedure laid down in the rules that the other party should be given notice. See Rule 8(10)(c). The purpose of this provision is to ensure that the affected party is not taken by surprise. The importance of this rule is all the more relevant where point of law raised is a product of a construction of that law gathered from the facts. But it seems to me doubtful whether there is necessity for a notice to the other party

/where

where the point of law is not a product of that construction from the facts but rather appears ex facie the affected party's papers.

Van Winsen above says at page 81

> "..... A party is entitled to make any legal contention which is open to him on the facts as they appear on the affidavits, and the court may decide an application on a point of law which arises out of the alleged facts even if the applicant has not relied thereon in his application."

See CIV/APN/120/86 Pitso vs Executive Committee of the Lesotho Evangelical Church (unreported) at 3 to 4. See also Yorkshire Insurance Co. Ltd vs Ruben 1967(2) at 265 .

Relying on Van Winsen at page 89 Mr Buys submitted that

> "where an application is brought ex parte, but the rights of other persons may be affected by the order the court will not make an out-and-out order but will grant what is called a 'rule nisi'. This is an order directed to a particular person or persons calling upon them to appear in court on a certain fixed date to show cause why the rule should not be made absolute."

He submitted that on the above basis it becomes clear that if the court is persuaded that a rule nisi is appropriate such a rule affords only a temporary relief. Contrasting the above submission with what appears to be prayed for here he pointed out that what is sought here is an outright final order of ejectment. This, he submitted is untenable in view of the fact that it disregards the importance of letting the other party being heard.

He ruefully submitted that the applicant in this matter seeks to drag the respondents over a barrel at short notice to have them evicted from the premises and in the same breath says they should tell the court why they should be allowed to go back to occupy those premises.

He submitted that ex parte procedure is an extra-ordinary procedure entitling the court to grant relief only

/in

in exceptional circumstances.

The court, he argued, is protected against applications of these nature even before hearing them.

The devices used to secure this end ensure that the court is not suddenly inundated with all forms of applications becoming suddenly urgent as where people don't wish to await their turn and prefer to secure a place ahead of cases pre-existing on the court calendar.

These devices consist in the fact that the rules are prescribed in a manner that ensures that the time limits and forms are to be observed.

Hence the court will not give relief if the other party has not been given proper notice. Methods of service too are outlined as well as the times. See Rule 8(22).

A further device consists in the requirement that a certificate of urgency should be signed by an officer of this Court who thereby certifies that having looked at the matter in question he formed the opinion that it is urgent. I have grave doubts whether it is appropriate that an attorney who has drawn the papers is in turn entitled to sign such a certificate.

Allegations that the matter is urgent are not enough if proof is not furnished with regard to fear of suffering irreparable harm, prejudice and the fact that notice would precipitate the apprehended danger.

By contrast with the above it appears that the respondent's path is not beset with like or even as many obstacles.

Sub-rule 18 of Rule 8 clearly shows that a respondent doesn't have to obtain leave of court in order to be heard. He is entitled to anticipate the return date on giving a brief period of only 48 hours' notice. Sub rule 17 shows that in counter applications the rules as to prescribed periods apply to him as they do to the

/applicant

applicant but interpretation of a similar rule in Yorkshire above reveals a different picture because the learned Munnik J. in reference to the requirement to give notice said :-

> "I am satisfied that the use of the word 'notice' in sub-rule (11) as opposed to the 'notice of motion' in the other sub-rules to Rule 6 indicates that interlocutory and other applications incidental to pending proceedings were not intended to be brought by way of formal notice of motion in the same way as applications initiating proceedings."

See also CIV/APN/402/86 Khoboko vs Khoboko & 2 Others (unreported) at 5 and 6.

Relying on Amler's Precedents of Pleadings at 129 respondents' counsel submitted that the applicant's attempt to effect an ejectment by resorting to motion procedure cannot succeed. He further submitted that the applicant's effort to avoid instituting an action is to no avail.

In the notes section appearing immediately below the heading Eviction or Ejectment Amler refers to cause of action and points out that

> "Ejectment of an occupier of premises can be obtained by means of :
>
> (a) the rei vindicatio. In such event reliance is placed upon the plaintiff's ownership and the defendant's wrongful possession of the property; or
>
> (b) a possessory claim ..."

Pretoria Stadsraad vs Ebrahim 1979(4) SA 193 shows that the plaintiff need not allege and prove any title to the property from which the defendant is to be evicted, but Steenkamp vs Mienies En Andere 1987(4) SA 186 shows that the plaintiff must however allege and prove

(a) the right of the defendant to possess e.g. the terms of the agreement between the parties; while Myaka vs Havemann & Another 1948(3) SA 457 shows that the plaintiff should also allege and prove;

(b) a valid termination of the right to possess.

/It

It is also essential to allege and prove :-

(c) the continued occupation by the defendant or someone holding on his behalf or through him. See Amler above at p. 130.

(d) damages suffered (if any) as a result of the holding over. See Phil Morkel Ltd vs Lawson & Kirk (Pty) Ltd 1955(3) SA 249

These four things above have to be proved. But needless to say the applicant left me at sea regarding what damages he suffered if any.

It becomes clear therefore what is paramount in his mind is the desire to collect more and more money by way of increasing the rental from the current rates to some rates likely to suit his ever-expanding desire.

With regard to the relief claimable Amler states that it is

(a) optionally, cancellation or confirmation of the cancellation of the agreement;

(b) ejectment from the premises;

(c) damages, if any.

But in the instant case the applicant seeks ejectment before he has applied for and obtained cancellation of the agreement. I am thus inclined to the view expressed on behalf of the respondents that the applicant has placed the cart before the horse.

It would appear that moving on vindicatory basis if allowed would enable the applicant to obtain an order before he has proved his case. On all accounts that would be an absurdity.

To succeed the applicant must prove the nullity of the lease and obtain confirmation of the prayer for nullification by him of the contract.

It was submitted for the respondents that annexures N M 8 and 9 contain sufficient ammunition to support the view that the applicant was aware that the respondents

/dispute

dispute that the sublease agreements are null and void. The respondents are of the view that the legislation does not make the sublease agreements null and void per se in the face of the fact that there is still an opportunity to apply to court for leave to have them registered, or at least that there is still room for making an application.

Indeed section 24 clearly shows that an application must be made and registered only after the consent has been granted.

The respondents have charged that the applicant has not informed the court of or set out in detail in the founding affidavit the defence raised by the respondents. They submit that if the court was aware of the respondents' defence or objections its decision might have been influenced in their favour. See CIV/APN/149/88 Monoto vs The National University of Lesotho (unreported) at 3 where this Court said :-

> "I take the view that contents of this supplementary affidavit constitute the most crucial information which should not have been omitted in the first instance. The fact that this information was not laid bare at that stage is telling against the applicant's bona fides."

At page 4 it was said of the applicant

> "The fact that he ultimately laid bare this aspect of the matter does not detract from the observation that he had something to hide. He only furnished it when he realised that it would surface in any case at the instance of the other party. It is not wrong to infer that he was aware that if he disclosed it in the founding affidavit (the application) would have been discharged."

Responding to the onslaught Mr Mphalane indicated that references to disputes of fact in this application are fictitious and not genuine. He asked the court to consider that all requirements have been complied with by the applicant. He submitted that the applicant being aware that there might be raised objections based on

/disputes

disputes of fact forestalled any such possibility and canvassed relevant points in his affidavit.

He submitted that the agreement was entered into since 1987 but till 1989 the leases had not been registered all because of the respondents' attitude. He made much of the fact that the leases were prepared by the respondents' attorneys. He buttressed his argument that non-compliance with section 24 renders the agreement null and void by vehemently drawing on the use of the word shall with regard to the fact that the section requires that the leases be registered.

Mr Mphalane submitted that the nullity of the leases justified the applicant in approaching this court on the basis of urgency because if the contracts are inexistent then obligations which should flow from them cannot be enforced.

He denied that the reason for moving this application was so as to enable the applicant to hike the rent. He pointed out that by filing their opposition only a day before this matter was heard betrayed a clear intention on the respondents' part to delay these proceedings. He submitted that the prayers despite argument to the contrary by the respondents, are framed in a manner that is understandable to the court. He accordingly asked for confirmation of the rule, alternatively that the respondents be afforded an opportunity to file their opposing affidavits and that the matter be proceeded with and argued today.

It was argued on behalf of the applicant that the papers were properly served on the respondents' attorneys. Mr Buys in reply pointed out that the address given was for purposes of receiving summons. The respondents' view was consistently that the applicant shouldn't have proceeded by way of motion. But if the applicant was dissatisfied then the address where they would accept service was that of their attorneys.

/The

The applicant was challenged for non-disclosure; it being alleged that he knew that the respondents' attorneys denied that contracts were prepared by them yet the applicant failed to disclose that denial.

In view of the line of procedure that appears to me to be favoured by dependable authorities I am inclined to refuse hearing this matter on the basis of urgency.

Although the application richly deserves dismissal I am however disinclined to prejudge the issues upon which the merits may be based. While it would save the time to order that the papers as they stand should be converted into pleadings, it appears that they are not in such a state that conversion could serve a useful purpose.

Consequently the respondents are awarded the costs.

J U D G E.

5th February, 1990.

For Applicant : Mr Mphalane
For Respondents: Mr Buys.