CIV/APN/203/89

IN THE HIGH COURT OF LESOTHO

In the matter between:

SUN INTERNATIONAL OF LESOTHO (PTY) LTD. APPLICANT

AND

HASSIM ISMAIL ZAKHURA RESPONDENT

Before the Honourable the Chief Justice Mr. Justice B.P. Cullinan on the 11th day of April, 1990.

For the Applicant : Mr. S.C. Harley
For the Respondent : Mr. T. Mahlakeng

JUDGMENT

Cases referred to:

(1) Setlogelo v Setlogelo (1914) AD 227;
(2) Sekhonyana v Pitso & Anor. CIV/APN/381/88 (Unreported);
(3) Jockie v Meyer (1945) AD 354;
(4) Bennett v Shaw 19 S.C. 248; 12 C.T.R. 450;
(5) Constantine v Imperial London Hotels (1944)2 All E.R.;
(6) Brown v Hayden (1931) CPD 70;
(7) Lomak v Killarney of Durban (Pty) Ltd. (1961)2 SA 573;

The applicant was granted a rule nisi in this matter on 28th August, 1989, calling upon the respondent to show cause as to why he should not be prohibited from entering or remaining upn the applicant's premises at 12 Orpen Road, Maseru. The rule also operated as an interim interict. The applicant now seeks a final interdict.

The applicant carries on business as hoteliers, under the name and style of "Maseru Sun Cabanas" (hereinafter referred to as "the hotel") at the above address. A founding affidavit was filed by an Alternate Director of the applicant company, who is also the General Manager of the hotel. It is supported by another affidavit, a joint affidavit by two employees of the hotel. The respondent filed an answering affidavit and the General Manager filed a replying affidavit. The affidavits filed on behalf of the applicant allege discourteous, unseemly, abusive, violent and even criminal conduct on the part of the respondent on a number of occasions. For his part the respondent denies the allegations.

The learned Attorney for the applicant, Mr. Harley, refers in his heads of argument to the case of Setlogelo v Setlogelo (1), the leading authority in the matter of interdicts. I had occasion to consider that authority in Sekhonyana v Pitso & Anor. (2) and as a matter of convenience I adopt what I had to say in that case.

Mr. Harley submits that the applicant has the right of possession, use and ejoyment of his property. Thus, when illegally deprived of possession of his property, his remedy lies in the rei vindicatio action. There can be no doubt about that. Mr. Harley takes matters further, however, and submits that similarly, where the owners'use and enjoyment of the property is infringed, he has "appropriate legal remedies", and goes on to submit that therefore the owner's right to his property gives rise to a vindicatory claim. While the latter proposition is unobjectionable, it does not follow from that immediately preceding it, as to connect the two propositions confuses the right to ownership of the property with the right to user and enjoyment thereof.

As I see it, the rei vindicatio action is directed solely at the deprivation of possession, and not the user or enjoyment thereof. It is an action in rem, not in personam, wherein the applicant must prove that, (i) he is the owner of the property, and (ii) the defendant was in possession thereof at the commencement of the action (see e.g. Silberberg and Schoeman on The Law of Property 2 Ed. pp.288/294 and 300/322). The affidavits before the Court in the present case reveal a claim in personam, directed against the respondent, alleging conduct on his part which in effect constitutes a nuisance.

Mr. Harley submits tht in any event the hotel has the right to remove from its premises an "unwanted intruder", regardless of his behaviour and that an innkeeper may refuse entry to any client.

Voet (4.9.4. Gane's translation p.769) states that,

> "..... it is in the discretion of sailors, keepers of inns and stable-keepers not to accomodate anyone, in so far, that is to say, as they are not bound to run ship, inn or stable against their will. But after they have started to run them at their free discretion, they cannot turn travellers away except on giving just reasons for doing so".

In the case of Jockie v Meyer (3) the Appellate Division (per Tindall J.S.) observed that in the circumstances of that case,

> "it is not necessary in my opinion, to decide whether a hotel-keeper is entitled to refuse to accept a traveller though he has accomodation available.

> The latter question was raised but was not decided in Bennett v Shaw (4) and the correct answer to it seems to be a matter of some uncertainty in the Roman-Dutch law .....".

Further on at p.361 however, the learned Judge of Appeal concluded that

> "..... without expressing a definite opinion on the point, I am prepared to assume in favour of the plaintiff that an hotel-keeper is bound to give a traveller accomodation in the absence of good ground for refusal."

Indeed, in Bennett v Shaw (4) De Villiers C.J. had said of a hotel-keeper who had excluded a traveller after accommodating him for two nights,

> "If once he accepts a traveller he has no right to eject that traveller, who had engaged a room, without sufficient reason."

As Tindal J.A. observed however, that does not

necessarily mean that a traveller, once accepted, may stay indefinitely: he may well be given reasonable notice to leave. Such was the case, he observed at p.362 in England, where the law obliged an inn-keeper "to receive all comers who are travellers": see e.g. the celebrated case of Constantine v Imperial London Hotels Ltd (5) per Birkett J. at pp.172 and 178, where indeed the learned Judge held that the action by the plaintiff was maintainable without proof of special damage.

I observe that the dicta of De Villiers C.J. in Bennett v Shaw (4) were quoted with approval by Gardiner J.P. in the case of Brown v Hayden (6). The learned Judge President observed at p.72:

> "It seems to me that in a contract for the supply of board and lodging there is an implied condition that either party shall conduct himself in a decent and reasonable manner. It is implied because without it the relationship of landlord and lodger would become intolerable..... Either party must exercise his rights in the house so as not to injure the peace and quiet of the other - sic utere tuum ut alienum non

In the case of Lomax v Killarney of Durban (Pty) Ltd. (7) Caney J. held that an hotel-keeper could not eject a semi-permanent guest on the basis that he was privately leading an immoral life. He observed at pp.575/576:

> "I am not aware that the law allows an hotel-keeper to eject a traveller, a guest, a resident or a lodger for the reason that he is privately living an immoral life, whilst disturbing no one and creating no nuisance nor causing anyone any patrimonial loss. ..... so long as no criminal offence is being committed, no one being disturbed and the public conscience not violated, there can be no justification for intruding on the privacy of the private citizen in this regard." (emphasis supplied)

It will be seen that Tindall J.A. was prepared to assume that the inn-keeper was bound in the matter. So also in effect did De Villiers C.J., Gardiner J.P. and Caney J. I find much force in the view of Gardiner J.P., that there

must be an implied term in the relationship between landlord and lodger. I cannot see why the same should not apply to the relationship between hotel-keeper and guest. As I see it, there is a corresponding obligation upon both parties.

That being the case, the aspect of whether or not there is reasonable cause to exclude the respondent from the hotel, is indeed relevant. In this respect, while there is some inherent improbability in the respondent's affidavit, nonetheless issues of credibility arise which cannot be settled on the affidavits. The learned Attorney for the respondent, Mr. Mahlakeng, submits that such issues should have been forseen and that therefore this application, by way of motion, should now be dismissed. There is no correspondence before the Court. There is no evidence of any previous denial by the respondent in the matter. Furthermore, while there was a delay of some three months in approaching the court, quite clearly the procedure by way of action would involve even more delay. In all the circumstances, I consider it equitable to exercise the Court's discretion under Rule 8(14). I order therefore that the affidavits be regarded as pleadings and that the matter should proceed as a trial and that the parties are free to call viva voce evidence.

Meanwhile there is the aspect of an interlocutory,

rather than an interim interdict. I consider that on the affidavits there is a clear prima facie right, "though open to some doubt". The affidavits before me establish a reasonable apprehension of irreparable harm. While apparently all was quiet for some three months before the application, the alleged frequency of the incidents before that, indicates that such apprehension is well grounded. There are a number of hotels available to the respondent in Maseru. I cannot forsee that he would suffer any damage in the matter. Any repetition of the alleged conduct however would only deter others from frequenting the hotel and thus cause damage to the applicant. I have little doubt that the balance of convenience lies with the applicant. As to another remedy, I cannot perceive what other remedy would meet the alleged wrong in this case, other than an interdict.

The interdict sought, however, seeks to exclude the respondent from the applicant's entire premises at 12 Orpen Road, Maseru. Some offices are leased by the applicant to tenants on those premises. Mr. Mahlakeng submits that those tenants should have been joined as applicants, as their rights are also involved. The most serious incident alleged, however, involving assault, and ultimately the notifying of the police, occurred at the main gate to the property. The alleged misconduct was not therefore confined

to the hotel. The respondent in his affidavit makes no mention of the tenants on the property: he seeks admission solely to the hotel. No question arises of any damage to him therefore, in respect of exclusion from the property in general. That being the case, the balance of convenience is not affected and lies with the plaintiff.

I grant an interlocutory interdict to the applicant therefore, prohibiting the respondent from entering or remaining upon the applicant's premises at 12 Orpen Road, Maseru, until the final determination of this matter, or until further order of the Court. I grant costs in the cause.

Delivered at Maseru This 11th Day of April, 1990.

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B.P. CULLINAN
CHIEF JUSTICE