CIV\APN\250\90

IN THE HIGH COURT OF LESOTHO

In the Application of :

LESOTHO NATIONAL DEVELOPMENT CORPORATION — Applicant

v

SHELTER DEVELOPMENT AND CONSTRUCTION LESOTHO(PTY)LTD — Respondent

RULING ON POINT RAISED IN LIMINE

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 25th day of November, 1991

Mr. Buys for the respondent raised a point in limine as follows:-

The nature of these proceedings is of disguised action.

The applicant's founding affidavit shows at paragraph 3 on page 2 that the applicant entered into a sublease agreement with the respondent in respect of the applicant's Plot Number 12274-005\26B, Maseru Industrial Area. Annexure "A1" is attached in support thereof and termed a Certificate of Allocation.

Paragraph 5 on page 2 deals with certain amounts purporting to be rental.

In paragraph 7 on page 2 the applicant draws through its deponent a conclusion of the amount due. This is M42 463-56 broken down as follws :-

(a) M33 119-18 in respect of building rentals

(b) M9 344-38 in respect of land and ground rent.

Mr. Buys submitted that it would seem the applicant projects

the view that it has a contract and here is a document setting out the amount of the contract; further that it shows what it regards as the real amount forming the basis of that contract.

Learned Counsel indicated that the applicant sets out in prayers that the court should order payment of the amount that is not paid. Thus Mr. Buys pointed out that this in essence is an action alleging contract, quantification thereof and parties involved.

The Court was referred to page 52 of the 2nd Edition of Uniform Rules of Court by Nathan et al saying :-

> "The ordinary procedure for settling disputed questions of fact is not by affidavit but by viva voce evidence (Meyers vs Braundo 1927 TPD 393), and an applicant who deliberately initiates proceedings by way of application when he knows that a real dispute of facts must inevitably arise, and for which an action is the appropriate procedure, does so at his peril".

Reiterating that the nature of these proceedings is of disguised action Mr. Buys submitted that the applicant must have foreseen dispute of fact in this matter as in any event the applicant knew that this is no simple matter; for the applicant further knew there is a counter claim and that the respondent claimed set-off. Reference to Annexure "A3" of the applicant's own papers bears out the respondent's contention in this regard.

Pointing out that the applicant is not open and candid with the Court Mr. Buys referred to Annexure "G" supplied by the respondent in these proceedings and submitted that the applicant omitted to indicate to the Court the origin of the matter in dispute as clearly was the case on 22nd August 1990 per Annexure "G" - a copy of a letter sent to the respondent.

Mr. Buys further pointed out that the applicant failed to show the Court an agreement of the sublease proposed. This was brought to Court's attention by the respondent in opposing papers as borne out in Annexure "C" - Agreement of Sublease.

This document is blank in respect of the relevant details and does not indicate the amounts of rentals or even terms of the sublease Agreement. It is a document asking the respondent what the respondent thinks of a document of its type and whether the respondent would be interested in signing such document.

Mr. Buys submitted therefore that there was no contract between the parties as there was no consensus of parties to the terms thereof.

The Court was again referred to the founding papers particularly "A1" where in a letter headed Request for Allocation dated 13-12-1988 there are the following words in the opening paragraph

> ".....The allocation was made subject to your agreeing to meet the following conditions....."

The respondent's attorney thus submitted that the allocation is therefore a conditional and not a binding allocation. The parties didn't agree on rental in respect of land rent and so called ground rent.

The Court was referred to Annexure "D" filed in the opposing papers showing rent set out there from September 1989 to January 1990. Compared with details in paragraph 5 of the founding papers one sees the same amount as the outline of the amount detailed between the above given dates. The significant point is that the amounts reflected relate here with rent for the building and not with ground and land rent. The submission is well grounded therefore that land rent and ground rent don't appear in the statement Annexure "D". It is submitted by the respondent's attorney that the reason for this is that parties never entered into agreement relating to those.

The date 23-5-89 in "D" shows that credit was passed in the amount of M15 037-49. This appears to be the credit for the first three months.

The respondent admits in papers that by agreement between parties the contract is to commence on 1st July 1989 this being the date from which rental would apply. The applicant confirms this in para 5 of its replying affidavit.

But as respondent's attorney pointed out if these papers as they stand were to be converted into pleadings by order of this Court, calculation of the above amounts would lead to the

application failing because the papers are embarrassing. The applicant would still have difficulty proving its claim in its own papers, because it says relying on these amounts it concludes that they are in respect of rental due from March 1990 to July 1990.

It should be pointed out that much deductive process had to be employed to see how the applicant arrived at its conclusion as this aspect is not in the founding papers.

"A3" on the 2nd page charges the respondent with failure to pay rentals for March up to July 1990. This would appear to reflect failure to do so for 5 months.

In para 7 applicant says it is owed M33 119-18 being building rental. In respect of land and ground rent it is owed M9 344-38; but does not say in affidavit how this is arrived at. It necessitated the court's delving into arithmetical calculations to see that in respect of rent for the building one would have had to divide M33 119-18 by 5 to reach the M6 623-83 charged per month. Applying the applicant's method of calculation in respect of land and ground rents it would seem the applicant charges M1 868-83 per month.

But again problems seem continuously to dog the applicant's own papers because at page 2 in paragraph 5 it appears that in respect of land rent and ground rent the rental is charged per annum. In order to work and reduce that into monthly rate it means in respect of land the applicant charges M546-26 per month and in respect of ground it is M26-02 per month. The sum of these two

amounts per month should be M572-28. But on the applicant's calculation this should come to M800(+) per month subject to escalation of prices rate of seven and half percent.

Thus Mr. Buys submitted that not even the cause of action is clear from the papers. He stressed that in the opposing papers it is denied that the contract of agreement of sublease is in existence at all. He stated that the offer made by the applicant was subject to certain conditions; but that the offer was not accepted; and that land rent and ground rent were neither agreed upon nor even paid. The respondent's attorney emphasised that the applicant had not even started calculating that. Annexure "E" bears this out in the 2nd paragraph where it is said

> "you were still to update your accounts to render the account on the land rental and we are now awaiting this for consideration".

This was the position obtaining as of 12th February 1990 when Annexure "E" was written and addressed by the respondent to the applicant.

Mr. Buys submitted that even as of the above date the applicant had not included land rent and ground rent in his account. Nor does it appear the applicant did this as the applicant's statement Annexure "D" is silent on that question.

It was further submitted that the respondent disagreed with the 50% local participation proposal or condition insisted on. It is said the respondent never accepted that condition either.

Mr. Buys finally pointed out that no agreement was signed. Papers filed show no proof that the respondent ever signed any agreement. It was further submitted that the applicant must have been aware this was opposed. A letter was written to it to that effect but nonetheless steamed ahead at its own peril.

A further plea was made on behalf of the respondent to the effect that on 29-10-1990 my learned Brother Kheola J. made an order that this matter be postponed and wasted costs be argued to-day i.e. date of hearing this matter. Mr. Buys argued that the matter was wrongly set down for that previous day.

As indeed it appears no counter-argument was raised in respect of the application and argument on wasted costs for the date 29-10-1990 the Court awards them to the respondent.

In response Mr. Lerotholi for the applicant charged that the respondent was labouring under a misconception if it maintained any dispute of fact exists in this proceeding.

He submitted there is existence of sublease contract. It was submitted that the requirements for this were satisfied in that

(a) there was agreement on the amount of payment of rental

(b) there was agreement on the contract and

(c) there was delivery.

For this proposition I was referred to page 1 of The LAWS OF LEASE 2nd Ed. written by A.J. Kerr who says :-

"A contract of lease is entered into when parties who have the requisite intention agree together that the one party, called the lessor, shall give the use and enjoyment of immovable property..... to the other, called the lessee, in return for the payment of rent".

The Court was referred to Amler's Precedents of Pleading by Harms 3rd Ed. at 174 where in respect of Lease the notes show that the contract in order to be said to be existent, (A) party relying on a contract of letting and hiring must allege and prove a contract having the following essentials:-

(a) an undertaking by the lessor to deliver a thing to the lessee

(b) an agreement between the parties that the lessee will have temporary use and enjoyment of the thing;and

(c) an undertaking by the lessee to pay rent.

See Kriel vs Hochstetter House(EDMS) BPK 1988(1) SA 220 (T).

Mr. Lerotholi submitted that affidavits support the fact that a valid sublease agreement exists. He relies on "A1" paragraph 3 where the deponent avers that parties entered into a sublease agreement. But para 8.2 ad para 3 the above averment is denied by the deponent in an opposing affidavit where it is gone further to state that

"the contents of Annexure "A1" are merely a response from the applicant to my application to be allotted

factory premises in Maseru"

The applicant submitted through its counsel that "A1" is an initial offer which was tabled for the benefit of a tenant proposing to hire the ground area of 1000 sq metres. Counsel further submitted that the respondent sought to be allocated the factory premises which were duly allocated as per "A1" of the applicant's founding papers. On this basis Counsel for the applicant asserts that the existence of a contract has been established in that :-

(a) rent was paid

(b) temporary use was made of the premises; and

(c) there was agreement to deliver; proof of delivery is shown by the fact that there was occupancy of the premises by the respondent.

The applicant's counsel relied on Annexure "A1" for the proposition that there should have been agreement on rent and refers to the M4 890-24 in "A1" for the evaluation and quantification of the amount of rent required.

He stated that land rent was in the amount of M6 554-92 per month and ground rent M312-30 per annum.

Mr. Lerotholi speaking with his tongue in his cheek made a concession submitting that what seems to be causing "slight" confusion is the fact that "A1" was handed over to the respondent's counsel for consideration. He referred to this document as a

standard sublease agreement which elaborately provides conditions

of tenancy regarding the applicant's property falling under the class of manufacturing estates.

He invited the Court to bear in mind the distinction between the Standard Sublease Agreement and the existence of a contract between the parties.

He submitted that the respondent was invited to take a look and see if it was interested. So it occurred that the parties intended going into the contract after the respondent had satisfied itself that the invitation or offer was of interest to it.

I was referred to Cooper On South African Law of Landlord and tenant page 2 of the 6th Ed.

Learned Counsel submitted that in this instance following the agreement between the parties the following acts had been done:-

(a) the respondent had occupied the premises

(b) the respondent had paid rent

(c) the respondent does not deny tenancy or temporary use of the land. The respondent has in fact left the premises.

Reacting to the onslaught that the applicant has misconceived its case and has brought this matter by way of motion proceedings despite the disputes of fact Mr. Lerotholi invited the Court to examine the case and determine whether the allegation that there is dispute of fact is not fanciful and fabricated. See Arnold vs

Viljoen 1954(3) SA 322 at 332. Where no real dispute of fact exists Motion proceedings are permissible.

Mr.Lerotholi pointed out that what at all material times had been in dispute was whether the respondent was making proper or improper use of the premises. The Court was referred to Annexure "G" filed by the respondent.

In reply Mr. Buys pointed out that the applicant is required to go a step further than make the assertion that there is a contract of sublease between the parties. It must prove it. But the applicant having failed to do so, its Counsel on the Court's inquiry in that direction, turns round and says reliance be reposed on correspondence. The rule is that one stands or falls by one's founding affidavit. Instead the applicant seeks to rely on correspondence brought by the respondent to prove its case.

The applicant brought by way of correspondence and sought to rely on "A1". The applicant is obliged to prove this. There is the added difficulty whether now on the merits the Court must be compelled to make financial calculations to find what the actual amount of the claim is.

In response to the charge that there is no Counter Claim in papers before Court yet in the correspondence between parties the respondent had intimated it, Mr. Buys replied that Rules don't provide for that.

There is also a factor which was not given attention to by the applicant, namely, that the alleged contract it relies on has not been signed by either of the parties. In my view this would tend to defeat all arguments raised on the applicant's behalf.

The point in limine succeeds. Costs are awarded to the respondent including those of 29-10-90.

I am not satisfied that the applicant's case should be treated as a lost cause. On that score the papers will stand as pleadings. Each party is at large to amend its pleadings within twenty one days.

J U D G E

25th November, 1991

For Applicant : Mr. Lerotholi

For Respondent: Mr. Buys