CIV/APN/46/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABO CHARLES MAITIN	APPLICANT
AND	
MAY E. BARIGYE	1ST RESPONDENT
ACRES INTERNATIONAL LTD.	2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu on the 31st May, 1994.

In this case Applicant brought, by way of an application, ejectment proceedings before the High Court. This application was accompanied by a certificate of urgency signed by Applicant's Attorney.

In terms of Section 16(1)(c) of the Subordinate Court Order of 1988, the Magistrate's Court has jurisdiction to hear ejectment cases. This jurisdiction was conferred regardless of the value of that property.

Section 6 of the High Court Act of 1978 provides:

> "No civil cause or action within the jurisdiction of a subordinate court (which expression includes a Local or Central Court) shall be instituted in or removed into the High Court save—
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> (a) by a judge of the High Court acting on his own motion; or
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> (b) with leave of a judge upon application made to him in Chambers, and after notice to the other party."

It is common cause that Applicant did not follow this provision.

Applicant claims the matter was urgent and only in the High Court would he get a speedy remedy. The reason being that in the High Court matters suitable for action proceedings can be brought by way of application. In my view ejectment has to be brought by way of action in the High Court too.

There is an inherent power in the High Court to hear all the factually undisputed actions by way of application. This means if a matter that was brought by way of application turns out to be disputed, the Court might dismiss it or hear *viva voce* evidence. It is therefore always a risk to bring a matter suitable for action proceedings by way of application.

I was referred to the case Theko Masobeng v Mothae Thahane C of A (CIV) No.14 of 1992 (unreported). In that case, Respondent had brought Provisional Sentence proceedings on an acknowledgement of debt of M1,000.00 and two cheques of M2500.00 each. All these amounts plus the total amount claimed are now within the jurisdiction of a subordinate court.

It cannot be seriously argued in the Theko Masobeng v Mothae Thahane case (nor do I suspect it was argued) that applicant has the right to bring to the High Court a matter in which he has a remedy in the Magistrate's Court. What was really in issue was whether Appellant could choose a High Court remedy when a perfectly good one existed in the Magistrate's Court. Unfortunately this issue was not properly articulated in the High Court. The argument was crisply direct at whether or not the remedy of provisional sentence existed in the Magistrate's Court or not.

In Theko Masobeng v Mothae Thahane the real issue was whether it was right and proper to bring monetary claims in the High Court in which the Magistrate Court has jurisdiction. There was no doubt that if the Plaintiff wanted a quick remedy, he could apply for Summary judgment as his claims were based on liquid documents. The judge

in the Court below did not address this issue. If he had he might not have allowed the Court to be seized with Provisional Sentence proceedings in that case.

The fact that the Magistrate Court had no jurisdiction in provisional sentence proceedings was clear beyond a shadow of doubt because in terms of Section 29(f) of Subordinate Court Order, 1988 the Magistrate;s Court was forbidden from handling cases of Provisional Sentence.

The issue was for the first time properly put for the Court at the appellate stage. If the High Court had already in its discretion, elected to hear the matter, the Court of Appeal did not have any choice but only to determine whether or not the High Court had exercised its jurisdiction judicially. This is the way I understand the case of Theko Masobeng v Mothae Thahane. The Court of Appeal was dealing with Counsel's argument attempting to show the High Court's decision in the matter was not correct.

In the case of Theko Masobeng v Mothae Thahane the significant point to note was that the trial judge had not felt disposed to uphold the Appellant's objection based on Section 6 of the High Court Act, 1978. Browde JA at page 3 had found:

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> "The question at issue before the Court *a quo* - and I should add the only issue that was argued - was crisply put, whether or not an action for Provisional Sentence was an action within the jurisdiction of a Subordinate Court. The learned judge *a quo* found that it was not and granted provisional sentence for the amounts prayed in the summons together with interest at the rate of 25% per annum and a 10% collection commission."

The issue was not really whether in the circumstances of the case the Court was bound to hear the case merely because Respondent had chosen to institute proceedings in the High Court. The judge had a discretion in the matter. The question of Provisional Sentence where the total amount involved was M6000.00 was among the factors the judge *a quo* could not ignore. I say this even though the judgment did not deal with this aspect. If the judge felt the amount was trifling, he might have refused to hear the matter although it had been brought by way of provisional sentence. All I am saying is that the discretion of the Court and its powers under Section 6 of the High Court of 1978 remains unimpaired. What Browde JA did was to deal with whether or not the Court below exercised its powers and the discretion built into those powers correctly. He answered Counsel for Appellant point by point to show that the Court *a quo* had acted correctly.

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Incidentally it is not the first time this point is being raised. In Alain Andre v Mohale Papashane 1989 (1) LLR 39 where an ejectment application had been brought in the High Court. Rooney J in his discretion decided over the objections of Respondent to hear an ejectment application in the High Court despite the fact that it was within the Magistrate's Court's jurisdiction and the procedure in Section 6 of the High Court Act of 1967 similar to this one had not been followed. Once this had happened, there was no point in challenging the trial court's discretion because he had the power to hear the matter in terms of Section 6 of the High Act 1967 if he so chose.

The case of Alain Andre v Papashane 1989 LLR 39 is in many ways similar to the one before Court. In it, like the present, the Applicant had leased the premises to someone else although he was aware or should have been aware that the tenant in occupation would not let the matter rest. Maisels P at pages 45 and 46 said:-

> "On the question of balance of convenience one has the position that applicant was trading in the premises for some eight months up to November 1978 before he was unlawfully ejected by Lenkoe and Robbemond.
> ... On the other hand the respondent, if the applicant was allowed to re-

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> occupy the premises, may be liable in damages to Lenkoe and Robbemond because he cannot give them occupation under his lease with them. In this regard I consider it should have been apparent, to the respondent or his attorneys having regard to the previous history of this matter, that it was not unlikely that the judgment of Rooney J would be taken on appeal - as it was the day after judgment was given. In addition, again having regard to the previous history of the matter i.e. spoliation proceedings, the respondent or his attorneys could hardly have thought that the applicant would not resist an application for his ejectment. If under these circumstances he elected to enter into a lease with Lenkoe and Robbemond it may perhaps, not unfairly, be said he took a chance, as it were, that he might or might not lay himself open to an action of damages by the new tenants should his application for ejectment fail." The underling is mine.

In the instant case Mr. Sello for Applicant argued that Applicant was justified in bringing this ejectment application by way of application because he did not expect any real dispute of fact. The first document is the Letter annexure "A" to which is attached annexure "A1" a draft least drawn by Respondent for signature by the Applicant. It would seem on the face of the draft lease agreement it contains what had been verbally agreed by the parties. It is not clear why it was never signed in the light of the testimonial made by applicant that First Respondent Mrs. May Barigye clear association with

L'Afrique International (Pty) Ltd. Applicant says it was because the Lessee in the draft lease was L'Afrique International while First Respondent says this is not so, and she was never told why the lease was not signed..

In argument Mr. Sello said what the nature of the lease and the terms thereof are is not important. He bases his claim on the verbal agreement that First Respondent had made that she would quit at the end of April. It was on that basis that Applicant wrote annexure "C". It is dated 6.4.94 and reads:

> "This to inform you finally that the evacuation letter I wrote to you last month unfortunately cannot be changed or reversed. So your tenant can spend the month April 1994 for the double rent you paid initially and vacate the house by 30/4/94. I shall not discuss this matter any more."

This letter discloses the existence of no verbal agreement. It merely showed talks were going on since First Respondent received the Notice to Quit dated 8.3.94. That letter gave the grounds for termination as being First Respondent's persistent failure to pay rent timeously. This was disputed and several cheques that

were paid timeously were produced. Even the March delay was blamed on the applicant. See annexure "C" of First Respondent. The affidavits show some disagreement. In the letter dated 13th March three post-dated cheques were enclosed paying rent in advance up to June 1994. There certainly is no clear evidence that Applicant had grounds to resile from or terminate the verbal agreement. The fact that is clear is that First Respondent went on her knees begging Applicant not to terminate the lease. That in my view is not acquiescence or an agreement to vacate.

Applicant then referred to Second Respondent's annexure "A" in which First Respondent gave Second Respondent Notice to vacate because Applicant was adamant that his house be vacated. That annexure has nothing to do with applicant. Applicant was so to speak cutting her losses by evicting her sub-tenant. Yet Applicant seek to make this annexure evidence that First Respondent agreed to the termination of the lease.

Applicant was aware there would be a dispute of fact. His annexure "B" which is a letter from First Respondent puts the matter beyond doubt by making the following warning to Applicant:-

"Should you again attempt to cancel the

agreement or threaten eviction, we have instructions to immediately apply to court for an interdict restraining you for so doing."

Both parties agree that if I should find a dispute of fact that parties should have forseen I should dismiss this application. Indeed Mr. Sello was adverse to the idea of waiting a long time for this application to join a long line of contested trials that must wait for their turn.

I am satisfied that Mr. Buys for First Respondent is correct when he says in this case not only was the dispute forseen, it would not be correct to say with papers revealing what they do that a non-existent dispute of fact is being manufactured. Mr. Buys referred to Room Hire Co. (Pty) Ltd. v Jeppe Street Mansions (Pty) Ltd. 1949, SA 1155 at page 1159 (with which both parties agree) Murray AJP said,

> "As I understood the argument it was that a person claiming relief acts at his peril in proceeding by way of motion, and not adopting the normal procedure."

In Williams v Tuntall 1949 (3) SA 835 Dowling J held that the court should reserve to itself a discretion where

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there is no *bona fide* dispute of fact to deny Applicant a remedy where Respondent objects substantiating the possible prejudice he might suffer.

It cannot be disputed that our courts sanction ejection proceedings to be by way application in those few matters in which the dispute is one of law rather than facts. The normal way of bringing ejectment proceedings is by way of action. See R. Bakeries v Ruto Bakeries 1948 (2) SA 626 at 630. It is all the more difficult for me to understand why the matter was brought in the High Court and not in the Magistrate's Court.

I have come to the conclusion that these ejectment proceedings ought to have been instituted in the Magistrate's Court. If there were special or compelling reasons to bring the matter before this Court, Applicant was obliged to seek its leave. In that event he might or might not have persuaded the Court to allow him to initiate these proceedings before this Court. the case of Theko Masobeng v Mothae Thahane merely showed the High Court was not wrong in dismissing the objection that the claim on its merits have been legitimately brought to the High Court by way of provisional sentence. If it had chosen for good reason to uphold Respondent's objection, the judge would have been within his rights although on

the merits an amount of M6000.00 is not a trifling sum at all.

The words of Maisels P in Alain Andre v Mohale Papashane 1979 (1) LLR 39 at page 44 are appropriate to describe Applicant in that-

> "it may perhaps, not unfairly be said that he took a chance as it were, that he might or might not lay himself open to an action for damages should his application fail."

In the light of the above I dismiss Applicant's application with costs.

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W.C.M. MAQUTU
JUDGE

For Applicant : Mr. K. Sello
For Respondents: Mr. S.C. Buys

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