CIV/APN/314/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

GIOVANNI UNGARO	1ST APPLICANT
D.A. UNGARO AND SONS PTY (LTD) T/A VULCAN TYRES	2ND APPLICANT

AND

CLETUS TSELISO LEBINA	1ST RESPONDENT
C.T. LEBINA TRANSPORT PTY (LTD) T/A DAUS TYRES	2ND RESPONDENT
STANDARD CHARTERED BANK	3RD RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. Justice W.C.M. Maqutu on the 19th day of December, 1994.

This application was brought as an urgent application accompanied by a certificate of urgency dated the 26th October, 1994. It was served on the Respondents with the result that when the matter was heard on the 27th october, 1994 the Respondents were represented. The matter was

postponed to the 7th November, 1994 and the Respondents were directed by Lehohla J. to file their opposing affidavits before that date. By consent the Interim Order in the following terms was made:

(a) The Respondents are not to remove any of the stock in trade and property from the premises except in the normal course of business.

(b) The Respondents must give access to Applicant's Representatives to the premises and Books of Account and allow them to do stock taking pending the finalisation of the application.

(c) The Respondents must deposit all monies received on behalf of the company into the company's Account held with the Standard Chartered Bank (the Third Respondent).

Indeed a trading company is expected to sell its stock in trade at a profit in the normal course of business and to deposit all moneys in its bank account. The only prayer that was unusual was that of allowing Applicants full access to the business, books of account and to authorise

/...

stock taking.

What Applicants had initially asked for in their Notice of Motion and which today they insist upon, is that this Court should grant them an order in the following terms:

(a) That the Messenger of Court be authorised and directed to attach, take inventory and possession of all property, furniture or effects in or on the property described as C.T. Lebina Transport (Pty) Ltd trading as Daus Tyres, at Thabong along Mafeteng road in the premises of Applicant, at Thabong Area, Upper Thamae in the Maseru district, pending the outcome of proceedings about to be instituted by Applicant against Respondents.

(b) That the court messenger be authorised and directed to further take into his possession the following property in the possession of First and Second Respondents namely:-

(i) All stock in trade of tyres as well as machinery to be found in the premises referred to as C.T. Lebina and Transport (Pty) Ltd. trading as Daus Tyres.

(ii) A motor vehicle with registration number AF 914.

(c) That 3rd Respondent (Standard Chartered Bank) be directed to freeze and suspend all transactions on account number 0274009311 held in the name of 2nd Respondent pending the outcome of this application.

(d) That Respondents pay the costs of this Application in the event of opposition.

This matter was not heard on the 7th November, 1994, it was postponed to the 14th November 1994. On the 14th November, 1994 the Court acting on the urgency of the matter, stood the matter down. On the 15th November 1994 (when the matter again received attention) it was discovered that legal proceedings on the basis of which the

application for an interdict was being applied for had not been instituted. Security for costs had also not been filed. The Court was obliged to order that this should be done within 24 hours. The matter was adjourned to the following day, 16th November, 1994.

On the 16th November, 1994 Mr. Molete for Applicants made allegations to the effect that they have discovered disturbing facts during their inspection of Second Respondent's books of account, and stocks in trade that make a supplementation of their founding affidavit necessary. The position was in fact worse than they had alleged. The Court gave Applicant leave to file a Replying Affidavit that contains new facts that came to Applicant's notice as a result of the Interim Order that was granted by consent. Respondents were naturally given a right to answer the new allegations.

I was puzzled by the fact that on the 23rd November, 1994 applicants filed affidavits sworn to on the 11th November 1994. This was not quite what we expected having regard to the order they had obtained on the 16th November 1994. The Court expected Applicants to use this

opportunity to have a Replying Affidavit which freely included other papers and affidavits that not only dealt with matters raised in the Answering Affidavit of Respondent but went further and disclose in detail what he saw in Respondent's books of accounts and business operations. In the affidavit of 11th November, 1994, First applicant replied to what was said in First Respondent's Affidavit and touched briefly on what he saw when he had been given access to books of account and stocks of the Second Respondent Company. The Court in its Order of 16th November, 1994 had given Applicants leave to traverse these matters fully and in great detail. Respondents (on the other hand) availed themselves with the right of to file additional affidavit through the affidavit dated 22nd November, 1994. In it they dealt with new facts in the Replying affidavit dated 11th November. On the 23rd November 1994 the matter was postponed to 25th November, 1994 and further postponed to 2nd December, 1994.

An incredible thing was done by Applicant's Counsel on the 30th November, 1994 when he filed heads of argument. He attached to the heads of argument which he

filed annexures A,B,C,D and E. Annexures are never filed with heads of argument. Heads of argument deal with argument not facts of the case. These annexures contained cheques, written documents, letters, declarations in respect of goods of sales tax and insurance documents. The court could not look at these annexures because they were not properly before court. They violated every rule that governs application proceedings.

When Mr. Molete was asked why he was dealing with the matter in this haphazard way, he said it was because the matter was urgent. On the 16th November, 1994 I had given the parties an indulgence to facilitate the proper ventilation of the matter. The parties were given as much time as they wanted, but Mr. Molete always pressed for a date that was as near as possible. The Court was obliged to accommodate him. His desperate hurry seems to have operated against his clients interest because Mr. Molete did not file the extensive Replying Affidavit he had asked for. Despite all this pressure, the matter was eventually heard on the 7th December, 1994. Postponements had to be asked for, for one reason or another.

The facts of this application are by no means straightforward. The Applicants and Respondents differ in many respects on the facts. It is therefore convenient to summarise the version of each side as to facts.

Ungaro and Sons (Pty) Ltd is the Second Applicant. First Applicant Giovanni Ungaro is the Managing Director of Second Applicant, a company registered in the Republic of South Africa. Ungaro & Sons (Pty) Ltd (Second Applicant) trades as Vulcan Tyres.

This company has been in the tyre business for over 20 years and therefore decided to extend its trading operations to Lesotho. To achieve this First Applicant Tommaso Ungaro and Elizabeth Ungaro registered a company in Lesotho under the name Daus Tyres (Pty) Ltd. This was done on 10th November, 1993. The Lesotho authorities refused to issue a trading licence for this company because the majority of the shareholders were not people of Lesotho. When this happened substantial stocks in trade, furniture and a motor vehicle had been supplied by Second Applicant to Daus Tyres (Pty) Ltd.

Applicants say they appointed Cletus Lebina (First Respondent) as branch manager by letter annexure "A". That letter is dated 6th November, 1994. An application for employment form which has been annexed and marked "A" Upon failing to get a licence First Applicant says First Respondent offered to sell him his company. This company is C.T. Lebina Transport (Pty) Ltd. and it already had a trading licence to do business in Lesotho. It was decided by First Applicant and fellow shareholders that this offer be accepted and trading commenced under C.T. Lebina Transport (Pty) ltd. trading as Daus Tyres.

According to First Applicant First Respondent and his wife agreed to sell their shares in C.T. Lebina Transport (Pty) ltd. to Tommaso Ungaro and first applicant. Pursuant tot hat agreement they signed share transfers but these were not registered for what he terms "reasons beyond our control". There are letters which show First Respondent was aware of what was going on. To substantiate what he says First Applicant has annexed annexures "C" and "D" share transfers which reflect sales by Cletus Lebina to First applicant and Polotso Lebina to Tommasso Ungaro. These papers are largely blank and on

them are unwitnessed signatures. A letter annexure "E" written by D.A. Ungaro & Sons trading as Vulcan Tyres on 15th March, 1994 to C.T. Lebina is attached. Below on the said letter is an acknowledgment that is signed twice. Annexure "B" is a letter dated 15th March, 1994 signed by First Applicant as director of C.T. Lebina Transport (Pty) Ltd. trading as Daus Tyres appoint First Respondent as Branch Manager Lesotho for M1000.00.

Everything (according to First Applicant) went well in the business. They invested an amount in excess of M200,000.00, which comprised of stock-in-trade of about M160,000.00, a motor vehicle valued at M20000-00 various plant machinery, office equipment and furniture valued at M20,000-000. First Applicant's company also obtained a sub-lease for premises in which business is conducted and have been paying rent to the owner.

In September, 1994 First Respondent became very negative towards the other directors. He refused to do his work, report to them and even refused to allow stock taking. Bank balances, details of transactions, stock-taking and report on the condition of the vehicle were no

more provided. Attorneys on both sides are now involved. Applicants said they were afraid First Respondent will take away the stock and dispose it in his own way causing them to suffer irreparable damage. Applicants want the Deputy Sheriff to seize everything and keep it and trading operations should be suspended.

Alfred Karl Wurth has made a supporting affidavit in which he states that he is the Applicant's sales representative. He said he was personally involved in what was going and in the attempt to settle the matter between the parties amicably. He confirms that on 13th October, 1994 First Respondent refused to have access to the merchandise. This happened on several occasions, that he does not specify. He says he saw invoices for sold tyres amounting to M2,367.45 before the invoice book was forcibly taken away from him. Mr. Wurth has duplicated an amount of M1,410.00. He supports the general averments of first Applicant.

First Respondent's Answering Affidavit states that he was not aware he was being used as a means for the expansion of Applicants' business operation. He however

admits the contents of annexure "A" but says the deal fell through when Applicants could not get a licence.

First Respondent denies that he ever agreed to sell shares of his company to Applicant. He even denies a decision could be taken jointly with his wife as they have been estranged since 1991. First Respondent challenges Applicants to produce a resolution of Second Applicant authorising the acquisition of First Respondent's shares. First Respondent denies selling his shares and those of his wife to applicants for M1000.00. He denies he ever signed annexure "C" the share transfer. He points out that annexure "C" is not dated nor is the signature on it his. First Respondent also denies annexure "D" has his wife's signature.

First Respondent denies that Applicants could acquire all share of C.T. Lebina Transport (Pty) Ltd. and thereby deny themselves a licence as the company would cease to have Basotho nationals as majority shareholders. He concludes "the deponent and I could not have done such a stupid thing". First Respondent also disputed the Applicants' allegation that the signature on annexure "D"

is that of his wife and challenges them to prove that it is, because it does not look like it.

First Respondent says he signed annexure "E" to acknowledge the M1000.00 for what he had spent to register C.T. Lebina Transport (Pty) Ltd. Apparently this was signed in blank in the box. He admits he and Applicants were going into a joint venture and that the intention was to sell him a portion of his shares. In that event he was to contact his wife. He says he signed annexure "C" in blank for that reason. He denies the contents of annexure "E" totally.

First Respondent acknowledges the fact that he signed annexure "B" but he says it was the same day that signed annexure "E". He says he only signed the box of annexure "B" details (which he denies) were filled in later. It is correct the agreement was that he was supposed to be the branch manager after a portion of the shares was transferred. First Respondent denies that the sub-lease of the premises in which the business of C.T. Lebina Transport (Pty) Ltd. is carried on was entered into by and between the landlord and Applicants. He annexes the sub-

lease agreement annexure "CTL3" which is signed by First Respondent as managing Director of C.T. Lebina Transport (Pty) Ltd. The signature of the lessor and lessee are witnessed on the last page of the document. The date of signature of the sub-lease is not filled in but it took effect on the 1st January, 1994.

First Respondent denies that C.T. Lebina Transport (Pty) Ltd. was ever supplied with stocks, furniture and motor vehicle valued collectively at M200,000.00. Applicants are challenged to produce invoices to that effect for the goods that were delivered. He said goods were imported from the Common Customs Area with C.T. Lebina's Transport's (Pty) Ltd. import permit through First Applicant. According to First Respondent First Applicant was to import goods from the Common Customs Area with the import permit of C.T. Lebina Transport 1(Pty) Limited for as long as that permit was valid. In return C.T. Lebina Transport (Pty) Ltd. would as a consideration for the use of their permit receive a portion of the imported goods to the value of M400,000-00. Furthermore transport, furniture and office equipment would be provided by First Applicant during the currency of the

licence.

First Respondent says Applicants were never in control of his company. Their interest was in the use of the import permit of C.T. Lebina Transport (Pty) Ltd. Consequently this company does not belong to Applicants. Second Respondent admits that in September 1994 relations broke down and he alerted the Registrar of Companies about the blank share transfer forms which he signed and which he believes three members of the Ungaro family might misuse. In that letter the Registrar of Companies annexure "CTL4" dated 14th September, 1994 First Respondent says he asked members of the Ungaro family to return those blank forms, because the business did not materialise.

In the affidavit dated 11th November, 1994 filed of record on 23rd November, 1994 Applicants through First Applicant answered First Respondent's affidavit. In it is stated First Respondent gets a monthly salary from Applicants. The last salary being that of August 1994. Furthermore First Respondent wrote several letters from them asking for authority to do certain things. Applicant

says D.A. Ungaro & Sons 1(Pty) Ltd. transferred their vehicle registration AF 914 to C.T. Lebina Transport (Pty) Ltd. together office furniture, plant and tyre fitting equipment.

First Applicant further reveals that Mr. Litsoane of Webber and Newdigate is the one who drew their attention to C.T. Lebina Transport (Pty) Ltd., they did not know of it when they employed First Respondent. They insist they bought the company C.T. Lebina Transport (Pty) Ltd. for M1000. Applicants say they did not question First Respondents power to sell the company. They insist annexure "E" was handed to first Respondent. Applicant challenge First Respondent to produce evidence of payment of rental.

Applicant admit that the question of import permit was raised and the permit granted. They wanted to obtain goods for low prices in order to compete. The import permit of M135,050.00 was granted in June but never used. They deny and dismiss with contempt the First Respondent's allegation that they "promised a payment (by any method whatsoever) of M400,000.00" for the use of that permit as

it was for M135,050.00. They say they are in possession of documents for the delivery of the said stock and assets.

First Applicant says they never promised to "give" First and Second Respondents anything except First Respondent's salary. First Applicant says they have a lot of documentation such as inter company loan documents, payments of salaries, rent, maintenance and repairs of motor vehicle, insurance documents, invoices that will show their ownerships of the company.

First Applicant admits that they received a faxed letter to the effect that First Respondent is accusing them of trying to seize his company. First Applicant says they are the rightful owners of the company and First Respondent is their employee.

The First applicant says stock taking took place but the Respondent refused to sign as a witness the stock sheets. They took from Respondents premises the stock reports, assets lists, bank printouts as well as three invoice books to be processed by their Accounts department

at the applicant's head quarters in Roodeport. First Applicant makes general allegations that stock of approximately M40,000-00 was missing and that First Respondent withdrew an unauthorised amount of M45,000.00. First Applicant says the stock-taking was conducted by applicants' representative Mr. A. Wurth. It is for these reasons that First Applicant insist on the order in his Notice of Motion. This time Mr. Wurth has not made any supporting affidavit.

The application First Respondent was authorised to file to deal with new allegations was sworn to on the 22nd November, 1994. In it they challenged the fact that not a single salary cheque was annexed in their First Applicant's replying affidavit. He says he was receiving a monthly commission of M1000.00 per month for dropping his job as sales representative for Earthmoving Equipment Repairs. I am not sure that here he was dealing information arising from stock taking. Similarly challenging the fact that furniture was bought by DA Ungaro and Sons (Pty) Ltd. does not seem to result from stock taking. There are other averments that I did not expect First Respondent to challenge in this special

affidavit.

First Respondent challenges the vague allegations about stocks of the company. He denies refusing to sign stock sheets. He challenges Applicant to produce stock sheets if they do exist. First Respondent says he co-operated fully with Applicants and even showed them bank statements, his savings books and even invoice books. He even allowed them to take them to their head office where they came back mutilated. Applicant denies the stock of M40,000.00 is missing. He insist the stock supplied was less than M40,000.00.. He denies the withdrawal alleged by Applicants and says even if there was, he did not need authority from applicants. He says no moneys were advanced to him and this not even alleged in the founding affidavit.

The court at the day has o evaluate the averments of the parties. My great problem is how could Applicants determine stock shrinkage or loss if they have not proved they supplied it in the first place. They were challenged to provide invoices proving their supply and the receipt of such stock by the Respondents. Applicants have not done so. Mr. Wurth who did the stock taking never even

made an affidavit.

I was surprised that Applicants did not specifically take advantage of the order of the 16th November, 1994 by making the required affidavits. Their counsel had said Applicants would reveal glaring stock shortages. I was particularly disturbed by this omission because affidavits reveal that Applicant took all the documents to their head office to make copies. Surely some of this documentary evidence could have bene annexed as proof of their allegations. Further more Applicants should have been aware they were entitled to have the last word after receipt of First Respondent's specially authorised affidavits.

In application proceedings pleadings and evidence are rolled in one, and presented through affidavits. For First Applicant to make allegations vigorously, and given the opportunity to prove them (to fail to substantiate them through affidavits and annexures) left me with a feeling that I was being bombarded with words but no facts. Without facts I cannot decide this application.

A company is a juristic person that is:-

> "an entity, with a name of its own, but having no physical existence, existing only in the contemplation of the law, on which the law confers personality; that is the capacity to acquire rights and to incur obligations." Wille's *Principles of South African Law* 7th Edition at page 155.

The problem I have with First Applicant is that he does not appear to have recognised the existing of the company laws of Lesotho or those of the Republic of South Africa. This application involves company law and companies are litigants. We cannot forget that a company has no physical existence and only exits in the contemplation of the law. At paragraph 11 of the Founding Affidavit, First applicant says:

> "I was handed a certified copy of the Memorandum and Articles of C.T. Lebina Transport (Pty) Ltd. by the First Respondent."

If Applicants' claim they have taken over C.T. Lebina Transport (Pty) Ltd and bought all its shares they should have done so in terms of the Memorandum and Articles of

Association of that company.

Section 23 of the *Articles of Association of C.T. Lebina Transport (Proprietary) Ltd.* on transfer of shares provides:

> "the instrument of transfer of any share in the company shall be in writing, and shall be executed on behalf of the transferor and transferee, and duly attested, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in respect thereof."

Applicants' claim C.T. Lebina Transport (Pty) Ltd. is theirs on the basis of documents of transfer of shares that are undated and which are not attested by the applicants as transferees and respondents as transferors. By attest I mean witnessed. We are shown annexures "C" and "D" which are papers bearing undated and unwitnessed signatures of transferors. For Giovanni Ungaro (First Respondent) to have written and signed annexure "B" as a Director of C.T. Lebina Transport (Pty) Ltd. struck me as

strange. He probably did not read the Articles of Association of the company. He should have known he was not a director of the company.

Perhaps First Applicant did not treat company law as something to take seriously. He handled the whole matter informally when it was a legal matter between the parties? What was the understanding between the parties when they began to do business? What is certain is that appearances do not reveal what was actually going on.

How First Respondent came to sign annexure "C" the transfer or shares is now covered by a mass of occurrences allegations and denials. First Respondent starts by denying his signature and later admitting it in the same affidavit.

First applicant says all shares were sold to him for M1000.00 by First Respondent who was only an employee and was just a branch manager. First applicant towards the end of his affidavit suggests that Applicant was still a director of C.T. Lebina Transport (Pty) Ltd. vaguely and in passing at paragraph 15 of his founding affidavit where

he says:

> "From about the 6th of September, 1994, first Respondent became very negative to other Directors and stopped doing the necessary reporting..."

Annexure "B" which First Respondent whose acknowledgment First Respondent signed on the 21st April, 1994 simply appoints First Respondent as branch manager with a salary of M1,000.00 per month with no stated commission. An unspecified commission would be paid if a sales target of M300,000.00 is achieved. I have already said that in law and having regard to the stated objectives of Applicants, First applicant could not validly have signed annexure "B". Indeed First Respondent says it was signed in blank, details were filled later. Was annexure "B" genuine? It is not easy to choose who to believe.

An amount of M1000.00 for a manager is rather low. Furthermore for the sole manager of C.T. Lebina Transport (Pty) Ltd. who is also a Director to be appointed a branch manager strikes me as odd. By what authority could First

Applicant appoint a branch manager? Surely a Board of Directors ought to have made such an appointment. I am left with a feeling that I am not being told everything that is essential for the determination of this case. In fact I am not told enough.

If I proceed on the balance of probabilities I have no hesitation in saying Applicants are not being truthful when they say the signed blank share transfer form annexure "C" was for the transfer of all the shares of First Respondent. The behaviour of Applicants in behaving as if First Respondent was no more a shareholder and director of C.T. Lebina Transport (Pty) Ltd is responsible for the present problem. I find them to have not told the truth on this particular point because they had to approach First Respondent to allow them to come into C.T. Lebina Transport (Pty) Ltd. because their company Daus Tyres (Pty) Ltd. could not get a licence to trade because the majority of shareholders were not nationals of Lesotho. Therefore C.T. Lebina Transport (Pty) Ltd. would be of any use to them if the majority of its shareholders were no more nationals of Lesotho.

If Applicants are not being untruthful then they wanted to have it both ways. They were brow-beating Applicant by telling him he had sold him all their shares while maintaining a facade to the Lesotho authorities that the company still had a majority of shareholders that were Lesotho nationals. In that event it is false that after signature of share transfers

> "the actual registration of transfer did not proceed for reasons beyond applicant's control"

This conclusion tallies with First Respondent's annexure "CTL4" dated 14th September, 1994 to the Registrar of Companies where he says,

> "I am writing to report to you that during March 1993 I endeavoured to go into a business venture with certain three (3) members of the Ungaro Family who I had signed blank transfer shares with an intention to allocate some shares to them... I fear that the aforementioned forms might be used by Ungaro family to my prejudice and request that no transactions in any manner

whatsoever should take place without my written consent."

It is significant that Applicants were silent about this letter, which they do not deny getting in their affidavit of 11th November 1994. They only vaguely said "first Respondent became very negative towards the other directors". They were in my view deliberately keeping back vital information from the court. They could not have done this *bona fide*.

Urgent applications are brought because urgent relief has to be obtained because of the danger that delay might cause the Applicant harm. Applicants brought this urgent application to protect their business interests and among the reliefs they sought was a *Rule Nisi* with very drastic consequences for the Respondents. Good faith is essential in all applications, see Jones and Buckle *civil Practice of the Magistrate Courts of South Africa* 8th Edition Volume II at page 400. Although Applicant was served less than 24 hours before application was moved in my view this application was virtually seeking relief *ex parte*. Therefore what was said by Herbstein and Van Winsen *Civil*

Practice of the Superior Courts of South Africa 3rd Edition at pages 80 and 81 applies to this case, that is:

> "the utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court..."

It seems to me that Applicant was not fair to the Court in failing to disclose to the Court that trouble between the parties was among other things caused by the fact that First Respondent wanted Applicant to return the share transfer forms that he had signed in blank, and First Respondent had reported the matter to the Registrar of Companies. When first Respondent at the beginning of his affidavit began by denying his own signature and later admitting his signature. A belief grew in me that I was dealing with two litigants that could not be trusted, therefore issues of credibility were not going to be straight forward. The Applicants have initiated these legal proceedings and thereby set the pace in this scenario in which avoidance of the truth garnished with non-disclosures dominate legal proceedings.

Mr. Molete in argument said I should prevent

Respondents from being enriched at the expense of the Applicants. I should not allow my hands to be tied by company law. So to speak I understood him to say "equity should be observed, it should be preferred to strict law and to excessively exact and subtle arguments". In our law as Voet 1·1·6 has observed (in the passage from which these words are extracted) "equity is bound up with laws" There was never a separate system of equity in our law as there once was in England. Could it not be that these words which appear in Voet 1·1·6 apply to Applicants:

> "He who, holding the letter of the law, opposes its intention and meaning, may be said to act in fraud of the law; and he who refuses to notice the intention with which a thing was said may even be called a pettifogger or a strainer of words."

The best way could not to ignore company law because Application himself has founded his claim on it and wants benefits under it, although some parts of it do not favour him. Company law in this case preserves equality and binds all people equally Voet 1·3·5.

In these proceedings which are by way of application

and in which issues of credibility are not easy to determine, the conduct of parties also does not help, therefore:-

> "Our courts have often refused to allow one of the parties to a contract to take advantage of his own conduct to the detriment of the other party, where such conduct induced the other to act on it." *Bothwell v Union Govt* 1917 AD 262 at page 269.

I will therefore not to decide the merits one way or the other.

This is an application for an interdict *pendente lite*. For Applicants to succeed they must demonstrate the following:-

(a) A right on the balance of probabilities. If the right is *prima facie* established though open to some doubt that is not always enough see *Webster v Mitchell* 1948 (1) SA 1188 at 1189.

(b) Fear of irreparable harm must be alleged, but this must be based on a well-grounded

apprehension.

(c) The Court has to determine the balance of convenience by weighing the prejudice that might be caused to applicants or the respondents if the order was granted or refused.

(d) This must be the only satisfactory remedy.

If Applicants had demonstrated a clear right the Court would have found no difficulty in granting this application easy. In this case however since an interlocutory relief is sought in circumstances in which facts are far from clear, a combination of the nature of Applicant's right, how well grounded apprehension of irreparable harm has been established and the balance of convenience have to be viewed collectively. No comprehensive rule can be laid down for granting or refusing to grant interdicts, each case has to be dealt with according to its merits.—See *Prinsloo v Luipaardsvlei Estates & GM Co. Ltd.* 1933 WLD 6 at page 25.

The property in question including the motor vehicle

are now the property of C.T. Lebina Transport (Pty) Ltd. the Second Respondent herein. This property was transferred is not clear. What cannot be disputed is that promises and agreements (on which now there seems to have been no *consensus ad idem*) were made. I have not been persuaded that Applicants were acting in good faith. They deny they had promised Applicant massive commission. First Respondent says he signed a lot of papers on which Applicant relies in blank. Applicants say they have bought out Applicant and his wife on the basis of blank share transfers. Something they not have done having regard to what was behind their need for a Lesotho company that had a majority of Lesotho nationals. I cannot without going fully into questions of credibility decide this question.

I have already said that I cannot trust Applicants. They made wild allegations about the stock they had supplied to Respondents but refused to prove its quantum and value despite the challenge that was made to them by First Respondent. They also failed to supply this information although they claimed to have it, despite the promise they made to the Court when the Applicants were

allowed to bring the information by Court Order of 16th November, 1994.

I was not impressed with the First Respondent either when he denied some of his signatures and later admitted them. Even so, we should not forget that the application that is before Court is that of Applicants.

The order that Applicants ask for is so drastic and unfair to the Respondents who are to be prevented from realising the stock in trade that is already the property of C.T. Lebina's Transport (Pty) Ltd. If a trader sells something to the company it ceases to be his although he may be the beneficial owner of the shares of the company. See Gower *Modern company Law* 2nd Edition at page 66. Applicants still believe the motor vehicle stock-in-trade and the property they transferred to the company are still theirs. Their failure eventually to acquire shares in that company does not change the position.

As Gower has shown incorporation can hit the man who uses it for his devices as well as hit those people he was aiming the iron curtain of incorporation against. "The

iron curtains keep in those who erect them as well as keeping others out". In *Rex v Gillet* 1929 A.D. 364 at page 371 De Villiers A.C.J. speaking of two companies said:

> "In law a registered company is a separate and distinct legal *persona*, and every company is entitled to do whatever is authorised by its memorandum and articles of association... And as long as they do what they are authorised to do, it makes no difference that they are controlled or even dominated by Gillet. Always provided they stay within the law."

In *Botha v Van Niekerk En 'N Ander* 1983 (3) SA 513 the court refused to lift the veil of incorporation to enable applicant to get at a Respondent other who was the dominant force in the company.

In this case it is clear that Applicants do not own the shares of C.T. Lebina Transport (Pty) Ltd. (Second Respondent). This was the major premise on which their claim was based. They have not even proved the quantity and the value of the goods they claim to have supplied the company.

Even if I was entitled to lift the veil, not enough has been supplied as evidence to enable me to act. The reason being that even if Applicants were shareholders as Hoexter A.C.J. said in *Stellenbosch Farmers Winery v Distillers Corp & Ano.* 1962 (1) SA 458 AD at page 472A a shareholder,

> "...is financially interested in the success or failure of the company but not that he has any right or title to any assets of the company. In short a shareholder has a proprietary interest in the company, but not in the business of the company."

I am not sure Applicants should have greater rights than even shareholders.

applicant have brought an action where they claim the M350,000.00 value of machines and goods supplied. I do not think I should hand over the property of the Second Respondent Company to Deputy Sheriff *pendente lite*. This has never been done and Mr. Molete, Counsel for Applicants, could not even persuade me that the goods would be safe having regard to current record of the Court's Deputy Sheriff. I have already generally

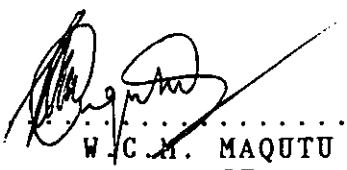
expressed my dissatisfaction with Applicant's application.

I therefore make the following order which is largely the Order that Lehohla J. gave by consent except for the question of costs and Applicants' access to the business of the Second Respondent company:-

(a) Respondents are not to remove stock in trade otherwise than in the normal course of business while Applicants claim is pending.

(b) All monies collected are to be deposited into the company's account held with Third Respondent.

(c) Applicants are to pay the costs of this application.



W.C.M. MAQUTU
JUDGE

For the Applicants: Mr. *L. Molete*
For the Respondents: Mr. *H. Nathane*