

IN THE HIGH COURT OF LESOTHO

In the matter between:

ABDUL GANNY DAMBHA

APPLICANT

and

SALES TAX DEPARTMENT
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Acting Justice Mrs. J.K. Guni
On the 23rd day of October, 1995

In this application, Mr. ABDUL GANNY DAMBHA, requested from this Court an extraordinary Order, restraining 1st Respondent from carrying out, the sale of goods, as advertised on 27th and 28th August 1993. This applicant obtained that Interim Order. The goods in question were, and still are in the supermarket known as FOUR SQUARE, at Butha-Buthe. The proprietor of the Supermarket was at that time LARGE SHANGAI (PTY) LTD. This company is not a party to this proceedings. There is no action pending nor to be instituted against it. This applicant is therefore seeking a definite and final order.

The facts of this case, to which there appear to be no dispute, are as follows: That the applicant's Supermarket was hired out by LARGE SHANGHAI (PTY) LTD., which ran the very same

business of a Supermarket. During that period, when LARGE SHANGHAI was conducting the business of the Supermarket on those premises, the company owed rent and other moneys to the applicant in respect of the stock in trade which the said company took over when it commenced to conduct the business of the said Supermarket. In the course of conduct of the same business the LARGE SHANGHAI (PTY) LTD., owed Sales Tax to first Respondent.

The first Respondent took steps to recover the said Sales Tax which was owing, due and payable to it by LARGE SHANGHAI (PTY) LTD. It is not disputed that first Respondent took possession of the said goods and advertised to sell them in order to recover the Sales tax owed to it by the Proprietor of the the said Supermarket. There is no dispute as regards the lawfulness of those steps taken by the first Respondent to recover the Sales tax due to it from LARGE SHANGHAI (PTY) LTD.

It is this very action of trying to recover the Sales tax owed and due for payment, by LARGE SHANGHAI (PTY) LTD., that this applicant sought to prevent by the restraining Interum Order which he now requests this Court to confirm.

In the first place, an interdict is an extraordinary summary measure issued in circumstances, where a party requires protection against unlawful actual interference or threatened interference with his or her rights. The first question that arises, is whether or not there was actual or threatened interference with the rights of this applicant? The goods advertised were to be sold by the 1st Respondent on the dates

specified in Annexure "D" attached to the founding Affidavit. This is admitted by both parties. Was the first Respondent's action an unlawful interference with this applicant's rights. There is no allegation that this was so. Both parties claim to have a right to sell the goods in order to recover the money owed to him/or her by the owner of the said goods. Both parties have legitimate claim to sell the goods in question in order to recover the money owed to it by LARGE SHANGHAI (PTY) LTD. The question of dispute is their rank in priority of their claims.

The applicant claimed that the LARGE SHANGHAI (PTY) LTD., owed him rent and other moneys. In order to protect this applicant's rights, or as succinctly put by the parties at paragraph 4 of Annexure "B" (Agreement between A.G. DAMBHA the applicant herein and LARGE SHANGHAI (PTY) LTD.)

"In order to recoup himself for the loss sustained, the said A.G. Dambha and Large Shanghai (Pty) Ltd., agree that Ganny Dambha hold as a lien for his loss the amount of stock remaining and amounting in all in the sum of M24,929-00".

It is on the basis of this agreement that this applicant claimed to have a superior right from that of the department of Sales Tax as regards the sale of goods left in that Supermarket by LARGE SHANGHAI (PTY) LTD. It is this right of lien which he seeks to protect by an interdict order obtained against first Respondent. Although this applicant specifically claims the

source of his right as this agreement, Mr. Mosito argued that the parties to the said agreement had in mind, at the time they arranged to enter into the said agreement, the landlord's hypothec. This agreement between LARGE SHANGHAI (PTY) LTD., - the tenant, and this applicant, - the landlord, was the perfection, of the landlord's common law right. This is permissible in Roman Dutch Law practice. Webster v Ellison 1911 AD page 86 at page 87; ELLIOT BROS (E.L.) (PTY) LTD v SMITH 1958 (3) SA 858 at page 860. There is no argument against the submission that the sub-lessee's movables are also subject to the lessor's hypothec. Mr. Putsoane for first Respondent argued that, the lessor's hypothec is specifically placed in the second position or at least after the payment of tax by Section 27 (1) SALES TAX ACT NO.8 of 1982. This section provides as follows:-

"Where the assets of a vendor or a person liable to pay tax are compulsorily sold or distributed to pay his debts, tax, interest or penalty shall be given a preference to any other debts"

Mr. Mosito conceded that if there is distribution of assets or if those assets have already been sold, and their proceeds are being distributed, the department of Sales Tax must be given preference. Mr. Mosito claimed that the goods in question have not yet been distributed. The department of SALES TAX, when the time comes for distribution it must be preferred. But for the time being the goods are held as Landlord's tacit hypothec. On payment of rent and those moneys owed by LARGE SHANGHAI (PTY) LTD

the goods will be returned to the owner.

The stock in trade left in the Supermarket, was there for no other purpose except for Sale. In Annexure "C" the letter of Notice of termination of the sub-lease, it is explicitly expressed that the parties should "meet to enable them to enter into an agreement about the take over of the stock". In paragraph 4 "PURPOSE FOR WHICH LET" In ANNEXURE "A" 4.2. the sub-lessee took over the stock in trade in the said premises in the same fashion contemplated in the Subsequent Agreement - Annexure "B". This confirms in my mind the impression that the applicant wants to sell the goods himself rather than the said goods be sold by the first respondent as advertised. This applicant wants to sell those goods in order to recover the moneys owed to him by the sub-lessee. The department of SALES TAX wants to sell those goods in order to recover the debt owing by the sub-lessee. The Agreement between this applicant and LARGE SHANGHAI (PTY) LTD - sub-lessee is recognised and perhaps accepted as a perfecting measure of the landlord's right of tacit hypothec, cannot be regarded as binding on anybody other than the parties themselves. The agreement between these two parties A G DAMBHA and LARGE SHANGHAI (PTY) LTD cannot bind third parties or exclude lawful claims of other parties who are not a party to it.

The intervention by the legislature in terms of Section 27 (1) Sales Tax Act 1982 changed the common law position of places to be taken in the queue for payment by creditors. This

applicant and first Respondent are creditors. LARGE SHANGHAI (PTY) LTD is the debtor. The stock in trade which first Respondent advertised to sell on 27th and 28th August 1993, is the movable property of the debtor. Those goods are the only assets of LARGE SHANGHAI (PTY) LTD whose creditors, the parties to this suit seek to sell and recover the debt owed by it to them. In the distribution of those assets of the person liable to pay tax, (LARGE SHANGHAI (PTY) LTD is such a person), "tax, interest and penalty shall be given a preference to any other debts". The first Respondent does not only have a lawful right, but has a prior right against all other creditors in this case.

The rule must therefore be discharged with costs.

K.J. GUNI
ACTING JUDGE

For the Applicant: Mr. Mosito

For the Respondents: Mr. Putsoane