CIV/APN/154/98

IN THE HIGH COURT OF LESOTHO

In the matter between:

BUS STOP HARDWARE (PTY) LTD **APPLICANT**

AND

M.J.M. PROPRIETARY LIMITED **1ST RESPONDENT**
MESSENGER OF THE MAGISTRATE COURT **2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Chief Justice Mr. Justice J.L. Kheola on the 16th day of July, 1998.

This is an application for an order in the following terms:

1. **THAT** condonation be granted to the applicant for the non-compliance with the Rules of Court pertaining to service and process and the matter be heard on an urgent basis.

2. **THAT** a rule nisi with immediate effect be issued:

   2.1 interdicting the 1st and 2nd respondent from taking any steps to eject the applicant from the premises which it occupies at or on **Plot No.13283 - 232, Cathedral Area, opposite Manonyane Centre;**

2.2 That the 1st and 2nd respondent be interdicted from disturbing in any manner the applicant's occupation of the aforesaid property.

3. **THAT** an order be issued calling upon the respondents to show cause, if any, on **25 MAY 1998,** at **10.00a.m.**, or as soon thereafter as the matter may be called, why:

3.1 the orders contained in and set out in paragraph 2 above, should not be made final;

3.2 the 1st respondent should not pay the costs of this application on the scale as between attorney and own client.

4. **THAT** the respondents be ordered to file and deliver their notice of intention to oppose, if any, and their opposing affidavits, if any, on or before **15 MAY, 1998.**

5. **THAT** such further and/or alternative relief as may be appropriate be granted to the applicant.

The facts which are common cause are as follows:

The first respondent instituted an action in the Magistrate's Court against a certain Mairoon Adams in which it claimed, **inter alia,** ejectment of the said Mairoon Adams from certain premises in Maseru. The first respondent, in its particulars of claim in the said action, alleged that they had entered into an agreement with the owner of the premises in terms whereof they rented the said premises from the said owner thereof, that Mairoon Adams was in unlawful occupation of the premises and that they were therefore entitled to the relief

claimed.

Mairoon Adams entered an appearance to defend the said action, whereupon the first respondent, as plaintiff, applied for summary judgment, which was granted. Mairoon Adams then took the matter on appeal, but her appeal was dismissed.

The first respondent thereupon obtained a warrant of ejectment in terms whereof the second respondent (the Messenger of the Magistrate's Court) was instructed to eject the said Mairoon Adams from the premises. The second respondent was urged by the first respondent to give effect to the warrant of ejectment.

The applicant, a duly registered company, thereupon approached this Court for urgent relief on the basis that it was in occupation of the relevant portion of the premises and not Mairoon Adams, that the warrant of ejectment consequently did not justify or provide for its ejectment, would therefore be unlawful and that it was entitled to an interdict restraining the second respondent from giving effect to the warrant of ejectment by ejecting it from the said premises.

An interdict with immediate effect was duly issued by the Court **ex parte.**

The first respondent thereupon gave notice of anticipation of the return day and filed an opposing affidavit in which it apparently denies that the applicant is in occupation of the property and prays for the discharge of the interdict.

The matter has now been argued before me and what clearly emerges from the submissions of both **Mr Wessels,** S.C., counsel for the applicant and **Mr Sello,** attorney for the respondents, is that there are serious disputes of fact which cannot be resolved without hearing oral evidence. The main issue is whether the first respondent was ever in occupation of the premises in question.

The second issue is whether the applicant was ever in occupation of the premises in question.

The third and the most important issue concerns the ownership of the property in question. The first respondent has a sub-lease agreement entered into between itself and one 'Mantebaleng Mokhutle as owner of the property in question. The sub-lease was entered into on the 27th September, 1996. In terms of section 36 of the Land Act 1979 the consent of the Minister of Home Affairs

was obtained on the 20th March, 1997.(See Annexure **"MGV5"** to the answering affidavit)

In its answering affidavit deposed to by one Marcelino Gonvalves Vecente, who is its director, it is alleged that the first respondent was given occupation on the 1st November, 1996 and physically took over the four roomed building on the plot and has been collecting rent from the tenants occupying the same since the said date. He denies that the applicant is in occupation of any portion of the premises. It is Mairoon Adams who is in occupation of the premises.

In her supporting affidavit 'Mamalia Joyce Tseppe alleges that she is the daughter of one 'Mantebaleng Adelina Mokhutle who died in March, 1997. The deceased was the registered allottee of plot numbers 36 and 37 which were eventually given new numbers 13283 - 232. The improvements on the plot consisted of a main building and a separate flat-roofed structure.

In cc 120/1990 the deceased sued Mairoon Adams for damages for free occupation of portion of the premises which had been occupied by Mairoon's father one Teboho Dhamba. She refused to pay rent for her occupation of the portion of the premises. She alleges that that case is still pending in the

Magistrate's Court. This litigation was instituted during the year 1990 and that case was still pending until her mother died in March, 1997.

She alleges that the first respondent took occupation of one portion of the plot on the 1st November, 1996 leaving her mother as a tenant in one of the four rooms which she (deponent) subsequently took over upon the death of her mother in March, 1997. The other three rooms are also being let to first respondent. She alleges that since the death of her mother Mairoon Adams has continued to occupy the premises without paying any rent. She is not aware of the existence of the applicant and that it is in occupation of the premises and not Mairoon Adams. She further alleges that Retselisitsoe Mokhutle who is alleged to have entered into an agreement of lease with the applicant has no title or claim to the property in dispute or any portion thereof.

In its founding affidavit deposed to by one Rahima Tarr who is its director, the applicant alleges that it was incorporated as a company and duly registered as such in the offices of the Registrar of Companies on the 31st October, 1996. It occupies the premises which are presently known as No. 13283 - 232, Cathedral Area, Maseru. It has been in occupation of these premises since its incorporation. The occupation is in terms of an agreement of lease which it entered into with

Retselisitsoe Mokhutle. The premises were previously occupied by Mairoon Adams.

She alleges that neither the first and second respondent is entitled to or has any lawful cause to remove the applicant from the said premises, she however truly and honestly fears that the applicant will be disturbed in its possession and occupation of such premises and thereby suffer damages through loss of business and customers.

I agree with **Mr Wessels** that where a lessee has not yet obtained occupation or possession of the leased property, he cannot obtain an ejectment order against a person who is already in possession of the relevant property. He must look for relief against the owner (lessor) of the property. In other words the lessee must be given possession of the property by the lessor. Thereafter he can protect his possession against the whole world.

In **Bodasingh's Estate v. Suleman** 1960 (1) S.A. 288 (N) at 290 F-H the learned Judge said:

> "Now it is a primary duty of a lessor to deliver to the lessee the use and occupation of the property, and in order to fulfil this duty he must give him 'free and undisturbed possession not in contest

> when delivered.' He does not fulfil that duty if, when he hands over the property, it is occupied by some other person, whether that person is a trespasser or it there under colour of right..... Where that person is a trespasser, the lessor must surely therefore have the right to eject him in order to fulfil his contractual obligation..... furthermore, a contract of lease (without delivery of possession), as clearly appears from this last case, **JADWAT & MOOLA v SEEDAT** 1956 (4) S.A. 373 (N), does no more than entitle the lessee to claim possession from the lessor (and those of his successors who had prior notice of the lease), and from no one else (except under a cession of action). It is only after he has been given possession that he can protect that possession against the whole world and in particular against all the lessor's successors." (My underlining).

If the applicant can prove that at the relevant time it was already in possession of the relevant portion of the premises and that the first respondent was not in occupation of the relevant portion of the premises, then it (applicant) must obtain judgment in its favour. In a situation like that the first respondent must sue the lessor and claim that it should be given free and undisturbed possession not in contest when delivered.

The applicant is relying on the evidence of its Directors what after its incorporation on the 31st October, 1996, it took occupation of the premises in question. The Directors are Rahima Tarr and Mairoon Adams. This allegation is denied by the first respondent on the ground that the person who was in unlawful possession/occupation of the premises was Mairoon Adams. First respondent sued her and obtained an order of ejectment. She appealed to the High Court but her

appeal was dismissed. In those proceedings Mairoon Adams never mentioned that she was not in occupation of the premises and that it was the applicant who was in occupation. Why should a Director of a company who is wrongly sued in her own name not disclosed to the Court that it is her company that is in occupation?

Mr Sello has submitted that evidence withheld from the Court and which must be readily available to the applicant is its trading licence in respect of the premises. During arguments in Court **Mr Wessels** attempted to hand in a trading licence from the bar. **Mr. Sello** objected on the ground that the trading licence could not be handed in at that stage of the proceedings because it would prejudice his client's case. They would have no opportunity to challenge the correctness of its issue. I sustained the objection.

Mr Sello submitted that the applicant's case should not succeed on the ground that Mairoon, close to some six months after applicant allegedly took possession, did not, in answer to ejectment proceedings instituted against her on 22nd May, 1997, simply deny that she is in occupation and, in so far as it may have been required of her to state who was, to have mentioned the applicant and, possibly apply for its joinder at that stage. That, on the contrary she averred, in her affidavit in response to the first respondent's application for summary

judgment (Annexure **MGV2** to the answering affidavit at pra.3) not only that she occupied the premises but that she did so in terms of a lease. In those proceedings she referred to herself as a female trader trading on the premises as Bus Stop Hardware and Furniture.

I find it as most inconceivable and improbable that Mairoon Adams forgot that she was not in occupation but that applicant was. She is not an old Mosotho lady who cannot write her name, who does not know anything about company law. She was represented by a lawyer who drafted her papers in that case. She alleged that she occupied the premises in terms of an agreement of sublease. It was only last year in May when she made the allegation of the existence of a sublease between herself and one Retselisitsoe Khomo Mokhutle. In his supporting affidavit Retselisitsoe alleges that the sublease between himself and Mairoon was entered into in 1991 and was for a period of three years. It must have expired in 1994.

It is again inconceivable and improbable that in 1997 Mairoon Adams was still hiding behind an expired sublease. It is not surprising that the court found that she had no **bona fide** defence and granted summary judgment.

Mr. Wessels submitted that when Mairoon Adams deposed to the affidavit in opposition of the application for summary judgment against her, she was not acting on behalf of the applicant and whatever she stated or failed to state in that affidavit cannot be held against the company, bind the company or be attributed to the company.

I do not quite agree with the above submission. Mairoon Adams is not an outsider but a director of the applicant and if she knew that she was not in occupation of the premises but the applicant was, she ought to have merely stated that fact. There was absolutely no reason why she did not reveal that it was the applicant which was and is still in occupation of the premises. By saying that she was in occupation in terms of a sub-lease entered into between herself and one Retselisitsoe Mokhutle, Mairoon Adams actually supports the first respondent's case that she was the person in occupation of the premises. She cannot now be heard in this proceedings to contradict herself and say that it was the applicant who was in occupation of the premises. In her replying affidavit in the present proceedings she is trying to justify her allegation in the ejectment proceedings that she was in occupation of the premises on the ground that she has no legal training and that when her attorney of record enquired from her what her defence was, she pointed out to him that the lease in respect of the property could not have been

held by 'Mantebaleng Mokhutle as the lease was in fact held by the successor of Moeti Mokhutle and the first respondent could therefore not have concluded a sub-lease in respect of the property.

The allegation she is now making cannot change her allegation that she was in occupation of the relevant portion of the premises. That allegation was apparently accepted by the trial court and that is the reason why an ejectment order was granted against her. That allegation supports the first respondent's case that she was in occupation of the relevant portion of the premises.

Mr. Wessels submitted that the applicant company was not formed in an effort to foil or frustrate the efforts of the first respondent to obtain possession of the premises, since it was formed and registered before the first respondent even instituted its action against Mairoon Adams.

The issue here is whether at the relevant time the applicant was in occupation of the relevant portion of the premises. There is no doubt about the date of the company's formation and registration. It may be that it was formed and registered but never took possession or occupation of the premises immediately after its incorporation. However, the other director Mairoon Adams alleges that

at the relevant time she, and not the applicant, was in possession of the premises. This conflict in their evidence is difficult to be understood and casts doubt on the veracity of their evidence. The trading licence of the applicant would probably clear this doubt.

Mr. Wessels submitted that in the well known case of **Room Hire Co. (PTY) LTD v. Jeppe Street Mansions (PTY) LTD** 1949 (3) S.A. 1115 (T) at 1165 the following principle, which is still followed, was laid down:

> "A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary examination.... and to ascertain whether the denials are not fictitious intended merely to delay the hearing..... the respondent's affidavit must at least disclose that there are material issues in which there is a **bona fide** dispute of fact capable of being decided only after **viva voce** evidence has been heard."

In **Soffiantini v. Mould** 1956 (4) S.A. 150 (E) at 154 the following approach was suggested:

> "It is necessary to make a robust, common sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

I agree with **Mr. Wessels** that principles stated in the two cases referred to above are still our law. In the present case the issue is that of occupation by either the applicant or the first respondent at the relevant time. On a balance of probabilities and on the evidence of the first respondent the applicant was not in occupation of the relevant premises but Mairoon Adams was. The applicant has failed to discharge the onus that it was in occupation of the premises in question. On this ground alone the **rule nisi** should be discharged with costs.

The law is that every claimant who elects to proceed on motion runs the risk that a dispute of fact may be shown to exist, and the way in which the court exercises its discretion as to the future course of the proceedings in such an event will depend very much upon the extent to which the claimant is found to have been justified in accepting that risk. If, for example, the applicant should have realized when launching his application that a serious dispute of fact was bound to develop, the court may dismiss the application with costs. (See The Civil Practice of the Supreme Court of South Africa, 4th edition page 241).

In the present case there can be no doubt that the applicant realized when it launched this application that a serious dispute of fact had already developed because of the litigation between its director Mairoon Adams and the first

respondent. The applicant took the risk knowing very well that there was a serious dispute of fact regarding who was in occupation of the premises in dispute. On this ground alone the application should be dismissed. The applicant ought to have proceeded by way of an action.

In the result the **rule nisi** is discharged with costs.

J.L. KHEOLA
CHIEF JUSTICE

16th July, 1998

For Applicant - Mr. Wessels
For 1st Respondent - Mr Sello