CIV/APN/400/00
IN THE HIGH COURT OF LESOTHO

In the matter between:

MAIROON ADAMS	1st APPLICANT
BUS STOP HARDWARE	2nd APPLICANT
and	
THE MESSENGER OF THE SUBORDINATE COURT MASERU	RESPONDENT

RULING

Delivered by the Honourable Mr. Justice T. Monapathi on the 25th day of October 2000

This was the anticipated return date.

The application had been moved ex parte on Sunday the 27th October, 2000 before Mofolo J. An interim Court Order was granted on that day to the effect that the Respondent herein be interdicted from evicting and/or harassing the Applicants and all persons responsible to them from occupying premises situated at plot 36-37 (also known as plot no. 13283/232). And also that a warrant of apprehension against "a person or persons of particulars unknown of Bus Stop Hardware and Furniture issued on 20th October 2000 by the Subordinate Court, Maseru" be set aside. The Respondent has been the person ordered to execute the warrant for

MJM (PTY) LTD who had been Plaintiff and where First Applicant had been Defendant.

It was said that the reasons for wanting to interdict the Respondent who was a mere messenger of Court was that there had previously been a Court Order which was in the nature of an interdict. The order thereto was attached to the proceedings as annexure "D".

To enable it to understand the present proceedings this Court was told of a long chain of events. I wished it was helpful. There had been a certain application which was launched by MJM (PTY) Ltd against the Commissioner of Police and the Attorney General. Orders were granted to the effect of interdicting the members of Lesotho Mounted Police from interfering in any manner whatsoever with the ejectment of respondents by the messengers of the Maseru Magistrates' Court pursuant to the judgment in CC 402/97 in the premises in plot no. 13283-232 Cathedral Area in Maseru Urban Area. The second paragraph said the Commissioner of Police was to ensure that Messenger of Court carried out the judicial execution of the said Order. There was also an order for costs.

In response to the above application as Mr. Seamatha contended the proceedings in annexure "D" were launched. Application CIV/APN/192/2000 had been launched despite the fact that MJM (Pty) Ltd was well aware of the existence of an earlier application. It was aware of CIV/APN/327/1998 whose effect was that MJM (Pty) Ltd was allowed occupation of the property.

Mr. Seamatha spoke of a Paragraph 5 of the Court Order delivered on the 17th December 1998 and by the full bench. This was conditional upon the prosecution of an appeal by either the Applicant or Bus Stop Hardware. The

appeal has never been prosecuted. Paragraph 5 thereof says: Order of ejectment in which First Respondent (MJM Pty Ltd) obtained judgment against Mairoon Adams in the Magistrate's Court is suspended with immediate effect. The rule nisi which Peete J issued on the 7th August 1998 in case number CIV/APN/327/98 was stayed pending the outcome of the appeal against the discharge of the said rule pronounced by Peete J in the same matter.

It meant that at that time there was in the back round of all things an intended appeal against the order of Peete J. This appeal was proved not to have been filed at all. Instead then the other related appeal matter: see also RETSELISITSOE KHOMO MOKHUTLE NO v MJM (PTY) LTD, MESSENGER OF MAGISTRATES COURT, REGISTRAR OF DEEDS, ATTORNEY GENERAL AND MAMALIA TSEPE C of A (CIV) 30/98 Friedman J (13 October 2000) where at page 4 the learned Judge of Appeal said:

> "Applicant states that he entered into a lease of property with Adams which was renewed from time to time. When Bus Stop, of which Adams is a director, was incorporated appellant let a portion of the property to Bus Stop in terms of an oral agreement. Bus Stop and Adams both applied for orders interdicting First Respondent from ejecting them. Their applications were unsuccessful."

The learned Judge of Appeal goes further to say at page 5 of the said judgment about the Appellant.

> "Until the estate is wound up after appointment of an executor and until he receives dominium in the property, an heir has no control over it. Applicant accordingly had no interest in protecting the alleged right of occupation of either Adams or Bus Stop which he had purported to grant to them prior to his appointment as executor and at the time when, as heir, dominium in the property had not yet passed

> to him. It follows that the appeal must fail." (My underlining)

When the Respondents (including MJM (Pty) Ltd) won the appeal against the Appellant who purportedly granted the Applicant rights of occupation Mr. Seamatha would have been wise to have conceded to say that the Applicant would for all intents and purposes be without a judgment, strictly speaking. I say this most advisedly knowing that the Court of Appeal in C of A (CIV) No 15/00 RETSELISITSOE KHOMO MOKHUTLE NO v MJM (PTY) LTD AND FOUR OTHERS by Friedman J on the 13th October 2000 held for the Appellant against a judgment of the High Court which had upheld MJM (Pty) Ltd's exception. The Applicant's lessor (if not the estate) therefore remained a substantial claim before the High Court presumably intended, in effect, to disturb MJM (Pty) Ltd's lessors' rights. Mr. Seamatha went on however to stress that his client therefore had a kind of judgment in his favour that was annexure "D".

In the annexure "D" the orders were set out as follows for clarity. It was that:

1) "The Respondent is interdicted from ejecting the Applicant Bus Stop Hardware (Pty) Ltd and all persons through the aforementioned occupying the premises situated at plot 36-37 (also known as plot number 13283-232) Cathedral, Pitso Ground Maseru by virtue of Warrant of Execution issued under case no. CC 424/97.
2) The warrant of apprehension against Farouk Farouk on 30th May by the Subordinate Court, Maseru is set aside."

Clearly the sole Respondent was the Messenger of Magistrate's Court of Maseru. I was not able to understand why Mr. Seamatha replied to say that the Messenger Respondent was a party strictly speaking. And furthermore why said the messenger would be said to be having any interest at all except that of an agent of the person who issues out a warrant, a writ or process of Court. Surely he does not dispute or

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claim anything. He executes a warrant which in the opinion of Davis Jin R v HUGHES 1940 CPD:

> "..... the messenger had no option but to obey it, and he was consequendy in the execution of his duty when he was doing so." His interest is his duty and nothing else. I did not see why there could be a relationship between the acts of the Messenger who was now acting in order to execute, and the fact that the full bench decided in favour of the Applicant who has not prosecuted his appeal for over two years. This was no good answer to whether correctly speaking a messenger such as the Respondent was a party when he was not disputing a substantial right and in the absence of a true litigant or respondent. He was not a party in the absence of a substantial respondent. In the event that he conducted himself irregularly, as Mr. Seamatha submitted, he ought to be cited with the judgment creditor because correctly speaking a messenger of Court is never a sole party to any proceedings. There was therefore an obvious strangeness in annexure "D".

Mr. Seamatha emphasized that the additional reason for Applicant to sue Messenger of Court was this existence of a prior judgment (rule nisi) attached as Annexure "C" in CIV/APN/192/2000 granted by Mofolo J on the 5th day of June 2000. The Order was similar to that of Guni J (annexure "D") of the 4th July 2000 except that in the latter the setting aside of warrant of apprehension against Farouk (see annexure "F") was sought "pending its review". That was said to be "the judgment" the Applicant spoke about in annexure "D" which confirmed annexure "C". It was against those orders which Mr. Seamatha said there had been no appeal by the Respondent herein nor that was there any reference about them in the Court of Appeal when the two judgment referred to earlier were being considered. He submitted that the ruling therefore stood as precedent in favour of the Applicant.

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I did not see how these orders (in annexure "C" and "D") which were strictly interlocutory could have been treated in anyway better than what they were. That they ought to be entered

as pending a substantial decision in the Court of Appeal or elsewhere. This was much more so even as they appear to be permanent interdicts which they ought not to be. In any event this Court was never told of the end of the intended review nor appeals to which they had relevance. If there was no such review one can easily speak of chicanery, trickery or fraud on the part of the person who procured the orders well knowing that they were intended to have the effect they should not have in strict law.

I did not see why after the Court of Appeal decision any of matters that were applications of an interlocutory nature could be said to have survived. If they had fallen off as they did it made sense that MJM)Pty) Ltd would want to execute and issue a warrant as it had done in terms of case number CC 424/97.

I waited to see if there were any substantial reasons that pointed to anything that was wrong with the warrant of ejectment (re-issue) dated the 19th October 2000 - see annexure "B". If what make the warrant of ejectment irregular is the fact that it:

> ".....is abundantly clear from the aforesaid orders issued under case no. CIV/APN/192/2000 that the Respondent is prohibited by the Honourable Court to ejectment" then it cannot be so with those writs which were issued after the date of the order.

There cannot be a permanent interdict against a messenger when the judgment which is being executed is not under scrutiny nor is being questioned. Hence the question as to what was fate of the review that annexure "C" speaks about as pending review. It should have resulted some comment in annexure "D"

which Mr. Seamatha spoke of wanting to re-enforce it by means of the instant application. This submission by Applicant means that every other re-issue of the writ CC 424/97 could find itself frustrated by annexure "D" or such like order if the reasoning is valid in law. But it is not.

I asked the Applicant to explain the anomaly that a warrant of the Magistrate's Court was being challenged in what could neither by transfer, nor by appeal, nor by review nor by any kind of an application for a declaration. Indeed that is the question (of jurisdiction) that should have been asked by the issuers of annexure "C" and "D". Perhaps a charge can be made that the effect of a different opinion or reasoning by this Court would be a review of some kind of the decisions of the Courts who made the order in annexure "C" or "D". Why does Counsel expect that this Court should agree with the findings when wrong parties was cited and real parties not cited. The response by Applicant's Counsel was that the warrant was null and void on the face of it hence the entitlement of the Applicant to have sought its interdiction. I did not agree, with respect.

There never was a good answer to the question why the warrant even if it was bad it could not be challenged before the Magistrate's Court where it emanated. I would repeat that I was not shown the proceedings for review which were said to be the condition for the filing of the interdict in annexure "D". Nor were the proceedings of the Magistrate's Court transferred to this Court. This was the question that the Courts who issued annexure "C" and annexure "D" should have asked.

I thought the Magistrate who issued the warrant at the time, the Clerk of Court and not excluding the Respondent who had a real interest (MJM (Pty) Ltd) should have been cited in this proceedings "to show cause" as it were. This was

even more so when these parties have several times in the past been before the judges of the High Court. In particular before the application for orders in annexure "C" and "D". On none of those occasions have there been this serious act of non-joinder .

This goes together with the need to have stated the substantial cause and reason for challenging the proceedings before this Court not before the Magistrates Court except if the proceedings came by way of the permitted procedures. It was stated in reply that the warrant was vague and embarrassing and could not be enforced. I did not find that this was the case nor the reason stated in any of the ten paragraphs of the Applicant's deponent's affidavit. It was said the warrant was vague and embarrassing in that it had not been addressed to specific people. It was contended it was for that reason null and void. If it is so why was it not challenged before the magistrate?

I brought Mr. Seamatha's attention to the fact that a judgment that was still to be executed was a proceedings which were pending before that Court. This was by analogy similar to proceedings that have not been withdrawn before a Court. That virtually meant that the case founding the disputed writ was still a matter before the magistrate. This was because even if it had gone on appeal when the appeal ultimately failed a return is made to the Court a quo to execute the judgment. This appears to be even so in the instant case where no appeal was pending. So is the theoretical and even more so the practical reality that the matter will still belong to the Court a quo before finalizing execution.

I impressed on the Applicant's attorney that it might perhaps be that there were many faults with the writ, as issued, even bordering on irregularity but those matters would still have to be entertained as prescribed in before the High Court

Act 1978 and the High Court Rules when brought before the High Court. The stock reply was always that it was MJM (Pty) Ltd which started this process of forum shopping. I thought that even if it was so it was a wrong practice that had to be curbed. So that it was an objection which should have been raised all along and a question (of jurisdiction) which should have been asked all the time even with regard to the proceedings that brought about annexure "D".

It might perhaps be that the matter of appeal which Mr. Seamatha spoke about as pending was something other than the two Court of Appeal decisions that I have just referred to earlier in my judgment but there was no reference to such an appeal in the instant application. It might perhaps be that the intention of the Applicant was to seek to declare that the writ of execution was a bad process, again that was not clear in the papers. For all I am able to recall at the time that the full bench is said to have sat there was an intended appeal by the Applicant whose fate no one speaks about now. It concerned some issue of a right of occupation by a lessee of the property in dispute. If I am wrong it can only be that there was such appeal after at all. But no one spoke about it in these proceedings.

I agreed with Mr. Sello for the Respondent that the relief sought by the Applicant appeared to be one of a permanent interdict which had virtually been previously sought in annexure "D" which confirmed of annexure "C" I did not have to consider the query that the matter had been wrongly moved ex parte without notice. The prejudice in such procedure was almost guaranteed when the party with real interest was not even cited who had had a judgment in its favour for close to three years. Except to add that if this application had been a normal well founded claim that it was urgent would speak for itself. That is if it had to do with a stay of execution of a writ properly sought for example.

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The judgment that was being executed by the magistrate was a judgment over which there had been an appeal to the Court which had gone through several stages in different guises of applications since about 1998. It was an old matter. My interest remained to be about the nature of the relief sought. Now is about a challenge to a messenger of Court (Respondent) who seeks to execute an order of the Magistrate Court. This is done when it appears that is at the end of road. That is why Counsel for Respondent contended that the present strategy was to chase and intimidated Respondent with multitudinous Court Orders.

The problem remained to be in my view not one of non-joinder but a deliberate avoidance of citing the only party with a real interest that is MJM (Pty) Ltd. It cannot really be a good case that MJM (Pty) Ltd should have applied to have itself joined. It is a case of MJM (Pty) Ltd who has a real interest in this case who was being deliberately avoided so that when another turn comes it is cited so that the problem become protracted and protracted.

This is a situation where MJM (Pty) Ltd has a judgment in its favour which has a minimum of two years. A real basis has to be made out how the execution of judgment can be stopped. That is why Counsel for the Respondent kept on asking why the matter was even being brought ex parte. That is besides the question of the application being brought in a wrong Court.

One perplexing aspect would really be why the Applicant not relying on annexure "D" but rushed on again to this Court to sue for another order. He should have relied on annexure "D" in refusing to be ejected or on refusing to be arrested. If it has any value then it would have been a good defence before the magistrate or any arrester. Instead the Applicant came here before the Court to get an identical order. This is wrong. There were also other more fundamental

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issues.

Applicant should have at all times, in asking for an interdict, have to show a clear right, a wrong actual committal or apprehended which is basic. An Applicant came here before this Court to say that the Courts must interdict for all times execution of a judgment of a court of competent jurisdiction. Why would a real litigant (MJM (Pty) Ltd) be given a right, by means of judgment, and thereafter the same Court to have the fruits of the judgment denied that litigant? This kind of relief novel as it appears should have a justification as to what it is based upon in law in seeking to stop a judgment in being executed. Only an appeal or stay

would stop a judgment from being executed by the magistrate or judge who granted the judgment.

This Court knows of no other way of stopping a judgment which is binding in law. That is why for example in a matter involving Applicant and MJM (Pty) Ltd there was stay of Chief Magistrate's judgment (which had come by way of appeal here) when appeal had been noted. Then instead of following up on that appeal to the Court of Appeal there is this multitudinous applications of strange and peculiar character unknown to our procedures which all seek to interdict the execution of a judgment of a competent court. There has to be a basis for that. And similarly why would a warrant of apprehension that is good on its face and content being sought to be interdicted on grounds that there has already been preceding orders which are not too clear as to their basis.

I am satisfied that there had to be execution of the judgment in CC 424/97. This was after appeal to the Court, stay and decision of this Court which decided against the Applicant. It did not appear that after this the Applicant took any appeal. It was not clear how she could rely on the two judgments of the Court of

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Appeal one of which succeeded.

The disputed writ was issued by the Magistrate and the Clerk of Court who appointed this Respondent, who is a Messenger of Court who now as I found was a wrong respondent because he was not a real party with a real interest. I did not find any good explanation from the Respondent's Counsel as to why the real party or litigant (MJM) Pty Ltd was not cited. This company was the real party who belonged to the dispute.
I did not have any explanation furthermore, as to the kind of interdict sought was being sought by the Applicant. I did not find any good explanation furthermore how this Applicant came to this Court other than by stay of execution or appeal. Neither did the Applicant say that she came by way of review, transfer of proceedings nor was a declaration being sought. Nor was there an explanation why this matter would not be challenged at the Magistrates Court where it still belonged. This seems to be a wrong Court. I was not persuaded that because this High Court has already decided the matter as shown in annexure "D" that I ought to be bound as if by ratio decidendi, stare decisis or res judicata or whatever while the real party was not and had not been joined in the proceedings. Even if it has happened in the past it could only mean that it was irregular.

Finally I did not see that the Applicant had any right nor that the Respondent had committed a wrong in the attempted execution of the judgment.

In addition I did not quite appreciate the kind of relief sought in the circumstances where virtually the Respondent had not done any wrong.

My decision was that the application ought to fail with costs. Perhaps there

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could still be something good in she application if it was brought before the magistrate.
But at present and for above reasons it was misconceived.

T. MONAPATHI
JUDGE