

CIV/APN/490/99  
IN THE HIGH COURT OF LESOTHO

In the matter between:

MOHALE TUNNEL CONTRACTORS	APPLICANT
AND	
SECURITY LESOTHO (PTY) LTD	RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu On the 2nd day of February, 2000

On the 25th November, 1999, applicant, the Lesotho Tunnel contractors, filed of record an urgent application on notice to respondent. This matter was supposed to be heard on the 29th November, 1999. It was postponed to the 6th December, 1999. On that day it was postponed to the 13th December, 1999 for mention to enable the parties to obtain a date of hearing.

On the 15th December, 1999, the matter was brought before me for hearing. In it applicant was asking for the ejection of respondent from certain sites and that respondents employees should be interdicted from entering those sites. Finally applicant was asking the court to direct the

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police to help the Deputy Sheriff to evict the employees of respondent from the above-mentioned sites.

After hearing Mr Malebanye for applicant I dismissed the applicant's application with costs and promised to give reasons on the 2nd February, 2000.

THESE ARE THE REASONS

Respondent brought CIV/APN/482/99 in which it was asking for an interdict against the applicant and Mohale-Matsoku contractors. In it respondent wanted applicant and Mohale-Matsoku Contractors to be restrained from expelling the employees of respondents contrary to the terms of a contract between respondent and Mohale-Matsoku Contractors. The application in CIV/APN/482/99 was being brought because (according to respondent) applicant purported to have terminated a contract to which applicant was not a party.

While CIV/APN/482/99 was pending, and in the full knowledge of that application, applicant brought this application. In this application, applicant was seeking an eviction order against respondent from the very sites which are the subject of CIV/APN/482/99. Applicant proceeded in this manner despite the fact that he was aware that an injunction was being sought against applicant because respondent claimed applicant was terminating a contract in which it was not a party. It is convenient at this stage to quote a portion of applicant's founding affidavit:

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On the 14th day of August, 1999, the services of the Respondent company were terminated on notice.

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A dispute has arisen between the present applicant and the respondent under case number CIV/APN/482/99 before the High Court of Lesotho where respondent is attempting to obtain certain relief against the present applicant.

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At the hearing of this matter, a true copy of the papers in CIV/APN/482/99 will be placed before Your Lordships as I am advised that that application together with this application will be heard together."

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The opposing affidavit that I signed under CIV/APN/482/99 be and is hereby incorporated word for word and figure for figure to the extent that such affidavit is relevant and indeed is of assistance to this Honourable Court in determining the relief prayed for herein."

It is of interest that on the roll only this application appeared. CIV/APN/482/99 was only brought to me as I was going into court. I noted that on the 13th December, 1999 when it was postponed, there was a judge's minute that it should be heard together with this one. In the light of what transpired in this matter CIV/APN/482/99 was not even called for mention.

In answering this application for ejectment, respondent challenged the claim there could be cross-referencing between this application and

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CIV/APN/482/99 because "there has not been a consolidating order consolidating CIV/APN/482/99 and this matter". Respondent accused applicant of misleading this court. He persisted in saying there has never been any contract between respondent and applicant. The contract that applicant purported to terminate is between respondent and Mohale-Matsoku Contractors. As Mohale-Matsoku Contractors is not a party in these proceedings, there is non-joinder of an essential party.

Respondent also objected to the fact that applicant had brought ejectment proceedings to the High court when that is a matter for the Subordinate Court—See Section 16(1) of the Subordinate Courts Order 1988. Ejectment proceedings could consequently only be brought before this court regardless of value, if the party seeking to do so had first sought leave court. See Section 6 of the High Court Act of 1978.

Applicant's ejectment application had several problems which proved to be fatal to it. These were:

- 1) Applicant made a skeletal case in his founding affidavit, completely ignoring respondent's case of which he was already aware. Applicant ought to have been advised that he stands and falls by his founding affidavit. It is trite law

that in application proceedings, the founding affidavit constitutes the evidence and the pleadings. It is no good annexing documents which cannot be directly related to the application by admissible evidence. I could not understand why the contract that was allegedly terminated by applicant was not annexed to applicant's founding affidavit. What was annexed was a contract with A.A. Security services, a contract that was irrelevant to legal proceedings between applicant and respondent.

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- 2) In application CIV/APN/482/99 respondent had challenged applicant's locus standi to cancel the contract and eject respondent from the sites in question. Despite the knowledge that the respondent claimed only Mohale-Matsoku contractors were the proper party to do so, applicant brought these proceedings without any attempt in his founding affidavit to allege facts supporting its locus standi. As respondent crisply put it, applicant failed to demonstrate "a clear right right" in his founding affidavit.
- 3) Applicant attempted to supplement his case in his replying affidavit through what he called the "confirmatory affidavit" of Andrew Wilson who is styled a Quantity Surveyor of Mohale Matsoku Contractor in an unsigned affidavit which is on page 72 of the paginated record. On page 171 of the paginated record the same Andrew Wilson in another "confirmatory affidavit" of 13th December 1999 is described as a civil engineer. It is trite law that an applicant is not entitled to file supplementary affidavits with his replying affidavit for the purpose of supplementing the founding affidavits. Applicant could only supplement his case with leave of court after making a specific application to that effect. To put this principle in the words of Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa 4th Edition* at page 366 "The general rule which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon either to affirm or deny...and where the applicant had failed to allege his locus standi to make an application it was held that he could not do so in a replying affidavit". It is this difficulty that applicant had and which he unsuccessfully tried to solve through annexing a "confirmatory affidavit" of a civil engineer of Mohale-Matsoku Contractors to his replying affidavit.

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Applicant brought an ill-advised application founded on a dispute of fact which ought to have been resolved in CIV/APN/482/99. In his founding affidavit applicant glosses over this dispute and deliberately conceals its nature. Failure to disclose facts which would be adverse to the success of applicant's application, especially where an application was intended to be *ex parte* (as this one was originally intended to be) can be fatal. Faced with a similar case, *Conradie J in Hall and Another v Heyn and Another 1991(1) SA 381 at 397 BC* said:-

"It is trite law that an applicant should, especially in the case of an ex parte application, place all relevant facts before the court.... I think I am entitled to discharge the rule nisi on that ground alone."

This application ended up being on notice, nevertheless, throughout these proceedings the summary true facts of what CIV/APN/482/99 contained were never brought out by the applicant except by a general reference to it. Even when such reference was made, it was to applicant's affidavit. A litigant cannot require of a court that it should bring a file of another case pending before it, in order to determine issues before it. It would be pre-mature to determine whether the existing dispute is of a kind that would be of a class that would convert CIV/APN/482/99 into a trial cum application.

An interdict of a temporary nature is a matter that should be dealt with by way of application. A permanent interdict should normally be instituted by way of action. In urgent matters, a party has to have

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protection from a continuing mischief or infringement of his rights. Sometimes the interdict sought may be of a permanent nature, but on the balance of convenience the applicant might have no option but to seek a immediate curial intervention. In that event even a dispute of fact might have to be resolved by way of viva voce evidence. Even though there are cases of this nature, application proceedings are not meant for disputed matters.

In urgent matters, courts prefer to give temporary or interim relief. Parties are normally expected to institute an action so that both parties can fully ventilate their grievance. A practice has developed over the years whereby applications are extensively used in legal proceedings. This has been done so often that the distinction between matters suitable for action proceedings and those suitable for application proceedings has often been blurred.

Application proceedings are nevertheless always risky for a litigant who chooses them as a means of obtaining a remedy from this court. Legal proceedings are normally expected to be brought by way of action. In an action there has to be pleadings such as a summons, a plea, discovery of documents and a pre-trial conference before a matter is brought before court for full ventilation through viva voce evidence. In application proceedings the matter is dealt with through affidavits. No viva voce evidence is normally expected. In other words, application proceedings are not designed for the full ventilation of a dispute.

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A party who proceeds by way of application (unless there is no other course open to him) must have made sure that there is no real dispute of fact, before he proceeds. He must be expecting either that his adversary has no genuine defence or if there is a dispute, it will be that of law. If there is a dispute of fact, the court is entitled to dismiss applicant's claim, unless it can be persuaded otherwise, and applicant could not have foreseen such a dispute. There are applications in which viva voce evidence can be called to resolve a dispute on a few issues. This is a matter for the court to decide.

It is an abuse of court process for no good reason to lodge an application while another application covering virtually the same ground is already before court. Not only does it make papers and proceedings unnecessarily prolix, it also even makes litigation unmanageable and

repetitive. What this application ought to have been is a counter-application to CIV/APN/482/99. Problems such as ejection which is a magistrate's court matter would not arise in a counter-claim because it would follow logically from the failure of respondents' application in CIV/APN/482/99. Similarly the non-joinder of Mohale-Matsoku Contractors (which is a legitimate objection in this application) would not be an issue in CIV/APN/482/99 because Mohale-Matsoku Contractors is already a party in it.

The balance of convenience favoured a dismissal of this application and granting applicant leave to counter-claim out of time in CIV/APN/482/99. This would obviate the duplication and confusion that would have existed had this application and CIV/APN/482/99 continued

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to be separate. The way this application had been brought did not also entitle applicant to any indulgence in my view.

WCM MAQUTU  
JUDGE

For applicant : Mr S Malebanye

For respondent : Mr K Mosito