

CIV/APN/106/02

IN THE HIGH COURT OF LESOTHO

In the matter between:-

BUTTERFIELD HOLDINGS (PTY) LTD 1ST APPLICANT
DUROFIN FINANCIAL SERVICES (PTY) LTD 2ND APPLICANT

and

PALEO TLELAI RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
On the 31st May, 2002

On the 19th day of November 2001 in CIV/APN/464/2001 my Brother **Monapathi J.** granted a final order confirming an interim order previously made by my Sister **Guni J.** on the 6th November 2001. The final order reads:-

“IT IS HEREBY ORDERED AS FOLLOWS:

1. The **Rule Nisi** granted on the 6th November 2001 is hereby confirmed as follows:

- (a) The normal modes of service are dispensed due to urgency.
- (b) The Deputy Sheriff is ordered to take inventory and attach property in Applicant's premises at MATHABISO TLELAI CENTRE which belongs to the Respondent.
- (c) The lease agreement entered into by the parties on the 31st August 1999 is hereby cancelled.
- (d) The Respondent is hereby ejected from the premises for breach of agreement.
- (e) The Respondent is ordered to pay arrear rental in the amount of M180,200.00.
- (f) The Respondent is ordered to pay the costs of this application.”

This final order was purportedly served upon the manager of Butterfield Bread Lesotho (Pty) Ltd on or before the 8th November 2001 and attachment of certain goods made by the messenger of court Mr Masenyetse.

Background

On the 3rd September 1999 the 1st applicant entered into a bakery franchise agreement with Butterfield Bread Lesotho (Pty) Ltd and in order to finance the equipment to be installed for the bakery business, the 2nd respondent furnished credit facilities to Butterfield Bread Lesotho (Pty) Ltd for the conversion, fitting and equipping the premises at Mathabiso Tlelai Centre. In the instalment sale agreement between the 2nd applicant and Butterfield Bread Lesotho (Pty) Ltd clause 4.1 states-

*“Seller shall remain the owner of the goods until
Purchaser has paid all amounts and complied
with all its obligations in terms of this agreement”.*

It is also common cause that on or about the 31st August 1999 the Butterfield Bread Lesotho (Pty) Ltd had entered into a lease agreement with the present Respondent. The contract of lease was for a period of five years; and the rental was M31,900.00 per month. It is common cause also that the leased premises where the franchise bakery business was to be conducted were shop no.13283/365 Kingsway Maseru.

In his founding affidavit Mr Oosthuizen - a managing director of both applicants, states that in order to guarantee the security of the bakery equipment, the following letters were written to the Respondent:-

“5 September 2001

*PJ Tlelai
P.O. Box 156
Ladybrand 9745*

By Fax 09266 310341

Dear Mr Tlelai

Further to our letter dated 30 March 2000 in regard to the Instalment Sale Agreement between Durofin (Pty) Ltd and Butterfield Bread (Pty) Ltd, you are hereby notified in terms of clause 10 that the equipment as per Annexure A is subject to an Instalment Sale Agreement to the amount of R326,781.55.

It would be appreciated if you could file this document in your previous records”.

This letter had been preceded by another dated 30th March 2000 to the effect that the bakery equipment “is subject to an instalment sale agreement.”

Section 10 of the Instalment Sale Agreement reads:-

“If at anytime the goods are kept or stored on premises not owned by the Purchaser, Purchase shall immediately notify Seller in writing of the name and address of the owner of such premises. Purchaser shall similarly notify the landlord of the Seller’s ownership in the goods.”

The listed goods is an assortment of various bakery equipment “Annexure D-A”

The founding affidavit goes on to allege that it appears that on the 19th November 2001 respondent obtained a final court order in CIV/APN/464/01 in which he was authorized to attach and take inventory through the court sheriff of “all the property in Applicant’s premises at MATHABISO TLELAI CENTRE which belongs to the Respondent” (Butterfield Bread Lesotho (Pty) Ltd) (my underline for emphasis).

The important question then is: As at the 19th November 2001 which property at the bakery business belonged to Butterfield Bread Lesotho (Pty) Ltd and was attachable?

In their founding affidavit the applicants alleges that the subsequent to the final court order in CIV/APN/464/01 the respondent has taken possession and control of the equipment listed in Annexure “E” as being goods which were under the instalment sale agreement and in regard to which ownership had not yet passed to the Butterfield Bread Lesotho (Pty) Ltd. They also state that in fact on 23rd May 2001 Mr Ivan Meiring entered into “a voluntary surrender” to tender immediate return and restoration of the goods to Durofin Financial Services (Pty) Ltd when his company could not pay instalments timeously.

Only the following items however seem to have been attached by the messenger under the final court order in CIV/APN/464/01.

1. 2 money files
2. 2 display cabinet
3. 5 ovens
4. 1 slicer
5. 1 roller bread
6. 2 tables
7. 2 mixers
8. 1 bun divider
9. 3 tables
10. 2 micromati machines
11. 5 deep freezers
12. 3 tables
13. 2 pots
14. 1 burner

15. 2 cylinder
16. 1 deep freezer
17. 1 roller
18. 1 computer
19. 1 photocopier
20. 2 office desk
21. M1993.00 cash

To these allegations, the respondent states that he is not trading at the said premises and that the “*equipment*” was bought by a company MATHABISO TRUST (Pty) Ltd at a public auction held by the court premises on the 22nd December 2001. He states he “*is no longer in possession of the equipment.*”

It is the applicant’s case that again on the 21 December 2001 (that is after the final court order dated 19.11.01) and just a day before the purported sale in execution a letter was written by applicant’s attorneys addressed to

“*Mr PJ Tlelai and/or ALL PERSONS TRADING FROM OR CONDUCTING BUSINESS AT SHOP NO.13283/365*” that Durofin is a lawful owner” of the bakery equipment.

In his answering affidavit, the respondent denies ever receiving the letters or faxes stating that the bakery equipment as listed belonged to the second respondent under the Instalment Sale Agreement. He says sometime in May he was told by a Mr MEIRING that since he was unable to pay for the equipment, he was going to return the machinery and replace it with a second hand equipment. He says Mr Meiring then began defaulting in rent

payments. He says that in June 2001 Meiring informed him that he had surrendered the equipment and he verily believed this information to be true.

It should be noted here that on the 23rd May 2001 Mr Meiring acknowledged a voluntary surrender of the goods effectively terminating the instalment agreement and tendered immediate return of the goods forming the subject matter of the agreement. When the “*purported*” sale by public auction took place on the 22nd December 2001 the voluntary surrender had already taken place seven months before. In his replying affidavit, Mr Oosthuizen has stated that

Para. 9

“The goods and equipment were never physically removed or dealt with as set out above from the premises by the second applicant and no second-hand machinery was obtained to replace the original equipment.”

It is not in dispute that the respondent was the landlord of the premises in which Butterfield Bread Lesotho (Pty) Ltd carried on bakery franchise and under clause 10, the duty rested on Butterfield Bread Lesotho (Pty) Ltd to immediately “*notify the landlord of the seller's ownership in the goods.*” As early as May 2001, the respondent admits that Mr Meiring told him that since he was unable to meet the monthly instalments over the bakery equipment; he was going into a voluntary surrender.

In view of the fact that the “purported public auction” allegedly conducted on the 22nd December 2001, and at which Mathabiso Trust (Pty) Ltd “bought” the property, has not been proved to have taken place, it is dubious and indeed difficult to believe that the bakery equipment is no longer at the premises. The respondent being the landlord still therefore has the physical control and possession of the said equipment. The items listed by messenger Masenyetse are not related in any way to the items subject matter of this application.

Mr Matoane while conceding that the bakery equipment is still at the premises, submits that since the messenger Mr Masenyetse led the respondent to believe that the equipment had been bought by Mathabiso Trust (Pty) Ltd on the 22nd December 2001, the interpleader proceedings should have been resorted to.

Our Rule 51 (1) of the High Court Rules 1980 reads:-

“(1) (a) Where any person, (hereinafter called “the applicant”) alleges that he is under any liability in respect of which he is or expects to be sued by two or more parties making adverse claims, (hereinafter called “the claimants”) in respect thereto, the applicant may deliver a notice (hereinafter called “an interpleader notice”) to the claimants.

(b) Where there are conflicting claims as regards property attached in execution, the sheriff or the deputy-sheriff shall have the rights of an applicant and the execution creditor involved shall have the rights of a claimant.”

In our law, an interpleader is a form of procedure whereby a person in possession of property not his own (or is a custodian of property to which he lays no claim in his own right) which is claimed from him by two or more other persons is enabled to call upon the rival claimants to such property to appear before the court in order that the right to such property, as between rival claimants, may be determined without putting the holder of such property to the trouble and expense of action or actions [Erasmus – *Superior Court Practice* – B1-399; Rule 51 of the High Court Rules 1980]. It should however be noted that in this case Mr Masenyetse’s inventory of attached goods does not affect the bakery equipment the subject matter of this application. He could not therefore be an applicant in terms of the Rule 51, nor could Mathabiso Trust (Pty) Ltd be a rightful rival claimant because the purported sale in execution of the bakery equipment never took place – **Kamfer v Redhot Haulage (Pty) Ltd** – 1979 (3) SA – 1149. As Nestadt J. said at p.1152-

“What is clear, however, is that, essential to its operation, is that the applicant alleges that he is being or expects to be sued by two or more parties making adverse claims to property or money held by him.”

It is clear that Mathabiso Trust (Pty) Ltd had no rival claim which is valid under law. The bakery equipment, in short, could not have been validly attached by Mr Masenyetse even if he had purported to so do; he could not therefore have been entitled to bring an interpleader under Rule 51 (see **Kamfer’s** case supra p.1153-1154 where Nestadt J. continued to say

*“The Rule does not **per se** provide him with a haven in which to rest his uncertainty. The latter must arise from the rival claims; it must not be the result of not knowing the law or being unable to judge whether or not, allegations which, if established give rise to a good claim. It is only where he finds himself “in the middle”, so to speak, because he is faced with two **prima facie** valid and enforceable claims (or the threat thereof) to money or property that he is holding and to which he lays no claim, that resort can be had to Rule 58”*

[Our Rule 51] see also **Beazley v Magnum Estate Agents (Pty) Ltd** 1979 (4) SA 94.

Indeed the interim and final orders granted by my Sister **Guni J.** and my Brother **Monapathi J.** respectively in **Paleo Tlelai vs Butterfield Bread Lesotho** CIV/APN/464/01 on the 6th and 19th day of November 2001 respectively stated explicitly-


“(b) Ordering the Deputy Sheriff to take an inventory and attach all the property in Applicant’s premises at Mathabiso Tlelai Centre which belongs to the Respondent.” (my emphasis)

If the bakery equipment no longer belonged to Butterfield Bread Lesotho (Pty) Ltd it stands to reason that this equipment could not be attached by the messenger of court.

Mr Fischer argued from the beginning that a robust commonsensical approach be adopted to determine whether (a) the second applicant is the

owner of the bakery equipment in question and (b) whether the respondent, though laying no claim to this equipment, is still in physical control of the same. Indeed a similar approach was followed by my Brother **Monapathi J.** in **Mhlambe v Mhlambe & Others** – 1991-96 LLR 617 where he held that if the presence of the goods is not clearly denied, the court should make a robust common sense approach to a dispute on motion, otherwise the effective functioning of the court can be “*hamstrung by blatant strategem*” See also **Soffiati v Mould** – 1956 (4) SA 150. This court has not been convinced that a proper and official sale in execution ever took place on the 22nd December 2001 bestowing good title over the bakery equipment to **Mathabiso Trust (Pty) Ltd.**

For these reasons, the application is granted with costs in terms of prayers 2 and 3 of the notice of motion.



S.N. PEETE

JUDGE

For Applicants : Adv. Fischer
For Respondent : Mr Matooane