

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

**C of A (CIV) NO. 37/2022
CCA/0091/2021**

In the matter between

MOTHIBELI THOMAS SEHLABO

1ST APPELLANT

BONGA (PTY) LTD

2ND APPELLANT

And

**PUMA ENERGY LS (PTY) LTD
RESPONDENT**

1ST

**TOTAL LESOTHO (PTY) LTD
RESPONDENT**

2ND

**COMMISSIONER OF POLICE
RESPONDENT**

3RD

**OFFICER COMMANDING FLIGHT
1 POLICE STATION
RESPONDENT**

4TH

**ATTORNEY GENERAL
RESPONDENT**

5TH

CORAM: DAMASEB AJA
CHINHENGO AJA
VAN DER WESTHUIZEN AJA

HEARD: 20 OCTOBER 2022
DELIVERED: 11 NOVEMBER 2022

SUMMARY

Parties engaged in the business of running a fuel Filling station in terms of an unwritten understanding where 1st and 2nd respondents were lawful occupants of the premises and supplied the petroleum products for sale by a joint management.

*First appellant disrupting operations of the business resulting in its closure by the police to maintain law and order; First and second respondents approaching High Court for interdictory relief; High Court finding 1st appellant responsible for events leading to closure of business and granting the interdictory relief sought with costs on attorney and client scale; On appeal, decision of High Court upheld as it amounted to no more than restoring the status quo ante and interdictory relief merited in all the circumstance;
Appeal dismissed with costs*

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] This appeal is against an order made by the High Court (Mathaba J) on 15 June 2022 in favour of the 1st and 2nd respondents, and against the appellants, applicants and respondents, respectively in that court. I have only renumbered the paragraphs of the order. It reads as follows:

“1. The Applicants be granted access to and possession of Plot No.14314-14 Mazerod Maseru situated at the corner Main South 1 and A5 Roads Masianokeng, Mazerod Maseru, Lesotho (“the Premises”).

2. The Applicants be granted access to, and possession of the retail Filling station business situated at the Premises.

3. The Third and Fourth Respondents deliver and hand to and make available the keys and each and every item taken and/or removed from the retail Filling station business on the Premises to the First Applicant upon Filling of this order on the Third and Fourth Respondents.

4. The First to Fourth Respondents shall not interfere with or obstruct the conduct of business of a retail Filling station business on the Premises unless it is by due process of the law.

5. The First Respondent shall not threaten or assault the employees of the First and Second Applicants.

6. The First Respondent shall not interfere with the business of the First Applicant and the Second Respondent conducted on the Premises unless it is by due process of the law.

7. The proceeds of the sale of petroleum products and related petroleum products and all proceeds of the sale of the consignment stock of the First Applicant be banked by the manager of the First Applicant, Tsitso Tsoaledi, or any individual designated by him or the Territory Manager of the First Applicant.

8. The First and Second Respondents pay costs of this application at attorney and client scale.”

[2] The appeal is opposed by the 1st and 2nd respondents.

[3] When the court order was made, the appellants had been using the 1st and 2nd respondents' business premises for the sale of petroleum product. The premises are situated at Plot No.14314-014 Mazenod in Maseru, otherwise known as Masianokeng Filling Station. The use of the premises was in

terms of a petroleum independent retail dealer agreement entered into by the 1st appellant and the 2nd respondent. The business of the latter had been merged with that of the 1st respondent, although it retained the 2nd respondent's trade emblem or colours. Effectively the Masianokeng Filling Station was owned by the 1st respondent. I henceforth refer to the 1st and 2nd respondent as "the respondents". They are one and the same entity.

[4] The independent retail dealership agreement had been entered into in October 2018 for a period of 3 years. It expired in 2018 and thereafter the parties related to each other and continued to do business, but without renewing the dealership agreement. The learned judge a quo observed that although the continued relationship was based on an oral agreement it is not clear what the terms were between the expiry of the 3-year dealership agreement until 1 July 2019. The problem with entering into another agreement was occasioned by a disagreement between the 1st appellant and the respondents. The 1st appellant wanted the agreement to be between the 2nd respondent, a company that he controls, and the respondents. The respondents wanted to maintain the dealership agreement in the name of the 1st appellant.

[5] During 2020 and 2021, according to the respondents the appellants operated Masianokeng Filling Station on the basis of an oral agency agreement, an arrangement entirely different from a dealership agreement. The agency agreement entailed

that the appellants did not assume the responsibility of purchasing stock and fuels and sale for own account, which is the hallmark of the dealership agreement: the respondents put in its stock and fuel for sale with the respondents receiving payment in the nature of a commission. Thus the respondents made available to the appellants the business premises, provided petroleum products and lubricants for sale at the Filling Station and paid the appellants M60 000.00 monthly to cover their financial and administrative costs. The respondents were entitled, under the terms of the oral agreement, to enter the premises for purposes of inspection and to assign some of its employees to work with the appellants. They appointed some of the staff, including a manager to co-manage the Filling Station. The respondents averred that the oral agency agreement commenced on 1 July 2019 and was to terminate on 28 June 2023.

[6] As at the time that the present dispute arose, the 1st appellant was indebted to the respondents, originally in the sum of about M3 million as at 1 January 2019. This indebtedness, which he readily admitted at least to the extent of one half thereof, arose from his running of another petroleum Filling station, Total Success at Khubetsoana, one of the respondents' dealership net network. The liability was one of the factors that the parties had to consider in renewing the agreement relating to Masianokeng Filling Station. The idea was that the appellants would settle the liability with part of the profit made from running Masianokeng Filling Station.

[7] Masianokeng Filling Station business was conducted in the way I have outlined above until 5 November 2021, when the Filling Station was closed by the Police. On that day, according to the respondents, the 1st appellant arrived at Masianokeng Filling Station and caused a serious disturbance and disruption of the business, including violently trying to remove the respondents' representatives thereat. He was armed with a firearm and brandished it to scare off the staff. Two of the appellants' representatives reported the disturbance to the Police, leading to the closing down of the business. The learned judge gave a detailed account of the respondents' version of what happened on that day. He sets out the position of the respondents on this event at paragraph [18] of the judgment:

“The companies assert that their employees and representatives were in peaceful and undisturbed possession of the premises which was violently and with force interfered with ... Consequently, so argue the companies, the actions and conduct of [the appellants] were unlawful, violent and uncalled for in dispossessing Puma Lesotho (1st respondent) and its employees and representatives ... the premises from which lawful, continuing and income-producing business activities were conducted.”

[8] The judge narrated the appellants' case, which was in opposition to that of the respondents in several areas. They dispute the existence of an agency agreement. When the parties failed to agree on the renewal of the dealership agreement, they held discussions with the view, primarily, to resolve the appellants' liability arising from the running of Total

Success Filling Station business. They reached an understanding regarding how Masianokeng Filling Station should be run to meet this objective, operative from July 2019. That understanding subsisted until 5 November 2021.

[9] The appellants do not ascribe a label to the understanding but set out its terms, namely, the respondents would take over the running of the Filling Station and co-manage it with the appellants using the 2nd appellant's trading licence; "the fuel onsite would remain in the name of Bonga" [2nd respondent] and so would the stock in the shop thereat; the respondents would use the profit from the profit made by the appellants to pay off the debt; the respondents would supply fuel to the Filling Station with the 2nd appellant as the operator; the arrangement was to be for twelve months ending on the last day of 2020, during which respondents would pay to appellants M60 000.00 monthly; appellants would pay all overheads costs; when the debt was fully paid the respondents would hand back full dealership to the appellants.

[10] The appellants disputed the amount of the debt to the respondents. The last statement thereon was given to them on 28 May 2021 showing that the amounting still owing in respect of Total Success Filling Station debt was M493 884.04 and M539 116.74, being another debt allegedly incurred by the 2nd appellant in its dealings with the appellants at Masianokeng Filling Station.

[11] The appellants, through the 1st appellant, disputed the respondents' version of what happened on 5 November 2021 but admits that it is those events that led to the closure of Masianokeng Filling Station and gave rise to the current litigation. The learned judge *a quo* also narrated the appellants' version in detail.

[12] The issue for decision by the High Court arose from motion proceedings instituted by the respondents after the events of 5 November 2021. They sought the relief that was ultimately granted to them by the court as appears at paragraph 1 of this judgment. The issue as defined by the learned judge was whether the appellants and respondents had a dealership agreement or an agency agreement. A dealership agreement would give possession of the premises and stock thereat to the appellant. The agency agreement would merely require the appellant to act as agent for the respondents without being possessed of the premises or stock. The judge saw the issue for decision as being-

“to determine whether the parties entered into an agency agreement from 1st July 2019 in relation to the conduct of the business of Masianokeng Filling Station and whether the events of the 5th November 2021 warrant confirmation of the interdict.”¹

[13] The judge undertook a thorough consideration of the law relating to formation of contracts and the doctrine of quasi-mutual consent. He explored the factual averments and denials

¹ Para [29] of judgment.

by the parties and arrived at the conclusion that there were no real disputes of fact relying on *Makhetha v Estate Late Elizabeth 'Mabolase Sekoyela*², to the effect that a real dispute of fact arises when the respondent denies material allegations made by deponents for the applicant and produces positive evidence to the contrary. The essence of his reasoning is to be found at paragraphs [49] to [51], [57] and [58] of the judgment, where he says:

“[49] The respondents do not dispute the existence of two business models. It is common cause that whatever agreement the parties had during the period under consideration, it was not definitely independent retail dealer model. The agreement for independent retail dealer model had not been renewed when it expired in 2018. Tellingly, the companies have provided the description of each model at paragraph 35 of their founding affidavit and this is not disputed as well.

[50] Significantly, most of the material terms stipulated at paragraph 40 of the answering affidavit of what the respondents classify as a temporary arrangement between the parties fit the description of the agency model which the companies allege existed between the parties during the period under review.

[51] For instance under the agency agreement, the companies pay an agent agency fees, provide petroleum products to be sold as well as shouldering all the expenses of the agent including staff related costs. This is exactly what happened in casu. Mr Sehlabo’s denial that the M60 000.00 monthly payments were agency or administration fees is preposterous. The respondents’ own invoices classify the M60 000.00 as agent fee. Again, the parties are in agreement that the profits generated from Masianokeng Filling Station were remitted to Puma Lesotho.

² (C of A (CIV) 44 of 2017) LSCA 16 (07 December 2018) para 24.

....

[57] Again, in determining whether agency or dealership agreement exist, the distinction normally resolves around whether the person concerned acts for himself to make profit as he can or is remunerated by pre-arranged commission. See FMB Reynolds, *The Law of Agency*, 1985 15th ed., Sweet and Maxwell at 21. Another important question to be asked is whether he takes the profit on the sales which will make him a seller or a commission in which case he is likely to be an agent. FMB Reynolds *The Law of Agency*, *ibid*.

[58] The above questions are answered in the affirmative in this case. I have already found that respondents were paid agency fees which is not necessarily different from a commission. Neither is it disputed that the profits generated from the filling station were remitted to Puma Lesotho. The fact that the arrangement as styled by the respondent was never signed is neither here nor there considering the element of consensus in forming contracts.”

[14] The learned judge found as fact that the parties entered into an agency agreement and that was the business model on which Masianokeng Filling Station was run from July 2019 to 5 November 2021. I find no fault with the judge’s reasoning and her conclusion. He undertook a detailed analysis of the law on granting interdicts, referred to several relevant authorities including the *locus classicus* on the issue - *Setlogelo v Setlogelo*³, and granted the interdict sought by the respondents.

[15] In doing so the judge based his decision on facts established by the evidence: that the appellants have the

³ 1914 AD 221.

exclusive right of occupation of Plot No. 14314-04 on which Masianokeng Filling Station is situated by virtue of a Notarial Deed of Sub-lease between the appellants and the owner thereof, Mapetla Holdings (Pty) Ltd; the petroleum products at the premises belong to the appellants and are delivered to Masianokeng Filling Station for sale by the 2nd appellant; the filling station was being co-managed by the appellants and the respondents during the period from July 2019 to 5 November 2021; when the 1st appellant went to the business premises on 5 November 2021 he intended to take over the business and lied to the staff that the differences with the respondents had been ironed out and he was back to run the show. In short, he caused the disturbances that constrained the Police to close down the business. In relation to the events of 5 November 2021 the judge, in eloquent terms, stated:

“The totality of the evidence before me is that Mr Sehlabo unilaterally and forcefully took over Masianokeng Filling Station on the 5th November 2021 and that the take-over generated a fracas between himself and Puma Lesotho employees. As a consequence, the business of the filling station was closed and opened following the granting of the interim order. If Mr Sehlabo had been at the premises under normal circumstances, then the question would be why would he convene a meeting and tell staff that he was back at the operations and that they will see him more often? Why would he ask Puma Lesotho staff to take leave so as to normalise the operations going forward. The answer is simple, Mr Sehlabo was introducing a new order.”⁴

⁴ Para [79] of judgment

[16] The respondents were incurring losses from the day that the business was closed down. The appellants were not entitled to resort to self-help, the judge found, and in this regard, he referred to *Hanyane v Total (Pty) Ltd*⁵ in which Ramodibeli J (as he then was) deprecated similar conduct as being “so repugnant to the rule of law that it must be nipped in the bud”. He then granted the order against which this appeal lies.

Basis of appeal

[17] The appeal is based on five contentions. The first is that the court *a quo* misapplied the *Plascon-Evans* rule⁶ by disregarding that the business was operated in appellants’ names; the appellants are retail traders whilst the respondents are wholesalers and are prohibited by law from being both wholesale suppliers and retailers; and on the facts the 1st appellant did not resort to self-help but was a victim of attack by respondents’ representatives.

⁵ (CIV/APN/412/97) [1999] LSHC6

⁶ The rule comes from the statement in *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635 – 635 where, as quoted by the judge *a quo*, Corbett JA said:

“It seems to me, however, that this formulation of the general rule [as stated in *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G], and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s founding affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3-) SA 1155 (T) at 1163-5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself the right to apply for the deponents concerned to be called for cross-examination under R 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire supra* at 1164) and the court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E-H). Moreover, there may be exceptions to this general rule as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see remarks of Botha AJA in the *Associated South African Bakeries* case, *supra* at 924A).

[18] The second contention is that the respondents failed to establish a right to the interdict because their right to supply petroleum and related products was not threatened.

[19] The third contention is that the court failed to recognize that the granting of the interdict would perpetuate an illegality whereby the respondents would conduct business illegality as both a wholesaler and a retailer.

[20] The fourth is that the court failed to recognize that the business is owned by the appellants and that the respondents only “own the intellectual property rights and the right to supply petroleum products and are not licenced to operate a filling station business”.

[21] The fifth contention is that the court erred in granting attorney and client costs against the appellants in circumstances where the respondents “did not succeed in respect of the main remedy they sought to enforce, the alleged verbal tenancy agreement.”

[22] The appellants, in my view, misconstrued the relief sought by the respondents in the court *a quo*. The respondents sought to be granted access and possession of Plot No.14314-014 and the retail Filling station thereat. They wanted the police authorities to restore to the business the keys and other items that they took upon closing down the business and not to interfere or otherwise obstruct the conduct of business at

Masianokeng Filling station. They wanted an order that the 1st appellant should not threaten or assault or interfere with employees at the business “including employees of the [2nd appellant], members of the public and clients of the Filling station. They wanted an order that the proceeds of the sale of petroleum products and consignment stock be banked by their manager or person designated by him; that its employees be granted undisturbed access to the Plot and, they wanted costs on attorney and client scale.

[23] It is to be noted that the judge refused to grant an order as prayed –

“Directing that the oral Agreement of Agency between the [respondents] and the [2nd appellant] be enforced to govern the relationship between the [respondents] and the [appellants].”

[24] The learned judge carefully confined himself to granting only that relief as would restore the *status quo ante* in light of the established fact that the 1st appellant had disrupted operations and caused the closure of the business. And that is precisely what he did. Counsel for the appellants, however, contended in their heads of argument on appeal that the respondents’ prayer was for the enforcement of the oral agency agreement when he knows very well that the court refused to grant that relief. He falls into the same error as the respondents had done where he states:

“All what the court a quo ought to have upheld was the dealership agreement which existed and which should continue to exist as the true position which regulates the parties’ relationship.”⁷

[25] The court could not have made a contract of dealership or agency for the parties. The furthest that it could go and did go was simply to restore the position as it was before the events of 5 November 2021. And restore, it did.

[26] In its judgment the court found as a fact that in relation to the events on 5 November there were no material disputes of fact. But for the visit of the 1st appellant on that day and his attempts to remove respondents’ employees, the business would not have been closed down. The learned judge considered the application of the *Plascon-Evans* rule to the facts of the case before him and finding that there were no material disputes of fact, he decided in favour of the respondents. There is no basis at all for faulting his approach and conclusion.

[27] In so far as the granting of the interdict is concerned, the facts as correctly accepted by the court *a quo* support the learned judge’s conclusion. The 1st appellant came to the Filling station and caused a scene that resulted in the closure of the business. He attempted to remove the respondents’ employees and declared that the operations would henceforth be run on his terms. The precise manner in which the 1st appellant and the appellants’ representatives interacted is not really material.

⁷ Para 47 of heads of argument.

It is the overall result of his interferences that matters. The respondents were the rightful occupants of the Plot, they supplied the fuel to be sold thereat, their staff were involved together with the 2nd appellant's employees in running the business. All that came to an abrupt stop because of the conduct of the 1st appellant. He threatened the respondents' employees, tried to remove them from the premises and brought the business operation to a halt. There can be no more deserved an interdict than the one granted by his Lordship. His decision can only be upheld by this Court.

[28] An order of costs is a matter in the discretion of the court, in this case the court of first instance. Before it served a case in which due to the conduct of the appellants, the operations of Masianokeng Filling station had to be closed. The daily loss occasioned by the closure was huge. The conduct of the 1st appellant was in the circumstances completely uncalled for. In exercise of its discretion the court *a quo* decided to award costs on the higher scale of attorney and client. That was not so wrong an exercise of discretion as would warrant interference by this Court.

[29] The costs of the appeal must follow the event.

1. Accordingly, the appeal is dismissed with costs.

MH Chinhengo

**MH CHINHENGO
ACTING JUSTICE OF APPEAL**

I agree

PT Damaseb

**PT DAMASEB
ACTING JUSTICE OF APPEAL**

I agree

J van der Westhuizen

**J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL**

FOR APPELLANTS: MR LETSIKA with ADV M MOLISE
FOR REPONDENTS: ADV H LOUW with ADV M
KHATLELI