CIV/APN/38/96

IN THE HIGH COURT OF LESOTHO

In the matter between:

THUSANANG BAHOEBI MULTIPURPOSE COOPERATIVE SOCIETY — APPLICANT

AND

PHEELLO NHLAPO — RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 14th Day of March 1996

Approaching this court by the way of EX-PARTE APPLICATION, this applicant sought and obtained a RULE NISI in the following terms:

"1. The forms and period of service of this application is dispensed with on the grounds of its urgency.

2. That the Rule Nisi be hereby issued calling upon the Respondent to show cause on the 19th February 1996 why the Order in the following terms should not be made absolute:

a) The Deputy Sheriff of the above Honourable Court should not be empowered and authorized to seize and keep in his custody vehicle with Registration No. 166896, and 7.65mm Gun with Serial No 153947 until the finalization of the case instituted simultaneously with this application;

b) The Respondent should not be ordered to pay the costs of this application.

3. That Prayer 2.(a) above should operate as an interim Order."

This applicant sought an order of attachment of the property from Respondents, on the ground that 1st Respondent allegedly owed money to this applicant and that the legal action for the recovery of that money, is to be, or has been, instituted against the 1st respondent. In simple terms, especially as far as the motor vehicle is concerned, the applicant seeks to execute against this property, the judgment it will obtain, should it succeed in the intended action against 1st Respondent. The enforcement and execution of judgment before it is obtained is an unknown phenomena in our legal system. As expressed at paragraph 8.2 in the FOUNDING AFFIDAVIT deposed to by one BOTHATA MARAKE on behalf of this Applicant, "the Applicant holds NO SECURITY for the money spent by respondent" (My underlining). The significance of which is to highlight the Applicant's motive to approach the court in this fashion. It is clear that Applicant is not claiming anything other than to hold that property so attached in order to recover from it the money allegedly owed to it by the respondent.

Notice to raise points of Law was delivered on behalf of respondents. The points so raised are:

"1. THAT the jurisdiction of the abovementioned Honourable Court was ousted in terms of Proclamation 47 of 1948.

2. An attachment as security for a debt is not available to the Applicant.

3. Deponent for Applicant has no locus standi."

The first point of law raised on behalf of the respondents is about the competence of the court. It is argued by Mr. Snyman that the jurisdiction of this court was ousted in terms of Proclamation 47 of 1948 (Cooperative Societies 47/1948). It is Mr. Snyman's contention that this application was wrongly brought before a wrong forum. In terms of section 51(1) Cooperative Societies Proclamation 47/1948 any disputes touching on the business of the registered society, must be referred to the REGISTRAR for decision. Section 51 (1) PROCLAMATION 47 of 1948 COOPERATIVES SOCIETIES provides as follows:-

> "51. (1) If any dispute touching the business of a registered society arises -
>
> (a) among members, past members and persons claiming through members, past members and deceased members; or
>
> (b) between a member, past member, or person claiming through a member, past member or deceased member, and the society, its committee, or any officer of the society; and
>
> (c) between the society or its committee and any officer of the society; or
>
> (d) between the society and any other registered society;
>
> such dispute shall be referred to the Registrar for decision.
>
> A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, shall be deemed to be a dispute touching the business of the society within the meaning of this sub-section."

The Applicant herein is a co-operative, a registered Co-operative The respondents are members. 1st Respondent is a member and still is a chairman although on suspension. It is

alleged on behalf of the Applicant that 1st Respondent was suspended from the chairmanship and membership of the Applicant. The averment that the suspension from membership and chairmanship "means per se no more a member of the Applicant de facto" (at paragraph 4 REPLYING AFFIDAVIT) is absurd. The ordinary meaning of suspension of a member of a voluntary association such as this Co-operative society, is that there shall be a temporary forced withdrawal of the member from exercise of his privileges. (GOLDMAN V SWEDE AND OTHERS 1930 WLD 216). It is even more absurd for the deponent of the Applicant's Founding Affidavit to claim to be the chairman of the Applicant on the ground that this 1st Respondent is suspended. In effect this means that there are two chairmen. One suspended and the other not. The chairmanship of the deponent to the Founding Affidavit should be exercised in the acting capacity until and unless there has been termination of the chairmanship of the 1st respondent.

As far as the 1st Respondent's membership of the Applicant is concerned, he is still a member if what he has done was to withdraw temporarily due to suspension. The suspension must not be indefinite. Something must happen after the member is suspended. He should be either expelled or reinstated. This dispute therefore is between the society and a member. The dispute falls squarely within the perimeters of section 51 (1) (b) CO-OP SOCIETIES PROCLAMATION 47 OF 1948.

Should this dispute be referred to the REGISTRAR for decision? The word used in section 51 (1) (d) is "shall". The

parties in those circumstances have no choice but must refer the dispute to the REGISTRAR for decision. Even on this point alone this application must fail; but nevertheless I shall proceed to consider one other point in limine so raised.

The second point of law raised was that of attachment of property as security for the alleged indebtedness of the respondent to the applicant. In the Notice of Motion, it is shown that this is the matter of temporary interdict pendente lite. This being so, it is therefore abundantly clear that the measure or measures this applicant wants this court to take against the respondents, are not the end in themselves. Those measures are merely intended to assist the applicant to achieve its objective. Applicant claims that the respondent has misused or used its money without authority and the recovery of that money is the applicant's objective. At paragraph 8.2 FOUNDING AFFIDAVIT, it is clearly spelled out that this order sought is to provide the applicant with the security to recover in the intended action that money allegedly misused by the 1st Respondent. It is said,

> "8.2 If the temporary interdict is not granted the Applicant will definitely suffer irreparable harm as it holds no security for the money spent by the Respondent, without authority, and to his personal benefits and to enrich himself unjustly."

Attachment of property, as security for debt, is not available to this applicant according to Mr. Snyman's submission. In terms of the HIGH COURT RULES, Legal Notice No.9 of 1980, rule

6 (1) attachment of property is permitted if it is to found or confirm jurisdiction. There is no provision for attachment of property before judgment as security. This applicant is seeking to execute the judgment against the property of respondents even before he obtains such a judgment. Now as it turned out, the motor vehicle attached is not the property of the 1st Respondent whom this applicant alleged misused or spent without authority its money. Even if attachment for security was available in our law, it could not be available against the property of a third party such as 2nd Respondent in this matter. Refiloehape Nhlapo is the owner of the motor vehicle the applicant has rented to be used by 1st Respondent in order to facilitate the business of the Applicant herein (see paragraph 7 Founding Affidavit).

It is known to the deponent of the Applicant's Founding Affidavit that the motor vehicle sought to be attached is a rented motor vehicle. It is further known to that very same person that the said motor vehicle does not belong to 1st Respondent. Without properly and firmly establishing that there has been a change of ownership of this motor vehicle, the Applicant cannot assume without any ground whatsoever that the motor vehicle hired from someone, should now be attached by the hirer, Applicant. At paragraph 7 of the Founding Affidavit, it is alleged that, "the Applicant made arrangement with Respondent to rent vehicle with Registration number A6660 Chasis No KB 265 184 206 AHKF and Engine No. 166896 to the Applicant". To this Applicant this motor vehicle is still on hire it to. There is no allegation and prove that such arrangements have changed.

It is claimed on behalf of the Applicant that it has a lien on the motor vehicle because the money used by Respondent to repair the motor vehicle in question and the money Respondent used for petrol, without authority, belongs to the Applicant. The respondent may have used Applicant's money to repair that motor vehicle. That does not give the Applicant any right over that motor vehicle other than those of a hirer. The Respondent may have used Applicant's money to buy petrol for that motor vehicle; that fact cannot even if proved, give this Applicant the right to hold onto the motor vehicle against its owner. I am not attempting to go into the matter of 1st Respondent's indebtedness to the Applicant. The legal Action has been or is to be instituted to recover the money owed by 1st Respondent to this Applicant. In order to satisfy the judgment that may be obtained against the 1st respondent, Applicant cannot be allowed to hold 2nd Respondent's property.

It is claimed on behalf of Applicant that it has a lien on the property sought to be attached by the Applicant. What kind of lien can this be? It is not mentioned nor explained. Since it is alleged that the motor vehicle to be attached was rented to be used by Respondent in order to facilitate the business of Applicant, it can therefore be safely assumed that the lien referred to must relate to improvements as it is further alleged that 1st Respondent used Applicant's money to pay for the repairs and petrol for the said motor vehicle. This court was not shown how the money spent on petrol improved the motor vehicle, entitle the Applicant who need to run that motor vehicle

to a lien of improvement. Even for the money spent on repairs there was no evidence to show this court that the motor vehicle was improved to such an extent that it would entitle the hirer to hold on to it for paying for those repairs. Whether or not the money was used wrongly for those repairs is the matter to be determined in the trial should the action to recover that money be instituted. Lien provides dilatory defence against a rei vindicatio. It is only a defence. Lien does not ground a cause of action. It is a defence against recover of possession by the owner. BROOKLYN HOUSE FURNISHERS (PTY) LTD V KNOETZE & SONS 1970 (3) SA 264 (A). In our present case Applicant had rented the motor vehicle in question. The Motor vehicle is already in the possession of Applicant. Its suspended chairman is holding the said motor vehicle not in his own right, but on behalf of the Applicant. Applicant if deprived by respondent of its possession must recover that possession in an appropriate action not seek to attach that motor vehicle.

As far as the gun is concerned 1st Respondent does not claim its ownership. 1st Respondent may be the licensed possessor of the said gun but that does not confer the right of ownership to him. 1st Respondent had admitted using Applicant's money to buy both the gun and the licence. 1st Respondent has further averred that no demand was made to him to hand over the gun to its rightful owner. The society being a corporate body may not be qualified to possess the gun. Its employees or member may be the ones to obtain the licence to possess that gun on its behalf.

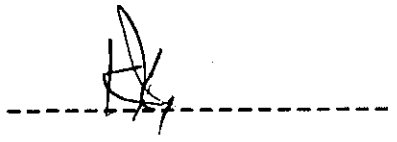
The following order is made.

It is ordered:

(1) The motor vehicle attached in this case be released to its owner Refiloehape Nhlapo. Applicant to pay the rental at the rate of M500-00 (Five Hundred maloti) from the date of attachment to the date of release.

(2) The gun should remain in the custody of the Sheriff until Applicant has authorised and obtained a licence for anyone of its members to possess that gun.

The Rule is discharged with costs.



K. J. GUNI

JUDGE

For Applicant: Mr. Mphalane

For Respondent: Mr. Snyman