

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/116/10

In the matter between:

ALDA TRADING (PTY) LTD

1ST APPLICANT

XU YAOHUA alias ALICE

2ND APPLICANT

PATRICK DINGISWAYO

3RD APPLICANT

TMC ELECTRICAL PROPERTIES (PTY) LTD

4TH APPLICANT

AND

XIA WEI GUO

RESPONDENT

SUMMARY

Urgent application- Points in limine- High Court's jurisdiction to entertain the application- Section 2 of the High Court Act 1978- matter not urgent- Application dismissed with costs.

RULING

Delivered by the Honourable Madam Justice L. Chaka-Makhooane J on this 11th day of August, 2010.

[1] The Applicants lodged an urgent application by way of notice of motion moving the court to grant the prayers couched in the following terms:

1. *Dispensing with the rules on modes and periods of service on the grounds of urgency.*
2. *That rule nisi be issued calling upon the Respondent to show (if any) on a date to be determined by this Honourable Court why the following order shall not be made absolute.*
 - (a) *All stock-in trade presently within Alice restaurant at Industrial Area, near TMC, in the City of Maseru where Respondent operates business styled Alice Restaurant, shall not be attached in exercise of 1st Applicant's tacit hypothec.*
 - (b) *Respondent shall not be interdicted and restrained, from removing, disposing or otherwise dealing with the said stock-in trade in any manner except by process of law pending finalization of this application.*
 - (c) *Authorizing the Deputy Sheriff to keep under lock and key the said premises to ensure that Respondent does not remove the stock pending finalization of this application.*
 - (d) *1st Applicant shall not be authorized to sell all stock presently within the premises (sic) Alice Restaurant, Industrial Area, Maseru City and realise the proceeds thereof in settlement of Management fee and Lesotho Brewing Company debt owed by the Respondent.*
 - (e) *Ordering Deputy Sheriff to attach and take into possession a motor vehicle bearing registration letters and numbers AE 813 and put 2nd Applicant in possession of the said vehicle pending finalization hereof.*
3. *Ordering that prayers 2 (a) (b) and (c) to operate with immediate effect as an interim relief.*

4. *Ordering the Respondent to pay costs of this application.*
5. *Granting the Applicant such further and or alternative relief as the Court may deem fit.*

[2] The Applicants informed the court that on the 1st September, 2007 they entered into a management agreement with the Respondent in terms of which the latter would manage the 1st Applicant's Restaurant at his own expense and profit and loss.

[3] It is the Applicants' case that the parties agreed among others that, the duration of the contract would be one year and the Respondent would pay a management fee in the sum of twenty three thousand five hundred Maloti (M23, 500.00) on a monthly basis. The said amount was to escalate at the rate of 10% per annum and the interest for the late payment would be charged at the rate of 1.5% per annum against the Respondent.

[4] The Applicants further show that the management contract expired on the 31st August, 2008 and it was extended verbally on the same terms because the 1st Applicant had been hospitalised in China and the other director were not present. The contract was further extended verbally in August, 2009, on the same terms and for the same reason of 1st Applicant's ill health.

[5] The Applicants aver that during the period of 2008/2009 and 2009/2010 the Respondent failed to pay the escalated fee and that resulted in the management fee arrears of two thousand three hundred and fifty Maloti (M2350.00) per month. The court was further informed that the Respondent paid twenty three thousand five hundred Maloti (M23, 500.00) for the months of September and October and eleven thousand Maloti (M11 000.00) for the months of November and December. The Respondent failed to pay the management fee for the months of January and February, 2010.

- [6]** Consequently, in February 2010, the Applicants invoked the termination provision of the contract giving the Respondent one month's termination notice. The matter commenced before this court in March, 2010.
- [7]** It is also alleged that the parties entered into an addendum to the main contract styled Agreement, which served to facilitate payment of the security in arrears. The Agreement was also meant to facilitate payment in the sum of twelve thousand three hundred and twenty Maloti (M12, 320. 00).
- [8]** The Applicants claimed that the Respondent owed ninety four thousand three hundred and twenty Maloti (M94, 320.00) and had only paid fifty six thousand Maloti (M56, 000.00) with an outstanding balance of thirty eight thousand three hundred and twenty Maloti (M38 320.00).

[9] It is the Applicant's case that the Respondent is indebted to her in the amount of thirty two thousand Maloti (M32,000.00) for the sale of a motor vehicle of registration number AE 813, which Respondent has used for two(2) years. The Respondent is alleged to have failed or refused to pay for the vehicle.

[10] Wherefore, the Applicants claim for the attachment of the Respondent's stock in the sum of one hundred and eighty seven thousand three hundred and twenty Maloti (M187 320.00) from the Respondent due to the alleged Respondent's wrongful conduct.

[11] **Mr. Matooane** raised points *in limine* namely, that the contract was brought in contravention of **section 6** of the **High Court Act 1978**, in that the matter ought to have been brought to the Magistrate's Court or to the Labour Court. The second point of law is that the matter is not urgent and finally

that there is a dispute of fact that will make it difficult to decide the matter on the papers.

[12] The first issue for determination is whether this matter falls within the jurisdiction of this court or not. The prayers sought in the notice of motion are essentially for an interdict restraining the Respondent from disposing off the stock, the attachment of the stock, in exercise of the tacit hypothec and the claim for the repossession of the motor vehicle.

[13] Without a doubt, the total sum of the property to be attached exceeds the Magistrate's Court monetary ceiling, even though the nature of the claims, tacit hypothec and *mandamen van spolie*, fall within the jurisdiction of the Magistrate's Court. The High Court is not precluded from entertaining these claims acting on its own motion, in terms of **section 6** of the Act. See **Letsie v Nts'ekhe C of A (CIV) No. 27/09**

(unreported). It is also common cause that interdict matters fall within the jurisdiction of this court.

[14] I now turn to consider the question of the urgency of this matter. The grounds advanced are that firstly, the Respondent may decide to deplete the stock and vacate the premises without paying, such that the Applicants will lose their right to tacit hypothec. The Applicants claim that as the Respondent continues to operate the business the Applicants continue to lose more money. Secondly, the Applicants claimed that they suffer prejudice as the motor vehicle deteriorates as a result of the Respondent's continued use for the past two (2) years.

[15] I have no doubt that this matter is not urgent. This matter has a long standing history, from 2008/2009 to 2009/2010. In that time, the Respondent is said to have defaulted in the payment of the escalated fees, the interest and the monthly management fee for some months, as per the agreement. It is

unfortunate that all these long standing dues and arrears for the period of 2008/2009 and 2009/2010 are only being brought to court for an urgent relief in March, 2010. A period of more than a year had lapsed before the contract was terminated.

[16] It is inconceivable to imagine that the business could have stopped running while the 1st Applicant was away in China because of ill health, for over a year. Therefore, that reason as an excuse is without merit. I am not convinced that the alleged urgency exists in this matter. It is my view that the Applicants have failed to prove and to treat this matter with the urgency with which this court is requested to treat it. See **Mahlakeng and Others v Southern Sky (Pty) Ltd and Others LAC 2000-2004 742 at 750** as correctly quoted by the Respondent's counsel. The court cannot, at this moment be held at ransom.

[17] The Applicants informed the court that the motor vehicle that they seek to repossess has been used by the Respondent for the past two (2) years. The 1st Applicant saw no reason to rush to court during that time to assert her right. I find that the prejudice alleged is self-created. Had the urgency been genuine the matter would have come to court many months before now.

[18] I am aware that the Respondents Counsel had raised more than one point in *limine*. One of these points of law is the fact that there are glaring disputes of fact which clearly cannot be resolved on the papers. See **Motaung and Another v Pheko Building Construction LAC (2000-2004) 234**. I agree with Respondent Counsel that there are disputes of fact that will not be resolved on the papers alone without the benefit of *viva voce* evidence.

[19] Having found that there is no urgency in this matter, the application is dismissed on this point alone, with costs on an ordinary scale.

L. CHAKA-MAKHOOANE
JUDGE

For Applicant : **Mr Makhaketso**

For Respondent : **Mr Matooane**