

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**MOLATELI MOHLOAI**

**Applicant**

**and**

**ALAN RANGER**

**1<sup>st</sup> Respondent**

**COMMISSIONER OF POLICE**

**2<sup>nd</sup> Respondent**

**ATTORNEY-GENERAL**

**3<sup>rd</sup> Respondent**

**Coram: Hon. Hlajoane J**

**Date Heard: 1<sup>st</sup> September, 2011.**

**Date of Judgment: 25<sup>th</sup> October, 2011.**

*Summary*

*Arrest suspectus de fuga – points in limine raised that went to the roots of the matter - Rule discharged with costs.*

**JUDGMENT**

[1] This is an application that was brought *ex parte* and on urgent basis. It is an application for arrest *suspectus defuga*. The writ of arrest was issued on the 17<sup>th</sup> August 2011 and the 1<sup>st</sup> respondent was brought before Court under arrest on the 18<sup>th</sup> August, 2011.

- [2] The application was brought in terms of **Rule 7 of the High Court Rules**<sup>1</sup> (The Rules) as 1<sup>st</sup> respondent is a *perigrinus*. Before the filing of this application, applicant had issued summons against the 1<sup>st</sup> respondent in which he had claimed payment of the sum of M220,000.00 (Two hundred and twenty thousand maluti) for damages. He had claimed that the 1<sup>st</sup> respondent had unlawfully assaulted him causing him serious injuries, pain and suffering. Both parties being employees of Rumdel Cape Construction in Lesotho.
- [3] Applicant has alleged in his papers that he was assaulted on the 9<sup>th</sup> May, 2011. The summons were served on 1<sup>st</sup> respondent on the 11<sup>th</sup> August, 2011.
- [4] In explaining the reasons for urgency, applicant indicated that he had been informed by his co-workers that the 1<sup>st</sup> respondent was about to depart, or was making preparations to depart from Lesotho to South Africa on or about the 17<sup>th</sup> August 2011 for good as his contract had expired.
- [5] The application was opposed and the necessary set of affidavits were duly filed. The 1<sup>st</sup> respondent in his answering papers raised some points of law. The applicant also raised points of law in his replying affidavit.
- [6] The points of law raised by the 1<sup>st</sup> respondent are the following:-
- (a) Non joinder
  - (b) Non compliance with the Rules of Court.
  - (c) Lack of urgency.

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<sup>1</sup> Legal Notice No.9 of 1980

[7] **On Non-Joinder**

It is the first respondent's case that since they have been working together with the applicant at Rumdel and the quarrel arose at the time they were arguing over their wages at the workplace, the acts complained of must be taken to have happened within the scope of their employment so that because it was during the course of duty when so quarrelling, the employer ought to be held vicariously liable; **Theko and Others v Morojele and Others**<sup>2</sup>.

[8] He argued that failure to have joined the employer as a necessary party with direct and substantial interest in these proceedings must be considered fatal. It was said in **Feldman (Pty) Ltd v Mall**<sup>3</sup>, that:

“The actions of the employee must be completely unconnected with those of his master to exculpate the employer.”

We have been told that applicant and 1<sup>st</sup> respondent quarreled over wages at work place. The question of wages is work related. If it was said they quarreled over cigarette or beer that would be outside scope of employment.

[9] The next question to be asked would be the effect of having committed a wrong during the course of duty? The employer would be held vicariously liable for the acts of his employee which must be read into his contract of employment.

[10] In **Lesotho National Olympic Committee and others v Morolong**<sup>4</sup> it was held that application ought to have been dismissed for the simple reason that

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<sup>2</sup> 2000 – 2004 LAC 302

<sup>3</sup> 1945 AD 733 at 742

<sup>4</sup> 2000 – 2004 LAC 449

there had been failure to join persons whose election was sought to be nullified.

In the same vein this application stands to be dismissed for failure to have joined the employer.

[11] **Non-Compliance with Rules of Court**

1<sup>st</sup> respondent contended that the application is fatally flawed as it has failed to comply with the Rules of Court both in form and content. **Rule 7 (4)** dictates amongst other things that;

“The affidavit in all cases shall contain an allegation that the plaintiff has no or insufficient, security for his demand, specifying the nature and extent of the security, if any, and alleging that a sum or value of at least M300 remains wholly unsecured, - - - .”

Looking at the applicant’s affidavit such allegations are wanting. Failure to have made such mandatory allegations rendered the application defective and has to be dismissed.

[12] **Rule 8 (4) and (5)**

**Rule 8 (4)** demands that every application brought *ex parte* shall be filed before noon on two court days preceding the day for hearing. The present application was filed on the 17<sup>th</sup> August and moved the same day it was filed. This was a clear violation of the Rules of Court, **Mahlakeng v Southern Sky (Pty) Ltd**<sup>5</sup>.

[13] **Lack of Urgency**

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<sup>5</sup> 2000 – 2004 LAC 742 at 751

Applicant has shown in his papers that the cause of action arose on the 9<sup>th</sup> May, 2011. He however only approached Court on urgency on the 17<sup>th</sup> August 2011. No reason has been advanced for that delay.

[14] 1<sup>st</sup> respondent has referred to decisions by the Court of Appeal warning practitioners about their lax attitude in complying with the Rules of Court.

- **Sea Lake (Pty) Ltd v Chang Hwa Enterprises Ltd**<sup>6</sup>
- **Vice Chancellor – National University of Lesotho v Matsobane Putsoa**<sup>7</sup>
- **The Commander LDF v Matela**<sup>8</sup>.

[15] 1<sup>st</sup> respondent further argued that the urgency claimed is based on hearsay evidence. Applicant said he was told by the co-workers that 1<sup>st</sup> respondent was to move out of Lesotho permanently on the 17<sup>th</sup> August 2011.

[16] 1<sup>st</sup> respondent pointed out that hearsay evidence may be admissible in urgent matters but there are still some guiding principles for admitting such evidence. An example given of one who may have said, he was told by so and so that the other person is leaving. The fact of having been told must be followed by some act to confirm that hearsay as saying he in fact also saw the person alleged to be leaving also packing his bags.

[17] That applicant to make such evidence admissible could have at least attached affidavits of such co-workers. **Southern Pride Foods (Pty) Ltd v Mohidien**<sup>9</sup>.

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<sup>6</sup>1999 – 2000 LLR & LB 391

<sup>7</sup>C of A (CIV) No.28 of 2002

<sup>8</sup>1999 – 2000 LLR & LB 16 at 18

<sup>9</sup>1982 (3) S.A 1068 © at 1072 (B)

[18] 1<sup>st</sup> respondent also relied on what was stated in;

**Yorigami Maritime Construction Co. Ltd v Nissho –Iwai Co. Ltd**<sup>10</sup> that;

“In urgent matters, the Court is entitled to admit hearsay evidence in an affidavit provided the source of the information and the grounds for belief in its truth are stated.”

[19] For the reasons stated above applicant has failed to prove any urgency in the matter.

[20] The applicant had also in reply raised points *in limine* of non-compliance with the order of Court. It will be remembered that 1<sup>st</sup> respondent was brought before court on the 18<sup>th</sup> August 2011 under arrest on the basis of the warrant of arrest *suspectus de fuga*.

[21] On that day to gain his release the Court ordered that he files security bond to the tune of M100,000.00. His counsel Mr Phafane KC undertook to file such security which was so filed on the 25<sup>th</sup> August 2011. So that there has been compliance with the order of Court and the concern by the applicant has been overtaken by events.

[22] Since the 1<sup>st</sup> respondent has been successful in the points *in limine* raised, I find no need to address the merits of this application.

The rule is thus discharged with costs.

**A. M. HLAJOANE**  
**JUDGE**

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<sup>10</sup> 1977 (4) S.A. 682 at 692

For Applicant:

Ms Tsoeu

For 1<sup>st</sup> Respondent:

Mr Shale