

IN THE HIGH COURT OF LESOTHO

CIV/APN/373/2011

In the matter between:-

HATA BUTLE (PTY) LTD

APPLICANT

And

MAMOHALE MAAMA

1ST RESPONDENT

THE OCCUPANTS OF

ROBERTO RESTAURANT

2ND RESPONDENT

JUDGMENT

Coram : Hon. Majara J.
Date of hearing : 18th August 2011
Date of judgment : 14th February 2012

Summary

Application for spoliation and interdict orders – Whether a dispute of fact exists and if so whether it is a material one – material dispute of fact exists which cannot be properly decided on affidavit – application dismissed on this point alone –

applicant at liberty to institute case afresh by way of action proceedings in terms of the rules of court.

ANNOTATIONS

STATUTES

High Court Rules of 1980

CASES

1. Room Hire Co., (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155
2. Peterson v Cuthbert & Co., LTD 1925 AD

[1] This application was instituted on an urgent basis for spoliation and interdict orders against the 1st respondent for her alleged illegal occupation of a business property commonly known as Roberto Restaurant at Roma opposite the University's main campus. It is opposed. I find it apposite to mention at this stage that subsequent to the hearing of this case in August 2011, **Mr. Mpaka**, Counsel for the applicant approached this Court and informed it that he wishes to make a suggestion to the respondent's Counsel that might help resolve the matter speedily before I could write and deliver my judgment. However, it later transpired that his attempts did not bear any fruit, hence the late delivery of this judgment.

[2] The applicant avers in his papers that he is the lawful and registered owner of all property rights to Plot 18333/025 in terms of a Deed of Transfer that was

registered on the 10th November 1993 after the ownership rights were purchased from the Lesotho National Development Corporation (LNDC).

[3] It is the case of the applicant in terms of the founding affidavit deposed to by Eugene Ewald Hattingh that since the transfer of the property into its name the applicant was in possession and in full control of all the commercial buildings erected on the plot the subject matter herein. Further that the Centre consists of various buildings namely, a shopping complex, a filling station, a restaurant and a rondavel that is used for offices and small shops.

[4] He adds that the restaurant has been rented out as Roberto's since at least August 2002 and the applicant has made major commercial improvements to the premises including erection of a large shop and a restaurant for the university students. When the proprietor of Roberto Restaurant passed away, the applicant intended to make further improvements and instructed two people to start the work. Upon arrival thereat the two were informed that the restaurant did not belong to the applicant but was under the exclusive control and ownership of the 1st respondent. Upon being contacted, the 1st respondent confirmed this allegation.

[5] It is the applicant's case that the 1st respondent has despoiled it of the property which it has been in possession and full control of all these years. Further that it has a clear right to occupy the commercial buildings at Hata-Butle which includes the Roberto restaurant and will therefore suffer extreme financial loss if the ownership and control thereof is alienated and/or taken over by the respondents.

[6] The answering affidavit is deposed to by the 1st respondent who raised some points in *limine*, namely, lack of urgency, non-joinder, a dispute of fact, final interdict and mis-joinder.

[7] On the first issue which has since been overtaken by events in that both parties were heard after they closed their pleadings and filed their respective heads of argument, it is the 1st respondent's contention that the matter is not urgent for the reason that an organization, Lesotho Observatory Foundation (LOF) of which she is a member by virtue of her holding the position of chief had instituted proceedings in the Magistrate's Court in 2010 where it complained of encroachment by Mr. S. Buys at the instance of the applicant.

[8] The applicant's reply on this point is that the 1st respondent is not cited in the said case, **No. CIV/APN/279/2005** and that the applicant could not have known about the involvement and/or the claims of the 1st respondent.

[9] On non-joinder, the 1st respondent made the contention that the applicant had failed to join the LOF while it fully knew that the latter is an interested party in the matter as the lawful allottee of the site in dispute. In this regard, the applicant replied that the LOF had only laid claim to the right to occupy a small concrete guard house at the servitude entrance to its property so that it was not necessary to join it as it has never claimed ownership to the property that belongs to the applicant.

[10] With respect to a dispute of fact, it is the assertion of the 1st respondent that same exists with respect to the question whether the site that was transferred by LNDC to the applicant known as Hata Butle, comprises the same place known as Roberto Restaurant, the rondavel building and the filling station which are the property of LOF. In reaction to this the applicant made the contention that there has never been a dispute about the stated property as is contained in the record of the Magistrate's Court.

[11] The 1st respondent also raised the issue that the applicant is in effect seeking a final interdict as contained in prayers 2, 3, 4 and 5 of his notice of motion and that this prejudices the interests of the 1st respondent to which the applicant made the assertion that what it is seeking is a spoliation order.

[12] With regard to the question of mis-joinder, it is the case of the 1st respondent that she has been improperly cited in her personal instead of official capacity as a member and overseer of LOF. In its response the applicant contents that the 1st respondent has testified in her affidavit that she continued to collect rentals of the Roberto Restaurant in the same way as her late father did. Further that since her details do not appear from the LOF documentation before the Magistrate's Court, there was no way the applicant could have known that she is acting in her representative capacity.

[13] Having heard addresses from the respective Counsel on the date of the hearing of this application, it might be in order to mention that it will serve no purpose for me to get into the merits of this application as I did indicate to them that, I had already formed the opinion that a genuine dispute of fact exists insofar as the issue of ownership, occupation and/or possession of the property in question goes. My reasons for so saying follow immediately hereunder.

[14] Both parties through their legal representatives, attached respective documents as proof that the property belongs to them. However, since in matters where a party seeks spoliation, ownership is not the real issue for determination by the Court, the real reason why I find that there exists a material dispute of fact is that each party claims that it has been in peaceful and undisturbed possession of the property for some considerable time.

[15] In terms of the applicant's averments, it has been in such possession since around the year 2002 when the property rights were transferred to it by means of a Deed of Transfer annexure "B". Further that it has been renting out the Roberto Restaurant for its own benefit and profit and has since been despoiled by the 1st respondent as it discovered this when it sent both Chief Theko Mofoka and Jobo Makhalanyane to go and remove the old thatch roof from the structure so that builders could break down the stone walls thereof, to make provision for new foundations and buildings.

[16] The 1st respondent firstly disputes that the applicant's property comprises all the buildings as already referred to herein. She further adds that she took back possession of the place in 2005 post the passing away of her father and has been collecting rentals since then to date. She further disputes the applicant's assertions that it has made improvements on the mentioned properties and states that this has been done on a separate site which is adjacent to the Hata -Butle, property which is the subject matter of this dispute.

[17] My perusal of the attached Deed of Transfer by the applicant has not thrown better light in this regard for the reason that it does not fully describe the nature of the buildings comprising what is referred to therein as a shopping complex. At paragraph 3 thereof which is the one in which the plot is described, it is stated as follows:-

"At the date of sale a shopping complex was erected on the land and that no unripened crops, growing timber or improvements which formed part of the property at (sic) the date of the said sale were purchased or otherwise acquired"

[18] The words, a shopping complex without any further detail and/or description, are unfortunately too broad to can better inform the Court on the

question of exactly what the site in dispute comprises and whether the Roberto Restaurant, rondavel and filling station form part thereof.

[19] Further, the site plan that the 1st respondent annexed as proof of her case, is equally uninformative insofar as what the site in dispute comprises and it is my view that this calls for an expert in land matters to come and give viva voce evidence and explain it properly to the Court.

[20] It is against this background and on the basis of a plethora of authorities **Room Hire Company (Pty) Ltd v Jeppe Street Mansions (PTY.), LTD.**¹ that I find that there is a material dispute of fact especially in light of what Murray A.J.P had to say in his judgment with respect to what should be considered on this issue:-

“The clearest instance is, of course, (a) when the respondent denies all the material allegations made by various deponents on the applicant’s behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary.... There are however other cases to consider. The respondent may (b) admit the applicant’s affidavit evidence but allege other facts which applicant disputes....”

[21] In addition, I also took into account what has been stated in other decided cases **Peterson v Cuthbert & Co., LTD**² as a word of caution for the Court to safeguard against possible abuse by respondents i.e. to raise this point when the alleged dispute is actually not a material one. In that case Watermeyer, C.J. expressed the following sentiments:-

“In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence....”

¹ 1949 (3) SA 1155 at 1163

² 1925 AD

[22] It is in light of these sentiments that I find that the disputed facts cannot be properly decided on the affidavits and that this application falls to be dismissed on this point alone. It would be remiss of me not to add that in the light of the applicant's assertions as admitted by the 1st respondent insofar as LOF is concerned, the latter ought to have been joined as a respondent for the reason that it has a direct and substantial interest in the outcome of these proceedings.

[23] The applicant is also at liberty to institute this matter afresh by way of action proceedings in which case, it should join the LOF. It also stands to reason that the other point that was raised namely, whether or not the applicant is seeking a final interdict in terms of his prayers falls away as it now remains merely academic. I so order with costs.

N. MAJARA
JUDGE

For the applicant : Mr. T. Mpaka

For the respondent : Mr. Mabulu