

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

BANU STAR (PTY) LTD

APPLICANT

AND

JOSEPH MAHLOMOLA MASENKANE

1ST RESPONDENT

FUJI LANKS (PTY) LTD

2ND RESPONDENT

JUDGMENT

Coram : L.A. Molete J

Date of Hearing : 26th May 2015

Date of Judgment: 23rd June 2015

SUMMARY

Sublease agreement – Specific performance – Validity of Sublease – Applicant having real right over property and to exclusive use – tender by applicant to comply with its side of agreement – Parties having consented to comply with the agreement in previous proceedings – Respondent bound by consent order – Court’s discretion to order interdict.

CITED CASES

Winkelbauer & Windbauer v Minister of Economic Affairs 1995(2)

SA 570(T)

Webster v Mitchel 1948(1) SA 1189

Ferreira v Levin NO and Others Vrynhock and others v Powell NO & Others

1995(2) SA 813

Setlogelo v Setlogelo 1914 AD 221 at 227

STATUTES

BOOKS

- [1] The Applicant approached the court and obtained an order of dispensation and *rule nisi* calling upon Respondents to show cause why the following order should not be made;
- (a) 1st Respondent shall not be interdicted from hiring out the premises known as plot **13293-78** situated at **Qoaling** in Maseru; pending proceedings in **CIV/APN/57/2010**.
 - (b) Declaring the agreement relating to the occupancy of 2nd Respondent on the plot to be null and void and having no force and effect in law.
 - (c) Directing that payment of rentals be made to Applicant, alternatively to its attorneys pending finalisation of the matter.
 - (d) Directing 1st Respondent to account for all the monies received from 2nd Respondent from date of occupation.

- (e) An order directing 2nd Respondent to vacate the premises forthwith.
- [2] The parties entered into a long term sublease agreement in respect of the plot in question which belongs to 1st Respondent.
- [3] As a result of the delay of the 1st Respondent to vacate the plot and give Applicant vacant possession, the Applicant approached the Court under **CIV/APN/57/2010** asking for an order of specific performance and compliance with the sublease agreement. Its validity extended to July 2045. It was duly signed by the parties.
- [4] The Applicant contended that it had a real right over the property and was entitled to the vacant possession and exclusive use of the plot.
- [5] Respondent's defence and opposition to the case, was that there was misrepresentation to him by Applicant in that the sublease agreement did not reflect the whole agreement between the parties; and that the applicant had not made payments due to him under the same agreement.
- [6] In particular; there was an addendum to the agreement which required the Applicant to construct a house for the Respondent on a site to be identified at **Ha Seoli**. The specifications of the house were contained in the addendum. It also contained a provision for payment of rent which it was alleged the Respondent had not complied with.
- [7] In reply the Representative of Applicant, one **Haroon Ahmed** admits that there was an addendum and goes on to say:

“The fact that the addendum which the Respondent now confirms is an extension of the agreement between us is valid is not a misrepresentation. The Respondent clearly testifies that it falls within his personal knowledge and that it is a binding contract. It however, did not form part of the registered agreement which does not nullify the registered agreement because the Applicant tenders to comply with the provisions of the addendum thereto.”

[8] The whole matter in **CIV/APN/57/10** culminated in an agreement between the parties. **Adv Mpaka** for the Applicant and **Adv Chobokoane** for the Respondent consented to an order of specific performance before **Lyons J**; and a Court Order was issued as follows;

1. An order of specific performance in the following terms was made
 - 1.1 Respondent would comply with the terms and conditions of the agreement of sublease entered into between the parties as modified by the addendum.
 - 1.2 Directing that the Respondent vacate the commercial premises known as plot **13293-718 Qoaling, Maseru**, until such time as the house is built in terms of agreement between the parties.
 - 1.3 Directing the Respondent to vacate any of the partially developed buildings and to allow the Applicant to demolish

those buildings to reconstruct a new building in terms of the agreement between the parties.

- [9] The parties then signed the addendum and further amended the agreement to specify that Respondent would vacate only when Applicant completes the house. However, at that point it seems the Respondent changed attorney and counsel, and persisted in the refusal to vacate.
- [10] It is common cause that the arrear rentals were paid in full to the Respondent and that the dispute now relates to the refusal of the Respondent to vacate.
- [11] The Respondent initially attempted to cancel the agreement under **CIV/APN/177/2010**; before **Lyons A.J.** he claimed that it should be held null and void for various reasons, specifically failure comply with addendum and rent payments.
- [12] That application and **CIV/APN/57/2010** were heard simultaneously and the result was that the application was withdrawn, and the agreement referred to above made an order of court.
- [13] **Attorney Hlaoli**, who was the new representative of Respondent made issue of the fact that his client would not vacate the premises until a new house is built for him as agreed. It would appear from the correspondence that Applicant had no problem with this.
- [14] However, notwithstanding the above, the Respondent not only continued to occupy the premises, he went a step further to sublet the plot to 2nd Respondent herein. This gave rise to the present application.

[15] It would appear that **attorney Hlaoli** also withdrew from the matter and the Respondent was represented by **Advocate K. Lesuthu** instructed by **A.T. Monyako & Co**, at the hearing.

[16] The main issue for determination is whether Applicant is entitled to the relief sought in this case, and whether in the circumstances the 1st Respondent is free to deal with the plot as he pleases, including sub-letting to 2nd Respondent.

[17] The Applicant submitted that the purpose is the restoration of the *status quo* pending the final determination of the rights of the parties. It does not affect or involve the final determination of such rights. It is meant to obviate an injustice to a party who *prima facie* has been wronged, but who needs time to obtain redress through the process of law.

Winkelbauer & Windbauer V Minister of Economic Affairs¹

[18] There may be apparent contradiction, or unconvincing explanation, in which case the matter should be left for trial; while the right is to be protected in the meanwhile, subject to the respective prejudice to be suffered in the grant or refusal of the interim relief.

Webster V Mitchel²

[19] An Applicant for such temporary relief must establish that his claim is not frivolous or vexatious. There must be a serious question to be tried.

¹ 1995(2) SA 570(T)

² 1948(1) SA 1189

Ferreira V Levin No And Others; Vrynhock And |Others V Powell No & Others³

- [20] The court has a discretion to grant the temporary interdict even where a clear right has not been proved; if the right that forms the subject matter of the main action that the applicant seeks to protect is *prima facie* established, even though open to some doubt.

Setlogelo V |Setlogelo⁴

- [21] The 1st Respondents case is aptly summarised by his Counsel as follows;

“First Respondent’s case is that Applicant never intended to lease his property but his intention was to own it. Assuming there is a valid agreement Applicant has not performed his part e.g. making any payment to 1st Respondent and building him a house as agreed before letting him take occupation of the lease property”

- [22] On the other hand Applicant says he has paid the amount, and alternatively tenders to make the payment, as well as building a house as agreed. The 2nd Respondent did not oppose the matter and it can be concluded will abide the judgment of the court.

- [23] It is further submitted by **Mr Mpaka** for the Applicant that there is a well-grounded apprehension of irreparable harm to the Applicant if the rights ultimately established, and the interim order is not granted.

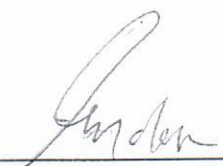
³ 1995(2) SA 813

⁴ 1914 AD 221 at 227

[24] The balance of convenience also favours the granting of the interim relief.

[25] In the circumstances and the facts of this case I must agree. I am therefore making the order that;

- (a) The Application succeeds and the Applicant is granted the relief as prayed.
- (b) The payment of rentals must henceforth be made to the trust account of attorneys Du Preez Liebetrau & Co.
- (c) 1st Respondent will pay the costs of these proceedings on the ordinary scale.



L.A. MOLETE

JUDGE

For Applicant : Adv T. Mpaka (Instructed by Du Preez Liebetrau & Co)

For 1 Respondent: Adv K. Lesuthu (Instructed by AT Monyako & Co)