

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/A/18/17

In the matter between:

HATA-BUTLE (PTY) LTD

PLAINTIFF

AND

FELIX PETROLIUM (PTY) LTD

DEFENDANT

JUDGMENT

CORAM:

HON. J.T.M. MOILOA J

DATE OF HEARING:

20 JULY 2017

DATE OF JUDGMENT:

25 MARCH 2019

ANNOTATIONS

Cases

1. De Klerk vs ABSA Bank Ltd and others 2003 (4) SA 315
2. Claude Neon Lights (SA) Ltd v Daniel 1974 SA 403
3. Mazibuko v Santam Insurance Co. Ltd 1982 (3) SA 125

Books

1. W. E. Cooper, Landlord and Tenant – 1994 (2nd ed.) 372

[1] Both Appellant and Respondent are registered companies operating in Lesotho. For convenience I will refer to Appellant as Plaintiff and Respondent as Defendant as it were in the court *a quo*. The appeal emanates from the Maseru Magistrate Court's decision in CIV/T/MSU/0117/16. It centers on the test for absolution from the instance at the close of Plaintiff's case. Plaintiff had instituted action proceedings against Defendant for ejectment on the basis that Plaintiff was the owner of the plot occupied by Defendant. Having heard argument from both counsel on the issue the Magistrate had granted the application for absolution from the instance with costs. No reasons were advanced by the Magistrate for his finding.

[2] **FACTS LEADING TO THE ACTION**

The Plaintiff Company was initially registered in May, 1980. In November 1993 property known as Plot number 18333 – 025 situate at Roma urban area was transferred and registered in the names of Plaintiff. Defendant is one of the tenants at these premises owned by Plaintiff. In November 2000 Plaintiff was placed under liquidation. A liquidator was appointed being one Stefen Carl Buys (Mr. Buys). At the time Defendant entered into the sublease agreement entitling him to take occupation of the property in question, Mr. Buys was acting on behalf of Plaintiff.

[3] At the time of this liquidation Plaintiff was indebted to Lesotho Bank Ltd and Frazers Lesotho. The auction on the property never took place as would normally be the case with a company under liquidation. Instead an offer of compromise was made between Plaintiff Company and the creditors. This offer of compromise was made an order of court as moved before this court by Mr. Buys under CIV/APN/87/2004. One of the orders therein was that Plaintiff was discharged from liquidation. Also the

liquidator was directed to convene a meeting with representatives of the offering party as well as to appoint shareholders and Directors for Plaintiff.

[4] **PLAINTIFF'S EVIDENCE**

In the court *a quo* evidence for Plaintiff was led by one Clark Mafitoe; PW1. He handed in a number of evidentiary documents as shall be seen below none of which were to prove ownership of the plot thereby founding the claim of ejectment. He testified that Plaintiff Company was first incorporated in 1980 and later re-registered in 2015. PW1 handed in Exhibit "A" being the Plaintiff's certificate of incorporation. PW1 also presented "B" being the company's extract containing the list of directors and shareholders. "C" was an offer of compromise between the company and its creditors, which was made an order of court. The effect of this offer of compromise was that rentals collected were used to settle debts due to creditors. After such payments the company was discharged from liquidation. I must point out here that from PW1's evidence and from "C" there was no indication of who the offering party was/were. However, he testified that one Eugene Edward Hattingh (Mr. Hattingh) had issued summons on behalf of Plaintiff wherein he claimed to be the sole shareholder and director of Plaintiff Company as a result of the offer of compromise. PW1 testified that Mr. Hattingh was not part of Plaintiff Company. He also testified that contrary to an order of court Annexure "C" the Liquidator failed to call a meeting of the offering party, shareholders and directors and that he did not release the control and management of the Company.

[5] In this regard PW1 handed in the summons marked "D" being an action wherein Mr. Hattingh claimed among others to be the sole beneficiary in terms of the offer of compromise and to be reinstated as the managing

director and only shareholder of the Plaintiff. While PW1's own version was that the debts were paid by rentals collected he testified further that Mr. Hattingh said he paid the debts of the company, hence his claim that he should be declared the sole beneficiary of the offer of compromise as well as sole director and shareholder of Plaintiff. According to PW1 letters were issued to tenants including the Defendant to the effect that they should stop paying rentals to Mr. Buys because he did not have the mandate to operate the Plaintiff (but he himself does not say who did have the mandate). Mr. Mafitoe said Defendant did not comply with the demand and summons were subsequently issued against them. They failed to react to the summons and were evicted by an order of court. However PW1 did not hand in the alleged "Eviction Order" as an exhibit as it was the case with the rest of his evidence. He said further that then Plaintiff was put back into occupation.

[6] Under cross examination Mr. Mafitoe conceded that he had no personal knowledge of what happened in 2004. He had no personal knowledge of the following:

6.1 That the creditors were paid from rentals collected. He learned that from company documents but he did not produce any of those documents.

6.2 He was not part of the meeting where directors were appointed. He was a student at NUL at the time.

6.3 That the liquidator failed to call a meeting of shareholders in 2004. He learned that from a letter written by Mr. Buys.

[7] Nor could Mr. Mafitoe deny under cross examination that the offering party was Arend (Mr. Hattingh). Moreover, Mr. Mafitoe could not disprove the evidence in "D" wherein Mr. Hattingh said that he was

appointed the sole shareholder and director of Plaintiff pursuant to a meeting of the offering party which the Liquidator was ordered to convene in terms of Annexure “C”. Mr. Mafitoe also relied on Annexure “A” (certificate of Incorporation re-registration) as proof that Mr. Buys never released the property to Mr. Hattingh. “A” happens to be the certificate of incorporation of Plaintiff when it was re-registered in December 2015. The document does not support his evidence insofar as it relates to Mr. Buys not releasing the property to Mr. Hattingh. PW1 also conceded that he sued the said Arend/Mr. Hattingh for the control of the company but did not challenge the same Hattingh’s mortgage of the site with Standard Bank, the latter scenario in my considered view is indicative of PW1 acknowledging Mr. Hattingh as the right person to enter into such commitments for Plaintiff at the time.

- [8] As regards Felix (Defendant) directly, PW1 said he was not there when the sublease agreement was entered into and signed, entitling Felix to take occupation of the premises. Moreover, he could not stop Felix from taking occupation before 2014 because he was not a director then. He only became director in 2014.
- [9] At the close of Plaintiff’s case Mr. Matooane for Defendant moved the court for an application for absolution from the instance. His basis was that to succeed on an ejectment claim Plaintiff had to prove that Plaintiff was the owner of the site in question and that they had failed to do so. According to him Plaintiff had failed to prove the basis for attempting to eject Defendant from the site. On the other hand Mr. Metsing for Plaintiff argued that Plaintiff had furnished evidence of deed of transfer (not part of the record) and “List of Shareholders”. He argued further that, that was *prima facie* evidence of ownership; further that those documents were not

challenged under cross examination. And that was enough for Defendant to come and answer. The Deed of Transfer was not tendered in as evidence by PW1. This Deed of Transfer document was crucial for Plaintiff to prove that there had been transfer of ownership from the liquidator to Plaintiff upon payment of debts through rentals as alleged by Plaintiff. After argument by both counsel the court granted the application for absolution from the instance, with costs. The Magistrate unfortunately did not furnish reasons for his ruling.

- [10] From my reading of the record of proceedings from the court *a quo* contrary to Mr. Metsing's argument there was no evidence of Deed of Transfer furnished by Plaintiff through PW1 Mafitoe. What PW1 did furnish were "A" the Certificate of Incorporation for Plaintiff, "B" an Extract containing the list of shareholders, "C" being the Compromise Offer of creditors (Order of court) and "D" being Summons by Plaintiff to several (21) Defendants. There is no documentary proof of ownership as Mr. Metsing argued. I cannot accept advocate Metsing's testimony from the Bar. Now, it is trite that for the common law remedy of ejectment the Plaintiff has to prove that he is the owner of the property and that Defendant is in occupation thereof. W. E. Cooper: Landlord and Tenant 1994 (2nd ed.) 372. Plaintiff in *casu* has not proved the critical element of ownership. As regards Defendant being in occupation of the premises PW1 testified that Defendant was evicted by an order of court and Plaintiff was put back in occupation. Rather confusing I must say. First, the confusion stems from the fact that PW1 did not hand in such an order of court as evidence as he had done with "A", "B", "C" and "D". And secondly, if I were to go by his version that Defendant was evicted by an order of court, then why are we here? How and when did Defendant re-occupy the premises so much that Plaintiff had to approach court for

recourse? Be that as it may we are here, dealing with a question of granting an application for absolution from the instance at the close of Plaintiff's case.

- [11] In **De Klerk vs ABSA Bank Ltd and Others 2003 (4) SA 315 (A.D)** the Court was faced with a somewhat similar scenario. In that case the court *a quo* had granted an absolution from the instance on the ground that Plaintiff had failed to lead any evidence that could prove his loss. **Schutz JA** who penned the Court's judgment referred with approval to the decision in **Claude Neon Lights (SA) Ltd v Daniel 1974 (4) SA 403** wherein the test for absolution from the instance was said to have been formulated. The quotation referred to by **Schutz JA** was to the effect that:

“When absolution from the instance is sought at the close of Plaintiff's case, the test to be applied is not whether the evidence led by Plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff.”

The learned judge of Appeal amplified the principle further by stating that “this implies that a plaintiff has to make a *prima facie* case in the sense that there is evidence relating to all the elements of the claim (my underlining) to survive absolution because without such evidence no court could find for the plaintiff. Also see **Mazibuko v Santam Insurance Co. Ltd 1982 (3) SA 125**.

- [12] At paragraph 10 of this judgment I have referred to W. E. Cooper's work where the learned author submits at page 372 of his book that the elements to a claim of ejectment are ownership by plaintiff and occupation by defendant. The facts of this case as pleaded do not establish ownership of plot number 18333 – 025 by Plaintiff. The element of occupation of the

premises by Defendant is scanty as at no point was it established at trial that they were evicted by an order of court. From the record of the trial Court there is no evidence explaining why there was another ejection action against the same Defendant. Under the circumstances I cannot fault the Magistrate's finding of absolution from the instance. On the authority of **De Klerk** (supra) Plaintiff has not given evidence that satisfies the elements to the claim of ejection and I find no fault in the conclusion of the trial Magistrate that Plaintiff has not made a *prima facie* case for ejection.

Appellant's appeal from judgment of the Magistrate is dismissed with costs.

J. T. M. MOILOA
JUDGE

FOR APPELLANT: ADV. K. METSING

FOR RESPONDENT: ADV. T. MATOOANE KC