IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CCA/0027/2020**

In the Matter Between:-

TS'EPISO SELIKANE **APPLICANT**

AND

MANAPO NKHOPE **1ST RESPONDENT**

MOSHABE NTHEBE **2ND RESPONDENT**

'MALINOTO MAFEREKA **3RD RESPONDENT**

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING : 06 TH AUGUST 2020

DATE OF JUDGMENT : 15TH AUGUST 2020

Summary:

CIVIL PRACTICE- *Applicant launching an application in circumstances where material disputes of fact were reasonably*

foreseeable- Applicable principles re-stated-Application dismissed on account that it was reasonably foreseeable that material disputes of fact would arise- Raising points in limine and the approach to determining validity of same- Lis pendens and how it should be dealt with- The court determining that it was in the interest of fairness and convenience to the parties that the application be dealt with on account of the fact that the parties have been awaiting judgment for two years in the initial matter.

Annotations :

BOOKS;

Herbstein and Van Winsen ***The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa 5th Ed. Vol.1***

STATUTES : *Oaths and Declarations Regulations NO. 80 of 1964*

CASES :

Tamarillo (PTY) Ltd v BN Aitken (PTY) Ltd 1982 (1) SA 398

Plascon – Evans Paints Ltd v Van Riebeeck Paints (PTY) Ltd 1984 (3) SA 623 (A)

National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA)

The master v Slomovitz 1961 (1) SA 669

Bocimar NV v Kotor Overseas Shipping Ltd 1994 (2) SA 563 (A)

Makoala v Makoala LAC 40 (2009 – 2010)

Lawrance Matime and Others v Moruthoane and Another LAC (1985-89) 198

Kalil v Decotex (PTY) LTD and Another 1988 (1) SA 943(A)

MOKHESI J

[1] INTRODUCTION

The applicant had instituted this proceeding seeking an order of specific performance and in the alternative damages for breach of contract. It must be states at the outset that there is a history of litigation between the two parties centering on the questions relating to the existence of the contract of sale of the immovable property in issue. In *casu,* the applicant is seeking relief couched in the following terms:

> *"a) First Respondent and second Respondent shall not be restraint and interdicted from interfering with Applicant of running of the business situated at Maputsoe near Maputsoe Police Post pending the final determination of this application.*
>
> *b) First Respondent shall not be ordered and directed to take the necessary steps to pass transfer of plot hold in Form C NO. 6480, situated at Maputsoe Urban Area near Maputsoe Police Post*
>
> *c) Alternatively, First Respondent shall not be ordered to pay Applicant damages for breach of contract in the amount of Two-Million Maloti (M2000,000.00)*
>
> *d) The Respondents shall not be ejected from Applicant's business herein*

e) First and second Respondent shall not be ordered to render an account of their collection of rentals from 11th June 2013 to date of their vacating of the said business and debatement of the said account.

f) First and second Respondents shall not pay to the Applicant the profits made by them in the course of their unlawful seizure of the business.

g) The oral agreement subletting one of the rooms to third respondent herein shall not be cancelled.

*h) The 1st Respondent shall not be ordered to pay the costs of this application on a scale of Attorney and Client Sc*ale."

[2] FACTUAL BACKGROUND:

The facts underpinning this application are vehemently disputed by the 1st respondent. The basis of the applicant's case is that his relationship with the 1st respondent started off being that of a tenant and Landlord. He avers that after being a dependable tenant, he developed an interest in buying the property in issue. His interest culminated in a sale of the property to him by the 1st respondent to the tune of five hundred and sixty-five thousand Maloti (M565,000.00) in 2013. The applicant states that the 1st respondent interferes with his enjoyment of the property by collecting rentals from the tenants. He attached to his application, uncertified copies of what he calls the agreement of sale and the

accompanying documents. This court directed the applicant's counsel, Mr Lenkoane, to furnish this court with the originals of the said documents, but his answer was that they are non-existent as they went missing sometime earlier. However, be that as it may, as already said, there is a history of litigation between the two parties concerning the same property.

[3] As alluded to in the preceding paragraph, the 1st respondent denies that there was an agreement of sale of the immovable property between her and the applicant. She further alleges that the documents which the applicant has annexed to his application as prove of the existence of the said contract of sale are fraudulent. I consider it apposite to stop here with the narration of the factual background, suffice it to highlight that in opposition to the application, the 1st respondent has the so-called points in *limine*, viz.

a) *Lis pendens and / or res judicata*

b) Non-affidavit.

c) Dispute of facts.

[4] a) *Lis pendens and/or res judicata.*

In terms of this point the 1st respondent alleges that there is a pending judgment in respect of the same parties before the High

Court, in CIV/APN/470/2017. In that application the 1st respondent had instituted an application seeking relief that:

> *"3. 1st respondent [applicant in this case] be interdicted from using Applicant's premises at plot 22124 – 194 situate at Maputsoe Town near Police Station at Border pending determination of CIV/DLC/LRB/54/17.*
>
> *4. 1st Respondent be interdicted from demanding payments from Applicant tenants at plot 22124 – 194 pending determination of CIV/DLC/LRB/54/17*
>
> *5. 1st Respondent be ordered and directed to unlock all the premises he has locked at plot 22124 – 194 situate at Maputsoe Urban Area.*
>
> *6. 1st Respondent be ordered and directed to restore connection of electricity and water to other tenants in plot number 22124 – 194*
>
> *7. 2nd and 3rd Respondents be directed to execute the order of this Honourable Court.*
>
> *8. That prayers 1, 2, 3, 4, 5 and 6 to operate with immediate effect."*

[5] This point ought to be dismissed on the score that it is not a point to be raised in *limine*. The approach to dealing with points in *limine* is trite. The approach is to consider only the averments

contained in the applicant's founding affidavit and to treat them as true, in order to determine the validity of the preliminary point (***Makoala v Makoala LAC 40 (2009 – 2010) at 42 para. 4****)*. The points raised in this regard are quintessentially defences on the merits. The practice of converting defences on the merits into points in *limine* was deprecated in ***Makoala*** by the apex court and this court on innumerable occasions, but it does not seem to be coming to an end despite these repeated admonitions. There is almost what I can call blind loyalty to raising points in *limin*e by counsel in this jurisdiction, which the 1st respondent's counsel is guilty of in this case, and that is to be decried. The court in ***Makoala*** went as far as to term this practice **"as being akin to the Pavlovian response**." Applying this approach to the so-called points *in limine* raised*,* it is virtually impossible for this court, looking only at the applicant's founding affidavit to determine whether a particular application is either *lis pendens* or *res judicata,* without the benefit of the respondent's papers raising that issue and providing proof, and that underscores the difference of the approach to dealing with a preliminary point, and a defence being raised on the merits. The same considerations are applicable even in respect of the issue of material disputes of facts. These points were therefore, not well taken and are dismissed.

[6] b) **Non-Affidavit**

The 1st respondent submits that the applicant's founding affidavit should be expunged because:

> "1.5.1 The statement of applicant does not constitute evidence for failure to follow mandatory prescripts of Regulation 7 of Government Notice NO. 80 of 1964. Deponent has not deposed to truth and correctness of his averments as the law demands." (emphasis added).

[7] It must, however, be said that Regulation 7 of Oaths and Declarations Regulations of 1964 does not relate to the issue the 1st respondent is referring to. Regulation 7 only prohibits the Commissioner of Oath from attesting in any affidavit relating to a matter in which he/she has an interest, and nowhere do the Regulations prescribe that the deponent to an affidavit must depose to truth and correctness of his/her averments. It is common cause that the words being complained about were not included in the founding affidavit of the applicant. But, does it mean that, the absence of those words without more, should translate into the affidavit no longer being regarded as such. In my judgment, the answer should be in the negative, as the ensuing discussion demonstrates. In support his contention, Advocate Mafaesa called in aid the dictum of Schutz P in ***Matime and Others v Moruthoane and Another LAC (1985-89)198 at 199C-D*** where it was said:

"The next difficulty that I have with the application in the High Court is that the deponents who purported to give evidence did not say that they had personal knowledge of the facts deposed to. It is true that in respect of some of the facts it appears from the affidavits themselves that knowledge is established. But when one has regard to the basic facts that had to be established there is lack of admissible evidence to make the simple case that was sought to be made."

I revert to this dictum in due course.

[8] In my considered view, *in casu*, it is apposite to consider what constitutes on affidavit. In ***Goodwood Municipality v Rabie 1954 (2) SA 404 (c)***, De Villiers JP quoted *Van Zyl's Judicial Practice 2nd Edition* at p.354 wherein an affidavit is defined as follows:

"[A]n affidavit means a solemn assurance of a fact known to the person who states it, and sworn to as his statement before some person in authority, such as a judge, or a magistrate, or a justice of peace, or a commissioner of the court, or a commissioner of oaths."

This definition read together with ***Oaths and Declarations Regulations NO. 80 of 1964*** leaves me in no doubt that the applicant's founding affidavit is a solemn assurance by him of the facts he alleges are known to him.

[9] Reliance by the 1st respondent on the dictum of ***Matime v Moruthoane,*** is misplaced. What the learned Judge was saying in that case was not that because of absence of the line in the affidavit that the applicant was deposing to the truth and correctness of his averments, the affidavit was not an affidavit properly so-called. What the learned Judge was saying was that the absence of that averment taken together with the absence of "basic facts" which had to establish the applicant's case, rendered the founding affidavit deficient.

[10] The correct statement of the law, in my view, is to be found in the decision of ***The master v Slomovitz 1961 (1) SA 669 at 671 h – 672 C*** where Jansen J said:

> *"Reference was made to cases such as Brighton Furnishers v Viljoen, 1947 (1) SA 39 (G.W) and Raphael Co. v Standard Produce Co. (PT) Ltd., 1951 (4) SA 244 (c) for the proposition that when an application is brought in representative capacity the petitioner must say that the facts are within his personal knowledge. In the present case there is no allegation to this effect in the petition itself; at most there is the allegation in the verifying affidavit*
>
> > *'that the facts and allegations contained in the aforegoing petition are to the best of my knowledge and belief true and correct.'"*

It is suggested that even if the petition were properly brought in a representative capacity, it would necessarily fail on this basis. But it seems to me that no such general proposition can be extracted from the cases. In general an application must be based on proper evidence (not e.g hearsay) and it must appear from the petition and annexures as a whole that the foundation for relief is so evidenced – it is not merely a question of the petitioner stating that the facts are within his personal knowledge. The very nature of the papers may belie such a statement even though it does not appear; or make it unnecessary where it is absent ….. The mere omission in the present case of an allegation that the facts are within the personal knowledge of the applicant is not conclusive – the petition and annexures must be approached as a whole ….”

[11] Based on the above authorities, I have no doubt that the fact that the applicant in his founding affidavit did not state that the facts were within his knowledge and correct, but only stated so in his replying affidavit is not fatal, for the simple reason that the applicant’s papers looked in totality shows that the facts he is alleging are within his personal knowledge. I therefore, find that this point was not well taken, and ought to be dismissed.

[12] THE MERITS

Lis Pendens

During argument it was revealed that CIV/DCL/LRB/54/2017 was dismissed by the Court *a quo* on account of lack of jurisdiction, and this is common cause. The 1st respondent in CIV/APN/470/17 (in particular prayer 3) and the applicant *in casu*, are seeking interdicts against each other in respect of the same plot 22124-194. They are both asserting their rights as the owner of the same property. In the present case the applicant is also seeking relief as the owner coupled with a claim for damages in motion proceedings. The court that is seized with CIV/APN/470/17 will have to decide the issue of ownership, as it is central to the decision of that case as it is in the present case. *In casu*, in the alternative, the applicant is claiming damages- and quite bizarrely, in motion proceedings. However, this conclusion does not debar the parties from being heard as this court has a discretion whether or not to halt this case. The question is always whether it is 'more just and equitable' that a latter case should be allowed to proceed (see; Herbstein and Van Winsen ***The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa 5th Ed. Vol.1 pp313-314*** wherein it is said:

> "It is not an immutable rule that the court will decide that the *lis* which was first to commence should be the one to proceed. Considerations of convenience and fairness are decisive in determining this question"

Mr Mafaesa for the 1st respondent informed this court that the parties have been awaiting judgment in CIV/APN/470/17 since 2018. To my mind the fact that the parties have been awaiting judgment for this long suggest to me that the uncertainty created by this long wait should be brought to an end by this court going ahead to decide this matter. To my mind it will be both fair and convenient for the parties to have finality to their legal wrangle regarding this property.

[13]Material Disputes of Fact

At the heart of the dispute between the parties herein is the alleged contract of sale for the immovable property between the applicant and the 1st respondent. The 1st respondent denies that there was such a contract between her and the applicant. She avers that, and this is common cause, that the relationship between her and the applicant was one of landlord and tenant. The applicant on the other hand avers that during the currency of their landlord and tenancy relationship he developed an interest in buying the rented property which he says he did in 2013 for an amount of M565,000.00 which he paid in full, but the details of this payment is not provided. He also annexed to his papers what appears to be an agreement of sale signed by both parties and their witnesses. The applicant, however, does not have an original agreement and even this one annexed to the papers is not certified as the true copy of same. The applicant avers further that he was in a peaceful

and undisturbed occupation until in 2017 when he says the 1st respondent "resurfaced" and held herself as the owner of the property.

[14] The applicant states that in the aftermath of the successful conclusion of the sale agreement, he had sublet one part of the building to the 3rd respondent, with the latter paying rentals to him. It must however be stated that the 1st respondent disputes these averments; she alleges that the purported agreement is a forgery and that she never vacated her premises. The 3rd respondent who was allegedly sublet the rooms and paid rentals to the applicant, disputes this and says she was never contracted to the applicant. There are no affidavits of the witnesses who were present when the agreement was supposedly concluded. I consider these to be material disputes of fact incapable of resolution merely on the basis of affidavits. When Advocate Lenkoane was made aware of these disputes of fact, during argument, he moved that in the event this court were to find that indeed material disputes of fact exist it should refer this matter to oral evidence in terms of Rule 8 (14) of the rules of this court.

[15] In terms of Rule 8(14), when disputes of fact arise on affidavits, the court is given a number of choices to invoke. If the court is of the opinion that that the dispute of fact is not resoluble on papers, it may either dismiss the application or make such orders it deems appropriate for ensuring a just and expeditions

decision. These options are open to the court for the simple reason that the court in application proceedings cannot resolve the dispute of facts between parties based on probabilities but on legal issues based on common cause facts (***National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para. 26).***

[16] It is trite that in motion proceedings, when dispute of facts arise, a final order will only be granted where the facts averred by the applicant, together with those alleged by the respondent justify the order. There are, however, exceptions to this general rule; where the version of the respondent is so far-fetched, untenable, entails uncreditworthy and bare or bold denials or palpably implausible that the court is justified in rejecting it merely on the papers (***NDPP v Zuma*** *(ibid);* ***Plascon – Evans Paints Ltd v Van Riebeeck Paints (PTY) Ltd 1984 (3) SA 623 (A) 634 – 5****)*

[17] Equally important, and quite germane to this case, is the principle that where the applicant seeks relief by way of motion proceedings, where it was reasonably foreseeable to him that a material dispute of fact would arise, the court will not exercise its discretion to refer the matter to viva voce evidence, but opt for dismissal instead:

> *"A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that*

*procedural form at his peril, for the court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application. "(**Tamarillo (PTY) Ltd v BN Aitken (PTY) Ltd 1982 (1) SA 398 at 430G – H**)*

[18] Furthermore, an application for referral to oral evidence must be made at the outset and not after argument on the merits. It must be made formally and specifically indicating who should be allowed to testify and on what issue. However, this rule is not inflexible, as in *exceptional* cases the court may depart from it even where no application for referral has been made:

"It would seem that in the court a quo Bocimar's counsel simply applied informally and non-specifically for the hearing of oral evidence, at the end of his argument on the merits, in the event of the court holding that Bocimar had failed on the papers to establish a genuine and reasonable need for security. No indication was apparently given who should be required to give evidence or submit themselves to cross-examination nor any indication given what evidence new witnesses would be able to give. In Kalil v Decotex (PTY) Ltd and Another 1988 (1) SA 943 (A) at 981 D – G reference was made to "the Salutary general rule that application to refer a matter to evidence should be made at the outset and not after

*argument on the merits. It was pointed out that the rule was not an inflexible one and that in exceptional cases the court may depart from it." (**Bocimar NV v Kotor Overseas Shipping Ltd 1994 (2) SA 563 (A) at 587 A – D)*.

[19] In ***Kalil v Decotex (PTY) LTD and Another 1988 (1) SA 943(A)*** at 979 H – I, it was held that the discretion to refer the matter to oral evidence will generally be exercised guided by the following considerations:

"Naturally, in exercising this discretion the court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant the less likely the court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent."

[20] Reverting back to the facts of this matter, it is common cause that there is a history of litigation between the two parties, in terms of which the issues germane to this case were hotly contested. In both CIV/DCL/LRB/54/2017 and CIV/APN/470/17, the issue of ownership of the property in question had been raised as a contested issue. It is clear to me that the applicant reasonably

foresaw the possibility of ownership of the property being disputed in this matter. In the result, I exercise my discretion to dismiss the application on this score.

[21] In the result:

a) The application is dismissed with costs.

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M. MOKHESI J

FOR THE APPLICANT: **ADV. LENKOANE INSTRUCTED BY T.B. SABA ATTORNEYS**

FOR THE RESPONDENTS: **ADV. MAFABA INSTRUCTED BY K.D. MABULU ATTORNEYS**