IN THE HIGH COURT OF LESOTHO

COMMERCIAL DIVISION

HELD AT MASERU **CIV/A/30/2021**

In the matter between

PUMA ENERGY LESOTHO (PTY) LTD **APPELLANT**

AND

'MALELOKO RUSSELL N.O.	**1ST RESPONDENT**
SOUTHERN EXPRESS	**2ND RESPONDENT**
MASTER OF THE HIGH COURT	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**
OFFICER COMMANDING MOHALES' HOEK POLICE STATION	**5TH RESPONDENT**
COMMISSIONER OF POLICE	**6TH RESPONDENT**
RCK HOLDINGS (PTY)	**7TH RESPONDENT**

Neutral Citation: Puma Energy Lesotho (Pty) Ltd v 'Maleloko Russell N.O. & 6 Others (CIV/A/30/2021) [2022] LSHC COM. 12 (17 MARCH 2022)

JUDGMENT

CORAM : **MOKHESI J**

DATE OF HEARING: **13 DECEMBER 2021**

DATE OF JUDGMENT: **17 MARCH 2022**

SUMMARY

CIVIL PRACTICE: *Appeal against the decision of magistrate issuing final orders without first affording the appellant a hearing and for having based his judgment on issues not foreshadowed in the pleadings- Held, appeal must succeed on these grounds*

ANNOTATIONS:

Legislation:

Deeds Registry Act 1967

Cases:

Fisher and Another v Ramahlele and Others (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) (4 June 2014)

Geldenhuys and Neethling v Beuthin 1918 AD 426

Khaketla v Malahleha and others LAC (1990 – 1994) 275

Lesotho National Olympic Committee v Morolong LAC (2000 – 2004) 449

Maphathe and Others v Kuper C of A (CIV) NO.83/2019

PS 2031 Investment CC t/a Kalema Tech & Hire v Metsi A Pula Fleet Management Agency (Pty) Ltd t/a Metsi A Pula Civil Plant Hire Rentals C of A (CIV) No. 60/2015 (29 April 2016) (unreported)

Thabo Charles Maitin v Barigye and Another LLR 1991 – 1996 Vol. 1

[1] **Introduction**

This is an appeal against the judgment and Orders of the Chief Magistrate, Mohale's Hoek Magistrates' Court. The 1st and 2nd respondents had lodged an urgent and *ex parte* application before the same Court seeking the following reliefs against the appellant:

> *"1. Dispensing with modes and normal periods of service of court process on account of urgency.*
>
> *2. That Rule Nisi be issued returnable on a date and time to be determined by this Honourable Court calling upon the 1st respondent to show cause if any why:*
>
> *a) It shall not be interdicted and restrained from operating the filling station belonging to the late Sebatana William Russell, under lease number 12591 – 011 currently under the 1st applicant's executorship and 2nd applicant's management;*
>
> *b) It shall not be interdicted and restrained from interrupting daily operations at the filling station herein referred to in (a) above under the applicant's control;*
>
> *c) That the 4th and 5th respondents be ordered to assist the messenger of court and or at the applicants in affecting service of the Court order safely;*
>
> *d) It shall not be ordered to remove all its equipment; staff and nay other relevant properties from the filling station referred to in (a) above as a result of contract expiration entered into by the applicants and the 1st respondent;*

e) Respondent shall not be ordered to pay costs of this application; and

f) The applicants shall not be granted further and or alternative relief."

[2] After hearing the applicants' counsel, the learned Chief Magistrate granted prayers 1, 2(a), (b) and (c) above, operative with immediate effect. The order did not have the return date. It would appear that on the following day, the return date was fixed, and a new order issued. Upon being served with the order, the 1st respondent anticipated the return date and prayed for variation and discharge of the rule *nisi*. A number of points in *limine* were raised, *viz;* that the rule *nisi* was issued without the return date; lack of jurisdiction of the Subordinate Court over eviction and spoliation due to the value of the property in issue which exceeded its jurisdiction*;* Magistrates' Court do not have power to issue a declarator and to interpret the contract. The matter was heard on the 26th October 2021, whereupon after hearing arguments, the learned Chief Magistrate issued an unwritten *ex tempore* ruling dismissing all the points in *limine.* Two days later, on the 28th October 2021, the Interim Court Order was confirmed. But before this Court Order could be confirmed, the 1st respondent had in the meantime lodged an application before this court in CCA/0086/2021, seeking certain reliefs which are not relevant for purposes of this judgment. The essence of the latter application was to seek spoliation against the applicants and preservation of its property, and other interdictory relief pending finalization of that matter.

[3] At the later stage, the learned Magistrate rendered written reasons for his judgment and in it, on the question of jurisdiction, he reasoned that the court

a quo had jurisdiction because the matter it was seized with was for ejectment to which monetary ceiling of that court is inapplicable. He relied on **Thabo Charles Maitin v Barigye and Another LLR 1991 – 1996 Vol. 1 at 472** in support**.** It should be recalled that prayer 2 (d) required of the appellant " to remove all its equipment, staff and other properties from the filling station referred to in (a) above *as a result of contract expiration…",* however when the learned Magistrate rendered his written judgment, the basis of confirming the rule *nisi* was non-compliance with S. 24 of Deed Registry Act 1967 which requires every sublease on immovable property be registered in the deeds registry if its duration is more than three years. I revert to this issue in due course. He cited a number of decisions in support of this posture, such as **Maphathe and Others v Kuper C of A (CIV) NO.83/2019** (unreported).

[4] Aggrieved with this judgment, the 1st respondent appealed to this court citing a number of grounds, *viz;*

(i) *That the learned Chief Magistrate erred in fact and in law for not finding that a Final Order could not be made as a consequence of the Rule Nisi issued on the 19th October as a result of Interim Court Order issued without a return date;*

(ii) *The learned Chief Magistrate erred in fact and in law in finding that a second rule nisi could be issued as an interim order on either 20 or 21 October 2021 with the return date of 12 November 2021, replacing or reviving the Interim Court Order without a return date dated 19 October 2021;*

(iii) *The learned Chief Magistrate erred in fact and in law in dismissing a point in limine that the court a quo did not have jurisdiction in eviction and spoliation matter and a matter to interdict the appellant;*

(iv) *The learned Chief Magistrate erred in fact and in law in dismissing the point in limine that the subordinate court did not have jurisdiction to issue declaratory relief and interpretations of contract;*

(v) *The learned Chief Magistrate erred in fact and in law in finding that that the sublease agreement entered into between the parties contravened the provisions of S. 24 of the Deeds Registry Act.*

[5] Before I deal with issues which arise in this appeal, it is apposite that the factual background to this case is laid out.

[6] **Factual Background and the Parties.**

Puma Energy is the appellant and the 1st respondent in the Court a *quo.* It is a duly incorporated company within the laws of the Kingdom. It operates in the energy space as a wholesaler and retailer of petroleum products and petroleum. It acquires existing wholesale and retail petroleum network with its entities including capex equipment installed at the retail fuel service stations. Where it has to construct new service stations, it enters into sublease agreements with the owners of the sites either on a short or long term basis and actually installs infrastructure for that purpose, which includes canopies, pumps and fuel storages, which can be above or underground (part of Capex Equipment). It sells all these products to the general public. In addition to service stations, to be included to the infrastructure erected on site, are shops and car wash facilities.

[7] The 1st respondent is the executrix of the estate of the late Sebatana Russell and is being sued in that capacity. The 2nd respondent is Southern Express

(Pty) Ltd, a company appointed for managing and maintaining the properties of the estate of the said estate. The 3rd respondent is the Master of the High Court, 4th to 7th respondents are Attorney General, Officer Commanding Mohale's Hoek police station, the Commissioner of police, RCK Holdings (the appellant's agent who trade on the premises in question) respectively.

[8] It is common cause that the infrastructure on the plot in question originally belonged to BP South Africa and BP Lesotho, and was later acquired by Excel Petroleum with the knowledge and written consent of the late Sebatana William Russell as confirmed in the Agreement between the parties. The late Sebatana Russell consented to the Excel Petroleum Supply Agreement on 11th May 2006. Subsequent to Excel Petroleum acquiring the site equipment assets and supply of petroleum and products from BP Lesotho during May 2006, it underwent a name change to Puma Energy LS (Pty) Ltd., the current appellant. Puma Energy thus acquired the Mohales' Hoek service station business and the capex equipment thereon and rebranded the service station Puma Energy.

[9] The late Sebatana Russell passed away in February 2011and his wife (1st respondent) was appointed the executrix of the estate. The 2nd respondent was appointed as the property manager by the executrix, and subsequent thereto, the executrix entered into a sublease agreement with the appellant on 02nd October 2018. Clause 2.2 of the said Sublease Agreement provides that the appellant would have two separate and distinct options of extension upon the same terms and conditions. The duration of the said sublease was three years less one day. Clause 2.2 further provides that the said options for extension would be deemed automatically exercised by the appellant without

notice to the executrix, with only the appellant having the right not to exercise the options. The appellant duly conducted its business of petrol filling and service station on the plot. In terms of clause 15 of the agreement, fuel pumps, tanks and fuel installations on the site in question remain at all times, the property of the appellant during the subsistence of the agreement and after its termination.

[10] The "General" provision (clause 19) provides that the Executrix undertakes to effect registration of the sublease against the title deed to the property and further authorizes the appellant to take steps to effect this registration. The acceptance of the offer was signed on the 13th February 2019. The result was that in terms of the date on which the offer was signed, the first period of three years less one day would have to come to an end on 12th February 2022. However, in terms of clause 2.1, the sublease agreement commenced on the first date of the sale of fuel, with the result that the sale commenced on June 2018. Consequently, the first period ended in June 2021, with the result that the automatic renewal kicked in extending the sublease agreement until June 2024. The 1st and 2nd respondents however were of an opinion that the sublease agreement came into effect on 02nd October 2018 and came to an end on 01st October 2021. For purposes of this judgment I will assume in favour of the respondents that the sublease agreement came into effect on the 02nd October 2018.

[11] On 19th September 2021 one Ernest Russell informed the appellant's Sale Manager, by email, that the sublease Agreement was expiring on the 02nd October 2021. There was back and forth correspondence and meetings between the parties with the result that on 15th October 2021 the Cluster

General Manager of the appellant wrote a letter to the 1st respondent reminding her of clause 2.2 of the Agreement on duration of the sublease and its automatic extension on expiry at the instance at the appellant. The 1st respondent was further reminded that the agreement still subsisted. After skirmishes between the parties regarding access to the site, the 1st and 2nd respondents lodged an urgent and *ex parte* application in the court *a quo*, the judgment regarding which is now the subject of this appeal. Although the appellant has raised a number of grounds of appeal, this appeal turns on two issues one of which was raised by this court with counsel during argument, namely the propriety of the 1st and 2nd respondents approaching the court *a quo* on *ex parte* and urgent basis. The other more fundamental, as can be gleaned from the judgment of the court *a quo,* is the basis of the said judgment, is an issue which is extraneous to the issues raised in the pleadings. I turn to deal with these issues.

[12] (i) **Court *a quo* basing its judgment on extraneous issues.**

As can be gleaned from the prayers sought by the applicants in the court *a quo,* non-compliance with S.24 of Deeds Registry Act was not among them. was not raised on a ground appeal by the appellant. They sought an interdict, and under prayer 2(6), the removal by the appellant of its equipment, staff and other properties "from the filling station referred to in (a) above *as a result of contract expiration* into by the Applicants and 1st respondent;" (emphasis added). Even in their founding affidavit, the applicants based their case on the fact that the contract between them and the appellant had expired, while on the other hand, the substratum of the court *a quo*'s judgment in confirming the rule *nisi* is that the sublease

agreement between the appellant, the 1st and 2nd respondents was not registered in terms of S. 24 of the Deeds Registry Act 1967 as its duration was three years and more.

[13] The court *a quo* should not have strayed out of the perimeters set out by the litigants as worthy of its determination. It is important to recall that in motion proceedings; it is to the pleadings or affidavit to which the court must look to determine the issues which the applicant has set out as worthy of determination. The court is therefore confined only to the issues raised by the parties. It must eschew basing its judgment on issues extraneous to those raised in the pleadings (**Lesotho National Olympic Committee v Morolong LAC (2000 – 2004)** 449 at 457D – E).

[14] There are, of course, exceptions to this rule as stated in **Fisher and Another v Ramahlele and Others (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) (4 June 2014)** at paras 13 to 14, when the court said:

> *"[13] Turning then to then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no*

prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the Court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits."

[15] In the present matter, the nature of the dispute as defined by the applicants' prayers and the averments in their affidavits, is that the sublease agreement between the parties had expired. That is the basis upon which prayer 2(d) was sought, hence the respondent's decision to lodge an application before this court in CCA/0086/2021 seeking the relief directing the applicant not to interfere with business operations because the sublease agreement between the parties was extant. There is nothing in the founding affidavits which approximate the issue that the sublease was invalid for non-compliance with S.24 of the Deeds Registry Act. The court *a quo* therefore based its decision

on an issue not foreshadowed by the pleadings and evidence, and on this basis alone, this appeal ought to succeed. Assuming that I am wrong in this conclusion, this appeal ought to succeed on the second issue to which I turn.

[16] (ii) **Abuse of *ex parte* and urgent procedure**

It is common cause that the parties have a long-standing business relationship spanning a period of fifteen years. The basis of that relationship is the sublease agreement alluded to above whose clause 2.2 provides that the appellant has two distinct and separate options for extension, and that the two options would be deemed automatically exercised by the appellant without notice to the executrix, with only the appellant having the right not to exercise them. At the end of the three-year term of the sublease on the 01 October 2021, Mr Ernest Russell authored correspondence to the appellant requesting that the sublease and sublessor engage in negotiations with the view to extending the agreement. This conduct ran counter to the terms of the sublease agreement which subsisted between the parties.

[17] Mr Ernest Russell's conduct in this case amounted to repudiation of the contract. The response of the applicant's Cluster Manager, in my considered view, made it crystal clear that the applicant had elected to keep the contract in being, and in law he was entitled to do so (**Geldenhuys and Neethling v Beuthin 1918 AD 426, 444**). The reasons advanced for approaching the court on an urgent and *ex parte* basis was that the appellant ignored Mr Ernest Russell's instructions to vacate the property (eviction instruction) and that the property was about to be sublet to another tenant. If it is accepted, as it should, that the sublease agreement between the parties was still extant,

there was no justification for obtaining an adverse order against the appellant behind its back. The appellant ought to have been accorded the benefits of *audi alteram partem.* To highlight the adverse nature of the respondents' approach, they obtained an order *ex parte* against the appellant, effectively barring it from operating the filing station. Although the rule *nisi* was obtained, in respect with prayer 2(d), the appellant was to all intends and purposes barred from running the business without first being heard. Put differently, the respondents obtained *ex parte*, a final relief in the form of an interdict against the appellant without hearing. It is important to always recall what the Court of Appeal had to say two decades ago in **Khaketla v Malahleha and others LAC (1990 – 1994) 275** at 280C –F

> *"Audi alteram partem is a fundamental principle of procedural fairness. I do not propose burdening this judgment with an exposition of the circumstances under which the rule may be departed from in civil litigation. Apart from cases where:*
>
> *(a) Statute or the Rule of Court sanction such a departure; or*
> *(b) The relief sought does not affect any other party;*
>
> *The rule should only be departed from in exceptional cases. One such exceptional case is where there is a reasonable likelihood that notice to the opposing party would enable him to defeat or render nugatory the relief sought or precipitate the very harm which the applicant is seeking to avert (citations omitted). The principle of audi alteram partem ought not to be subverted, even when granting a rule nisi, by ordering the rule (or any part thereof) to operate as an interim order if such interim order affects the rights of another party unless such interim order can itself be justified by the exceptions above referred to."*

[18] In the present matter, the court *a quo* and the respondents' counsel did not heed these salutary considerations, and therefore, this appeal ought to succeed on this basis (see also: **PS 2031 Investment CC t/a Kalema Tech & Hire v Metsi A Pula Fleet Management Agency (Pty) Ltd t/a Metsi A Pula Civil Plant Hire Rentals C of A (CIV) No. 60/2015 (29 April 2016) (unreported)** at paras 25 – 26). The urgency and *ex parte* procedure was clearly abused in this case and the court *a quo* should have responded accordingly in line with the warnings of the courts against such abuse.

[19] In the result the following order is made:

(a) The appeal succeeds with costs

(b) The order of the court *a quo* is altered to read:

(i) The application is dismissed with costs on attorney and client scale.

MOKHESI J

For the Appellant:	**Adv. Henk Louw assisted by Adv. Khatleli instructed by Harley and Morries Attorneys**
For the Respondents:	**Adv. S. Makara assisted by Adv. R. Lesholu instructed by K.D Mabulu Attorneys**