

# **IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CIV/A/32/2020**

In the matter between:

**UNITED MOTORS (PTY) LTD**

**APPELLANT**

**And**

**JIAN YONG ZHANG**

**RESPONDENT**

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## **JUDGMENT**

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Neutral Citation: United Motors (Pty) Ltd vs Jiang Yong Zhang LSHC 112 Civ (24May 2022)

**Coram** : His Honour Justice Keketso L. Moahloli

**Dates heard** : 12 August 2021

**Date delivered** : 24 May 2022

## **SUMMARY**

*Magistrate's Court – Civil proceedings – Jurisdiction – Claim for ejectment based on ownership – Subordinate Court Act 1988 – Sections 15(1) and 17(1) (c) interpreted and applied – Appeal against grant of summary judgment and order of ejectment – Whether defendant did not have a bona fide defence – Subordinate Court Rule 14(4) (c) and 14 (5) applied.*

## ANNOTATIONS

### Cases

1. *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333
2. *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA)
3. *Joy of the World v Malefane*, LAC (1995-1999)313
4. *Joy of the World v Malefane and Others*, LAC (2013-2014)108
5. *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).
6. *McCarthy Retail L Ltd v Shortdistance Carriers* 2001 (3) SA 482 (SCA)
7. *Tesvan CC v SA Bank of Athens* 2000 (1) SA 268 (SCA)
8. *Redemeyer v Redemeyer* 1968 (3) SA 1 (C)
9. *Rubin v Botha* 1911 AD 568
10. *Silverleaf Pastry and Confectionary Co (Pty) Ltd v Joubert* 1972 (1) SA 125(C)

### Statutes

1. *Subordinate Courts Act No.9 of 1988*
2. *Subordinate Court Rules 1996*

### Books

1. *A.C. Cilliers et al, Herbstein and Van Winsen – The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 2009 Juta, 5ed, Vol 1*
2. *Badenhorst et al, Silberberg and Schoeman's The Law of Property, bed 2006 Lexis Nexis*
3. *C.P. Smith, Civil Practice in Magistrates' Courts – The Practitioner's Manual, 2014 Lexis Nexis*

4. *S.Petè et al, Civil Procedure – A Practical Guide, 2011 Oxford University Press*  
**MOAHLOLI, J**

### **Introduction**

[1] This is an appeal against an order made at the instance of Mr Jian Yong Zhang (“Zhang”), by the Magistrates’ Court for the district of Berea (per the learned Resident Magistrate M.P. Monethi, ejecting United Motors (Pty) Ltd (“United Motors”) from Zhang’s commercial plot No. 13274-1948 situated at Ha Mabote in the district of Berea.

### **Background**

[2] Zhang sub-leased the undeveloped plot to United Motors for an initial period of three years, effective from 1 June 2017 to 31 May 2020. It is common cause that the parties simultaneously concluded a second sub-lease to run from 1 June 2020 until 31 May 2023. United Motors in addition avers that the parties also concluded a further sub-lease to operate from 1 June 2023 until 31 May 2026<sup>1</sup>.

[3] Upon taking occupation of the site in June 2017, United Motors fenced it off and also erected shaded packing bays for the cars intended for sale. The company claims that it spent M1 407 300.00 on these improvements, which it hoped to recoup during the course of the three consecutive 3 year lease periods.<sup>2</sup>

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<sup>1</sup> Record of proceedings, page 11, paragraph 5.2 r/w Record pages 39-40, para 6.1

<sup>2</sup> Record page 40 paras 6.2 and 6.3

[4] On 3 June 2020 Zhang gave United Motors three months' written notice of termination of the sublease agreement, invoking clause 3.2 thereof<sup>3</sup>. In this notice he stated that this was being done due to circumstances he could not avoid. The said clause 3.2 allows either party, on 3 months prior written notice, to terminate the agreement of sub-lease<sup>4</sup>.

[5] The legal representatives of United Motors responded to the notice of termination in writing on 31 July 2020. They, *inter alia*, notified Zhang's lawyers that they had advised United Motors "to adhere to [Zhang's] Notice on the following conditions –

(i) [that Zhang] should compensate [United Motors] for the improvements effected [at the site] to the tune of M1 407 300.00;

(ii) [that Zhang] should compensate [United Motors] for loss of business for the remaining 6 years to an estimated amount of M3 633 937.50.”

The letter added that “as soon as the aforementioned were met by [Zhang], [United Motors] will vacate the premises, but until such time ..... [United Motors] will continue to remain in occupation and pay the monthly rentals in terms of the current sublease agreement”<sup>5</sup>.

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<sup>3</sup> Record page 24, para 3.2 r/w page 34

<sup>4</sup> Record page 27

<sup>5</sup> Record pages 18-20, particularly at p19 last para & p20 first two paras.

## Summary Judgment

[6] On 5 October 2020 Zhang filed a Notice of Application for Summary Judgment in the Magistrates' Court for the District of Berea [CIV/T/BRA/15/2020]. He sought an order granting Summary Judgment against [United Motors] in following terms;

1. Ejectment of [United Motors] from [Zhang's] Plot No. 13274-1948 situated at Ha Mabote in the district of Berea;
2. Costs of suit on Attorney and own client scale;
3. Further and/or alternative Relief.”<sup>6</sup>

[7] In his founding affidavit he, *inter alia*, confirmed that this application was predicated on the action set out in the Summons and Particulars of Claim in the above mentioned CIV/T/BRA/15/2020. He said he was of the opinion that United Motors had no *bona fide* defence to the action, and that it had filed a Notice of Appearance to Defend merely for the purpose of delaying the said action.<sup>7</sup>

[8] For its own part, on 5 November 2020, United Motors filed an opposing affidavit in which, apart from pleading to the merits, it raised two points of law concerning lack of jurisdiction. Firstly, United Motors contended that the Berea Magistrates' Court had no jurisdiction over Zhang's claim for ejectment because the property in question was situated in the district of Maseru, and not of Berea.<sup>8</sup> The learned Magistrate dismissed this challenge

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<sup>6</sup> Record pages 21-22

<sup>7</sup> Record pages 23-25

<sup>8</sup> Record page 39, para 4B

on two grounds: (i) He held that United Motors had failed to allege facts upon which it argued that the place where the site was situated, Mabote, no longer fell within the district of Berea but now fell within the district of Maseru.<sup>9</sup> (ii) He further held that even if this site was situated in the district of Maseru as alleged, he, as a Resident Magistrate had power to exercise jurisdiction over causes of action set out in section 17 of the Subordinate Courts Act No.9 of 1988 (“the SCA”) in any area within the whole country. He relied on section 15(1) of the SCA for this.<sup>10</sup> It states:

“Local limits of jurisdiction

*The area within which ..... a Resident Magistrate may exercise powers and jurisdiction conferred by this Act shall extend to the whole country.”*

**[9]** The second jurisdictional point raised by United Motors was that the Magistrates’ Court had no jurisdiction since the dispute was essentially commercial in nature as it required interpretation of the sublease agreement.<sup>11</sup> The learned Magistrate was of the view that this objection was unsustainable because -

(i) United Motors had failed to demonstrate in its opposing affidavit what in particular needed to be interpreted in the sublease agreement in order to determine the straight forward request for ejection;  
and

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<sup>9</sup> Record page 81, last paragraph

<sup>10</sup> Record page 82, first paragraph

<sup>11</sup> Record pages 37-38, paragraph 4A

- (ii) the Commercial Court did not have jurisdiction to hear and determine  
ejectment disputes.<sup>12</sup>

[10] Concerning the merits, the learned Magistrate accepted Zhang's argument that United Motors, in its opposing affidavit, had failed to plead facts to sustain its defence. In other words, there was no triable defence raised by its opposing affidavit. It failed to disclose the nature and grounds of its defence as well as the material facts upon which it was founded.<sup>13</sup> In the result, summary judgment was granted as prayed for. And the court granted an order ejecting United Motors from Zhang's Plot No. 13274 – 1948.

### **The Appeal**

[11] United Motors has now appealed to this court against the whole order and judgment of the learned Resident Magistrate, on the following grounds:

- 1) *That the court erred and misdirected itself in dismissing the two points in law relating to lack of jurisdiction.*
  
- 2) *That the court erred and misdirected itself in dismissing the defence to the summary judgment. It ought to have found that the Appellant had a defence on the merits, and allowed it to file its plea accordingly in order for matter to be adjudicated on the merits. The court therefore made a wrong decision.*

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<sup>12</sup> Record page 81, first and second paragraphs

<sup>13</sup> Record page 82, second paragraph

## LEGAL ANALYSIS

### **Lack of Jurisdiction in respect of subject matter:**

[12] According to section 17(1) (c) read together with sections 2 and 3, of the SCA, “a [subordinate] court, with regard to causes of action, shall have jurisdiction in any action of ejectment against the occupier of any house, land or premises within the district.” In the interpretation section, “district” is defined as meaning “the area within which a court has jurisdiction in accordance with section 15(2).” And the said section 15 (2) provides that: “The area within which any other magistrate may exercise the powers and jurisdiction conferred by [the SCA] or by any other law shall extend to the district to which he is posted.”

[13] It is trite law that the jurisdiction of a magistrates’ court relating to actions for ejectment is limited to houses, land or premises situated within the court’s area of jurisdiction.<sup>14</sup> In other words, the immovable property which is the subject matter of the ejectment suit must be located within the district served by that magistrates’ court. In any action relating to property the court within whose territorial jurisdiction the property is situated (the *forum rei sitae*) will have jurisdiction to entertain claims relating to the property.<sup>15</sup>

[14] Section 15 (1) of the SCA does not change this position. All it enacts is that unlike lower magistrates who can only exercise their authority and preside over cases within the district to which they are posted, Chief Magistrates and Resident Magistrates may do so throughout the whole country.

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<sup>14</sup> see C.P. Smith, Civil Practice in Magistrates’ Courts – The Practitioner’s Manual, 2014 Lexis Nexis, at p.31

<sup>15</sup> see A.C. Cilliers et al, Herbstein and Van Winsen – The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 2009 Juta, 5ed, Vol 1 at pp. 56 para (b) and 77 para B; S.Petè et al, Civil Procedure – A Practical Guide, 2011 Oxford University Press, at pp. 42 and 69



[15] Having said all this, I agree with the learned Magistrate that United Motors did not present the court with sufficient factual evidence that the plot at the centre of this dispute fell within the district of Maseru. The company did not attach to its opposing affidavit any supporting affidavit from the land allocation authority or a copy of the Lease No. 13274-1948 to this effect. It instead sought to rely on the sublease agreement authored by the parties themselves, which is not authoritative.

**Lack of Jurisdiction in respect of cause of action:**

[16] Regarding the second jurisdictional objection, United Motors argues that the learned Magistrate ought to have found that he lacked jurisdiction to entertain an application for summary judgment arising from a contractual dispute that had to be dealt with by the Commercial Court. By not doing so, the learned Magistrate came to a wrong decision in principle.

[17] United Motors maintained by its nature, Zhang's claim and/or cause of action is based on the alleged cancellation of the second sub-lease agreement. And it claimed that it had rejected or refuted the purported cancellation regard being had to the fact that it had incurred considerable improvement costs which it had hoped to recoup during the course of its three consecutive sub-lease periods. It further claimed that the court *a quo* could not grant ejectment without first interpreting the terms of the parties' sub-lease agreement, particularly the termination clause 3.2.

[18] I find United Motors' argument disingenuous because in its response to Zhang's notice of termination of the sublease it never disputed or challenged the validity of the termination itself. It unequivocally accepted the

termination, but insisted on being first compensated for improvements effected at the site and loss of business for the remainder of the sublease [Record pages 19-20]. It never seriously challenged Zhang's interpretation of clause 3.2. And its reason for not doing so is understandable, since the clause allows termination without any reasons being advanced.

[19] I therefore cannot find any fault whatsoever with the learned Magistrate's rejection of the contention that the case fell to be heard and determined not by the court *a quo*, but the Commercial Court.

**Whether the defendant has no real defence**

[20] The procedure of summary judgment in the magistrates' courts is governed by rule 14 of the Subordinate Court Rules 1996. A defendant who has entered an appearance to defend may respond to the application by paying into court or giving security for any judgment including such costs and interest which may be given [rule 14 (4) (a) & (b)]. Alternatively, as United Motors purported to do in *casu*, the defendant may satisfy the court by affidavit, supplemented by oral evidence if the court permits, that he/she has a *bona fide* defence to the claim on which summary judgment is being applied for, or a *bona fide* counterclaim against the plaintiff [rule 14(4) (c)]. The defendant's affidavit must disclose fully the nature and grounds of the defence or counter-claim and the material facts relied upon therefor [rule 14 (5)]. And in terms of Rule 14 (7), if a defendant who has opted to contest the application does not satisfy the court that he/she has a *bona fide* defence to the claim, the court may enter summary judgment for the claim.

[21] The summary judgment remedy has been aptly described as extraordinary and stringent because it makes inroads on a defendant's procedural right to have his/her case heard in the ordinary course of events.<sup>16</sup> Courts are consequently loath to grant the remedy unless satisfied that the plaintiff has an unanswerable and unimpeachable case because the defence has no proper defence.<sup>17</sup> Even then there is a discretion to refuse it.

[22] In the present case the defendant in the court *a quo*, United Motors, in order to succeed in its defence, had to satisfy the court that it had raised a *bona fide* defence in its opposing affidavit. Its affidavit had to disclose fully the nature and grounds of the defence and the material facts it relied upon.

[23] It is important to note:

23.1 that it is the defence which must be *bona fide*; and whether it is *bona fide* or not depends upon the merits of the defence as raised in the defendant's opposing affidavit;<sup>18</sup>

23.2 that the 'nature' of the defence means the character or kind of the defence. And 'grounds' means the facts upon which the defence is based.<sup>19</sup>

23.3 that the essence of rule 14(4) (c) and 14 (5) is that "*there must be a sufficiently full disclosure of the material facts to persuade the*

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<sup>16</sup> Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A). Fourlanel (Pty) Ltd v Maddison 1977 (1) SA 333 at 347H; Tesvan CC v SA Bank of Athens 2000 (1) SA 268 (SCA)

<sup>17</sup> Fourlanel (Pty) Ltd v Maddison, *supra*

<sup>18</sup> Silverleaf Pastry and Confectionary Co (Pty) Ltd v Joubert 1972 (1) SA 125 © at 129

<sup>19</sup> P Rule 14-26

court                                that what the defendant has alleged, if it is proved at he the  
trial, will                                constitute a defence to the plaintiff's claims".<sup>20</sup>

23.4 that the court will not require of a defendant the precision apposite to  
pleadings.<sup>21</sup>

[24] In its opposing affidavit<sup>22</sup>, United Motors raises the following 'defences'  
to Zhang's claim for summary judgment:

24.1 "That it has a right to continue to pay monthly rentals as it has been  
doing and to be in occupation until such time [Zhang] would  
have compensated [it] for the improvements effected on the  
.....site;"<sup>23</sup>

24.2 That for so long as the compensation claimed by it is not paid, its  
sublease agreements with Zhang cannot be regarded as having  
been cancelled and as such remain binding between the parties;<sup>24</sup>

24.3 That "there is no breach of the second sublease agreement and as  
such [Zhang's] notice of termination was unlawful and/or prematurely  
issued."<sup>25</sup>

[25] The court *a quo* dismissed these 'defences' in the following words:

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<sup>20</sup> ditto

<sup>21</sup> Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) at para 32

<sup>22</sup> Record, pages 30-45

<sup>23</sup> Record, page 41 para 6.4

<sup>24</sup> Record, page 41 para 6.5 r/w page 42 para 7.2

<sup>25</sup> Record, page 41 para 6.6

*“In the absence of these material facts this Court holds that the pleaded facts cannot sustain a defence. Put differently, there is no triable defence raised by Defendant in its opposing affidavit. As stated above Defendant has failed to fully disclose the nature and grounds of its defence as well as the material facts upon which it is founded. It will be noted that on the merits Defendant accepts termination of the sublease agreement however, claims that it has incurred huge improvements and has lost future business. It has not been alleged before me that Defendant has instituted a claim for these damages or at the very least a right of retention claim (see: Joy to the World v. Malefane & Others C of A (CIV) NO. 16/2013 and C of A (CIV) No. 9/2016) This court is therefore hamstrung to come to its assistance.*

*In the result the Defendant has failed to show that it has a triable issue or a sustainable defence. Accordingly, summary judgment is granted as prayed for.”<sup>26</sup>*

**[26]** I am of the view that the learned Magistrate erred in concluding that United Motors had failed to raise any sustainable defence altogether. In my opinion the company raised a legitimate defence of right of retention, to Zhang’s claim for ejection, at paragraph 6.5 read together with 7.2 of its opposing affidavit.<sup>27</sup> In our common law, it is arguable that a lawful occupier may have the right to compensation for necessary expenses and/or useful expenses. And his/her claim could be enforced by means of a right of retention or by means of an enrichment action.<sup>28</sup> A *bona fide* occupier, as in the case of a *bona fide*

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<sup>26</sup> Record, page 82

<sup>27</sup> Record, pages 41 and 42

<sup>28</sup> Redemeyer v Redemeyer 1968 (3) SA 1 (c) at 84-9; McCarthy Retail L Ltd v Shortdistance Carriers 2001 (3) SA 482 (SCA) at 489F-G; Joy to the World v Malefane, LAC (1995-1999) 313 at 316 G-J; Joy to the World v Malefane and Others, LAC (2013-2014) 108 at 113B-F.

possessor, has a right of retention to secure his/her claim, save that an equitable deduction may be made in respect of his/her use and occupation of the land.<sup>29</sup> **Badenhorst et al**<sup>30</sup> at p317-8 suggest that even though the right of a *mala fide* occupier to compensation for necessary and useful expenses has not yet been settled, in view of the extension of the *bona fide* possessor's action to a *bona fide* occupier, the *mala fide* possessor's action must by analogy be taken to have been extended to a *mala fide* occupier.

[27] The preceding discussion amply demonstrates that United Motors raised a defence which warranted further ventilation and consideration, instead of just being brushed off by the learned Magistrate. As a result I strongly believe that United Motors did indeed raise a *bona fide* defence, and the summary judgment out not to have been granted. Zhang's claim cannot be regarded as unanswerable and unimpeachable since United Motors has a proper defence. In my view this was not a type of case where the court was justified to deprive the defendant of its procedural right to have its case heard in the ordinary course of events.

[28] In the result I order that:

1. The appeal is allowed.
2. The magistrate's order is altered to read:  
"The application for summary judgment is refused.
3. The defendant is granted leave to defend the plaintiff's action.
4. The costs of the application for summary judgment are costs in the cause of the action.

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<sup>29</sup> Redemeyer v Redemeyer, op cit, at 71F-H; Rubin v Botha 1911AD 568 at 577

<sup>30</sup> Badenhorst et al, Silberberg and Schoeman's The Law of Property, 5ed 2006 Lexis Nexis

**KEKETSO L. MOAHLOLI**  
**JUDGE**

**Appearances:**

For Applicant : Adv R. Setlojoane

For Respondent : Adv Molise with Adv L.A. Molati