

**IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)**

HELD AT MASERU

CCT/0034/22

In the matter between –

HATA BUTLE (PTY) LTD

APPLICANT

And

MOEKETSI MONETHI

1ST RESPONDENT

WEN HUI ENTERPRISES (PTY) LTD

2ND RESPONDENT

DIENGOANE HLALELE

3RD RESPONDENT

Neutral Citation: Hata-Butle (Pty) Ltd v Moeketsi Monethi & 2 others [2022]
LSHC 155 Comm (01 June 2022)

CORAM: M. S. KOPO, J

HEARD: 01ST JUNE 2022

DELIVERED: 01ST JUNE 2022

SUMMARY

*Respondent failing to file opposing affidavit – No condonation application -
Matter enrolled in uncontested roll – Application for postponement to file
condonation denied – urgency of the matter still key - Interdict*

Annotation

Books

LAC (2005-2006) at 315

Cases

SOUTH AFRICA

Joshua v Joshua 1961 (1) SA 455

Setlogelo V Setlogelo 1914 AD 221

LESOTHO

Jiao v Motebang and Another [2008] LSHC 57

JUDGMENT

Introduction

[1] The history of the litigation involving Hata Butle (PTY) LTD is very long, winding and with numerous litigants at different times. While this long history may give an insight of the dispute surrounding this company, it is only relevant to a certain extent for the purposes of the matter at hand.

[2] The history of the Applicant as a company and subject of a litany of cases can be gleaned from the affidavit of Mr. Curl Buys filed of record in this matter. Applicant has been the subject of contestations before courts of law as to its ownership. While Mr. Curl Buys seems to have come to the conclusion that the ownership of Applicant is settled, there are signs and evidence that this may not be so. The relevant history for this matter within the one history relayed by Mr. Buys is that Applicant was once under liquidation but was subsequently removed from liquidation and is now operating in its own right as a company. The second and third respondents are the tenants in the property of Applicant.

[3] Applicant brought this matter on an urgent basis for an order in the following terms:

1. PART A – URGENT RELIEF

1.1Dispensing with the normal rules of this Honourable Court as pertains to forms, notice and modes of service and allowing this matter to be dealt with as one of urgency in terms of Rule 8 (22) of the High Court Rules 1980, and the ordinary relief in paragraph 2

below heard by the court on an urgent basis on a date and time to be determined by this honourable court.

1.2 Interdicting and restraining the 1st Respondent either personally or through his agent or his *alter ego* from holding himself as the director, shareholder, representative or authorised agent of the applicant and/or to portray himself as the lawful representative or agent with any authority of the Applicant or to have any instruction, authority or rights in respect of all or any of the tenants to collect rental from occupants at the Hata-Butle complex Roma Maseru exclusively and/or to hold himself out, portray himself, or parade himself as owner, manager, agent, acting with authority as a duly representative officer of Applicant.

1.3 Interdicting and restraining the 1st Respondent either personally or through his agents or his *alter ego* to in any way, claim, demand, recover or receive any rental or monies due or outstanding from tenants at Hata-Butle Complex Roma, or to demand payment or arrear or unpaid rentals from any of the Respondents or any other occupants of Hata-Butle complex at Roma, Maseru and for his own personal or any other benefit.

1.4 Interdicting and restraining the 2nd Respondent from making any payment for monthly rentals due by the 2nd Respondent to the Applicant and 2nd Respondent to the Applicant and 2nd Respondent is directed to pay rental to the Applicant, in terms of the written sub-lease agreement, dated June 2020, between Applicant (and) the 2nd respondent, together with all arrear rentals due and payable to the Applicant and to do so upon written demand by Applicant's

attorneys (Du Preez, Liebetrau & Co.) in respect of the 2nd Respondent's three (3) shops in the Hata-Butle complex.

2. PART B – ORDINARY RELIEF

2.1 Directing 1st & 2nd Respondent, jointly and severally, and within 7 days of service of this order upon them, to account and debate any such accounting for all amounts received by them from or in respect of the Applicant's complex, Hata-Butle.

2.2 Directing the 1st Respondent to repay the amount of M99, 000.00 to the Applicant being the amounts received by the 1st Respondent for the 2nd Respondent in respect of monthly rentals for the periods December 2021, January 2022 and February 2022.

2.3 Declaring the letters issued by or on behalf of 1st respondent dated 08th March 2022 as unlawful.

2.4 Interdicting and restraining the 2nd and 3rd Respondents to make any monthly payments of any nature or cause to any third party except to the Applicant or to withhold such payments due for rental or occupation of any area within the said complex while in occupation thereof from Applicant.

2.5 Granting Applicant such further and/or alternative relief as this Honourable Court may deem necessary in the circumstances.

[4] On the 08th day of April 2022 the parties herein (Applicant, 1st Respondent and 2nd Respondent) duly represented appeared before my brother Mathaba J. and part A of this Application was duly disposed of. This means that by the time this matter was moved before me, 1st Respondent had been interdicted and

retrained from holding himself out as the director, shareholder, representative or authorised agent of Applicant and claiming, demanding recovering or receiving any rental or monies from tenants of Hata-Butle Complex Roma.

[5] Moreover, 2nd Respondent had been interdicted and restrained from making any payments of monthly rentals to the 1st Respondent but required to pay same to Applicant. My brother Mathaba J then ordered that the matter shall be set down for hearing when the parties had exchanged papers.

ISSUES IN THIS APPLICATION

[6] On the 17th day of May 22, Applicant then set the matter down for the Unopposed Motion Roll of the 31st day of May 2022 and served the Respondents herein. It is apposite to mention that when the parties appeared before My Brother Mathaba J on the 08th day of April 2022, 1st Respondent had only challenged Part A (Interim reliefs) and begged leave of court to address the merits at a later stage. As has been shown, he was unsuccessful.

[7] As far as the 2nd respondent is concerned, it was deposed on its behalf that the only concern and reason of not paying rent was that there were conflicting letters in as far as the administration of Applicant is concerned. This therefore means that it is common cause that 2nd Respondent had a contractual sublease agreement with Applicant.

[8] On the 31st day of May 2022 when the matter was called, Advocate Mpaka stood up and introduced himself as appearing for the Applicant in this matter. On I then ordered that the matter be postponed to the following day (the 01st day of June) as I had realised that the matter may be quite involving and may take a lot of the time of the Motion Roll. It was then that Advocate Thoahlane

indicated that he was appearing for the 1st Respondent. He was then ordered to appear on the same day that the matter was being postponed to.

[9] The issues that stood for determination in this court therefore stood thus;

1. Application for postponement
2. Part B as reflected above

POSTPONEMENT

[10] On the 01st day of June 2022 Advocate Mpaka and Advocate Thoahlane appeared for Applicant and 1st Respondent respectively. There was no appearance for 3rd Respondent even though service was effected on it too. On this day Advocate Thoahlane had still not filed the affidavit on Part 2 of this Application. He therefore applied for postponement so that he could file condonation application for late filing of the affidavit. To this Advocate Mpaka vehemently objected.

[11] As has been shown, the parties had initially appeared before Mathaba J on the 08th April 2022. Advocate Thoahlane admitted that he even got a reminder from Advocate Mpaka to file. He said he could not file as he could not get hold of his client. However, he was served with the set-down for this matter on the 11th day of May 2022 (after the reminder for him to file). He still could not file. Moreover, on the day of the hearing (the motion day) he still did not file even a condonation application that he is asking this court to grant him a postponement to go and prepare. It looks like counsel was expecting to readily get the postponement without any challenge.

[12] It is trite that postponement is awarded per the discretion of the court, which discretion must be exercised judiciously (**Joshua v Joshua**).¹This court, per High Court Directive of 30 June 2005 duly adopted by the Court of Appeal on 20th October 2005, has also made it quite clear that postponements have to be kept in check lest they add fuel to the fire in the erosion of confidence in the courts. Lehohla CJ, as he then was said;

The delays in the operation of the law and consequent erosion of respect for the process of the law have many causes. One of these is the abuse of the privilege to be able to apply for and obtain postponement of legal proceedings²

[13] This matter was instituted as an urgent matter. When counsel for the 1st Responded first opposed this matter, he elected to attack the matter on the points of law only. He was unsuccessful. He still had ample time to address the merits but chose not to do so. One ends up wondering if he avoided to address the merits because he did not have any grounds to. Moreover, on the date that Mr. Thoahlane appeared before court, there was no serious reason why he could not file his Affidavit. He mentioned (from the bar) that his client could not be reached. This is the digital era. It cannot be that for close to two (2) months, his client could not be reached. Granted, this country's terrain may make it difficult to get to one place or the other in remote mountainous areas. However, due to its small size it is very easy to get to even the remotest area in one day. Moreover, one may be away from a cellular phone reachable area for some time but not for almost two months without accessing even a message through one application or the other e.g. WhatsApp. For this reason, therefore, the postponement is denied.

¹1961 (1) SA 455

²LAC(2005-2006) at 315

PART B

FACTS AND THEIR ANALYSIS

[14] It is worthy of note that when postponement was denied, Advocate Thoahlane requested to be excused and Advocate Mpaka was left alone to address the court. He (Advocate Mpaka) moved that his main focus and the issue for decision of this court was only Part B of his application as PART A had already been dealt with before My brother Mathaba J.

[15] While the history of the litigation concerning the ownership of Applicant is very complicated, to say the least, and is not necessarily settled, the recent history concerning the relationship of Mr. Stefen Carl Buys and 1st respondent and that of 2nd Respondent and Applicant is very much clear from the papers filed of record. The issue in fact in this case is not the ownership of Applicant per se rather the administration thereof. On one hand, Mr. Buys says he has authority to administer Applicant while 1st respondent seem to allege that he (1st Respondent) is the one who has the authority.

[16] 1st respondent did not necessarily challenge the assertions of Mr. Buys on their relationship but for a bare denial. 2nd respondent did not challenge that it was contracted to Applicant on a sub-lease basis. And finally, 3rd respondent did not appear at all let alone make any assertions. It is safe to conclude therefore that the evidence that remains is that of Mr. Buys and Mr. Chen Neng Quan for the 2nd Respondent.

[17] As has been shown, 1st Respondent's affidavit was for the preliminary issues only and he has failed to file any affidavit on the merits. Be that as it may, this court cannot ignore that affidavit. 1st respondent deposes that he is in fact, the rightful owner of Applicant and Mr. Buys was only authorised by him

to collect rent for him. The question that remains is when did he then start to collect rent on his own behalf or on behalf of Applicant? On the other hand, the version of Mr. Buys is that he (1st Respondent) had been collecting rent on his instruction. He goes further to show that all went well until the advent of COVID 19 pandemic when the restrictions on movement were imposed when 1st Respondent started not accounting for the rentals that he collected. When one looks at the letters directed to 2nd respondent from both Mr. Buys and Thoahlane legal Chambers (Annexure “B” and “C” respectively of 2nd Respondent’s Affidavit, it becomes clear that the fracas started around the COVID 19 pandemic. This is consistent with the evidence of Mr. Buys.

THE LAW

[18] Part B of Applicant’s prayers seek a declaratory order and an interdict among others. These are the two issues that the legal principles relating to them will be looked at.

INTERDICT

[19] The law as to interdict is now settled within the country as was formulated succinctly in **Setlogelo V Setlogelo**³ and same grounds have been cited with approval in a plethora of cases within the country. One of those cases that enunciated the principle well is **Jiao V Motebang and Another**⁴ wherein Maqutu J, as he then was, pointed out the difference between a final interdict and an interim one by citing therein the learned authors (Prest in the Law and Practice of Interdicts) and quoted thus;

Unlike an interim interdict which does not involve a final determination of the rights of the parties, a final interdict

³1914 AD 221

⁴[2008] LSHC 57

effects such a final determination of rights. *It is granted to secure a permanent cessation of an unlawful course of conduct or state of affairs* (My emphasis)

The learned Judge went on in that matter to reiterate the requirements as;

- a) a clear right,
- b) an infringement of a right and
- c) that there is no alternative remedy.

In the present matter, Applicant established that, as a company, it is the landlord of Hata-Butle Complex and that 2nd and 3rd respondent have entered into a sublease agreement and as a result were tenants. It is therefore applicant's clear right to collect rent therein. Immediately we reach a conclusion that 1st Respondent has not shown any authority that he is an employee or shareholder of Applicant, then a clear right has been established by Applicant. In fact, the issue then rests on whether 1st respondent has authority to act for Applicant. This, 1st Respondent has not shown but on the contrary, there is evidence that he does not have any authority to act on behalf of Applicant.

[20] Immediately a conclusion is reached that Applicant has established a clear right, the next step can then be to enquire into a question as to whether there was an infringement of a right. The evidence that indeed 1st Respondent had been at the least demanding the rent from the tenants at Hata-Butle Complex is not only gleaned from the affidavit of Mr. Buys but even from that of Mr. Cheng Neng Quan. Mr. Chen Neng Quan showed that he got a letter from 1st respondent demanding rent or that it be paid into his account. This is clear infringement of Applicant's right.

[21] Did applicant have an alternative remedy? The answer should surely be in the negative. If 1st Respondent continued with his act of presenting himself as the representative or shareholder of Applicant, and 2nd and 3rd Respondents continued to pay rent to him, irreparable harm was on the cards. Applicant would continue to or entirely lose rent due to it. Even if it could be argued for the Respondents that damages could remedy the harm, if the 2nd and 3rd Respondents are not interdicted, they will continue to pay rent to 1st Respondent and thereby depriving Applicant of rent due to it.

[22] Having concluded that all the elements of an interdict are available, it is safe to therefore interdict 2nd and 3rd Respondents from paying rent to any other person but only into Applicant's account.

[23] Once a conclusion is reached that this case is fit for an interdict, it follows that there are grounds upon which letters written by or on behalf of 1st Respondents are null and void.

THE ORDER

[23] On the basis of the preceding analysis and conclusion, I therefore order as follows:

1. 1st and 2nd Respondents must, jointly and severally, and within 7 days of service of this order upon them, account and report any such accounting for all amounts received by them from or in respect of the Applicant's complex, Hata-Butle.
2. 1st Respondent must repay the amount of M99, 000.00 to the Applicant being the amounts received by the 1st Respondent for the 2nd Respondent

in respect of monthly rentals for the periods of December 2021, January 2022 and February 2022.

3. The letters issued by or on behalf of 1st Respondents are declared *null and void ab initio*
4. 2nd and 3rd Respondents are herein interdicted and restrained from making any monthly payments of any nature or cause to any third party except to the Applicant or to withhold such payments due for rental or occupation of any area within the said complex while in occupation thereof from Applicant.
5. 1st Applicant to pay costs of this suit.

Moneuoa Kopo J

For Applicant: Adv. Mpaka

For First Respondent: Adv. Thoahlane