

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

**HELD AT MASERU**

**CCA/0045/2022**

In the matter between:

**EXECUTORS ESTATE LATE LEBAMANG  
JAMES MONAPHATHI**

**APPLICANT**

**AND**

**DUST BUSTERS (PTY) LTD  
NETWORK OF EARLY CHILDHOOD  
DEVELOPMENT OF LESOTHO  
SPARETRONICS (PTY) LTD  
COURT SHERIFF  
OFFICER COMMANDING  
PITSO GROUND POLICE  
ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**4<sup>TH</sup> RESPONDENT**

**5<sup>TH</sup> RESPONDENT**

**6<sup>TH</sup> RESPONDENT**

**7<sup>TH</sup> RESPONDENT**

**Neutral Citation:** Executors Estate Late Lebamang Monaphathi v Dust Buster  
(Pty) Ltd & Others [2022] LSHC 171 Comm. (18 AUGUST 2022)

**CORAM: MOKHESI J**

**HEARD: 27<sup>TH</sup> MAY 2022**

**DELIVERED: 18<sup>TH</sup> AUGUST 2022**

## SUMMARY

**LAW OF PROPERTY:** *Application for a tacid hypothec-The requirements thereof- Civil practice- how evidence which is adduced for the first time in reply should be dealt with- Unjust enrichment- Principles considered and applied.*

## ANNOTATIONS

### CASES:

*Lehlohonolo Mangoejane and Another v Seabata Mangoejane and Another C of A (CIV) 43/2017 (07 December 2018)*

*LNDC v Crayon and Wing on Garment (Pty) Ltd; Wing on Garment (Pty) Ltd v LNDC and Another (CIV/APN/39/99, CIV/APN/39/99 [1999] LSCA 21 (12 March 1999)*

*Makoala v Makoala (C of A (CIV) 04/09) [2009] LSCA 3 (09 April 2009)*

*Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA)*

*Mokhutle N.O v MJM (Pty) Ltd and Others LAC (2000 – 2004) 186*

*Mohaleroe v Lesotho Public Motor Transport Co. (Pty) Ltd and Another (C of A (CIV) 16/2010)*

*National Executive Committee of the Lesotho National Olympic Committee and Others v Morolong (C of A (CIV) NO. 26 of 2001) (NULL) [2002] LSHC 10 (12 April 2002).)*

*Plascon – Evans Paints v Van Riebeek Paints (Pty) Ltd 1984 (3) 623 (A)*

*Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)*

## **BOOKS**

Eiselen and Pienaar **Unjust Enrichment: A casebook 2<sup>nd</sup> ed. Butterworths**

## JUDGMENT

### [1] **Introduction**

This is an application for a tacid hypothec and other ancillary reliefs. The application was launched *ex parte* and on urgent basis. It was couched as follows:

*“1. Dispensing with the rules and forms of service of this Honourable Court on account of urgency of this matter*

*2. That a rule nisi be issued returnable on a date to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why:*

*(a) All movable assets presently within the Estate’s property shall not be attached in exercise of Applicant’s tacid hypothec;*

*(b) 1<sup>st</sup> Respondent shall not be interdicted and/or restrained from removing, disposing off or otherwise dealing with the said movable assets in any manner except by due process of law, pending finalisation of this application.*

*(c) 4<sup>th</sup> Respondent shall not be ordered to assess the value of the property so attached and remove it for storage, however, if it exceeds the sum of the Applicant’s tacid hypothec, the value of the Applicant’s tacid hypothec shall be removed for storage.*

*(d) 5<sup>th</sup> Respondent shall not provide 4<sup>th</sup> Respondent with any assistance and/or personnel necessary to effect the execution of prayers 2(a) and 2(b) above.*

3. Applicants shall not be authorised to sell 1<sup>st</sup> Respondent's assets presently within its premises at Sea-Point Maseru and realise the proceeds thereof in settlement of the rental arrears owed to amount of Two Hundred Thirty Eight Thousand Three Hundred and Twenty Maloti (M238,320.00) herein.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall not be ordered to disclose the contracts they entered into with the 1<sup>st</sup> Respondent and monies paid to the 1<sup>st</sup> Respondent as rent.

5. Any property belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent shall be released to them upon proof of ownership of such property and upon disclosure of contracts entered into with 1<sup>st</sup> Respondent and proof of payment of rentals to 1<sup>st</sup> Respondent;

6. 1<sup>st</sup> Respondent shall not be ordered to pay any money it received as rentals for subletting the property to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents without Applicants' knowledge and consent contrary to the sub-lease agreement.

7. That prayers 1, 2, 2(a), 2(b), 2(c) and 2(d) should operate with immediate effect as an interim order of this court.

*Alternatively*

10. The 1<sup>st</sup> Respondent shall not be directed to pay the amount of Two Hundred Thirty Eight Thousand and Three Hundred and Twenty Maloti (M238, 320.00) being the amount owed to the Applicants.

11. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall not be ordered to disclose the contracts entered into with 1<sup>st</sup> Respondent and rentals paid.

*12. Any property belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall be released to them upon proof of ownership of such property and upon disclosure of contracts entered into with 1<sup>st</sup> Respondent and proof of payment of rentals to 1<sup>st</sup> Respondent.*

*13. 1<sup>st</sup> Respondent shall not be directed to pay all the money it received as rentals for subletting the property to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents without the knowledge and consent of the Applicants contrary to the sub-lease agreement.*

*14. Costs of suit.”*

[2] On the 5 May 2022 the Duty-Judge granted the interim reliefs sought and after the pleadings were closed, the matter was heard on the 27 May 2022. After hearing arguments, judgment was reserved.

[3] **Factual Background**

In April 2019, the Executors of estate Monaphathi and 1<sup>st</sup> Respondent, represented by Ms Paballo Mokoqo entered into a written sublease agreement. The agreement was duly signed on the 09 April 2019. Clause 13 of the agreement stipulates that it commences on the 01 May 2019. The agreement further provides that rental payable shall be M6,000.00 per month subject of 10% escalation per annum and that the 1<sup>st</sup> Respondent shall not sublet the property without the consent of the Executors.

[4] **Respective Parties' Cases**

(i) **Applicants Case**

It is the applicant's case that the 1<sup>st</sup> respondent failed to pay rentals since the coming into operation of the agreement. It is the evidence of Mrs Moroesi Tau-Thabane (the Executor) that on the 14 March 2022 she had a telephonic conversation with the Chief Executive Officer (CEO) of the 1<sup>st</sup> respondent Ms Paballo Mokoqo in which she demanded payment of rentals and reminded her that the agreement was terminating at the end of April 2022. Ms Mokoqo however asserted that the agreement would be terminating on the 01 December 2022 as per what she termed the proposed amendment to the main agreement which was never signed by the parties.

[5] Regarding the said amendment, it would appear that on the 21 February 2020, the Executor had written a letter to Ms Mokoqo in which she rejected the terms of the proposed amendment to main sublease agreement. It is the applicant's evidence further that on 16 March 2022, Ms Mokoqo requested, through email, to be provided with invoices so as to enable her to pay rentals, this notwithstanding the facts that rental payable has been provided for in the agreement and was known to her. The Executor obliged and sent the requested invoices covering the period from 2019 – 2022. It is the applicant's case that the 1<sup>st</sup> respondent has never paid rentals despite demands.

[6] On the issue of improvements the 1<sup>st</sup> respondent avers that she made improvements on the rented property and therefore, the amount expended on the said improvements should be set off against payment of rentals. The applicant avers that the 1<sup>st</sup> respondent failed to provide proof of such improvements. It is further the applicant's case that the 1<sup>st</sup> respondent

breached clause 9 of the agreement by subletting the premises to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent without her consent thereby unjustly enriching itself.

[7] (ii) **1<sup>st</sup> Respondent's Case**

Ms Mokoqo deposed to answering affidavit on behalf of the 1<sup>st</sup> respondent and before pleading over, raised, three of the so-called points in *limine*, namely; lack of urgency and abuse of *ex parte* procedure, disputes of fact and material non-disclosure. On the merits, the deponent admits that on the 9 April 2019 the parties entered into a written sublease agreement, she however, aver that subsequent to conclusion of the main agreement, a verbal agreement (Annexure 'DB1') was concluded which stipulated that the commencement date will be 01 December 2019 because renovations to the premises took longer than anticipated. This verbal agreement was concluded with the son of the late Monaphathi, one Mr Lebohang Monaphathi. It should, however, be stated that annexure "DB1" which is alleged to be evidence of this verbal agreement does not bear the deponent out because it was not signed by the parties.

[8] On the issue of payment of rentals, the deponent concedes that rentals have not been paid. She says the reason for non-payment was because when the parties concluded the agreement the premises had many defects as they laid unused for five to seven years. She, therefore, had to make some renovations. She concedes that she was asked to produce receipts of whatever expenditure she incurred so that it could be offset against the rent. She concedes further that she only sent to the Executors, in March 2022, what she calls "statement of rent" annexure "DB2". It should be stated that 'DB2' is not receipts of expenditure incurred, but the spreadsheet of what



she says is her expenditure. On the issue of subletting the premises, the deponent denied and put the applicant to the proof.

[9] In reply, the applicant denies that there was ever any oral agreement concluded between the parties because the agreement stipulates that any amendment should be reduced into writing. The Executors deny any knowledge of the oral agreement concluded between the 1<sup>st</sup> respondent and Mr Lebohang Monaphathi. It is in reply that the applicant annexed two contracts termed as Co-working Space concluded between the 1<sup>st</sup> respondent, 2<sup>nd</sup> and 3<sup>rd</sup> respondent in terms of which the so-called membership fee of M5,500.00 and M5,000.00 per month respectively was payable. The agreement with the 2<sup>nd</sup> respondent was signed on 01 January 2021 and was expected to end on 30 June 2022. The agreement with the 3<sup>rd</sup> respondent was signed on the 07 May 2021. These annexures were subject of much spirited debate with the 1<sup>st</sup> respondent's counsel urging the court to excise them from the pleadings as the applicant was making out its case in reply. I return to this aspect later in the judgment.

[10] **Issues for determination**

- (i) Points in *limine* raised;
- (ii) Whether the applicant impermissibly adduced new evidence in reply;
- (iii) The merits of the case.

[11] (i) **Points in *limine* raised**

The preliminary points raised should be dismissed as lacking merit: Tacid hypothec by its nature relates to movable property and if the defaulting respondent gets wind of the contemplated action, there is a real possibility

that by the time the matter is finally heard those movables could be removed from the premises thereby rendering the applicant's claim worthless. It is therefore on this basis that the court granted interim reliefs *ex parte*. As regards disputes of fact and material non-disclosure. The apex court in **Makoala v Makoala (C of A (CIV) 04/09) [2009] LSCA 3 (09 April 2009)** more than a decade ago made it plain that these two issues are not proper points in *limine* (at para.10) but counsel continue to raise them as such, nonetheless.

[12] (ii) **Whether the applicant impermissibly introduced a new matter in reply**

The 1<sup>st</sup> respondent's contention in this regard relates to Annexures "Es9", which are the contracts entered into between the Co-working space (Trading as Dust Busters (Pty) Ltd). These annexures were introduced for purposes of showing that the 1<sup>st</sup> respondent has sublet the property to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents after being called upon by the 1<sup>st</sup> respondent in its answering affidavit to produce proof that it had sublet the property to 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Before I deal with the factual scenario it is apposite that the legal principles applicable in the present situation are re-stated.

[13] Affidavits constitutes both the pleadings and evidence, and therefore the party's case must be made out in them from (**Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D**). The court is only confined to determining issues raised therein and should not have resort to extraneous issues and unproved facts. A litigant will not be allowed, in view of this principle, to make out its case in reply (**National Executive Committee of the Lesotho National Olympic Committee and**

**Others v Morolong (C of A (CIV) NO. 26 of 2001) (NULL) [2002] LSHC 10 (12 April 2002).)**

[14] Regarding the new matter introduced for the first time in reply, the approach is the following, as articulated in **Mohaleroe v Lesotho Public Motor Transport Co. (Pty) Ltd and Another (C of A (CIV) 16/2010)**, when the court said:

*“28. The objection that the new facts had been wrongly permitted in the replying affidavit is also without substance .... [T]he rule that new matter in replying affidavits must be struck out is ‘not a law of Medes and Persians.’ The court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent an opportunity to deal with it in a second set of affidavits.”* (see also: **Lehlohonolo Mangoejane and Another v Seabata Mangoejane and Another C of A (CIV) 43/2017 (07 December 2018) at paras. 20 – 21**

[15] This being a motion proceedings, should any dispute of fact arise, its resolution should be based on the well-known case of **Plascon – Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) 623 (A) at 634 E – 635 C**. This principle was aptly stated in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at para. 12** where the court said:

*“[12] Recognising that the truth almost always lies beyond mere linguistic determination, the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide*

is *dispute of fact or are so far-fetched or clearly untenable that the court justified in rejecting them merely on the papers:”*

[16] Reverting to the facts of the case, it should be recalled that among the reliefs sought by the applicant, was one directed at the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to disclose the contracts they had concluded with the 1<sup>st</sup> respondent. Clearly, the applicant was not in possession of the said contracts when the application was lodged, but she did was to make out a case in the founding affidavit that the 1<sup>st</sup> respondent is unjustly enriching itself by subletting the premises to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents contrary to clause 9 of the sublease agreement. In response, the 1<sup>st</sup> respondent denied subletting the premises to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and called upon the applicant to provide proof. After being served with the application, the latter respondents provided the applicant’s counsel with the contracts they had with the 1<sup>st</sup> respondent. These are the contracts the applicants annexed to the replying affidavits as proof. The 1<sup>st</sup> respondent did not apply to be allowed file a fourth set of affidavit to deal with this aspect, but merely contended itself with raising the issue in its heads of argument. The 1<sup>st</sup> respondent’s disinterest in applying for leave to file the fourth set of affidavit is hardly surprising because at paragraph eight (8) of its answering affidavit the deponent aver as follows:

“AD PARA 6 THEREOF 6 THEREOF

*Contents herein are denied and the applicant is put to the proof therein. The use of premises was agreed upon by Mr Lebohang Monaphathi and duly reduced into an amended agreement to indicate what, the premises will be used for, including among others for co-working space. It is vehemently denied that I sub-let the premises and I deny I*

*enriched myself in the circumstances. I wish to refer this honourable court to clause 4 of the amendment.*

[17] What the deponent above is saying is consistent with the annexure “Es9” which depicts that the 1<sup>st</sup> respondent signed with the 2<sup>nd</sup> and 3<sup>rd</sup> respondent in what is termed co-working space arrangement in terms of which monies were paid monthly to the 1<sup>st</sup> respondent by the latter for being provided with the working space on the subleased property. In the exercise of my discretion, annexure “Es9” should remain on the applicant’s replying affidavit, as it does not constitute new matter but proof of what has been alleged in the founding affidavit. These agreements are consistent with the 1<sup>st</sup> respondent’s line of argument that it was per the amended agreement that it was made known to the applicant that the premises will be used as co-working space.

[18] **The merits of the case**

The trite principle our law is that the landlord has a tacit hypothec over the movable property brought on to the subleased property. All that the landlord has to prove is that the sublessee is in arrears with his/her/its rental payment and that the movable property is within the rented premises (**LNDC v Crayon and Wing on Garment (Pty) Ltd; Wing on Garment (Pty) Ltd v LNDC and Another (CIV/APN/39/99, CIV/APN/39/99 [1999] LSCA 21 (12 March 1999)**). In this case all these requirements have been satisfied. The only defence that the 1<sup>st</sup> respondent has is that it was agreed between the parties that for the reason that the building stayed derelict for a period of five to seven years, the 1<sup>st</sup> respondent should do renovations and improvements and must produce receipts proving this expenditure so that it can be offset

against rental. Ms Mokoqo avers that Mr Lebohang Monaphathi did not have an issue with non-payment of rental as the agreement was concluded with him and that he knew it would take a long time to complete renovating the renovations. Given that the 1<sup>st</sup> respondent had initially concluded an agreement with the Executors, it makes no sense that regarding such crucial issue as the amendment to the contract and non-payment of rentals, she would find it appropriate to conclude a separate agreement with Mr Lebohang Monaphathi. Mr Monaphathi had no *locus standi* whatsoever to conclude any agreement with the 1<sup>st</sup> respondent while the estate is under administration. It follows that the version of the 1<sup>st</sup> respondent should be rejected as being implausible and clearly false as to be rejected on papers. To put to bed the notion that the 1<sup>st</sup> respondent could not validly conclude an agreement with Mr Lebohang Monaphathi as the heir, behind the back of the Executors, the following remarks are authoritative:

*“whatever leases appellant purported to enter into with Adams and/or Bus Stop were concluded at a time before his appointment as executor of the deceased’s estate. His only interest in the property was as heir. However in that capacity he had no right to enter into leases in respect of the property. Although the property vests in an heir on the death of the deceased, the heir does not acquire dominium in it. He merely had a right to claim the property from the executor when the latter is appointed. See Estate Smith v Estate Follett 1942 AD 364 at 367; Commissioner for Inland Revenue v Estate Crewe 1943 AD 656 at 692. Until the estate is wound up after the appointment of an executor and until he receives dominium in the property, an heir has no control over it. Appellant accordingly had no interest in protecting the alleged right of occupation of either Adams or Bus Stop which he had purported to grant to them prior to his appointment as executor and at a time when,*

*as heir, dominium in the property had not yet passed to him...*  
**(Mokhutle N.O v MJM (Pty) Ltd and Others LAC (2000 – 2004)  
186 at 188 J – 189 D.)**

**[19] Breach of Sublease Agreement**

In terms of clause 9 of the main agreement between the applicant and 1<sup>st</sup> respondent, the latter is prohibited from ceding or assigning the sublease or subletting all or any portion of the property, without written consent of the sublessor, which consent shall not be unreasonably be withheld. It is the applicant's contention that the 1<sup>st</sup> respondent breached clause 9 of the contract by subletting the premises to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. As already stated, the 1<sup>st</sup> respondent denies subletting the premises to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The deponent to the answering affidavit however makes a claim that she had an amended agreement with Mr Lebohang Monaphathi in terms of which it was agreed that the premises would be used as co-working space. This concession that the premises are used as co-working following an agreement with Mr Monaphathi (though it should be repeated an unlawful agreement) is consistent with annexure "Es9" which are the agreements concluded between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent in terms of which the latter would be allowed to use the space for a monthly payment.

**[20]** Although the agreement is structured on characterised as being based on membership it is a sublease agreement. Under clause 9 the nature of the agreement is stated to be:

*"9. (a) Nature of the Agreement; Relationship of the parties. Your agreement with us is the commercial equivalent of an agreement for accommodation in a hotel. We are giving you the right to share with us*

*the use of the office space so that we can provide the services to you. The whole of the premises and office space remains in our possession and control. Notwithstanding anything in this Agreement to the contrary, you and we agree that our relationship is not that of landlord-tenant or lessor-lessee and this Agree in no way shall be construed as to grant you or any member any title....”*

[21] In terms of clause 2 titled “The Benefits of Members” lists the types of “services” the members are to enjoy upon joining co-working space arrangement. The first and the over-arching “service” is “non-exclusive access to and use of the office space.” Other ‘services’ includes amenities of the office space such as access to internet, electricity etc. But as already said, the use of office space comes at a monthly cost which is embodied in the membership agreement. To me, this arrangement, is a sublease by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, of the space in question. The arrangement satisfies all the requirements of a sublease agreement, namely;

- a) An undertaking by the sublessor to give the 2<sup>nd</sup> and 3<sup>rd</sup> respondents the use and enjoyment of the property.
- b) There is an agreement between the parties that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent will use and enjoy property temporarily.
- c) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents, in return for using and enjoying the office space, undertook to pay a monthly amount, though it is not termed rent, but it is actually rent.



In the light of this factual conspectus, my considered view is that the 1<sup>st</sup> respondent breached the terms of the contract.

[22] **Unjust enrichment**

In order to succeed in a claim for unjust enrichment, the applicant has to satisfy the following requirements: (i) the respondent must have been enriched and (ii) the applicant should have been impoverished by the respondent's enrichment and lastly, (iii) the enrichment must be without a legal cause (unjustified). (see: Eiselen and Pienaar **Unjust Enrichment: A casebook 2<sup>nd</sup> ed. Butterworths**).

[23] In the present I am in no doubt that the 1<sup>st</sup> respondent has been enriched at the expense of the applicant. The money which went into the coffers of the 1<sup>st</sup> respondent should have gone to the applicant. The sublease agreement prohibited the subletting of the premises unless consent had been sought, but in this case that did not happen, and so there was no just cause for the enrichment of the 1<sup>st</sup> respondent at the expense of the applicant.

[24] In the result the following orders are made:

a) The rule *nisi* is confirmed as prayed in terms of prayers 2, 3, 4, 5 and 6 of the Notice of Motion.

b) The applicants are awarded the costs of suit.

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**MOKHESI J**

**For the Applicants: Adv. U. J Motsohi instructed by Mofolo, Tau-Thabane & Co. Attorneys**

**For the 1<sup>st</sup> respondent: Adv. Kao-Theoha instructed by K. D Mabulu Attorneys**

**For the 2<sup>nd</sup> to 6<sup>th</sup> Respondents: No appearance**