

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Court Division)**

**HELD AT MASERU**

**CCA/0053/2021**

In the matter between:

**HA SEOTSANYANA (PTY) LTD**

**APPLICANT**

And

**LITJOTJELA MALL (PTY) LTD**

**RESPONDENT**

**Neutral citation:** Ha Seotsanyana (Pty) Ltd v Litjotjela Mall (Pty) Ltd [2023]  
LSHC 42 COM (28<sup>th</sup> February, 2023)

**CORAM:** MATHABA J  
**Heard On:** 7<sup>th</sup> November, 2022  
**Delivered On:** 28<sup>th</sup> February, 2023

**SUMMARY**

*Interdict – To restrain the respondent from interfering with applicant’s possession of certain land – Applicant relying on unregistered sub – lease agreement and is asserting a right of lien as a bona fide occupier – Long term unregistered sub - lease agreement null and void and cannot be a source of rights – Applicant failing to disclose quantum of alleged enrichment or increase in the value of property and evidence of impoverishment – A claim for lien not substantiated –*

*Applicant's possession interfered with – Requirements of interdict proved - Respondent restrained from taking possession of the premises unless it is by due process of law.*

## **ANNOTATIONS:**

### **Statutes**

Deeds Registry Act No.12 of 1967

Land Act No.17 of 1979

### **Cited Cases**

#### **Lesotho**

Attorney General & Another v. Swissbrough Diamonds Mines (Pty) Ltd & Others  
LLR & LB 1995 – 1996 173

C & S Properties (Pty) Ltd v. Dr. Mamphono Khaketla (C of A (CIV) 64/2011  
[2012] LSCA 26 (27 April 2012)

Constituency Committee BNP Mafeteng and Others v. Issa C of A (CIV) 16 of  
2011 [2011] LSCA 24 (21 October 2011)

Joy To The World v. Malefane LAC (1995 – 1999) 313

Joy To The World v. Malefane and Others C of A (CIV) 16 of 2013 [2013] LSCA  
17 (18 October 2013)

Lehlohonolo Mangoejane and One v. Seabata Mangoejane C of A (CIV) 43 of  
2017 [2018] LSCA 15 (07 December 2018)

Leloli Trading (Pty) Ltd v. Mafeteng District Council [2022] LSCH 11 COM (9  
February 2022)

Makototo and Another v. Lesotho Development and Construction (Pty) Ltd C of A  
(CIV) 57/2013 [2014] LSCA 28 (24 October 2014)

Molomo Filling Station and Another v. Mendi Group (Pty) Ltd and Others C of A

(CIV) No.83/2019

Nthoateng Khitlone & others v. Botanical Oils (Pty) Ltd & others 2022] LSHC 166 Comm. (18 August 2022)

Taka v. Pheko C of A (CIV) 59 of 2015 [2016] LSCA 13 (29 April 2016)

### **South Africa**

Adendorffs Boerderye v. Shabalala and others (997/15) [2017] ZASCA 37 929 March 2017)

Astralita Estates (Pty) Ltd v. Rix 1984 (1) SA 500 (C)

Boshoga and Another v. TJ Mmakolo and Others (82446/2016) [2018] ZAGPPHC 656 (7 March 2018)

Eriksens Motors (Welkom) Pty Ltd v. Protea Motors (Warrenton) 1973 (3) SA 685 (A)

Geiger Enterprise (Pty) Ltd v. Crestar Printers & Publishers (Pty) Ltd 26037/2021) [2022] ZAGPPHC 275 (21 April 2022)

Knuttel N.O and Others v. Bhana and Others (38683/2020) [2021] ZAGP JHC 874; [2022] 2 ALL SA 201 (GJ) (26 August 2021)

Kudu Granite Operations (Pty) Ltd v. Caterna LTD 2003 (5) SA 193 MN v. AJ 2013 (3) SA 26

Outdoor Network Limited and Another v. The Passenger Rail Agency of South Africa (2013/26064) [2014] ZAGPJHC 271 (30 May 2014)

Rekdurum (Pty) Ltd v. Weider Gym Althlone (Pty) Ltd 1997 (1) SA 646 (C)

Rhooide v. De Kock 2013 (3) SA 123

Rubin v. Botha 1911 AD 568

Setlogelo v. Setlogelo 1914 AD 221

## JUDGMENT

### INTRODUCTION:

[1] This case is about a challenge to termination of a sublease agreement. The controversy arises from the letter dated the 29<sup>th</sup> June 2021 titled notice of termination of sublease agreement. The letter is addressed to the applicant by the respondent. The sublease agreement relates to business premises at Litjotjela Mall on Plot No 23123 – 214, situate at Seretse Khama Road, Maputsoe in the district of Leribe. The dispute centres around portion B of the premises.

[2] On 7<sup>th</sup> July 2021 my brother *Makara J* granted interim interdict restraining the respondent from interfering with the applicant and its tenants on portion B of the premises pending finalisation of this matter.

[3] The final relief which the applicant seeks is threefold. Firstly, an order that the letter of the 29<sup>th</sup> June 2021 is unlawful. Secondly, a two-pronged relief for an order restraining the respondent from terminating and interfering with its possession of portion B of the premises until it would have been compensated for the market value of the improvements effected on the premises. The relevant prayer consolidates a relief for interdict as well as being an assertion of enrichment

lien. Thirdly, an order directing the respondent or its agents to forthwith continue with the process of registration of the sublease agreement relating to the premises.

**BACKGROUND FACTS:**

[4] The applicant in this matter, Ha Seotsanyana (Pty) Ltd, ("*Ha Seotsanyana*"), is a company registered in terms of the laws of Lesotho having its place of business at Mapoteng in the district of Berea. It is pursuing this litigation through its director, Mr. Jan Mahomed Suleman ("*Suleman*"). The respondent, Litjotjela Mall (Pty) Ltd, ("*Litjotjela*") is a company registered in terms of the laws of Lesotho and having its place of business at Maputsoe in the district of Leribe. It is opposing the application through its director and company secretary, Mr. Joang Felix Molapo ("*Molapo*").

[5] I proceed to set out the salient facts relevant to this application. On 1<sup>st</sup> June 2013, at Maputsoe, Ha Seotsanyana in its capacity as the sub lessee entered into a written sublease agreement ("*the agreement*") with Litjotlela Mall, as the sub lessor in respect of a portion of the premises.

[6] There is serious contestation regarding duration of the agreement as a result of which each party has filed of record a copy of the agreement it relies on. Except for the duration, all other clauses of the agreement are identical. I therefore

deem it apposite at this stage to quote the clauses which might have a bearing in the consideration of this application.

“2. **LEASE PERIOD**

2.1...

2.3 The renewal period will be automatic unless either party gives notice in writing of its intention not to renew.

10. **REPAIRS AND ALTERATION – LESSEE:**

The lessee shall: -

- a) Not make any structural alterations to the buildings or any part there of without the prior written consent of the lessor.
- b) At own cost maintain interior of the premises, as well as all electrical, gas drainage and sanitary works in the premises, in good order and condition, and to this end shall (amongst other things) from time to time as required replace electric light, bulbs, starters, ballasts, incandescent and fluorescent bulbs;
- c) Use its best endeavours to prevent any blockage of any sewage or water pipes or drains used in connection with the premises and at own cost remove any such obstructions or blockage which might occur;
- d) Not change or interfere with the electrical installation as [at] the date of signature of this contract, without written consent of the lessor.

In summary, the lessee shall be obliged to maintain the premises in the same conditions and in the same state of repairs as at the date of first occupation, and shall at the expiration of the [agreement] restore the premises to the lessor in such condition, reasonable wear and tear alone excepted.

...

14. **REPAIRS AND ALTERATIONS – LESSOR:**

...

14.1 No alteration or variation hereof shall be of any force of effect unless it is recorded in writing and signed by both the lessor and lessee.

15. **ONLY CONTRACT:**

The parties to this agreement will only be governed by this agreement and no other.”

[7] Ha Seotsanyana took occupation of the premises in 2013. From June to December 2013 it developed Portion B of the premises by constructing a filling station, seven medium shops and office at the estimated costs of M3.5 Million. It runs the filling station and has seven tenants on the premises from whom it collects monthly rentals. It in turn pays its monthly rentals to the respondent as per the agreement.

[8] The trouble seems to have brewed in May 2021 when management of Litjotjela changed and Molapo became in charge of its daily operations. He reviewed the agreements between Litjotjela and its tenants. On 22<sup>nd</sup> June 2021 he wrote a letter to Suleman requesting the current agreement in respect of the premises that Ha Seotsanyana was occupying. This was following his discovery that of the 18 tenants, 15, including Ha Seotsanyana, did not have current agreements. I reproduce the relevant parts of the letter below:

**“Re: Lease on Premises at Litjotjela Mall Maputsoe**

On the 4<sup>th</sup> June 2021 we delivered a letter to you where we made you aware that Litjotjela Mall Pty Ltd is now under new management.

During a recent review of our tenant documents we were unable to locate a current agreement between yourself and Litjotjela Mall for the location you presently occupy. If such an agreement does exist could you kindly make it available to us for the purposes of updating our records. If such an agreement does not exist, then as per the terms of the previous agreement which lapsed in 2018 your tenure is now on a month to month

basis and we are liberty to make potential tenants aware of the availability of the location.

We would appreciate if you could make it (*sic*) the contract available to us before close of business on Friday 25 June 2021.

We consider you prized and valued tenant and look forward to continuing a mutually beneficial relationship.

I look forward to your response.”

[9] Suleman subsequently provided Molapo a copy of the agreement. Molapo reacted with the impugned letter dated the 29<sup>th</sup> June 2021 categorically querying the copy on the ground that the document was altered. The letter reads as follows:

**“Re: Notice of Termination of Sub Lease Agreement**

Dear Sir

In my letter of the 22 June 2021, I requested that you make available to us a copy of the **current** agreement between yourselves and Litjotjela Mall for the property you are presently sub-leasing from us. The document that you delivered to our offices on the 23 June 2021 has been altered from its agreed and original form and therefore does not constitute a binding or legal agreement between our two parties.

I had expected that, based on our previous communication, in the absence of a current and valid agreement you would have come forward to discuss a possible new agreement. The decision to alter the old contract is most unfortunate and a clear breach of trust.

I therefore wish to formally notify you that at present there is no agreement between us and that we have resolved as per Section 2.3 to not extend the 01 June 2013 agreement. As such we are now operating on a month-to-month basis and status can be determined on 3 months’ written notice by either party.

Commencing the 15 July 2021, we intend to approach the sub-lessees (the tenants currently renting from you) for the purpose of ascertaining their future intentions and establishing new contractual arrangements



with them if necessary.

I trust you will find the above in order.”

**THE NATURE OF THE DISPUTE:**

[10] The applicant contends that the respondent has interfered with its possession of the premises by its letter of the 29<sup>th</sup> June 2021. Further that the respondent’s two agents who refused to disclose their names approached its tenants on the 5<sup>th</sup> June 2021 to inform them that their monthly rental for June 2021 must be paid directly to the respondent. As a result, four of the tenants have already indicated that they will vacate the premises if the issue is not resolved by the 8<sup>th</sup> July 2021. Suleman says that his effort to intervene were all in vain as the agents told him that if he did not cooperate the filling station would be locked.

[11] The applicant ‘s case is that it has a clear right in respect of portion B of the premises and is entitled to retain possession thereof until the expiration of the agreement or until such time that the applicant would have been compensated for improvements it effected in good faith on portion B of the premises. It relies on being both the bona fide occupier and developer of Portion B of the premises as well as on the agreement which it claims has not lapsed as its duration is 15 years.

[12] Suleman contends that though there is no provision in the agreement relevant to the improvements in issue, the developments were a driving force

behind the conclusion of the agreement and that they were sanctioned by respondent's late company secretary, Mr. Thabo Chakela, ("*Chakela*"), pending registration of the agreement. The nub of the argument is that the applicant developed and occupied the premises with the understanding that the agreement was going to be registered and that it was going to enjoy the use and occupation of the developments for 15 years.

[13] The respondent does not deny the existence of the sublease agreement or possession of the premises by the applicant. Neither does it deny the developments effected by the applicant and the estimated costs of M3.5 Million associated with the development.

[14] It is rather resisting the claim on the ground that the agreement was for 5 years and not 15 years. Molapo accuses Ha Seotsanyana of having inserted the figure 1 before the figure 5 after the agreement was signed, thus illicitly changing the duration from 5 to 15 years. Consequently, so goes the argument, the agreement has lapsed, as a result of which the respondent is under no obligation to register it. Again, the fact that the agreement has not been registered bars the applicant from seeking to enforce it.

[15] Secondly, Molapo denies that the parties envisaged the applicant to develop the premises when the agreement was concluded. He asserts that the

applicant was expected to use existing infrastructure as the premises were already operating as a petrol and fuel depot. The basis of his denial is that the agreement not only omits any requirement to develop the property, but that it forbade any structural alterations to the premises without prior written consent of the respondent. Accordingly, Ha Seotsanyana has no contractually founded right to recoup expenses in respect of developments it effected on the premises on its own volition contrary to clause 10 of the agreement.

[16] Thirdly, Molapo denies that the respondent sent its agents to harass the tenants as alleged. He contends that the respondent has not had any interaction with the tenants at all regarding the status of Ha Seotsanyana's tenancy agreement. If I understand the basis of the denial well, it is that, besides himself, Litjotjela has only two employees who are known to Suleman and the tenants. As a consequence, if Suleman is telling the truth, he should have specified who of these employees harassed the tenants. Besides, the respondent had already set itself the deadline of the 15<sup>th</sup> July 2021 to approach the tenants. Thus, it could not have contemplated the rentals for June 2021 or changed tact by engaging with the tenants with whom it does not have a relationship.

**ISSUES:**

[17] There are three issues emerging from the papers. Firstly, the validity and enforceability of the agreement as well as whether the applicant does in fact have a lien. I will also consider if the impugned letter and the alleged events of the 5<sup>th</sup> June 2021 warrant interdict.

### **THE LEGAL STATUS OF THE AGREEMENT:**

[18] It is common cause that the agreement was never registered hence Litjotjela's argument that it cannot be enforced. In the heads of argument filed for Litjotjela, the legality of agreement is attacked on two fronts. Firstly, on the ground that consent for the agreement was not acquired contrary to section 35 and 36 of the Land Act 1979. Secondly, that the agreement was not registered contrary to section 24 of the Deeds Registry Act 1967.

[19] Failure to register the agreement has specifically been pleaded, albeit without specific reference to the Deeds Registry Act 1967. Conversely, failure to obtain consent has not been pleaded as a defence. However, this issue is derivable and cognisable from applicant's own papers. Thus, it would still be permissible to consider it on the strength of **Adendorffs Boerderye v. Shabalala and others**<sup>1</sup>. Be that as it may, of the view I take of the matter, it is not necessary to base my

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<sup>1</sup> (997/15) [2017] ZASCA 37 929 March 2017) para 24

decision on the Land Act.

[20] I therefore proceed to consider the significance of failure to register the agreement. Section 24 of the Deeds Registry Act 1967 provides as follows:

- “(1) Every agreement of lease or sub-lease of rights in or to immovable property which when entered into was for a period of not less than three years, or for the natural life of the lessee, or any other person mentioned in the lease or sub-lease, or which is renewable from time to time for periods which together with the first period amount in all to not less than three years, shall be registered in the deeds registry.
- (2) Such registration shall only be effected after the proper authority has consented in writing to the lessee occupying and using the land to which the lease refers, which consent shall not be unreasonably withheld.
- (3) Every agreement of lease or sub-lease of rights in or to immovable property and to which the proper authority has consented in writing shall be lodged for registration in the deeds registry within three months of the granting of such consent.
- (4) Every agreement of lease or sub-lease of rights in or to immovable property and to which the proper authority consented in writing prior to the commencement of this Act shall be lodged for registration in the deeds registry within three months of the date of commencement of this Act.
- (5) Failure to lodge such lease or sub-lease for registration within the prescribed period or within such extended period as the court may allow, shall render the agreement of lease or sub-lease null and void and of no force and effect.
- (6) Any agreement of lease or sub-lease of rights in or to immovable property executed, attested or registered contrary to the provisions of this section shall be null and void and of no force and effect.”

[21] The scheme of section 24 requires a sublease agreement for a period of not less than three years to be registered. As it was eloquently stated in **C & S Properties (Pty) Ltd v. Dr. Mamphono Khaketla**<sup>2</sup>, the process of subletting involves both an agreement which confers the rights and registration in order to transfer those rights.

[22] The Legislature has used the word “*shall*” in relation to the requirement to register a lease or sublease. Tellingly, failure to register renders a lease or sublease null and void and of no force and effect. Accordingly, it is pellucidly clear that the requirement to register a lease or sublease is peremptory and not just directory. The guidelines propounded by *Wessels JA* in **Sutter v. Scheepers**<sup>3</sup> lead me to a conclusion that the provisions of section 24 are peremptory and call for strict compliance.

[23] *Damaseb AJA* said the following in **Maphathe v. I Kuper Lesotho**<sup>4</sup> regarding section 24 of the Deed Registry Act as amended by section 94 of the Land Act 1997:

“[3] The effect of these provisions is that a lessor of land can only validly sublease land to another if it is registered in the deeds registry, consented to by a ‘proper authority’ and ‘lodged for registration in the deeds registry within three months of the granting of such consent’. The Act specifically provides that a failure to lodge such lease for registration

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<sup>2</sup> (C of A (CIV) 64/2011 [2012] LSCA 26 (27 April 2012) para 18

<sup>3</sup> 1932 AD 165 at 173 - 4

<sup>4</sup> (C of A (CIV) 5/13) [2019] LSCA 30 (31 May 2019) para 3

within the stated time or such extended time as may be ordered by a court, or if executed contrary to the provisions of the section, ‘shall be null and void and of no force and effect’.

[24] In **Molomo Filling Station and Another v. Mendi Group (Pty) Ltd and Others**<sup>5</sup> the Court of Appeal found unregistered long-term sublease agreement invalid and unenforceable for non-compliance with section 24(1). Besides, regard being had to section 24(2), occupation and use of land must be preceded by consent from proper authority. I could not agree more with my brother *Mokhesi J* ‘s remarks in **Nthoateng Khitione & others v. Botanical Oils (Pty) Ltd & others**<sup>6</sup> that:

“[19] What can be distilled from the above decisions is that inasmuch as the contract of sublease between the parties is binding, in order to transfer the rights which flow from the sublease to the sublessee, the formalities prescribed in section 24 of the Act must be followed. As part of the formalities for transference of the rights which flow from the sublease, consent of proper authority is required. The purpose of this consent as garnered from the provisions of section 24 (2) is to give the sublessee permission to occupy and use the land which is subject of the sublease agreement. Without consent from proper authority, the sublessee cannot have a right to occupy and use the subleased property. No legal title to the subleased property vests in the sublessee and an agreement between the parties by means of which a sublessee occupies and uses subleased property without consent of proper authority is invalid and ineffectual.

[20] In the present matter the parties did exactly that. They concluded a sublease agreement and the 1<sup>st</sup> respondent took occupation and commenced operations without the sublease agreements being registered. It is difficult to understand the purpose which will be served by seeking consent when the 1<sup>st</sup> respondent and the applicants have

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<sup>5</sup> C of A (CIV) No.83/2019 para 30 - 31

<sup>6</sup> [2022] LSHC 166 Comm. (18 August 2022)

arrogated to themselves the authority to permit usage and occupation, outside of the law. the power to authorise usage and occupation of subleased property vests in 2<sup>nd</sup> respondent.”

[25] The agreement was never lodged for registration as it should have. In fact, when the dispute arose, the period of three years had already elapsed from the time the agreement was entered into. Thus, the agreement has no legal effect by operation of law. As a result, it cannot be used as a launching pad by Ha Seotsanyana in a fight to retain and occupy the premises.

[26] On Suleman’s own version consent from proper authority was going to be applied for after the premises were sub-divided, but sub-division never happened. Resultantly, in the absence of consent from a proper authority, there is no basis upon which to order Litjotjela to proceed with registration even if the lease was for a period of fifteen years as contended by Ha Seotsanyana. It bears repeating that consent from proper authority is a *sine quo non* for registration and for occupation and use of land. Therefore, Ha Seotsanyana unlawfully occupied and used the premises in issue.

[27] Again, the impugned letter of the 29<sup>th</sup> June 2021 from Litjotjela is of no moment and its issuance is misplaced. Firstly, it seeks to terminate an agreement that is already null and void by operation of law for non-registration. Secondly, it conflates termination of agreement with its non – renewal. Invocation



of clause 2.3 of the agreement fuels the confusion and is inconsistent with Molapo's own version that the agreement lapsed in June 2018.

[28] In terms of clause 2.3, renewal of the agreement is automatic and a party that does not intend to renew is required to communicate such intention in writing. Therefore, if the duration was five years Litjotjela should have invoked this clause and issued the notice not to renew before the agreement ran its course. Otherwise the agreement would have been automatically renewed in June 2018 and in place until 2023.

[29] I am not oblivious to the fact that failure to invoke clause 2.3 timeously is not the basis upon which the applicant claims that the agreement is still extant. It will therefore not be the basis for my decision. At any rate, I have already found that the agreement is null and void, hence not enforceable. Be that as it may, the elephant in the room cannot be ignored forever - the controversy surrounding the duration of the agreement must be resolved.

### **THE DURATION OF THE AGREEMENT:**

[30] Despite my finding that the agreement is null and void, the argument

that the applicant should have recouped its expenses within 5 years of occupation cannot be brushed aside. If the agreement was for 5 years as contended by the respondent and the applicant should have recouped its expenses during that period, a right of retention may not arise.

[31] *Chinhengo AJA*, delivering unanimous decision of the Court of Appeal in **Lehlohonolo Mangoejane and One v Seabata Mangoejane**<sup>7</sup> stated as following on the subject of dispute of facts in motion proceedings:

“[29] Rule 8(14) of the High Court Rules provides that if the court is of the opinion that an application cannot properly be decided on affidavit, it may, in the interests of a just and expeditious decision, direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact. The court can be moved in this direction only if a real dispute of fact, and not a fictitious one, exists. In any event a court may take a robust view of the facts and decide the matter on probabilities disclosed by the affidavits. See *Bur Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B and *Sewmungal & Anor NNO v Regent Cinema* 1977 (1) SA 814 (N).”

[32] A robust common-sense approach to a dispute on motion proceedings is aimed at ensuring that the effective functioning of courts is not hamstrung and circumvented by a litigant’s blatant stratagem. Molapo is creating the impression that he knew the terms of the agreement between the parties<sup>8</sup>. He is emphatic that the duration was five years and that it lapsed in June 2018. Strangely he does not explain the respondent’s inaction from June 2018 when the agreement purportedly

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<sup>7</sup> C of A (CIV) No. 43/2017

<sup>8</sup> Pleadings, page 43, para 2.3

came to an end until June 2021 when the respondent issued the letters to the applicant.

[33] Similarly, Suleman 's positive assertion regarding his unsuccessful efforts to have a meeting with Molapo and discuss the contents of the impugned letter is not denied<sup>9</sup>. His observation that the impugned letter lacks detail of the alleged alteration cannot be faulted<sup>10</sup>. The detail only emerges from the answering affidavit. It is understandable why Suleman is only able to shed light on the alleged discrepancies between the two agreements at a replying stage. The respondent never sought leave to file a supplementary affidavit rebutting Suleman's explanation that the agreement in respondent 's possession is erroneous version that ought to have been destroyed after Chakela had corrected the duration of the agreement to 15 years in a meeting and in line with the parties' intention.

[34] In my respectful view, this is a dispute that has to be resolved in favour of the applicant. Molapo has acknowledged that the respondent was casual in documenting its agreements with its tenants<sup>11</sup>. More tellingly, the applicant stayed on the premises after the purported expiry of the agreement in June 2018. Almost three years past without the respondent questioning applicant's occupancy. Evidently, there is no explanation for this except that the agreement did not end in

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<sup>9</sup> Pleadings, page 12 para 6.5 and page 52 para 5

<sup>10</sup> Pleadings, page 14 para 8.2 and page 36

<sup>11</sup> Pleadings, page 44, para 2.7

June 2018.

[35] Again, Molapo's reliance on the so-called forensic analysis of the two documents is misplaced. He does not claim to be a handwriting expert, neither has any filed a supporting affidavit to reinforce Molapo's story that the figure 1 in the document was not written by Chakela. Thus, Molapo is not qualified to express opinion on the so-called forensic analysis. Taking the evidence as whole, I arrive at a conclusion that the agreement was for a period of 15 years as contended by the applicant.

#### **RIGHT OF RETENTION:**

[36] Ha Seotsanyana contends that it is a bona fide occupier and developer of Portion B of the premises thus it has a right of retention until it is compensated for the improvements it effected at the premises. The developments effected on the premises are not denied. Neither is the estimated cost of M3.5 Million. Hence the applicant wants to exercise *ius retentionis* over the premises should this Court refuse to grant prayer (d) in the notice of motion in terms of which the applicant is seeking an order that the impugned letter of termination is unlawful<sup>12</sup>.

[37] In **Rekdurum (Pty) Ltd v Weider Gym Althlone**<sup>13</sup>, *Van Reenen J*

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<sup>12</sup> Pleadings, page 4, prayer (d) and (e) and page 16, prayer 9

<sup>13</sup> 1997(1) SA 646 at 652 C

explained the essential content of *Ius retentionis* as follows:

“On my understanding of the authorities the essential content of a *ius retentionis* in South African law is the right on the part of a *retentor* to retain physical control of another’s property as a means of securing payment by the owner thereof – to the extent that he has been enriched – of money or labour expended thereon by the *retentor*”.

I respectfully agree. This is how the right of retention has been understood even in this jurisdiction<sup>14</sup>.

[38] A protection afforded by a lien founded on enrichment is a real right and does not found a cause of action but merely constitutes a defence against the owner’s *rei vindicatio*<sup>15</sup>. In the present matter, the respondent has not yet instituted action for recovery of possession of the property. Perhaps this explains the innovation in prayer (e) of the notice of motion which is two pronged as I have explained.

[39] It is beyond disputation that the applicant effected the developments without requisite written consent from the respondent. Thus, the applicant acted in defiance of its contractual obligation per clause 10(a) of the agreement. Consequently, its reliance on oral permission from Chakela was misplaced. The provisions of clause 14.2 and 15 are unambiguous that for any agreement to bind the parties, it must be reduced into writing and be signed for. These provisions are

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<sup>14</sup> Makototo and Another v. Lesotho Development and Construction (Pty) Ltd C of A (CIV) 57/2013 [2014] LSCA 28(24 October 2014) paras 6 to 7

<sup>15</sup> Rekdurum (Pty) Ltd, supra, page 652 G; Astralita Estates (Pty) Ltd v. Rix 1984 (1) SA 500 (C) at 504E; Boshoga and Another v. TJ Mmakolo and Others (82446/2016) [2018] ZAGPPHC 656 (7 March 2018), para 31.1

clear that the parties are only bound by the terms of this agreement.

[40] In **Palabora Mining Co Ltd v. Coetzer**<sup>16</sup> Mohamed J held that no right of retention can be successfully invoked where developments are undertaken in defiance of a contractual requirement of a prior written consent. This decision was subsequently followed in **Knuttel N.O and Others v. Bhana and Others**<sup>17</sup>. However, in the latter decision, the court still went further to consider whether the respondent had tendered satisfactory evidence of an underlying enrichment claim.

[41] All of that being said, it is incredibly amazing that the respondent does not explain why it folded its arms when such arguably massive developments were undertaken if they were not envisaged by the parties when the agreement was concluded. The respondent wants to exploit clause 10(a) of the agreement. *De Villiers* C.J made the following remarks in **Rubin v. Botha**<sup>18</sup> concerning defendant who wanted to take advantage of the law at the expense of plaintiff, which in my view apply with equal force in *casu*:

“The defendant took advantage of the law which, by declaring the lease to be void, frustrated the true intentions of both parties, and there appears to me to be no reason in the world why he should not be subject to the equitable rule of the Dutch law that no one should be enriched to the detriment and injury of another”

[42] The applicant is invoking the equitable remedy “*that no one should*

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<sup>16</sup> 1993 (3) SA 306

<sup>17</sup> (38683/2020) [2021] ZAGP JHC 874; [2022] 2 ALL SA 201 (GJ) (26August 2021) paras 95 to 98

<sup>18</sup> 1911 AD 568 at 576

*be enriched to the detriment and injury of another*” in the alternative. Conversely, the defence raised by the respondent conflates contractual and enrichment remedies. *Navsa JA et Heher AJA* explains the two remedies as follows in **Kudu Granite Operations (Pty) Ltd v Caterna LTD**<sup>19</sup>:

“[15] Kudu’s first contention is well-founded. There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in *Baker v Probert* 1985 (3) SA 429 (A), a judgement relied on by the Court *a quo*) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-mentioned scenario gives rise to a distinct contractual remedy: *Baker* at 439A, and restitution may provide a proper measure or substitute for the innocent party’s damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. As Van den Heever J said in *Pucjowski v Johnston’s Executors* 1946 WLD 1 at 6:

“The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was ab initio unenforceable or has subsequently become inoperative (*causa non secuta; causa finita*).’

The same principle applies if the contract is void due to a statutory prohibition (*Wilken v Kohler* 1913 AD 135 at 149-50), in which case the *condictio indebiti* applies.”

[43] Under this remedy the applicant seeks to exercise lien until it is compensated for the market value of the improvements it effected on the premises. The applicant occupied and developed the premises knowing that it was not the owner, but it believed that it would as a lessee, enjoy occupation and the use of the buildings for the full duration of the sublease. It was thus a bona fide occupier. In

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<sup>19</sup> 2003 (5) SA 193 at 201

**Taka v Pheko**<sup>20</sup> the Court of Appeal described a bona fide occupier as “*a person who occupies land under bona fide, but mistaken belief that he has title to the land.*” *Ranchod J* elucidated the distinction between bona fide possessors and bona fide occupiers as follows in **Boshoga and Another v. TJ Mmakolo and Others**<sup>21</sup>:

“[32] In Wille's Principles of South African Law reference is made to De Vos Verrykingsaanspreeklikheid 245-7 who defines (for the purposes of the law of enrichment) a bona fide possessor as someone who possesses (either directly or indirectly) property of which he believes he is the owner; a mala fide possessor, on the other hand, acts as if he were the owner, while knowing that he is not. An occupier is someone who does not have the animus domini but nevertheless occupies the property because it is in his interest to do so. Occupiers are divided into lawful occupiers (i.e. those who have the right to occupy the property), bona fide occupiers (i.e. those who believe themselves to be lawful occupiers, but are not) and mala fide occupiers (i.e. those who occupy property as if they are lawful occupiers, but know that they are not). [33] The learned authors of Wille's Principles of South African Law submit that 'useful improvements' must be taken to mean improvements which increase the market value of the property”. (footnotes omitted)

[44] *Howie JA* said the following in delivering unanimous decision of the Court of Appeal in **Constituency Committee BNP Mafeteng and Others v. Issa**<sup>22</sup> regarding the bona fide occupier ‘s right of retention:

“[14] Finally, and this was the point which received the most prominence in the advancement of the appellants’ case on the papers (and before us), the alleged exchange of sites was invalid for want of Ministerial consent in the light of the provisions of sections 35 and 36 of the Land Act. Because of such invalidity the agreement between Issa and the Constituency Committee could not have been bona fide. It should be added that it was also the appellants’ argument that the lease of 2008 was invalid, having regard to the terms of section 26 of the Deeds Registry Act, 12 of 1967.

[15] For the purposes of the relief sought in the court below the facts central to Issa’s case were that he had effected improvements to the property; that the improvements would benefit BNP when it became

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<sup>20</sup> C of A (CIV) 59 of 2015 [2016] LSCA 13 (29 April 2016) para 20

<sup>21</sup> (82446/2016) [2018] ZAGPPHC 656 (7 March 2018)

<sup>22</sup> (C of A (CIV) 16 of 2011 [2011] LSCA 24 (21 October 2011)



registered lessee; this rendered BNP liable to compensate him; and that he was, at all relevant times preceding the litigation, in possession of the property. (He did not seek to rely on the alleged exchange.)

[16] The remaining question is whether Issa effected the improvements as bona fide possessor or occupier. He was at least the latter and in either event entitled to compensation for the improvements and a lien to enforce his claim: Rubin v Botha 1911 AD 568; Fletcher and Fletcher v Bulawayo Waterworks Co Ltd 1915 AD 636; Kommissaris Van Binnelandse Inkomste v Anglo American (O.F.S) Housing Co Ltd 1960 (3) SA 642 (A) at 649B-E.”

[45] The bona fide occupier in the **BNP Mafeteng** case, *supra*, had occupied and developed land purely based on impugned agreement to exchange sites. The developments were effected before statutory consent was obtained from a proper authority. Nonetheless, the court recognised bona fide occupier’s right of retention until he was compensated for the improvements effected.

[46] In **Makotoko and Another v Lesotho Development and Construction (Pty) Ltd**<sup>23</sup> *Farlam* JA in delivering unanimous decision of the Court of Appeal found that the court *a quo* correctly applied the *ratio* in **BNP Mafeteng** case. Thus, the Court of Appeal recognised bona fide occupier ‘s right of retention even though occupation and developments were effected on the strength of an unregistered sublease agreement.

[47] It bears emphasising that the right of retention does not exist in isolation, it serves as a reinforcement of an underlying claim<sup>24</sup>. Lienholder is

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<sup>23</sup> (C of A (CIV) 57/2013) [2014] LSCA 28 (24 October 2014) para 11

<sup>24</sup> Knuttel N.O and Others v. Bhana and Others (*supra*) para 107;

entitled to retain possession of property as security and is not even entitled to use the subject of lien<sup>25</sup>. *Van Reenen J* articulated this point as follows in **Rekdurum (Pty) Ltd**<sup>26</sup>, *supra*·:

“The respondent, by conducting a business on the premises, is using it for a purpose wider than merely an object of security. By doing so the respondent is infringing the applicant’s *dominium minus plenum*, namely its *dominium* minus the *ius retentionis*.

Despite as thorough a search as I could manage in the limited time at my disposal, I failed to find any support for the proposition that an object over which a *ius retentionis* is being exercised may be commercially exploited by the person exercising such a right.

Hofmeyr J in *De Jager v Harris NO and the Master* 1957 (1) SA 171 (SWA) held that a lien over immovable property in respect of improvements could be exercised through a tenant as an agent of the lienholder in circumstances where the latter let the property over which the lien was being exercised at a nominal rental in terms of an agreement which the learned Judge describes as follows at 180G:

‘It must be remembered that it was not an ordinary contract of letting and hiring which he concluded with the tenant Visser. His allegation that the property was let to Visser at a nominal rental is not in dispute and the allegation that it was let subject to the condition that the tenant had to occupy the property and care therefor on applicant’s behalf can also accepted as proved, it being established that the lease of the property was offered on those terms; that the tenant actually entered into possession of the property and that he is still occupying the property.

I have no difficulty in accepting that Visser, the tenant, was at all relevant times acting as applicant’s agent to preserve his *ius retentionis*.’

That *caveat* effectively emasculates the following earlier statement by the learned Judge at 180C-D:

‘... (S)ince the applicant, even after the cancellation of the deed of sale, had a legal right to remain in possession of the premises to preserve his lien, I am of the opinion that he was entitled, although no longer a *bona fide* possessor, to the use of the improvements erected by him and also to let the property to a third party.’

The statement that a lienholder is entitled to let the property over which a lien is being exercised to a third party, has, as far as I could ascertain, not been referred to in any subsequent decided cases and

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<sup>25</sup> Ibid paras 104 to 10.5

<sup>26</sup> 653 to 654

seems to have escaped the attention of textbook writers on the law of property.

It in any event, is completely at variance with the law relating to liens based on enrichment and, in my respectful view, palpably wrong.

In the case of an analogous legal notion ('regsfiguur'), namely pledge, it is generally accepted that a pledgee, in the absence of an agreement to the contrary (the *pactum antichreseos*), is not permitted to use a pledged object for his own benefit. (see Joubert (ed) *The Law of South Africa vol17* para 494 at 373-4; T J Scott and Susan Scott (*op cit* at 120, 140 and 144); Silberberg and Schoeman (*op cit* at 457); CG Van der Merwe (*op cit* at 651 – 2).) As the possession necessary to perfect a pledge – as in the case of a *ius retentionis* – is *possessio naturalis* (see *Zandberg v Van Zijl* 1910 AD 302 at 313; *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A) at 611A), there is no reason in principle or logic why, as regards an entitlement to use the object which forms the subject-matter of a right of security, a retentor who exercises a *ius retentionis* founded on enrichment should be in a position more favourable than a pledgee.

In view of the foregoing, I have come to the conclusion that a retentor who exercises a *ius retentionis* founded on enrichment does not, in South African law, have a right to use the property which forms the subject-matter thereof for his own benefit. The logical consequence of that finding is that the respondent, by utilising the premises for the purpose of conducting a health and fitness centre business thereon, is wrongfully infringing the applicant's *dominium minus plenum*. It is that infringement which the applicant seeks to restrain by means of an interdict."

[48] The applicant's assertion that it must remain on the premises until it would have recouped its expenses<sup>27</sup> is untenable in law especially when it thinks it can use the premises for income generating purposes. Once it retains the premises pursuant to lien, the applicant will not have a right to commercially exploit the premises to recoup its expenses<sup>28</sup>. It can only assert lien as a security for its claim relevant to unjust enrichment. Accordingly, I turn to consider whether the applicant has tendered satisfactory evidence of an underlying enrichment action

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<sup>27</sup> Pleadings, page 10, para 58

<sup>28</sup> *Boshoga and Another v Mmakolo and Others*, supra, para 31.4

against the respondent.

[49] For a lien to arise in respect of unjust enrichment the applicant must prove that it effected improvements which increased the value of the property. The respondent must have been unjustly enriched, and the applicant impoverished from effecting the improvements that led to the increase in the value of the property<sup>29</sup>. *Browde* JA said the following in **Joy To The World v. Malefane**<sup>30</sup> regarding a right of retention:

“Dealing only with those improvements which are admittedly on the site in issue, the appellant, in order to establish a right of retention, had to show that the property was enhanced in value by the improvements. Not every building is necessarily an improvement. No effort was made to tender proof of enhancement, the appellant contenting itself with alleging the cost of the building it erected. This evidence is irrelevant to its claim to exercise any right of retention”

[50] Inasmuch as the developments are not contested in *casu*, the applicant does not explain if these were necessary or useful developments. *Cloete* JA said the following in **Rhode v De Kock**<sup>31</sup> regarding the classes of improvements and what needs to be established:

“[14] So far as the claim for necessary expenses is concerned, Rhode would have a claim for reimbursement for expenditure of money or material on the preservation of the property. He has no claim for his own labour: *Harrison v Marchant* 1941 WLD 16 at 20-21. The problem facing the appellant, however, is that he relies on the evidence of Bouwer who has estimated what the improvements would cost as at February 2010. That evidence is irrelevant. It does not establish that the appellant actually expended anything in money or materials.

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<sup>29</sup> Knuttel N.O and Others v. Bhana and Others (supra) para 107 to 115

<sup>30</sup> LAC (1995 – 1999) 313 at 316 I - J

<sup>31</sup> 2013 (3) SA 123 at 127-128

[15] So far as useful expenses are concerned, the amount of compensation is limited to the amount by which the value of the property has been increased or the amount of the expenses incurred by the appellant, whichever is the less; and the court has a wide discretion. That was the Roman law: D 6.1.38; the position was the same in the Roman-Dutch law: Voet 6.1 36; and it remains the same in the modern South African law *Meyer's Trustees v Malan* 1911 TPD 559 at 568; *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 at 648, 656-657 and 664-665.”

[51] The applicant is not claiming reimbursement for expenditure relevant to developments, neither does it allege that the improvements were made as a matter of necessity. I can safely assume that the developments fall in the category of useful improvements. This assumption is fortified by the nature of the developments and the fact that the applicant is claiming compensation for the market value of the improvements. The applicant's compensation is limited to the amount by which the value of the property was enhanced, or the amount of the expenses incurred in effecting the improvements, whichever is less.

[52] The applicant has described the developments that it effected on the premises, but there is no evidence that the developments have enhanced the value of the property. However, these being income generating developments, I accept that they must have enhanced the value of the property. I am cautious though of *Browde JA's ratio* in **Joy To The World v. Malefane**<sup>32</sup> that “*not every building is necessarily an improvement*” as well as that of *Davis J* in **Geiger Enterprise (Pty) Ltd v. Crestar Printers & Publishers (Pty) Ltd**<sup>33</sup> that the fact that R4.1 million

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<sup>32</sup> Supra, page 316 para I

<sup>33</sup> (26037/2021) [2022] ZAGPPHC 275 (21 April 2022) para 9.3

was spent on electrical installations, did not necessarily equate to the installations having increased the value of the premises.

[53] The fundamental challenge I have is that the extent to which the value of the property has been enhanced is conspicuously missing. Again, there is a considerable conflict whether the place was already used as a petrol and diesel depot before. Respondent contends that no developments were contemplated, and that the applicant was expected to use infrastructure that was already there. The applicant clearly appreciates the significance of this conflict in the determination of the value by which the property was enhanced; hence it asked the dispute to be referred for oral evidence. Counsel for applicant did not pursue this approach during oral submissions.

[54] Besides, the actual expenses incurred have not been disclosed. There is no evidence to substantiate the estimated expenditure of M3.5 Million. Proof of impoverishment of the lienholder is required to substantiate a claim for unjust enrichment and it is missing in this case. In **Knuttel N.O and Others**<sup>34</sup>, *supra*, the court stated that:

“[113] An increase in value of a property unaccompanied by evidence of impoverishment of the party who has effected the improvements which have led to the alleged increase in value of the property is not a valid basis for the exercise of an enrichment lien. There is therefore no need for the Court to have regard to the unsworn evidence of the increase in value of the Property without proof of impoverishment of the Second Respondent via expenditure by him on the improvements, which, as

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<sup>34</sup> *Supra* para 113

already pointed out, is not to be found in the Answering Affidavit (see in this regard Rhode v De Kock).”

[55] Confronted with a similar situation where expenses were unsubstantiated this is what the court said in **Boshoga and Another**<sup>35</sup>:

“[49] The difficulty I have with the calculations is that the useful expenses allegedly made are not supported by any invoices or receipts or other documentary evidence. All that the first respondent has are his own notes merely reflecting totals of numerous items purchased from various suppliers. He does not even have any receipts to show the amounts he paid for labour expended on the structures put up on the property. In other words, there is insufficient evidence about the amount for which the lien is to serve as security. The finding does not preclude a later successful claim by the first respondent where acceptable evidence regarding the alleged useful expenses incurred by him is presented.”

[56] In argument the applicant placed reliance on the case of **Joy To The World v. Malefane and Others**<sup>36</sup> in support of its right of retention. Though relevant, the case is distinguishable. Unlike the present case, detailed evidence of the property pre and post development had been provided and substantiated by photographs. Significantly, bona fide possessor’s claim was reinforced by a valuation certificate from quantity surveyors disclosing the value of the site and of the improvements. Understandably, the Court of Appeal recognised the possessor’s right to lien. In 1997 the same court had refused to recognise **Joy To The World**’s lien and granted an order equivalent to absolution from instance due to lack of evidence that the buildings had enhanced the value of the premises.

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<sup>35</sup> Supra para 49

<sup>36</sup> C of A (CIV) No.16/13 [2013] LSCA 17 (18 October 2013) para 9

[57] In light of the deficiencies identified on the applicant's case, this is not a proper case to grant lien which may end up being perpetual. The respondent cannot even provide security as the quantum of alleged unjust enrichment has not been disclosed. The value by which the property has been enhanced remains unknown as well. Put differently, there is insufficient evidence about the amount for which the lien is to serve as security. However, this does not bar a later successful claim by the applicant if acceptable evidence regarding the alleged expenses and enhanced value of the premises is presented.

**INTERIM INTERDICT:**

[58] I now turn to consider if the applicant has made a case for the respondent and/or its agents to be "*interdicted from terminating and interfering with*" its possession of the premises until it is compensated for the market value of the improvements. The character of the relief sought is temporary in nature and limited in duration, hence the heads of argument filed on behalf of the applicant addressed the requirements for interim interdict.

[59] The applicant crossed wires between the requirements of *mandament van spolie*, the possessory remedy available for the restoration of lost possession, and an interdict to restrain a threatened spoliation hence averments in the founding affidavit that the applicant was in peaceful and undisturbed possession of the



premises. *Boruchowitz J* differentiated the two remedies as follows in **Outdoor Network Limited and Another v. The Passenger Rail Agency of South Africa**<sup>37</sup>:

[23] Where the *mandament van spolie* is relied on, the possession which must be proved is not possession in the juridical sense; it is enough if the holding by the applicant is with the intention of securing some benefit for himself. The lawfulness or injustice of the possession is irrelevant. Thus, even a thief or robber is entitled to avail himself of the *mandament*. Also, a lessee who is deprived of the use and enjoyment of premises is entitled to invoke the *mandament* to have the use and enjoyment restored to him even though he is not a possessor in the juristic sense.

[24] If mere factual possession, irrespective of how it was obtained, was sufficient to establish a clear right, even a thief or *mala fide* possessor would be entitled to obtain a final interdict. There can be no justification for the protection by means of an interdict of illicitly or illegally obtained possession.

[25] The *mandament van spolie* cannot be invoked to prohibit a threatened spoliation; it is only available to a de facto possessor who has been despoiled. Possessory remedies to prevent a threatened spoliation were available in Roman law, namely the *mandament van complainte* and *mandament van maintainue*, but these were not imported into South African law.

[26] The *mandament van spolie* is a robust remedy which generally operates on an interim or temporary basis pending the final determination of the parties' respective legal rights. In contradistinction, a final interdict is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs. It stands to reason, therefore, that the applicant for a final interdict must establish that it is the holder of a right which is recognised as a matter of substantive law.

[27] The clear right required to be shown in interdict proceedings has been variously described. Van der Linden refers to it as "*een liquide recht*" ("*Judicieele Pracktjck*" 2.19.1). modern authorities refer to it as a definite right, that is a right clearly established.

[28] Whether a right is established is a matter of substantive law. The word "clear" relates to the degree of proof required to establish the right."

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<sup>37</sup> (2013/26064) [2014] ZAGPJHC 271 (30 May 2014)

[60] Be that as it may, it is clear that the applicant has not been despoiled as yet and what it wants is a temporary interdict. The requirements for temporary prohibitory interdict which the applicant must established are as follows<sup>38</sup>:

- (a) a *prima facie* right, though open to some doubt;
- (b) a well-grounded apprehension of irreparable harm if interim interdict is not granted and ultimate relief is eventually granted;
- (c) the balance of convenience favours the granting of the interim Interdict; and
- (d) the absence of any other satisfactory remedy.

[61] As regards how these requirements must be assessed, the court said the following in **Eriksens Motors (Welkom) Pty Ltd v. Protea Motors (Warrenton)**<sup>39</sup>:

“The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant’s prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of ‘some doubt’, the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see *Olympic Passenger Service (Pty.) Ltd. V*

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<sup>38</sup> Setlogelo v. Setlogelo 1914 AD 221; Attorney General & Another v. Swissbrough Diamonds Mines (Pty) Ltd & Others LLR & LB 1995 – 1996 173 at 193; Leloli Trading (Pty) Ltd v. Mafeteng District Council [2022] LSCH 11 para 22

<sup>39</sup> 1973 (3) SA 685 (A) at 691 (F)

*Ramlagan*, 1957 (2) SA 382 (D) at p. 383D – G. Viewed in that light, the reference to a right which, ‘though *prima facie* established, is open to some doubt’ is apt, flexible and practical, and needs no further elaboration.”

[62] The applicant contends that it derives clear right from the fact that it has agreement that has not expired and on its right to lien. I have already found that the agreement is null and void. Consequently, it cannot be a basis for *ius possidendi*. Again, the extent to which the improvements have enhanced the value of the property has not been disclosed, neither is the estimated expenditure substantiated. Resultantly, I have serious doubt that the applicant has a clear right based on right of retention. Rather, by virtue of being a bona fide occupier, the applicant has a *prima facie* right which is open to some doubt.

[63] This brings me to the next enquiry, namely whether the applicant has a well-grounded apprehension of irreparable harm. Based on the decision of this Court in **Leloli Trading (Pty) Ltd v. Mafeteng District Council and Another**<sup>40</sup> which took cue from **Setlogelo**<sup>41</sup>, it was argued that since applicant has shown clear right, it was not necessary for it to establish that the harm it apprehends is irreparable. It bears repeating that the applicant has not established a clear right, rather it has established *prima facie* right that is open to doubt. Consequently, it becomes necessary for the applicant to meet this requirement.

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<sup>40</sup> CCA/0074/2021 [2022] (9 February 2022)

<sup>41</sup> *Supra*, page 227

[64] This requirement has not been articulated in clearest terms in the founding affidavit. However, I am mindful that pleadings should not be read pedantically nor should the court overemphasise precise formalistic requirements<sup>42</sup>. At the centre of applicant's complaint is the impugned letter which purports to terminate the agreement and to inform the applicant of respondent 's intention to approach the subtenants on the 15<sup>th</sup> July 2021 *“for purpose of ascertaining their future intentions and establishing new contractual arrangements with them, if necessary, and the alleged events of the 5<sup>th</sup> July 2021*<sup>43</sup>.

[65] Based on divergent views regarding the alleged events of the 5<sup>th</sup> July 2021, I find the applicant's story unbelievable. The respondent has not only denied the events, but it has punched big holes in the applicant's story. The evidence set out above on this issue shows that the respondent's two employees or agents, including Molapo, are well known to Suleman and the subtenants. If such an incident took place, it is inconceivable how Suleman failed to identify the agents who purportedly stormed the premises by their names in his founding affidavit.

[66] Again, it is implausible that the respondent would have caused its agents to approach the subtenants on the 5<sup>th</sup> July 2021 when it had already informed the applicant that it will approach the subtenants on the 15<sup>th</sup> July 2021. There is not even a single confirmatory or supporting affidavit from one of the

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<sup>42</sup> MN v. AJ 2013 (3) SA 26 at 33 para 24

<sup>43</sup> Pleadings, page 17 para 10.1

tenants even at the replying stage. Worse still, Suleman is evasive in his replying affidavit and ignores important factors raised by Molapo in his answering affidavit regarding the alleged incident.

[67] The inevitable conclusion I arrive at is that the purported events of the 5<sup>th</sup> July 2021 never happened. I cannot think of any reason why the applicant concocted the story regarding the events of the 5<sup>th</sup> July 2021 other than that it wanted to justify urgency and to obtain interim relief against the applicant *ex parte*. Suleman's evasiveness and lackadaisical approach in his replying affidavit towards Molapo's allegations on this issue speak volumes. The applicant had obtained an interim interdict and saw no need to engage further on the purported events of the 5<sup>th</sup> July 2021.

[68] Can it be said that the impugned letter could have triggered apprehension of irreparable harm? It is common cause that the respondent did not only tell the applicant that the 2013 agreement was no longer in place, it went further to state its intention to approach the subtenants on the 15<sup>th</sup> July 2021 "*for purposes of ascertaining their future intentions and establishing new contractual arrangements with them if necessary*".

[69] It is the applicant that has sublease agreements with the subtenants and is collecting rentals from them and not the respondent. No meaning can be

ascribed to the impugned letter than that the respondent wants to take control of the premises and deal directly with the subtenants. In its view, the sublease agreement has lapsed as a result of which it has to deal directly with the subtenants. It has also made it clear that the applicant is operating the filling station on a month to month basis.

[70] The logical consequence of my findings in this regard is that the respondent wants to dislodge the applicant of the possession and control of the premises wrongfully without following due process of law. As a result, the applicant's apprehension of harm is reasonable. Suleman had not been successful in his attempt to engage Molapo.

[71] In **Setlogelo**<sup>44</sup>, the court stated that disturbance with bona fide occupier's possession "*is such an injury to him as to justify the granting of an interdict*". It treated such disturbance as spoliation. This approach was followed in **BNP Mafeteng** case where the Court of Appeal having found that bona fide occupier's possession was disturbed dismissed an appeal against interdict granted by the court *a quo*. BNP had collected monthly rentals from a subtenant who was ordinarily paying his rentals to the bona fide occupier. The applicant in *casu* wants to nip it in the bud.

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<sup>44</sup> *Supra*, page 225

[72] So far as the balance of convenience is concerned, I am of the view that it favours the applicant. The applicant is in possession of the property and is paying rentals to the respondent. On the other hand, should interdict be refused, the respondent will start collecting rentals from the subtenants to the prejudice of the applicant. Consequently, maintaining status *quo* until such that the respondent would have followed due process of law to get the applicant ejected from the premises will not have detrimental effect to the respondent.

[73] The fact that the applicant is in possession of the property and is bona fide occupier is beyond disputation. Thus, insisting that the applicant should avail itself of alternative remedies in circumstances of this case would mean that the applicant must first succumb to being despoiled and then pursue those remedies. That being the situation, the possible alternative remedies are therefore inadequate as applicant must first suffer harm.

[74] In view of the foregoing and taking a holistic assessment of the requirements for temporary interdict, this is a proper case where I have to exercise my discretion in favour of the applicant and grant temporary interdict. Doing otherwise will leave the applicant vulnerable to spoliation. However, the applicant has not quantified its compensation for the improvements. Thus, I cannot grant interdict against the respondent until such time that it would have paid undetermined *quantum*. I rather interdict the respondent from taking control and

possession of the premises without following due process of law.

**CONCLUSION:**

[75] The applicant wants to retain possession of the premises on the strength of a sublease agreement. In the alternative, it argues that as a bona fide occupier it is entitled to exercise lien on the premises until it is compensated for the market value of the improvements it effected. The agreement has not been registered as a result of which it is null and void. It cannot be a source of rights as it of no force and effect by operation of law. Even the impugned letter purporting to terminate the agreement was misconceived.

[76] Be that as it may, at the time the applicant occupied the premises, it was with the understanding that the agreement was going to be registered and that it was going to enjoy the use and occupation of the developments for 15 years. Therefore, the applicant is a bona fide occupier. It may have failed to substantiate its claim for lien, but the respondent has to follow due process to eject it from the premises. Therefore, the applicant deserves protection by way of interdict to ensure that the respondent does not take law into its own hands.

[77] Accordingly I make the following order.



77.1 The respondent is restrained and interdicted from interfering with the applicant possession on portion B of the business premises known as Litjotjela Mall on Plot No 23123 – 214, situated at Seretse Khama Road Maputsoe in the district of Leribe unless it is by due process of law;

77.2 The respondent is restrained and interdicted from interfering with the applicant's tenants on portion B of the business premises known as Litjotjela Mall on Plot No 23123 – 214, situated at Seretse Khama Road Maputsoe in the district of Leribe unless it is by due process of law;

77.3 The respondent shall pay costs of this application at the ordinary scale.

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**A.R. MATHABA J**  
Judge of the High Court

For the Plaintiff: Mr. L. Masoeru

For the Defendant: Mr. M. G. Makara