

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

**HELD AT MASERU**

**CCA/0008/2023**

**In the matter between:**

**THOLO ENERGY (PTY) LTD**

**APPLICANT**

**AND**

**TUMO TLELAI**

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

**MENDI GROUP (PTY) LTD**

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

**RE3 HOLDINGS (PTY) LTD**

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

**Neutral Citation: Tholo Energy (Pty) Ltd v Tumo Tlelai & 2 Others [2023]  
LSHC 26 Comm. (04<sup>TH</sup> MAY 2023)**

**CORAM: MOKHESI J**

**HEARD: 09<sup>TH</sup> FEBRUARY 2023**

**DELIVERED: 04<sup>TH</sup> MAY 2023**

## **SUMMARY**

**CIVIL PRACTICE AND PROCEDURE:** *Invocation of Rule 8(10)(c) of the High Court Rules 1980 by the respondent in urgent matters- Whether the respondent is barred from filing answering affidavit if he/she chooses to raise the points of law in terms of Rule 8(10) (c)- Held, in the circumstances of the case, the matter should be decided on the basis of the applicant's founding affidavit as the points of law raised have no merit- Application granted as prayed.*

## **ANNOTATION**

### **Legislation**

*High Court Rules 1980*

### **Books**

Van Loggerenberg, **Erasmus Superior Court Practice 2<sup>nd</sup> ed. Vol. 2**

### **Cases**

*Commissioner SARS v Hawker Air Services (Pty) 2006 (4) 292 (SCA)*

*Democratic Nursing Organisation, of SA and Another v Director General  
Department of Health and Others 2009 (30) ILJ 1845 LC*

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

*Mamarama Matela v Lesotho Communications Authority and others C of A (CIV)  
46/2022) (dated 11 November 2022)*

*BP Lesotho (Pty) Ltd v Moloji and Another LAC (2005-2006) 429*

*Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo  
and Others [2014] 4 ALL SA 67 (GP)*

*Mtshali v Mtambo and Another 1962 (3) SA*

*Zokufa v Compuscan (Credit Bureau) 2011 (1) SA 272 (ECM)*

## JUDGMENT

### [1] **Introduction**

The applicant approached this court on urgent and *ex parte* basis seeking the following reliefs:

*“1. That the ordinary Rules of this Honourable Court pertaining to normal periods and modes of service be and are hereby dispensed with on account of urgency hereof.*

*2. That a Rule nisi be and it is hereby issued returnable on the date and time determinable by this Honourable Court calling upon the Respondents to show cause, if any, why the following prayers cannot be made final and/or absolute to wit: -*

*a) An order interdicting and restraining First Respondent and his agents from interfering with the business of the filling station on Plot No. 13302 – 018, 13302 – 019 and 13303 – 020 in any manner whatsoever situated at Lithabaneng in the district of Maseru pending finalization of this application and CCA/0126/2022*

*b) An order interdicting Second Respondent from offloading, decanting, or in any manner whatsoever interfering with the business of the filling station on Plot No. 13302 – 018, 13302 – 019 and 13302 – 020 situated at Lithabaneng in the district of Maseru pending finalization of this application.*

c) *An order declaring that the Applicant is entitled to the exclusive use and occupation of the premises subject matter of the Sublease Agreement No. 51452 in particular the filling station.*

d) *Costs of suit on Attorney and client scale against the first and second respondents.”*

[2] On the 6 February 2023 when Adv. Tšabeha for the applicant appeared before court, he was directed to serve the respondents with this application as the court felt there was no basis made out for moving it *ex parte*. The moving of the application was then rescheduled to proceed on 09 February 2023. The respondents were duly served as directed, and on the 09 February 2023 Adv. Tšabeha appeared for the applicant while Adv. Mariti appeared for the 1<sup>st</sup> respondent and Adv. S. Makara for the 2<sup>nd</sup> respondent. Mr Tšabeha informed the court that he was withdrawing the relief he sought against the 2<sup>nd</sup> respondent (prayer 2(b) of the Notice of Motion) and tendered costs of withdrawal. It is apposite to state that Mr Mariti did not file any answering affidavit as he only filed Notice in terms of Rule 8 (10) (c) wherein he raised the so-called points of law.

[3] The matter was argued to finality and after hearing argument the court gave an *ex tempore* judgment in favour of the applicant in terms of prayer 2(a) as prayer 2(c) had been abandoned. Counsel were promised that written reasons for judgment will follow in due course. What follows are those reasons. I must, however, indicate that quite strangely, after the court had delivered an *ex tempore* judgment on the merits, to be precise, on the 10 February 2023 the 2<sup>nd</sup> respondent's answering affidavit was filed even though it was no longer the party in the proceedings as the relief that was

sought against it had been withdrawn. However, be that as it may, I now turn to deal with the background facts to the matter.

[4] **Background Facts**

The applicant and the 1<sup>st</sup> respondent concluded a long-term sublease agreement which is due to end in 2032. The second respondent is the owner and sublessor of Plots Numbers 13302 – 018/019/020. The applicant is a sublessee. The main business of the applicant is the automotive fuel filling station. Consequent to conclusion of the sublease agreement, the applicant further sublet the Plots to the 3<sup>rd</sup> respondent who is a dealer to operate the business of fuel filling station on the stated premises. Contractual disputes between the applicant and the 1<sup>st</sup> respondent arose which prompted the latter to institute an application under CCA/0126/2022 seeking cancellation of the sublease agreement. Around the same period, the 1<sup>st</sup> respondent sued out summons against the applicant claiming damages for breach of the sublease agreement. Both matters are pending hearing.

[5] During the pendency of these matters, on the 01 February 2023 a truck belonging Mendi Trucking company on the instruction of the 1<sup>st</sup> respondent offloaded petrol ULP93 and decanted it into storage tanks on the premises or property which is a subject of sublease agreement, and which is occupied by the applicant.

[6] The 1<sup>st</sup> respondent concedes, as can be gleaned from his Rule 8(10)(c) argument that he instructed the abovementioned truck to offload because “... the fuel which the Applicant failed/refused to supply from the said party to avoid the filling station from running dry...” This mindboggling statement

is made in the face of a registered sublease agreement in terms of which the maker of the statement has sublet his property to the applicant. This incident prompted the applicant to approach the court in the manner adverted to in the preceding paragraphs. In turn to consider the tenability of the points of law raised by the 1<sup>st</sup> respondent.

- [7] Before I deal with those points of law, it is critical to set out the procedural implications of raising the point of law in terms of Rule 8(10) (c) of the High Court Rules 1980. Notwithstanding the procedure prescribed in this rule it is generally expected that the respondent should file answering affidavits and deal with the merits even if he/she may have intended to raise the preliminary points of law only as failure to do so will put the court in an unenviable position of accepting the version presented by the applicant in his founding affidavit as being truthful without the benefit of the respondent's affidavit, or, in the alternative, having to grant postponement in order to give the respondent an opportunity to file an answering affidavit, thereby protracting the proceedings and causing the applicant to incur costs. This position was stated by the learned author Van Loggerenberg, **Erasmus Superior Court Practice 2<sup>nd</sup> ed. Vol. 2** at D1 – 64 – D1 – 65:

*“...A respondent should, generally, file his answering affidavit on the merit at the same time he takes a preliminary objection on a point of law. Should the respondent choose not to file an answering affidavit in response to the applicant's allegations but to take a legal point only, the court is faced with two unsatisfactory alternatives should the objection fail. The first is to hear the case without giving the respondent an opportunity to file an answering affidavit on the merits, something the court would be 'most reluctant' to do. The second is to*

*grant a postponement to enable the respondent to prepare and file an answering affidavit, a course which gives rise to an undue protraction of the proceedings and a piecemeal handling of the matter. It has been suggested that a respondent should be given the opportunity to file an answering affidavit where the court is satisfied that the respondent was not acting mala fide, where an adequate explanation for the failure to file an affidavit on the merits is given, where justice demands that the respondent should have further time for the purpose of presenting his case and where the disadvantages to the applicant of a postponement can be compensated by an appropriate order as to costs.”*

- [8] In the present matter, while it is undesirable to proceed with the matter without the benefit of the 1<sup>st</sup> respondent’s answering affidavit, in my considered view, the facts of this case call for a robust approach to be adopted. The matter was lodged on an urgent basis, the trigger being that, while the parties are engaged in litigation, the 1<sup>st</sup> respondent, on the 01 February 2023 interfered with the business operation of the Filling Station in issue by ordering a truck belonging to a different fuel distributor to offload and decant petrol into the storage tanks at the subleased property. The applicant is rightfully running the filling station on the strength of the sublease agreement.
- [9] The 1<sup>st</sup> respondent has not offered any explanation why he did not file the answering affidavit on the merits. Given the admission that indeed he interfered with the running of the applicant’s business, it is not surprising that he chose not to file the answering affidavit within the timeframes suggested by the applicant because he does not have any legally plausible answer on the merits on why he chose to deal with their contractual dispute

in this unlawful manner. Had the court postponed the matter to allow the 1<sup>st</sup> respondent to file the answering affidavit, that would have occasioned serious financial prejudice to the applicant not capable of being compensated by an award of costs. The actions of the respondent are tantamount to him resorting to self-help which cannot be countenanced in any manner by this court. I will therefore deal with the points of law raised by the 1<sup>st</sup> respondent in the rule 8(10) (c) Notice, namely, jurisdiction, approaching court with dirty hands, urgency, *lis pendens*, non-joinder and misjoinder. If these points fail, the application should succeed on the merits.

[10] (i) **Jurisdiction**

It is trite that a party instituting proceedings bears the onus of proving that the court has jurisdiction to entertain his case by stating the facts which establish the court's jurisdiction (**'Mamarambe Matela v Lesotho Communications Authority and others C of A (CIV) 46/2022) (dated 11 November 2022)** at para.7). Where an interdict is sought it is not a defence to say that the court does not have jurisdiction because interdict founds jurisdiction. What matters is that the requisites of an interdict should be met (see **'Mamarambe Matela v LCA** above at para.8). In **Mtshali v Mtambo and Another 1962 (3) SA (G.W.L.D)** at 473H – 474A, the court said:

*“There is obviously ample justification for the rule that an interdict founds jurisdiction and that no exception to the court's jurisdiction can be taken in such proceedings. The interdict procedure is an extraordinary remedy devised for matters which do not admit of delay – periculum in mora – and in which the power of the court should be summarily interposed to prevent and, if necessary, to discontinue, the perpetration of unlawful acts*



*forthwith and for good or pending action. The administration of justice would be seriously hampered, if not frustrated, if a court does [not] have such power within its own area of jurisdiction. ... On the short ground, therefore, that lack of jurisdiction cannot be interposed as an objection in proceedings for an interdict in which the recognised requirements of an interdict are satisfied by facts within the territorial jurisdiction of the court...”(see also: **Zokufa v Compuscan (Credit Bureau) 2011 (1) SA 272 (ECM)** from paras.33 to 38)*

- [11] In the present matter the applicant has satisfied all the requirements of an interdict, namely, (a) *prima facie* right; (b) well- grounded apprehension irreparable harm if relief is not granted;(c) the balance of convenience and lack of suitable alternative remedy (**BP Lesotho (Pty) Ltd v Moloji and Another LAC (2005-2006)** 429). The applicant has a clear right over the property in issue based on the sublease agreement between the parties. There is well-grounded apprehension of harm to the rights which it has over the property, and the balance of convenience favours granting the interim interdict to nip the unlawful acts of the respondent in the bud. In my considered view, there is no suitable alternative remedy to halt the unlawful acts of the respondent other than by way of a temporary interdict. The fact that the parties’ sublease agreement contains an arbitration clause cannot be used to denude this court of its jurisdiction to deal with the unlawful conduct of the 1<sup>st</sup> respondent pending finalization of the litigation between the parties.

[12] (ii) Non-disclosure of material facts, non-joinder and misjoinder on the basis of **Makoala v Makoala C of A (CIV) 04/09 [2009] LSCA 3 (09 April 2009)** at para.10, are not points in *limine* properly so-called.

[13] **Lis Pendens**

Even this point is misplaced as the pending dispute between the parties arise from different set of circumstances and the remedy being sought is markedly different. What is being sought in this matter is an interdict and nothing else. This point should equally be dismissed.

[14] (iv) **Urgency**

Urgency is not a ground for dismissing an application as it merely talks to abridgment of the rules of this court regarding the forms and periods of filing court documents. It has nothing to do with the substantive relief and so, for that reason it cannot be the basis for dismissal of the application as it merely talks to abridgement of the rules of this court regarding the forms and periods of filing court documents. It has nothing to do with the substantive relief and so, for that reason cannot be the basis for dismissal of the application (**Commissioner SARS v Hawker Air Services (Pty) 2006 (4) 292 (SCA)** at para.9). This principle notwithstanding, where it is found that the applicant is abusing urgency procedure, the court may invoke its inherent jurisdiction to prevent abuses its court processes by dismissing the application to mark its displeasure.

[15] It is generally accepted that financial hardship or loss on the part of the applicant cannot be used as the basis for urgency. For the applicant to succeed in persuading the court that its application, on the basis of financial

loss or hardship should be dealt with urgently, must further show existence of exceptional circumstances warranting the granting of orders expeditiously. (**Democratic Nursing Organisation, of SA and Another v Director General Department of Health and Others 2009 (30) ILJ 1845 LC** at para. 19).

- [16] An equally persuasive decision from the South African which deals with the proper approach to urgency, is the case of **Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and Others [2014] 4 ALL SA 67 (GP)** at paras. 63 – 64, the court said:

*“I proceed to evaluate the respondent’s submission that the matter is urgent. The evaluation must be undertaken by an analysis of the applicant’s case taken together with allegations by the respondent which the applicant does not dispute. Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently .... It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense the application cannot be urgent.*

*Once such prejudice is established other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant and any delay by the applicant in asserting its rights.*

*This last factor is often called, usually by counsel acting for respondents, self-created urgency.”*

[17] The case against the 1<sup>st</sup> respondent, as already stated, is that he is unlawfully interfering with the running of the applicant’s business. It is not disputed as the 1<sup>st</sup> respondent ordered that fuel be supplied to the applicant’s business, as to how such an act could possibly even cross the 1<sup>st</sup> respondent’s mind is unfathomable. The 1<sup>st</sup> respondent has sublet his property to the applicant and should not be meddling in the running of the latter’s business. It does not matter that there is a dispute between them because for as long as the applicant is in lawful occupation it is to the exclusion of the 1<sup>st</sup> respondent. The respondent’s conduct is bound to cause serious financial harm to the applicant, but on top of it, there is exceptionality in the nature of a possible breach of peace and confrontation between the parties which must be interdicted pending finalization of the dispute between the parties. For these reasons I find that urgency was established.

[18] In the result:

- (i) The application succeeds as prayed in terms of Prayer 2(a) of the Notice Motion with costs.

---

**MOKHESI J**

**For Applicant:                      Adv. S. S Tšabeha instructed by K. D. Mabulu  
Attorneys**

**For the 1<sup>st</sup> Respondent: Adv. K. A Mariti instructed by T. Maieane & Co  
Attorneys**