

Verslagwaardig:	JA / NEE
Sirkuleer Aan Regters:	JA / NEE
Sirkuleer aan Streeklandroste	JA / NEE
Sirkuleer Aan Landdroste:	JA / NEE

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Saakno: / Case number: **656 / 2011**
Datum verhoor: / Date heard: **26 / 08 / 2011**
Datum gelewer: / Date delivered: **30 / 09 / 2011**

In the matter between:

LODESTONE INVESTMENTS 2 (PTY) LTD

Applicant

and

DANIEL ZEGENU MOSES T/A MINI BOUTIQUE

Respondent

***Coram:* Hughes-Madondo AJ**

JUDGMENT

HUGHES-MADONDO AJ

1]The applicant seeks the eviction of the respondent and/or any other occupant from its premises at Shop 6 (previously shop 4) Old Mutual Centre, Corner York and Jones Street, Kimberley ("the premises").

2]In April 2011 the applicant first instituted eviction proceedings citing Daniel Zegenu Moses t/a MINI BOUTIQUE as the respondent. This is the present case. Sometime in July 2011 the applicant then instituted the same eviction proceedings against SELAM BOUTIQUE CC under case number 1051/2011. The applicant contends that the respondents cited in both cases are one and the same, and are occupying its premises.

3]Initially, the applicant sought to consolidate both matters however at the commencement of the proceedings the applicant abandoned the consolidation application and opted to deal with this eviction application instead.

4]This application was brought on an urgent basis and was scheduled to be heard on 29 April 2011. The respondent opposed the application and raised a *point in limine*. The matter was postponed *sine die* and placed on the opposed roll with the costs reserved. In addition the court ordered that when the matter was heard, the *point in limine* raised by the respondent be dealt with in the merits of the application.

5]I now turn to deal with the respondent's *point in limine*. The respondent contends that in these proceedings the applicant has cited the wrong party as being in occupation of its premises.

6]It is therefore prudent to set out briefly the background in order to understand the point raised by the respondent.

7]On 30 May 2006 the applicant, being the owner of the premises, entered into a written lease agreement with Henok-Mekuria Tefera ("Tefera"). The duration of the lease agreement would be for the period 1 April 2006 to 31 March 2011.

8]According to the lease agreement there would be no cession of any rights pertaining to the lease and there would be no subletting of the premises without prior consent from the applicant. Another relevant term of the lease was that renewal of the lease had to take place four months prior to the expiration of the lease.

9]Tefera traded as MINI BOUTIQUE at the applicant's premises.

10]On 7 October 2009 Tefera sold his business MINI

BOUTIQUE to Danial Zegenu Moges (Moges). In the sale agreement Tefera ceded the lease to Moges and the latter would occupy the premises. Moges would also pay the rental in respect of the leased premises directly to the applicant.

11]The applicant stated that it only became aware of the aforesaid sale between Tefera and Moges in May 2010. Further, that it was never a party to the sale and had never consented to the cession and occupation of its premises by Moges.

12]Be that as it may, the applicant continued to accept rental payments from Moges and allowed Moges to occupy the premises.

13]On 22 June 2010 the applicant sent a "New Tenant Application form" to Moges. Moges completed the form and returned it to the applicant. In completing this form Moges stated that the prospective new tenant was "MINI BOUTIQUE (as its registered business name) under "SELAM BOUTIQUE CC".

14]In addition Moges also attached the following documents to the New Tenant Application form:

(a) CIPRO registration of SELAM BOUTIQUE CC;

- (b) tax clearance certificate of SELAM BOUTIQUE CC;
- (c) proof of Moges's residence from Phokwane Municipality;
- (d) identity document of Moges; and lastly
- (e) bank statements of SELAM BOUTIQUE CC.

15]Thus by June 2010 the applicant became aware that MINI BOUTIQUE was in occupation of the applicant's premises. It was further aware that though MINI BOUTIQUE was the trading name, MINI BOUTIQUE traded so under SELAM BOUTIQUE CC.

16]The law as regards a close corporation is clear. Upon registration of a close corporation it becomes a juristic person and continues to exist as such notwithstanding the change in its membership until it is deregistered or dissolved. See **section 2(2) of Close Corporations Act 69 of 1984**.

17]A close corporation would therefore have its own legal *persona* which is distinct from the natural persons that make up its membership, and can sue and be sued. See **Dadoo Ltd v Krugersdorp Municipal Council**, 1920 AD 530 as regards legal *persona*.

18] Having regard to the law above, and if one examines the facts of this case, it is clear that the SELAM BOUTIQUE CC, a close corporation, would have its own legal *persona* which would be distinct from that of Moges.

[19] The applicant, being well aware before it instituted these proceedings, that the occupier of the premises was MINI BOUTIQUE with the registered business being SELAM BOUTIQUE CC, still opted to proceed against Moges instead of against the close corporation.

[20] Realising that it had erred, the applicant then proceeded to institute proceedings against SELAM BOUTIQUE CC, in July 2011 under case number 1105/2011. At this stage the applicant should have withdrawn these proceedings as it was clearly now evident that they had proceeded against the incorrect party. In the result the respondent's *point in limine* must succeed.

[21] It is trite that costs usually follow the successful party. The costs which were reserved on the previous occasion become due at this stage. The applicant being aware as far back as June 2010 that SELAM

BOUTIQUE CC was suppose to have been cited as the occupier of it premises, it therefore stands to reason that the applicant is liable for all the costs inclusive of those reserved on the previous occasion.

[22] I therefore make the following order:

The application is dismissed with costs inclusive of the costs reserved on 29 April 2011.

W HUGHES-MADONDO
ACTING JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

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Obo Applicant:	Adv. De Beer obo L.Coetzee Attorneys
Obo Respondent:	Mr. M. Fletcher of Fletcher's Attorneys