CIV/T/50/83

IN THE HIGH COURT OF LESOTHO

In the matter of :

THE SOLICITOR GENERAL — Plaintiff

v

1. THE LESOTHO QUALITY AGGREGATE INDUSTRIES(PTY)LIMITED — 1st Defendant
2. MACHACHE TRANSPORT — 2nd Defendant

JUDGMENT

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 24th day of March 1983

The plaintiff instituted an action for ejectment of the defendants from 67 hectares of land in an area called Mokunutlung in the district of Maseru.

The defendants entered an appearance to defend and plaintiff applied for Summary Judgment in terms of Rule 28 of the High Court Rules on the ground that the defendants have no bona fide defence and had entered an appearance solely for the purpose of delay.

The Solicitor General is the nominal plaintiff representing the Government of Lesotho in terms of s.3(2) of the Government Proceedings and Contracts Act 1965 (Vol X Laws of Lesotho p.633).

In the area of land known as Mokunutlung there is granite stone suitable for quarrying.

The crux of the plaintiff's case is that the defendants are carrying on mining operations at the site without holding a mining lease or a mining licence issued in terms of the Mining Rights Act (No. 43 of 1967 Vol XII Laws of Lesotho p. 516) hence acting illegally. The only body that by law is empowered to make such a grant is the Mining Board or His Majesty the King acting on the recommendation of the Mining Board (s.6). The Mining Board is established by s.5 of the Act and its members are the Cabinet, i.e. the Council of Ministers constituted under s.5 of the Lesotho Order 1970.

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It is common cause that the defendants do not hold and have not been granted either a mining lease or a mining licence by the Mining Board. The defendants however in their defence against the application for Summary Judgment have set out facts showing that they were attempting to obtain such a grant from the Mining Board albeit by a circuitous route and almost, but not quite, succeeded. This appears from documents attached to the affidavit opposing Summary Judgment (annexures A B & C). Four bodies of persons were involved :

1. The Lesotho National Development Corporation(LNDC) a parastatal statutory organisation (by Act 27 of 1967 Vol XII Laws of Lesotho p. 83) but a legal entity in its own right. The chairman of the board of directors is the Prime Minister (or any Minister which he may from time to time designate) and the Minister of Finance (s.8(3) as amended by Act 20 of 1974 in gazette No.9 of 1975 dated 28th February 1975). Both are in the Cabinet and hence in the Mining Board,

2. The Ministry of Water Energy and Mining(the Ministry),

3. The Cabinet i.e. the Mining Board (the Board),

4. The two defendants who are respectively a limited private company and a firm or business engaged in transport. The company is run and the transport business is operated by a gentleman called Florio who in effect, or to a large extent, "owns" (to use the word colloquially) both. Where the context so requires I shall use the name Florio as connoting the two defendants.

In an attempt to get a mining licence or lease from the Board Florio dealt with LNDC. The Ministry acted as a channel of communication between the Board and LNDC but neither the Ministry nor the Board had any dealing whatsoever with Florio as a person or with the defendants. The first defendant was at one time a wholly owned subsidiary of LNDC. On the 28th February 1981 Florio purchased from LNDC the whole share capital of that subsidiary. LNDC however had been negotiating with the Board, through the Ministry, the grant to it of a lease or licence in terms of the Mining Rights Act 1967 in respect of Mokunutlung site. It should be noted that the correspondence produced by the defendants shows that these negotiations took place between June 1981 and April 1982 when LNDC had divested itself of the whole share capital of its former subsidiary, but it may well be (and I will so assume in favour of defendants) that LNDC contracted to cede to the first defendant any mining lease or licence which LNDC may have been able to procure from the Board. LNDC appears to have encouraged defendants, at any rate until 11th March 1982, to go

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ahead with impvements to Mokunutlung as if everything was in the bag so to speak. The letter from LNDC to Florio under the signature of its Managing Director (annexure D of the opposing affidavit) demonstrates that he was not fully familiar with the provisions of either the Mining Rights Act or the Land Act 1979. It also incidentally negates defendants contention in their defence that they held a grant over the land from the chief under whose jurisdiction it falls. I shall deal with this aspect in more detail in due course.

Mr. Kuny who argued the case for defendants submitted that paragraphs 7,8,9,10,11,12,13,14,15,16.17,18 and parts of 21 of the affidavit supplied by Mr. Thabo Makhakhane on behalf of the plaintiff were irrelevant superfluous and vexatious and should be struck off. Mr. Tampi submitted that the plaintiff was enjoined to make what is in effect a declaration and this is what Mr. Makhakhane had done. The affidavit in opposition admitted or traversed all the averments made by Mr. Makhakhane. The affidavit sworn on plaintiff's behalf certainly disclosed a cause of action for ejectment and was not defective though the particulars averred in some paragraphs were not necessary or relevant. I left the matter of striking out in abeyance in order to hear arguments on the main issues. Mr. Kuny says, if I understand correctly, that there are six grounds justifying the Court in refusing to exercise its discretion to grant Summary Judgment, viz,

1. That the plaintiff, i.e. Lesotho Government, has no "locus standi" to bring an action for ejectment because it does not own the land and has "no interest".

2. That the relief claimed(ejectment) was misconceived for the plaintiff's remedy if any, was to apply for an interdict the granting or refusal of which depended on a multiplicity of factors, which may or may not have been favourable to defendant, but which will not have included an order of ejectment.

3. That the plaintiff cannot obtain ejectment under the Mining Rights Act because the Act itself provides for the prosecution of an offender contravening the Act and the plaintiff should have proceeded to lay a complaint with the police.

4. That granite stone may not be base mineral that falls within the definition in the Mining Rights Act. Summary Judgment will prevent the defendants from raising the defence that stone is not a mineral, as they would be entitled to if the action goes to trial.

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If they are so able to persuade the Court at the trial then no mining lease or licence is required from the Board since defendants have a grant"from the chief".

5. That the defendants have adduced sufficient facts that would entitle them to counterclaim for damages from the plaintiff.

6. That the defendants have in any event a prima facie claim in damages against LNDC and should be given an opportunity to apply to join it as a party to the proceedings. The defendants will be deprived of this opportunity if Summary Judgment is granted.

The defence of estoppel has not been pursued.

Mr. Kuny cited the following cases to illustrate the difficulties in ascertaining whether an earth's substance such as stone is or is not a mineral:- Glencairn Lime Co. (Pty)Ltd v Ministers of Labour and Justice 1948(3) SA 894; Ex-Parte Erasmus 1968(4) SA 788; S. v. Twin Springs(Pty)Ltd 1981(1) SA 562. It is, Mr. Kuny submits, a matter of evidence at the trial. Mr. Tampi cited Hoisain v Wynberg Town Clerk 1916 AD 236; Southend Corp v Hodgson Ltd 1961(2) All E.R. 46 and Brady v S.A. Turf Club 23 SC 385 for the proposition that estoppel cannot be pleaded against statutory provisions.

Mr. Tampi's arguments in answer to the points raised are :

1. That the plaintiff is charged by law with the administration of the Mining Rights Act and has an interest in seeing to it that the provisions of the Act are complied with, and has a right to enforce this interest by way of ejectment.

2. That ejectment is a remedy open to the plaintiff and it need not have proceeded to follow every other remedy that may be available to it. The criminal prosecution of an offender does not exclude a civil remedy.

3. That the definition of "base mineral" in s.1(2) of the Mining Rights Act and the word "mine" in the same section are unambiguous and must include granite stone quarrying. All the parties involved knew this as a fact. The definition of aggregate in the Industrial Licencing (Aggregate) Regulations 1980 (L.N. 8 of 1980) makes this crystal clear. In answer to Mr. Kuny's submission that stone, at an impending trial, may not be held to be a mineral and quarrying not a mining operation that requires a lease or licence in terms of the Mining Rights Act, it nevertheless requires a lease or licence in terms of s.12 of the Land Act 1979 which Act (by s.3 thereof) vests all land in Lesotho in the Basotho Nation, held by the State, as representative

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of the Nation.

4. That no counterclaim lies against the Board for damages but even if such a claim can be made it is not a defence to plaintiff's claim for ejectment (Spilhaus & Co Ltd v Coreejees 1966(1) SA 525).

5. That the defendants may or may not have a claim in damages against LNDC but LNDC is neither the Board nor the Land Allocating Authority and plaintiff's claim to ejectment cannot be defeated.

I have no doubt in my mind that granite stone falls within the definition of base mineral and what the defendants are undertaking is a mining operation requiring a lease or licence under the Act. The defence that defendants hold a land grant from the chief is bogus. The LNDC Managing director's letter to Florio, referred to earlier, shows that until the 11th March 1982 at any rate no chief had made a grant either to LNDC or to anyone else. The documentary evidence of the grant from the chief was not attached to the defendants' affidavit. I do not think it exists because after the Land Act 1979 land allocations can only be granted in accordance with the provisions of the Act.

The legal position is clear to me.

1. Under s.2 of the Mineral Rights Act the right to minerals in any land are vested in the "Basotho Nation". I had occasion in Kou v Minister of Interior and another (CIV/APN/360/77 dated 17th April 1978 - unreported) to analyse what the "Basotho Nation" means in matters relating to land.

2. Under s.3(1) of the Land Act 1979 all land whether it has minerals as defined in the Mining Rights Act or not is vested absolutely and irrevocably in the Basotho Nation and is held by the State as representative of the Nation. Section 3(2) goes further to say that for the avoidance of any doubt no person other than the State shall hold any title to Land except as provided under the customary law or under this Act. It is plain that LNDC had not acquired any customary law title to the area of Mokunutlung. If anything happened on the lines suggested by defendants in their affidavit after the 11th March 1982 then surely the land they occupy in which quarrying operations are in progress, is for a commercial or industrial purpose within the meaning of s.12 of the Land Act 1979 which lays down special procedure before a lease or a licence is issued. Nothing has been forthcoming from defendants on this matter.

The facts which defendants aver, if pleaded, prima facie show that an arguable case has been made out against LNDC with

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whom a contract, express or implied, may have existed in relation to Mokunutlung at the time of the purchase of the shares. But LNDC is not the plaintiff. LNDC has a board of directors two of whom sit on the Board, or at any rate certainly one since the chairman has the power to designate a Minister who may not necessarily be a Cabinet Minister: we have three of them at the moment, and there are 14 Cabinet Ministers. What the letter dated 11th August 1981 (annexure B) shows is that at a meeting of the Board, LNDC got its consent in principle, subject to conditions, to grant it a lease or licence but the Board later changed its mind. There was however no privity of contract between the Board and the defendants. I do not know if the defendants have a claim against the Board in delict but if they do have such a claim it does not affect the plaintiff's right to possession immediately on the anology of Spilhaus' case, supra, which was concerned with the delivery of a specified movable object, and delivery of an immovable object ought to make no difference. The case before me today is not one between landlord and tenant simpliciter but between landlord (or landowner) and squatter in a situation governed by a unique and unusual land law.

In my opinion the defendants have no defence against ejectment that can be sustainable at law (Roscoe v Stewart 1937 CPD 138) and no case has been made out to refuse Summary Judgment. Summary Judgment is accordingly entered for the plaintiff as prayed.

T. S. Ramaema

CHIEF JUSTICE
24th March, 1983

For Plaintiff : Mr. Tampi
For Defendants : Mr. Kuny