

IN THE HIGH COURT OF LESOTHO

In the Application of :

JAMES MOTLALETSI MOTAUNG Applicant

and

MAHOMED OSMAN Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 17th day of February, 1986.

Applicant herein has moved this Court for an order  
couched in the following terms :

- "1. Rule Nisi be issued returnable on a date and time to be determined by the above Honourable Court calling upon the Respondent to show cause why:
  - (a) Bataung garage at Qoaling Ha Seqobela, presently occupied and used by Respondent should not be closed with immediate effect;
  - (b) Respondent should not pay the monthly rental in the amount of M3,000 being rental for the occupation and use by him of the said garage premises since July, 1983 to date;
  - (c) Respondent should not pay interest a tempora morae at the rate of 11 per cent;
  - (d) He should not pay costs of this application.
2. That prayers 1(a) and (b) above should operate as an interim interdict pending the finalization of this application."

The Rule was on 6th March, 1984, granted as prayed but the Respondent subsequently opposed its confirmation.

The facts that emerged from the affidavits were briefly that on 17th June, 1983, the Applicant and the Respondent entered into a written contract (Annexure D) whereby the former agreed to sell to the latter all rights,

title and interest in and to the buildings and other improvements erected with the consent of Government, express or implied, and the garage plant and equipment on his unnumbered business site - situate at Qoaling in the district of Maseru, measuring 150 feet x 250 feet according to Title Deed Number 4568 of 19th February, 1968 (Annexure A).

In terms of Clause 1 of the conditions of the Deed of Sale signed by the parties the purchase price of the property was M155,000 of which M50,000 was to be paid by the Respondent as a deposit into the Trust Account of Messrs. E.G. Cooper and Sons - Attorneys of Maseru. The balance was to be paid in twelve (12) monthly instalments commencing from the date on which the ministerial consent for the transfer of the property would be obtained. Indeed it would appear that in consequence of the deed of sale, the Commissioner of Lands was approached with an application for lease to facilitate the requisite ministerial consent. This is implied in annexure 'M' about which more will be said later in this judgment.

It was common cause that upon signature of the Deed of Sale on 17th June, 1983, the Respondent did pay the M50,000 into the Trust Account of Attorneys E.G. Cooper & Sons. In terms of Clause 2 (of the Deed of Sale) which provided that occupation of the property would be given to the purchaser on 1st July, 1983, the Respondent did assume occupation of the property on 1st July, 1983. He was, therefore, only awaiting the ministerial consent to be obtained so that he could start clearing the balance of the purchase price in accordance with the provisions of the Deed of Sale.

However, according to the Applicant after they had signed the Deed of Sale on 17th June, 1983, the parties held another meeting during which it was verbally agreed that they had not fully understood the terms of the Deed of Sale which should, therefore, be cancelled. A draft agreement (Annexure F) to that effect was prepared but never signed by either of the parties. Nonetheless, following the alleged unsigned verbal agreement, the applicant addressed a letter (a copy of which

3/ is annexure M) .....

is annexure M) dated 14th December, 1983 to the Commissioner of Lands advising him of the parties' alleged verbal agreement and questioning the wisdom of his proceeding with the processing of the application for the ministerial consent.

The applicant further deposed that following the alleged verbal agreement to cancel the Deed of Sale concluded on 17th June, 1983, he and Respondent entered into another agreement whereby the latter was to pay him an amount of M3,000 per month as rental for the occupation and the use of the property. The Respondent was, however, not honouring the agreement by refusing/neglecting to pay him the amount.

The Respondent hotly disputed Applicant's averment that following the conclusion of the Deed of Sale on 17th June, 1983, another meeting was held during which he and the Respondent verbally agreed to cancel the Deed of Sale. We have, therefore, the word of the Applicant as against that of the Respondent on this point. However, assuming for the sake of argument, that the parties did enter into an agreement to cancel the Deed of Sale, it was applicant's evidence that such agreement was never signed by the parties. That being so, the verbal agreement could never have been valied for Clause 7 of the Deed of Sale clearly provided:

"This Deed of Sale constitutes the entire agreement between the parties and no modification, variation or alteration thereto should be valid unless in writing and signed by the parties there- to." (My underlinings)

I do not see how an invalid agreement to cancel the Deed of Sale could have, in fact, cancelled it. For this reason Respondent's contention was that as far as he was concerned, the agreement concluded between him and the applicant on 17th June, 1983 was still in force. I entirely agree. It follows, therefore, that if it were based on the purported cancellation of the Deed of Sale by the alleged verbal agreement, prayer 1(a) of the Notice of Motion cannot stand.

It must, however, be pointed out that as it was subject to the minister granting his approval or consent in some future time, the agreement entred into by the parties to

sell the property was subject to a true suspensive condition i.e. it was not, as yet, a contract of sale over the property. It was merely an agreement that the parties would enter into such a contract when and if the minister gave his consent to the parties to do so (Corondinas & Another v. Badat 1946 A.D. 548 p.551).

As regards Annexure M, the copy of the letter dated 14th December, 1983, the Respondent deposed that it was never copied to him and he was surprised to learn of its existence from the Commissioner of Lands. I have looked at Annexure M and I must say, on the face of it, there is no indication that it was copied to the Respondent. I find it difficult, therefore, to resist the inference that the applicant wrote it behind the back of the Respondent in an attempt to surreptitiously undermine the agreement concluded by the parties on 17th June, 1983. That was patently a dishonest act from which the applicant could not be allowed to benefit.

The Respondent further disputed applicant's evidence that following the conclusion of the agreement of 17th June, 1983, the parties entered into another contract whereby he was to pay the applicant an amount of M3,000 as monthly rental for occupation and use of the property. On the contrary he (Respondent) was the one who suggested by way of a compromise that he would be prepared to pay the M3,000 monthly rental pending the ministerial consent on condition that the total amount paid would be deducted from the balance of the purchase price as soon as it became due and payable i.e. when the ministerial consent had been obtained. For that purpose the Respondent offered to prepare a draft amendment to the contract of 17th June, 1983 which amendment would be signed by the parties in accordance with the provisions of Clause 7 of the Deed of Sale. However, notwithstanding repeated requests, applicant refused/neglected to give him the go ahead and the Deed of Sale remained unamended.

Reading from the papers before me, it would appear that the Respondent did write Annexure 'C', the letter of 14th November, 1983, in which he accepted by way of a compromise to pay the amount of M3,000 as monthly rental on conditions

5/ that the .....

that the agreement of 17th June, 1983 was amended in accordance with the provisions of Clause 7 of the Deed of Sale and the amount paid would be deductible from the balance of the purchase price when it became due and payable. The applicant clearly accepted this compromise by Annexure 'G', his letter of 18th November, 1983. It is, however, clear from the letters marked Annexures "H", "J" and "K" that the parties never finalised the question of amendment as proposed by the compromise. Until this had been done, it seems to me, there was no reason why the Respondent should have paid the M3,000 monthly rental for occupation and use of the property since July, 1983.

In the light of all that has been said above, it is clear that the view that I take is that the applicant is not entitled to the reliefs sought in this application and the Rule Nisi granted on 6th March, 1984 ought to be discharged with costs to the Respondent. It is accordingly so ordered.

B.K. MOLAI  
JUDGE

17th February, 1986.

For Applicant : Mr. Khaue,  
For Respondent : Mr. Tsotsi.