

IN THE HIGH COURT OF LESOTHO

In the matter between:-

FLORA SELESO	1st Applicant
MAKARA RAPHOKA	2nd Applicant
MAMMUSI MOTHOKANA	3rd Applicant

and

MARGRET :MATHABISO THAKALEKOALA	1st Respondent
THE MESSENGER OF COURT (MR. LEMENA)	2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 24th day of September, 1990

On the 18th June, 1990 the applicants applied for and a rule nisi couched in the following terms was granted in their favour:

1. (a) Why the warrant of ejectment issued under CC. 638/89 should not be stayed until the finalization of the appeal noted to this Honourable Court which is due to be heard on the 29th day of June, 1990.

(b) The first respondent should not be ordered to pay the costs of this application.

2. Prayer 1 (a) should operate as an interim interdict.

To-day is the extended return day of that rule nisi.

The facts of the case are that on the 9th January, 1939 the 1st respondent sold to the 1st applicant a certain plot situated at Sea-Point known as Plot No. 13281-54 together with the improvements thereon. According to the agreement the 1st respondent was to pass to the 1st applicant her obligations under the mortgage bond hypothecating the said property. The said mortgage bond was for an amount of about M59,000-00. In addition to that the 1st applicant was to pay to the 1st respondent the sum of M5,000-00 immediately upon the signing of the agreement. The first applicant has duly paid the said sum of money.

The 1st respondent undertook to arrange with the mortgagor the transfer of the mortgaged property to the 1st applicant as quickly as possible. If the 1st respondent failed to transfer the mortgaged property to the 1st applicant the former was to reimburse the latter the said sum of M5,000-00; alternatively the first respondent would permit the 1st applicant to remain in occupation and do business thereon for such period as shall make it possible for the 1st applicant to recover the said sum of money.

On the 7th April, 1989 the 1st respondent obtained a consent certificate made by the Minister of the Interior in terms of sections 36 and 84 of The Land Act, 1979.

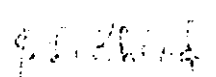
I shall not deal with the merits of this case because there is an appeal pending before this Court and the merits will be dealt with at the hearing of that appeal. It seems that the parties accused each other of breaches of the contract until the 1st respondent instituted an action for ejectment in the Magistrate Court, Maseru. A judgment was granted in her favour in terms of which the applicants were to be ejected from the said plot. An appeal was lodged on the 17th November, 1989.

On the 7th December, 1989 in CC. 536/89 the 1st respondent made an application in which he applied for execution of the judgment granted against the applicants on the 15th November, 1989. The trial court having heard all the arguments and having considered the balance of convenience granted the order of the execution of the judgment.

It is common cause that in the present application the applicants deliberately held back this material fact and gave the Court the impression that there was no impediment other than the fact that an appeal against the judgment had been lodged. The duty of the applicants was to appeal against the order of execution of the judgment, alternatively to disclose to this Court that the 1st respondent had obtained a judgment that the judgment should be carried into execution in terms of section 51 of the Subordinate Courts Order, 1988.

It is trite law that the utmost good faith must be observed by litigants making ex parte applications in placing material facts before the court; so much that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure (De Jager v. Heibron and others 1947 (2) S.A. 415). On this ground alone I came to the conclusion that the application ought to be dismissed.

In the result the rule nisi was discharged with costs.


J.L. KHEOLA
JUDGE

15th October, 1990.

For Applicants - Mr. Mphalane
For Respondents - Mr. Hlaoli.