CIV/APN/198/88

IN THE HIGH COURT OF LESOTHO

In the Application of :

TUMANE MAKOKO Applicant

V

MAHOMED OSMA 1st Respondent
THE COMMISSIONER OF LANDS 2nd Respondent

J U D G M E N T

Delivered bythe Hon. Mr. Justice M.L. Lehohla
13th day of February, 1990.

At the hearing of this application it was resolved that a determination should be made regarding the points raised in limine on behalf of the first respondent before any arguments could be heard on the merits.

The question raised in limine was decided for the first respondent.

The following are the reasons for the Court's finding :-

Fani Makoko is the applicant's father. He filed a supporting affidavit in support of the applicant's claim to the relief sought.

Fani entered into an agreement of sale of a site as reflected in annexure "B" with the first respondent in July 1980. In his supporting affidavit Fani avers that he did this to punish his son the applicant.

The order sought by the applicant is to set aside an

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agreement to which Fani is a party though he has not been joined.

It was argued for the first respondent that on account of the interest Fani had in the agreement he ought to have been joined in these proceedings. He however had filed his affidavit showing his attitude to these proceedings.

In C of A (CIV) No. 12 of 1987 Lepoqo Mohale & Another vs Commissioner of Lands & Survey and 3 Others (unreported) the Minister of the Interior who was not joined in the proceedings had his affidavit used both in the court below and the Court of Appeal. See also the same parties in CIV/APN/358/86 (unreported).

But in C of A (CIV) No. 12 of 1983 David Masupha vs Paseka 'Mota (unreported) it was felt that the proceedings in the court below were fatal on account of the fact that the respondent's daughter whose interests were substantial and direct was not joined. It is of interest that she had not filed any affidavit to signify her attitude to the proceedings in the court below nor even in the Court of Appeal notwithstanding a request to do so by the latter court.

In the instant matter the 2nd respondent has not filed any opposing papers.

It was argued for the first respondent that the Land Act enjoins the Commissioner of Lands to register leases. The actual registration is effected by the Deeds Registrar. It was submitted therefore that either the Registrar of Deeds or the Attorney General ought to have been joined.

In CIV/APN/397/87 Swallows Football Club vs Lesotho Sports Council & 2 Others(unreported) at page 14 this court stated:-

> "I come to the conclusion therefore that the proceedings brought before me are fatally defective in that a party which has a direct and substantial interest in

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the outcome of this matter has not been joined."

In the case just cited above the court had made an observation as follows:-

> "(the) Applicant is not unaware of the stage reached in the progress towards finals and of the incidental consequences brought about by such progress. Being an interested party the applicant must be aware of the number of Clubs required by laws and regulations governing the conduct of the finals to participate in those finals. By necessary implication, inclusion of the applicant in the finals requires exclusion of one of the Clubs which holds itself as qualified in terms of the rules to participate in the finals. How then can such a club be dislodged from its position without having been joined in proceedings that are likely to lead to such end?"

See Masupha above at page 2.

It appears that in terms of annexure "L" the area within which the site falls was declared a selected development area as far back as 21st August 1981.

The 1979 Land Act in section 44 provides that once the Minister has declared any area a selected development area all the titles to land within that area shall be extinguished but substitute rights may be granted as provided in Part V of the Act. See section 48.

Nothing in the papers or in argument shows that after the extinction of rights held by the applicant's father to the land in question there came into operation any substitute rights for the father to that land.

The applicant's claim to this land is that it was given to him as a donation by his father. It would seem that the law that was applicable in the circumstances was the 1973 Land Act. But even if Fani felt he had a lawful title to this land before the operation of section 44 of the 1979 Land Act it appears that he failed to effect all the requirements which would have given the applicant lawful title to that land.

/Annexure

Annexure "A1" purports to be an instrument through which title was sought to be bestowed by Fani on the applicant. This is a letter written by Fani on 14.2.77 saying he binds himself before the chief that he gives his site situated at Borokhoaneng to his son, Taumane Makoko.

In this letter Fani expresses the hope that the chief would change the names against which the land is held to those of Taumane.

But reference to the then applicable 1973 Act shows that transfer of land in the rural area where the site in question then fell could only be effected by the chief acting in consultation with the Land allocation committee.

Nothing in the papers shows that the land allocating committee had anything to do with this land.

The applicant cannot rely on the purported donation in the absence of proof that the land allocating committee had approved such donation. It was his duty to ensure that the application for donation was processed to finality.

It would seem he maintains that he made a mistake by not pursuing this. Can he rely on his mistake in a manner that prejudices a bona fide buyer i.e. the 1st respondent? I think not. He is estopped from so acting. It does not auger well to suggest that either the applicant or his father failed to do things imposed by the law because either one or both of them are laymen.

There is merit in the submission that as at 21.8.81 Fani and not his son was the one qualified to be granted the lease. But even then when the rights to the place became extinct following the operation of section 44 of 1979 Land Act it does not follow that the title to substitute right comes as a matter of course in respect of the land previously held because that law shows that

/if

if the land was held for purposes which are not consistent with the development scheme the previous holder will have no title to that land.

I uphold the point in limine centred on the view that following the extinction of the previous holder's right to that land any interested party had as good a qualification to apply for a lease to hold that land as any other party.

The 1st respondent obtained his lease to the land in a manner recognised and permitted by the law. I don't see why he should be disturbed.

Costs are awarded to the first respondent.

J U D G E.
13th February, 1990.

For Applicant : Mr. Lepholisa
For Respondent : Mr. Pheko.

CIV/APN/367/88

IN THE HIGH COURT OF LESOTHO

In the Application of :

DORBYL FINANCE (PTY) LTD Appplicant

V

J.M. LETHOBA Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 12th day of February, 1990.

On 8th December 1988 the applicant obtained an interim Court Order before Molai J. On the following day the applicant sought to be issued from the office of the Registrar the Court Order appearing on pages 31 and 32 of the record.

The 3rd August 1989 was the extended return date of the Rule Nisi which had been granted a long time previously.

I heard the matter on the return date.

The case for the applicant is that he sold a bus to the respondent. The respondent is in arrears. The applicant's counsel as indeed the applicant's papers set out that the respondent says that he had to pay for repairs on the vehicle hence his failure to pay the price fixed for the bus. The respondent is of the view that because of the expenses he incurred in repairing the

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vehicle he was not obliged to effect payments agreed upon between him and the applicant.

In an answering affidavit one Molati who is not the respondent avers that he is entitled to answer the applicant's papers because he Molati is the one using the vehicle.

The applicant's counsel indicated that he was not taking the point that Molati has no locus standi but rather is impugning the respondent's attitude.

Annexure B attached to the applicant's papers shows in clause 6 relied on by the applicant at page 7 of its affidavit that

> "Ownership in the goods shall not pass to the Buyer until receipt by the Seller of all amounts payable by the Buyer under this agreement in respect of such goods."

See paragraph 4 of the applicant's affidavit.

The applicant also relies on the breach clause reference to which is made at page 8 setting out that

> "Should the Buyer default in the punctual payment of any amount falling due in terms hereof .... then in any of the aforesaid events the Seller shall have the right to claim immediate payment of all amounts then outstanding under this agreement whether or not such amounts are due at that stage, all of which amounts shall immediately become due and payable; provided however that if the Buyer fails to make payment thereof the rights of the Seller under this Clause 15 shall not be exhuasted and the Seller shall, notwithstanding the election to claim immediate payment in terms of this sub-clause, be entitled to claim and recover the relief set out in 15.2.2; or in terms of 15.2.2 cancel this agreement whereupon the Buyer shall be obliged at its own risk and expense forthwith to deliver possession of the goods to the Seller and the Seller shall be entitled to recover the difference between ..."

the amounts set out in paragraphs 15.2.2.1 and 15.2.2.2.

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