CIV/APN/232/90

IN THE HIGH COURT OF LESOTHO

In the Application of :

'MATEBOHO TLALI — Applicant

vs

MPHALE SULA — Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 24th day of June, 1991

The applicant brought the above application on an urgent basis against the respondent for a Rule Nisi calling upon the respondent to show cause why :-

(a) he shall not be directed to put the applicant in occupation of the immovable property situate at Qoaling Ha Besele in the Maseru district,

(b) he shall not be directed to transfer, forthwith, to the applicant lawful ownership of the said immovable property and to execute all documents required for such transfer,

The third prayer required the Deputy Sheriff and the Chief of Qoaling Ha Besele to carry out orders, if granted, in (a) and (b) above in the event of the respondent's failure to comply therewith.

Prayer (d) on costs calls upon the respondent to say why the scale applicable should not be on attorney and client, while (e) calls upon the respondent to say why he shall not be interdicted from causing the applicant to be evicted from her residence at Qoaling .....

/The

The applicant, relied on the averments contained in her affidavit stating that between the period 1966 and 1981 she and the respondent cohabited and lived on a site belonging to the respondent.

However in 1975 the respondent erected a house for the applicant to live in at Ha Letlatsa. By agreement with the respondent, the applicant removed to this house and has been residing there since 1981.

In 1986 the respondent demanded that the applicant vacate the above residence and move to a third house erected by the respondent at Ha Besele. The applicant refused to do so on the grounds that the house she was occupying was the result of a joint effort between her and the respondent and that by agreement she would in due course have property rights to this house transferred to her. The respondent's counter argument was that the agreement was that the property that it was envisaged would be transferred to the applicant was this third house.

In 1987 the respondent instituted ejectment proceedings against the applicant and succeeded in doing so before the Matala Local Court in part because that Court accepted the respondent's assertion that he had built the applicant a house at the third site.

The applicant's appeal to Matsieng Central Court was upheld only to be upset by the Judicial Commissioner's Court which re-instated the judgment of the Local Court.

The applicant failed to obtain a copy of the Judicial Commissioner's written reasons for judgment because the said Commissioner was seriously ill and died soon afterwards.

The applicant then decided to accept the respondent's version of the agreement between the parties and thus bow down in the house of Rimmon, for in any case the Judicial Commissioner's Court had determined that the respondent's version was the right one.

/Accordingly

Accordingly the applicant aligning herself with the terms of the agreement given Judicial sanction/force to by the Judicial Commissioner's Court caused a letter to be sent to the respondent's attorneys requesting to be placed in occupation of the third house in terms of the judgment. The letter is attached to the papers marked "A" dated 16th July 1990.

In response to Annexure "A" the respondent's attorneys addressed Annexure "B" dated 30th July 1990 to the applicant's attorneys saying in part with regard, no doubt, to the third site :-

> "Our client has agreed to give possession of the property to your client in terms of his undertaking throughout these legal proceedings.
>
> Kindly let us know when your client wishes to take possession.
>
> We understand that there will be need to change the Form C that it could be in your client's name.
>
> Our client will proceed to do so immediately....."

The applicant's attorneys proposed that Friday 3rd August, 1990 be marked as the suitable date for the applicant's occupation of the third house in the site in question. See Annexure "C".

On 7th August 1990 the respondent's attorneys wrote a letter to the applicant's attorneys pointing out that they were withdrawing their letter (Annexure "B") of 30th July. Further explaining that this letter was a product of some misunderstanding and urging the applicant's attorneys to take whatever action they deemed appropriate; the respondent's attorneys concluded by pointing out that they had argued the appeal and considered that their mandate had terminated at that point and no further.

Mr. Sello for the applicant submitted that the

/respondent's

respondent's opposing affidavit is mainly common cause.

In his replies to the questions put by the Local Court the respondent indicated that the applicant resided in the 2nd site since 1981 when she moved from the 1st site where she used to live with him.

It is also indicated that the parties cohabited because their marriages to their respective spouses had failed.

The respondent further indicated at page 21 that he and the applicant set up home through their joint resources with the applicant. This is the second site.

At the time of the trial before the Local Court the respondent and the applicant were not staying together. The applicant was staying at the second site while the respondent was staying at the first site. He wanted the applicant to remove to the third site because the second site was a business site intended to be rented to tenants. Otherwise he explained to the Court that they lived apart with the applicant in order to avoid frictions which might arise due to the fact that each party had grown up children from the failed respective marriages and the respondent feared that these children might resent the illicit relations between the parties.

Notwithstanding the foregoing in his affidavit before this Court the respondent seeks to explain that granting the applicant any of the properties involved in the dispute was an act intended by him and the applicant to defraud his family.

He further stated that the applicant's qualification to occupy as her own any of these sites without his heirs' knowledge and consent was conditional upon the continued existence of the concubinage between him and the applicant. To make it plain that the applicant has no reason to expect to occupy either the second or third site

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as of right the respondent avers that the concubinage no longer exists. He further indicates that the applicant is well aware that the site which had been intended for her and which she refused was given to the respondent's child 'Mannaki 'Mamohloki Mohono who has even made improvements on the said site.

In my view, it is plain that in the Court of first instance the respondent's contention was that the place agreed upon for the applicant to remove to was the third site. Although the applicant argued that the place agreed upon was the second site the Courts preferred the defendant's version to hers. It seems to me that the agreement did not exclude the essential element that in recognition of the applicant's contribution to the building erected after she cohabited with the respondent she was to receive a house where to live apart from the respondent. While this essential element in the agreement obtains it seems to me immaterial whether the site in question is the one that the applicant claimed or the other/which the respondent was accepted in his version regarding that it was the one agreed upon. The end result is that the applicant cannot be turned to the veld. Although it is arguable that the Local Court and in turn the Judicial Commissioner's Court were wrong to dismiss the applicant's claim, in my view, the consideration upon which the respondent embarked on building a house at the third site for the applicant is enforceable, for under oath he said "at this new site at Ha Besele where I want the applicant to go and stay, all the expenses are solely mine". It seems to me that this was done regard having been had to the fact that the applicant was to forego the site to which she had contributed in the development of.

Thus, to adopt the popularised American expression, it would seem the bottom-line was that in acknowledgement of the applicant's contribution to the enlarged estate of the respondent she was to receive a developed site. Therefore

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any attempt to turn her out to the veld should fail. The Court cannot ignore the importance of the correspondence reflected in Annexures "A" to "E". Nor can it condone the transparent excuse that the then attorneys of record had acted outside their mandate. To my mind the most important end result of litigation is execution of judgment. A legal practitioner's mandate cannot be said to have been out of turn if his extended/services are employed to realise the most important result in litigation. There is a vital principle that it is in the interests of justice that litigation comes to finality.

It thus would appear that the respondent's attempt to bail out of what he considered to be an agreement between him and the applicant was prompted by a combination of two things : the undeserved success in the court of first instance and the Judicial Commissioner's Court and the greedy desire to skin the applicant to the bone.

The Court was invited to grant the application and order costs on attorney and client scale.

I have noted that the respondent was represented by a different counsel from the one who had argued his appeal in the Judicial Commissioner's Court. I do not think that Mr. Mohau's efforts to do his duty by holding the torch for a client's dull brief should warrant this Court's cesure.

Moreover his argument based on the view that the nature of the agreement if shown to be immoral would not be enforceable served as a foil to the view that the applicant's contribution was not the bestowing of her favours on the respondent or the sale of her body to him.

The application is granted with costs on party and party scale.

J U D G E

24th June, 1991

For Applicant : Mr. Sello
For Respondent: Mr. Mohau