C OF A (CIV) NO.10 OF 1994
CIV/APN/121/90

IN THE LESOTHO COURT OF APPEAL

In the matter between:

DAVID SALLEY	APPELLANT
AND	
UDO STADTSBUCHLER	RESPONDENT

HELD AT:

MASERU

CORAM:

STEYN, JA
BROWDE, JA
KOTZÉ, JA

JUDGMENT

STEYN, JA

Appellant is the Executor in the estate of his late father, one Archie Salley, who died after the institution of the proceedings which are the subject matter of this appeal. It would be convenient

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however to continue to refer to the late Archie Salley as the Appellant.

The present appeal is within a narrow ambit. Appellant had *inter alia* sought an order in the High Court in the following terms:

> "1. Directing the Respondent to vacate property on Plot 38, Cathedral Area (also known as Plot (3283-319) Maseru Urban Area, Maseru district."

(It is not necessary to refer to the ancillary relief claimed in par. 2 of the Notice of Motion as this was abandoned at the hearing.) The matter was heard on the 4th of November, 1993 and on the 4th of March, 1994 Kheola J. (as he then was) granted the order as prayed, together with costs of suit. Respondent has not appealed against this order, nor contested before us the correctness of this finding. The issue before us is to determine the validity of a condition imposed in the order of the learned Judge which can best be reflected by citing the exact terms of the Order granted. It reads as

follows:

> "...I make an order in terms of prayer 1 with costs of suit on condition that the applicant pays M.40,000 to respondent for the improvements."

In his Notice of Appeal, Appellant notes his dissatisfaction with that portion of the judgment of the High Court which

> "(a) makes Respondent's occupation of the premises, the subject matter of the said Application, conditional upon the Appellant paying the sum of M.40,000 being for improvements allegedly made by Respondent;
>
> (b) directs Appellant to pay the said sum of M.40,000 at all."

The appeal is based upon the following grounds:

"1. The said sum of M40,000.00 has:

(a) not been claimed by the Respondent in

his papers and there is, therefore, it is respectfully submitted, no basis upon which Respondent can be given judgement in connection therewith.

(b) Has not been proved.

(c) Appellant's liability therefor has not been alleged in the papers nor established.

(d) Being an unliquidated amount it required evidence to establish it which evidence was never advanced.

2. Even if it were to be held that Respondent was entitled to the said sum of M40,000.00, the fact that up to the date of hearing the premises were still in Respondent's occupation, raises the question whether Respondent has not derived all the benefits, if any, and exhausted them, which may have enhanced

the value of the premises. This could only be established at a trial where oral evidence could be led including evidence of whether they were necessary or luxurious improvements.

3. Having regard to the fact that the trial Court was aware of the fact that the Appellant may be entitled to claim some damages from the Respondent for his use of the premises free over a period of many years, the trial court committed a serious irregularity in making an order which had the effect of depriving the Appellant of his right of pleading set-off in answer to any claim by the Respondent for payment of the alleged sum. In particular the Court a quo committed a serious irregularity in deciding that it is not going to go into the question of damages and then proceeding to award the Respondent his alleged damages."

It can therefore be assumed for purposes of the

decision of this matter that Respondent was in unlawful occupation of the property owned by Appellant and that the Court *a quo* was correct in granting an order as prayed. It is therefore unnecessary to traverse the tortuous and unfortunate history as to how it came to pass that the parties found themselves in the predicament of being unable to give effect to an agreement of sale which would have conferred ownership of the property in question on Respondent or his nominee. What we have to decide is whether the High Court was right to impose the condition included in its order that Appellant should pay Respondent M.40.000 "for the improvements".

Counsel who appeared for Respondent pointed out that Respondent was a *bona fide* possessor of the property and was as such entitled to recover expenses associated with necessary or useful improvements effected on the property. This could well be correct. The difficulty is that Respondent did not claim the value of these improvements in these proceedings nor did he seek to prove that he was entitled thereto, leave alone as a condition to

the granting of the relief claimed in the notice of motion.

Counsel for Respondent did contend in his heads of argument that Respondent did claim that improvements to the value of M.40,000 had been effected whilst he was in occupation and that Appellant did not deny this. He also said that "it is not disputed that the amount of improvement lien is M.40,000".

For these statements Counsel relied on certain information Appellant placed before the Court in his presentation of the history of the matter. Appellant attached to his founding affidavit certain correspondence between the parties in late 1989 and early 1990 at a time when they were trying to effect an over-all settlement of the claims the one had against the other. Respondent's Attorneys wrote to Appellant's legal advisers and said *inter alia* that "Our clients have also expended the sum of approximately M40,000 on improvements to the premises with the landlord's knowledge and consent, which would have to form part of and parcel of these

calculations." ("These calculations" refer to an overall valuation of the property for purposes of effecting a sale thereof.)

To this letter Appellant's Attorneys responded by making a counter offer in which *inter alia* the following commentary appears opposite the figure M.40,000:

> "Less amount allowed for improvements done by your client on the property, <u>although we did not give written permission thereto and although we do not admit liability thereof just for the sake of settling the matter.</u>" (My underlining)

There can be no doubt that these facts fall far short of what Counsel has averred on a balance of probabilities establishes that useful improvements worth M40,000 had been proved by Respondent. There was in fact no proof of what these improvements were, what their value was and on what basis Respondent was allegedly entitled to compensation therefor. It is clear that the only evidence before

the Court that refers to their value was a bald averment made by Respondent in an attempt to secure a purchase price for the property on the basis of his calculations of some R196,521. Appellant was "just for the sake of settling the matter" and as part of a deal that would have netted him - on his calculations - some R334.602 prepared to accept a figure of R40,000 as "an amount allowed for improvements".

But there are apart from the above, other obstacles in the way of making the conditional order made by the Court *a quo*. The first is that it was never raised in his papers by Respondent. The sole dispute before the High Court was whether or not Appellant was entitled to have his rights of occupation restored or whether any ministerial consent had been granted which conferred some right of occupation on Respondent or his nominee. It requires no argument that a party cannot also be awarded that which he has not claimed in the lis between the litigants.

Moreover, the papers make it clear that the

parties have a variety of claims the one against the other which, as the learned Judge himself points out, were not capable of resolution in the present proceedings. By ordering as it did, the Court effectively denied Appellant the opportunity of setting off such claims as are amenable to extinction by way of set-off against the Respondent's claim for compensation for improvements.

Whilst therefor one can understand that the Court *a quo* - labouring under the misapprehension that the matter was "common cause" - was desirous of making an order which it believed would be just as between the parties, neither the evidence nor the form, nature and content of the proceedings entitled it to impose the condition imported into its order.

The appeal succeeds. The order granted the High Court is amended to read

> "ordered in terms of prayer 1 with costs of suit"

The words that follow thereon are deleted. Respondent is to pay the costs of appeal.

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J.H. STEYN
JUDGE OF APPEAL

I agree

J. BROWDE
JUDGE OF APPEAL

I agree

G.P. KOTZÉ
JUDGE OF APPEAL

Delivered at Maseru this 28th day of July, 1994.