CIV\APN\214\95

IN THE HIGH COURT OF LESOTHO

In the Application of :

MASERU CENTRAL ENGLISH MEDIUM SCHOOL	1st Applicant
LESOTHO GIRL GUIDES ASSOCIATION	2nd Applicant

vs

UNITY ENGLISH MEDIUM	1st Respondent
RIKARE TS'IU	2nd Respondent
TAU NTSOHI	3rd Respondent
LERATO KHAKA	4th Respondent
M. MOKHOTHU	5th Respondent
COMMISSIONER OF POLICE	6th Respondent
ATTORNEY GENERAL	7th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 7th day of August, 1995

On 23rd June, 1995 Mr. Mosito appearing ex-parte for the applicants sought and obtained a rule nisi returnable on 30th June, 1995 calling upon the respondents to show cause, if any, why :

(a) the respondents shall not be interdicted forthwith from continuing to demolish the buildings of the 2nd applicant at the said

(sic) site pending finalisation of this application;

(b) the respondents shall not be interdicted from removing any property on the 2nd applicant's premises pending finalisation of this application;

(c) the respondents shall not reconstruct the said premises;

(d) the respondents shall not be ordered to return the property of the applicants removed from the premises of the 2nd applicant;

(e) the respondents shall not be ordered to pay costs hereof on attorney and client scale;

(f) the Commissioner of Police and\or all officers subordinate to him (sic) be ordered to enforce this order;

3. Prayers 1, 2(a), (b) and (f) operate with immediate effect as an Interim Court Order.

On 26th June, 1995 Mrs Makara for the first five respondents anticipated the return date determinable on 28th June, 1995. The Notice of Anticipation was served on the other side at the recorded time reflected as 11.20 a.m.

Thus clearly the other party (the applicants) who was virtually dragged before me in chambers on 28th June, 1995 at around 9.35 a.m. i.e. long before 11.20 a.m. was prejudiced because the 48 hours' notice to which it was entitled according to Rule 8(18) had not fully run. The said rule says :

> Any person against whom an order is granted ex-parte may anticipate the return day upon delivery of not less than 48 hours' notice"

Although Mr. Mosito merely wished to be granted an opportunity to file his replying affidavits later in the day and

did not instead press for the logical consequence attendant upon such a breach of the rules of court as this, I take the view that this is a breach that cannot lightly be brushed aside. More of that later then.

Just in passing, it is worthy of note that the history of litigation between some of the parties on either side of the fence in this matter is a long one. It started in the High Court some years back and went to the Court of Appeal whose solution seems not to have slaked the vigour with which the litigation among parties continues to rage on. Suffice it to say that there are also contempt proceedings pending before court in a matter much related to the one before court now.

It was in regard to the broad bird's-eye view of the scale of conflict involved that I was tempted to convert papers filed into pleadings and refer the matter to trial. But a countervailing argument by Mrs Makara sought to persuade me that there wouldn't be a need to adopt that approach if, as it happens to be the case according to her, the question is beyond dispute as to who is the owner of the premises from which the school run by the first applicant operates.

I have, accordingly, resolved to treat the matter as it stands on papers.

The applicants rely on the founding affidavit of Malikeleli Masia who deposes therein that she is the 1st

applicant's Manager.

She further avers that on 9th November 1994 the first respondent instituted proceedings before this Court in CIV\APN\322\94 marked "A".

Malikeleli Masia has brought to the court's attention that the first respondent, in proceedings marked "A" referred to above, did not incorporate or refer to Annexure "B" which lists items of school property contained in various class rooms.

Having pointed out that the application which resulted in annexure "A" has not come to finality, Malikeleli Masia avers further on a note more relevant to the instant proceeding that on 16th June, 1995 the respondents raided the premises of the 1st and 2nd applicants situate at the Maseru Central site number 523 and cut down the gates and fence. This Court has been made aware that the subordinate court is seized of a trial following these actions by the alleged respondents. Masia averred further that one Ralifate Nts'asa acting in the capacity of a "messenger of court" served Mrs Khotle of the second applicant with annexure "C" under the pretext that annexure "C" was an order authorising the respondents to cut down and remove the fences as he did. It seems to me that this deponent in referring to annexure "C" is actually referring to annexure "A". I say so because it is annexure "A" which ordered removal of razor wire from the school gate.

This deponent avers that she has since discovered that the so-called messenger of court had not been authorised by the Registrar of this Court as required by law to act as he did.

It is the Court's distinct recollection that indeed annexure "A" was of limited application directing that the razor wire be removed from the school gate. Nowhere could it be said that this order authorised the cutting down of the entire fence and its removal.

Masia goes further to indicate that on the evening of 21st June, 1995 she heard over Radio Lesotho an announcement by the Committee of the 1st respondent directing the parents of pupils of the 1st respondent to get ready to go and remove property from the applicants' premises on Site Number 523.

Masia avers further that on 23rd June, 1995 the respondents together with many other people invaded the applicants' premises - relying on annexure "A" being purportedly re-served by one Khauhelo Mohobane - removed the razor wire and demolished prefabricated buildings erected on the site and used for school purposes by the first applicant rented from the 2nd applicant.

Masia was apprehensive that the demolitions were going on even as she was having her affidavits prepared. It should be remembered that on no account was authority given in annexure "A" to demolish any prefabricated structures erected on Site Number

523.

The 1st applicant expresses fear that the demolition of the class-rooms used by the said applicant for purposes of conducting school business prejudices it in its capacity as a tenant on these premises. The prejudice is more telling when regard is had to the fact that this act by the alleged respondents was neither enjoined by any court order nor prefaced by a suit against the 1st applicant.

Masia maintains that as proceedings are still pending in CIV\APN\322\94 the respondents have no authority to enter the premises of the 2nd applicant and interfere with its tenants, nor would even the 2nd applicant itself be so entitled.

The applicants feel that this is a matter of great urgency warranting urgent relief because the applicants face prospects of irreparable harm should the conduct complained of be allowed to prevail.

In answer to the above charges the second respondent Rikare Ts'iu averred that the applicants were guilty of non-disclosure in that they did not inform the court that the prefabricated structures which were being dismantled in fact belonged to the 1st respondent. He attributed deliberate misdirection to the court as the motive behind this non-disclosure. This is strongly denied in the replying affidavit and compelling reasons advanced in support of that denial in

paragraph 5 ad para 4. In a nutshell the view persisted in by the 2nd applicant is that what is in the soil accedes to the soil.

Indeed my appraisal of the true meaning of authorities with regard to improvements at the end of tenancy does not support the respondents' case.

This deponent goes further to say that this application is not urgent and that the urgency advanced by the applicants is only artificially contrived moreso because the applicants tend to deliberately ignore the fact that the property which is the subject matter of the dispute belongs to the 1st respondent. To support the question of ownership of property this deponent referred the court to Annexes "AU", "BU" and "CU" i.e. Memorandum of Loan Agreement, Instalment Loans and Sublease Agreement respectively.

The argument that there is no urgency in this application is negated in my view by the fact that in response to this application the respondents filed notice to Anticipate the return date. To my mind it is a contradiction in terms to anticipate a return date and at once deny existence of urgency. Thus such argument is self-defeating. In any event it escapes me how a party can be faulted for moving court on urgent basis if he or she realises that property he or she perceives rightly or even wrongly as his or hers, is in the process of being unlawfully demolished or violated. In such circumstances it is

not incomprehensible that any delay incurred before seeking relief might result in irreparable harm to the rights or interests of the party who apprehends harmful consequences of the wrongful act perceived.

Ts'iu goes further to say that the 1st applicant's board resolution is not evidenced as required by the Rules of Court, especially in ex-parte proceedings.

But in the Court of Appeal case C. of A.(CIV) No.6 of 1987 The Central Bank of Lesotho vs E.M. Phoofolo (unreported) at p.15 Mahomed J.A. as he then was, said

> "There is no invariable rule which requires a juristic person to file a formal resolution, manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts".

In the instant case such authority is clearly borne out in paragraph one of Masia's founding affidavit buttressed by Khotle's supporting affidavit at paragraph 2.

The main thrust of Ts'iu's averments is centred on the right of ownership. Indeed learned Counsel Mrs. Makara's submissions were geared to that end. In this way as intimated earlier the 1st respondent appears to me to have got hold of the wrong end of the stick.

I am inclined to this view because I have been told on behalf of the applicants and it was not denied that parties

herein i.e. the 2nd applicant and the 1st respondent entered into a lease agreement in February 1993 and the lease was to run for two years. This lease came to an end in February 1995. Thus at the time of the disturbance at the premises on 23rd June, 1995 there was no longer any lease agreement operating between the 2nd applicant and the 1st respondent.

Yet on 16th June 1995 the respondents, so it was submitted, invaded the 2nd applicant's premises and property with a view to removing what they called their property.

Surprisingly though the respondents started cutting down the fence on the 16th June 1995 as well as demolishing the prefabricated structures on 23rd June 1995. These structures are erected on the 2nd applicant's site and rented by the 1st applicant.

The question is whether the respondents were entitled to behave as they did. Mrs Makara relying on right of ownership submitted that they were. Mr. Mosito submitted that the question is out of the picture. What is relevant is in whose possession the property invaded was. Furthermore that what is to be considered is the legal question as to the fate of property that is not removed on termination of a lease.

What one gathers from Ts'iu's affidavit is that the main purpose for the "raid" was retrieval from the premises of what the relevant respondents regarded as their property. But

what brings to me a deep sense of unease is that in going on a rampage to demolish the fence and the prefabricated structures the respondents purported to rely on Annexure "A" yet this annexure was clearly of such limited application as to go no further than the removal of razor wire at the gate. The terms of that annexure were also very specific. But it seems the respondents deliberately went beyond the compass and ambit of that Annexure. I can only say that they did so at their own peril. The Court cannot therefore countenance contents of paragraph 12 of Ts'iu's answering affidavit as they make a mockery of the Court Order by averring

> "1st respondent avers that as owner of the prefabricated buildings it had every right, especially armed with Annex "A" to the Founding Affidavit to enter its own premises. 1st respondent denies entry of 2nd applicant's premises and puts applicants to the proof thereof".

Nohow can the 1st respondent claim with any colour of legitimacy to have acted under the authority of Annexure "A" when that Annexure gave no such authority. If by automatic operation of law the 2nd application is entitled to regard even the prefabricated structures as its property and has pleaded in its papers that its property has been violated, I don't think it need specifically have pleaded that its possessory rights to the prefabs have been transgressed as some separate entity from the premises on which those prefabs stood; especially when the fundamental principle on which the case turns is that what is in the soil accedes to the soil. Moreover the first paragraph of the 2nd applicant's affidavit clearly states that an interdict is being sought to prevent the respondents from continuing to

demolish buildings (meaning prefabricated buildings) of the 2nd applicant at the said site, pending finalisation of this application.

Needless to say the second paragraph prays that the respondents be interdicted from removing the dismantled parts of those buildings from the premises. Nothing can be clearer than that regarding the 2nd applicant's attitude towards the prefabricated buildings and portions thereof that had been removed by the alleged respondents.

On this score then the argument that the respondents were entitled to formal notice that a point of law regarding ownership of the prefabs would be raised, must fail.

Thus Mr Mosito's question is of vital relevance that whether the respondents are owners (which is denied) or not, the issue here is entry into the property of 2nd applicant without permission. Having submitted that it is common cause that the site belongs to 2nd applicant Mr Mosito pointed out that the respondents argue that they were entitled to enter the premises to retrieve what they say is their property. It is significant that although Ts'iu in paragraph 12 denies entry into 2nd applicant's premises his counsel did not challenge the assertion that the premises entered were in fact the 2nd applicant's. One sees immediately in instances like these that although on papers there is clear conflict of fact which should by itself or taken along with other factors warrant dismissal of the applicants'

case, the perceived conflict is false or even just artificial. Mrs Makara properly conceded that this apparent conflict was a mistake. In any event a further reading of Ts'iu's affidavit clearly contradicts what appears to be his initial stance. The Court is not unmindful of strong arguments raised by mrs makara relying on the right of ownership.

She brought to the Court's attention a strong statement of the law submitted by silberberg and Schoeman in the The Law of Property 2nd Ed. at p.162 that -

> "Of all the real rights ownership potentially confers the most complete or comprehensive control over a thing. .....
>
> It has been suggested that ownership embraces the power to use, alter, destroy or alienate the thing concerned, to enjoy the fruits thereof, to prevent others from using it and to transfer rights to the thing."

At page 338 the learned authors say -

> "Mere loss of physical control, however, does not result in the loss of ownership except in the case of captured wild animals which escape from the custody of their owner."

In another Edition under the subject Prescription Silberberg at p.113 says -

> "Acquisitive prescription, as a method of acquiring real rights, is a continuous process, namely the possession or use by one person of another person's - movable or immovable - property for an uninterrupted period of thirty years, nec vi, nec clam, nec precario, or as if he were the owner thereof, and with the intention of acquiring ownership or some limited real right (which is generally a servitude) in the property in

question. ....."

This is all very neat indeed provided it does not derogate from the principle that possession is nine tenth of the law. Indeed the learned authors above seem to have borne this principle in mind in their careful use of the phrase "ownership potentially confers the most complete control over a thing". In that use it seems to me that the learned authors were mindful that real rights of ownership do not exist in a vacuum. Thus if I am in lawful possession of someone else's property he cannot just dislodge it from me in breach of my possessory rights of it and with impunity. If that were to be allowed it would amount to saying ditto to self-help. That would be absurd hence the law frowns upon such a thing. In sum, one way of looking at Silberberg's statement of the position in law is that a man has every right to burn his house provided a tenant is not in occupation of such a house even if the tenant has failed to pay rent for a number of months unless the tenancy has been pronounced unlawful by a Court of law which is a proper authority.

The court is indeed indebted to Mr Mosito for formulating the position as follows:-

> "The point they (respondents) bring into issue is that they say they have property on the premises on the basis of which they have a right to invade the place as they did to retrieve that property. They have a problem there".

In my view the problem the respondents seem to have is

that in terms of Annex "CU" what ought to have happened is that upon termination of the lease the 1st respondent ought to have removed its improvements from this property which was entered into by respondents on 16th and 23rd June, 1995.

The lease terminated in February 1995 (since no specific date of that month is reflected in Annex "CU" before me, and in the absence of proof to the contrary one would be entitled to assume that the lease was signed on the last day of February 1993). But the respondents did not remove their improvements from the premises on or immediately around that time. Papers don't indicate that any attempt was made to remove those improvements on termination of the lease; notwithstanding that the position in law is that upon termination of a lease agreement the lessee who doesn't remove improvements which are attached to the ground forfeits those to the landlord and they become the Landlords property by operation of law.

Indeed, in the invaluable works of W.E. Cooper styled The South African Law of Landlord and Tenant this point is succinctly dealt with at pages 302 and 303 as follows :-

> "Upon the termination of the lease the owner of the property becomes owner of all attachments that have not been removed from the property. The lessee may not remove such attachments nor may he enter the property to harvest and remove crops. In two cases, however, the courts have held that a lessee who has reasonable grounds when sowing for believing the crops will ripen before the termination of the lease, may go upon the property after the termination of the lease to harvest the crop.

> There appears to be no authority for this principle and it is clear from the plaacat that a lessee who has not removed attachments (including crops) upon the termination of the lease is confined to a claim for compensation. The erroneous principle applied in the two Cape cases has,
>
> rightly, with respect, been rejected".

It is clear that even the exception which served for a while as blunting the decisive operation of the rule served for a very limited period leaving the principle intact that attachments or improvements left standing on the landlord's property upon termination of a lease become his. On the strength of authorities upon which the principle relied on by Cooper is founded it would have been prudent for the 1st respondent to have removed its property from the 2nd applicant's premises in February 1995. Failing that, then to have sought the consent of the 2nd applicant to effect such removal. If the consent was refused then the 1st respondent would have been entitled to sue (not for removal) but for compensation in regard to the value of what it claimed to be its property, instead of waiting for all this time between February 1995 and 16th and 23rd June 1995 and there and then de .ng to invade the 2nd applicant's premises and doing havoc there, in the result putting the applicants under the necessity to take the only reasonable step, namely, approach this court on an urgent basis.

For the above reasons I would confirm the rule with costs. I may only add that an award of costs on attorney and client scale as requested by parties on either side of the fence

has been refused by this Court taking into account the long history of bitterness attendant on this case and the ongoing rage with which the litigation on various other fronts is going on.

J U D G E

7th August, 1995

For Applicants : Mr. Mosito

For Respondents : Mrs Makara