

CIV/A/34/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEKENA MAKIBI

APPELLANT

and

'MAKHETHISA TAU

RESPONDENT

JUDGMENT

Delivered by the Honourable Acting Justice Mrs. J.K. Guni  
On the 17th day of October, 1995

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In this Action plaintiff sued this defendant for payment of the sum of (M2,000-00) two thousand Maloti being a purchase price of goods sold and delivered to the defendant by plaintiff at the defendant's special request. There are no summons or the copy of the summons commencing Action in this file. The REQUEST FOR FURTHER PARTICULARS, THE FURTHER PARTICULARS provided as requested, and the evidence led at the trial, all give the impression that the Action instituted by the plaintiff against this defendant was as described above.

The defendant's PLEA to plaintiff's claim as amplified by the further particulars, is total and absolute denial of indebtedness of any kind for anything. The amplified claim is to the effect that the parties entered into an oral agreement

in terms of which plaintiff was to prepare and lay out the ground for the purpose of manufacturing concrete blocks on the plot next to defendant's restaurant and give 2,000 of those cement blocks to defendant as a price for plaintiff to acquire ownership of that same unnumbered site at LONDON, PITSENG HA TAU, in the district of LERIBE.

Alternatively or in addition the plaintiff requested to be allocated a Dry cleaning business site. He indicated to the defendant that he would like to be given defendant's site near or at her restaurant. Plaintiff was allowed to use the site for the manufacturing of concrete blocks. Plaintiff was to give 2,000 of those blocks as price for the site for which defendant was to transfer title to plaintiff.

Defendant counter-claimed. In her counter-claim defendant averred that she is the owner of the site in question. Since November 1987 plaintiff is in wrongful and unlawful possession and occupation of the said site and notwithstanding demands refused to vacate the same. Defendant claimed damages at the rate of M250-00 per month as rental for the use of her site. In his PLEA to defendant's counter claim, plaintiff admitted that he was in possession of the premises referred to but denied that such possession is wrongful or unlawful. Plaintiff claimed that he is in possession of such premises in terms of the agreement entered into between himself and defendant, whereby defendant promised to transfer title to plaintiff, if plaintiff supplied her with 2,000 concrete blocks. Defendant having failed to

perform her part of the contract, plaintiff has offered to vacate the premises on condition defendant pays the price of the 2,000 concrete blocks which she has received.

The trial took place at the Subordinate Court, sitting at the LERIBE DISTRICT. Judgment was entered for defendant in terms of prayers (a), (b), (c) and (d) of her counter claim. Plaintiff has appealed against that judgment. The grounds of appeal are filed of record at page 88 of the typed record. I need not repeat them. It will suffice merely to say that it is a complaint against the findings of the trial Magistrate in this case, with regard to the evidence led before him.

It appeared in the cause of the trial, from evidence that plaintiff did deliver concrete blocks to the defendant as per their agreement. Defendant found those blocks unsuitable for the purpose for which they were made. Plaintiff was told by defendant to take possession of those concrete blocks and sell them. Plaintiff requested defendant to indicate at what price. Defendant gave plaintiff no price. Plaintiff complained that those blocks are so badly or poorly made that they will ruin his business if he sells them. Defendant suggested to plaintiff that he should sell those concrete blocks at (M75) seventy-five Maloti or even cheaper. Plaintiff appears to have had some regard to his reputation as a businessman. He did not feel he should be known to sell badly and poorly made concrete blocks which were made by him for defendant. Was he being dishonest? He expected defendant to receive and use them. Why, if he could not sell

them? Defendant therefore never took possession of those concrete blocks. At page 87 of the typed record, it is the learned Magistrate's finding that plaintiff has not performed his part of the contract, and he is accordingly in possession of the (that unnumbered) site at London Pitseng Ha Tau unlawfully.

The parties in the main claim in convention, in the counter claim or claim in reconvention and also on this appeal are referred as in the claim in convention.

In this action defendant sought to eject from that unnumbered site the plaintiff by means of rei vindicatio. Defendant has therefore place reliance for her claim upon her ownership of that same unnumbered site at London Pitseng Ha Tau. M B INVESTMENTS (PTY) LTD v OLIVER 1974 (3) SA 269, MYAKA v HAVEMANN and ANOTHER 1948 3 SA 457.

The burden to prove her ownership rests upon the defendant. CHETTY v NAIDOO 1974 (3) SA 18, MYAKA v HAVEMANN, SUPRA. The defendant set about to prove her ownership of the said unnumbered site by producing before the trial Court two documents: namely, form C and a lease. The production before Court of these two documents is a prima facie evidence of ownership but not conclusive. TAHLO MATOOANE v MOTLATSI QHOMANE CIV/T/270/93. When title is disputed; over and above the production of these documents, there must be acceptable competent evidence establishing better title. TEKATEKA v MOTLAMELLE LLR 1979. Plaintiff complains that these documents were obtained by fraud.

There was no evidence before Court to support that allegation. The learned Magistrate properly admitted both documents as proof of what they contained.

Defendant gave oral evidence that she applied for allocation of that site and her application for an allocation was successful and as a result she was issued with form C. In addition there was further evidence led from other witnesses to the effect that they came to know that the site in question belongs to the defendant. There is evidence of MAAMA TAU defendant's brother-in-law who knew that defendant applied to be allocated that site and that her application for allocation was successful. This plaintiff when he wanted the site to use for the purpose of manufacturing concrete blocks approached MAAMA TAU requesting him to use his good offices to intervene with his sister-in-law and persuade her to sell that site to him. Yet another witness, one LIRA SESIUOANE a headman of one of the villages under the Chieftainess 'MAKHETHISA TAU, defendant herein, was asked too by plaintiff to pray her Chieftainess not to evict him from that site. Both parties, plaintiff and defendant, informed LIRA SESIUOANE that the site belongs to the defendant. The evidence of one SEMPE is to the effect that plaintiff asked the Chieftainess to allocate a site to him for business. Plaintiff indicated that he would very much like to have a dry clean business site next to the Chieftainess's restaurant business. According to SEMPE the Chieftainess agreed that plaintiff should use that site on one condition that plaintiff gives her concrete blocks and that she will therefore give him form C - proof of

allocation to him.

The land Act has prescribed the procedures to be followed for allocation of land. The same Act has created and authorised or empowered a special committee for the purpose of allocation of land. Plaintiff could not produce before Court any of the documents that could establish or support his claim that he applied for the site or that the site was to be allocated to him. In his PLEA to defendant's counter claim plaintiff admitted that the site he is in possession of is the same site referred to by defendant; but added that he is in possession of it in terms of the Agreement between himself and defendant. This is the Agreement talked of in this proceedings as the agreement to transfer ownership of that site to plaintiff by defendant on condition that plaintiff gave defendant concrete blocks, (2,000) two thousand in number. By entering in an Agreement whose terms require defendant to transfer title to plaintiff, plaintiff has recognised and accepted defendant's title to that site. Defendant must be the owner. Defendant must have title before she can transfer it. Plaintiff's actions from the beginning indicate that defendant had a right or interest on that site which interested this plaintiff. So far ownership of the said site is established. The site is that of the defendant. Plaintiff admitted that he is in possession not wrongfully and unlawfully as defendant claims but in terms of the agreement between plaintiff and defendant. This is an important averment. BUSHOFF v UNION GOVERNMENT 1932 TPD. It is in the common course that there was an oral agreement between the parties. The

nature and precise terms of the said agreement is also the well established fact. KARIM v BACCUS 194 6 MPD 721.

There was evidence to show the trial Court that demands have been made by defendant for plaintiff to vacate but plaintiff has refused to vacate. LIRA SESIUOANE testified to the effect that he was asked to plead with the Chieftainess on plaintiff's behalf to reconsider her request to plaintiff to vacate the site. Plaintiff in his PLEA to defendant's counter claim is an offer to vacate on condition of payment of the sum claimed in the summons.

The learned Magistrate found that plaintiff failed to perform his part of the contract. That is to say plaintiff failed to deliver concrete blocks. Plaintiff cannot therefore succeed in his claim for payment for those concrete blocks. The learned Magistrate may have not pronounced the magic words "that the Plaintiff's claim in convention has failed" but his judgment has clearly spelled that out.

I must also deal briefly with the issue of the filing of the pleadings.

The filling of the pleadings is meant to put the parties in a very clear position of each other's case.

Plaintiff issued out summons commencing Action in the Magistrate's Court where he claimed payment for goods sold and

delivered. The relief sought left no doubt in the defendant's mind that she is required to pay some money to the plaintiff. She wondered what could that payment be for. When asked to spell out what goods he meant, plaintiff twisted and turned. In those zic zac he performed plaintiff indicated for the first time that he paid for an allocation or transfer of unnumbered site to him by defendant. This allegation puts quite a different colour to plaintiff's claim against the defendant. Could the defendant be certain what she was being sued for? Despite the ziczacing there still was no exit for plaintiff in his circle of dilemma. This case and evidence adduced therein demonstrated dishonesty, deceit bordering on corruption. Plaintiff had not called any member of the land allocation committee. Plaintiff had not shown the trial Court if at all the prescribed procedures for application for allocation were followed. Therefore this was not a question of allocation but that of transfer from the owner. Plaintiff failed in his claim in convention, defendant has succeeded in her claim in reconvention. As regards damages the plaintiff should pay at the rate of (M250-00) two hundred and fifty Maloti from November 1987 to the date he vacates the site.



The Appeal is dismissed with costs.



K.J. GUNI

ACTING JUDGE

For the Appellant: Mr. Hlaoli

For the Respondent: Mr. Mafisa