CIV\APN\41\95

IN THE HIGH COURT OF LESOTHO

In the matter of:

NONE MOLETSANE MONARE Applicant

and

LESOTHO ELECTRICITY CORPORATION Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 8th day of March 1995

This is an application for the following relief:

(a) That the Respondent's Officers and Respondent's Agents shall not be restrained from carrying out further developmental activity on the site No. 06464008 situated in Mafeteng urban area pending the outcome hereof.

(b) The Respondent's officers and Respondent's agents shall not be restrained from acting and or interfering with the said site No. 06464008 situated Mafeteng

urban area pending the outcome hereof.

(c) That respondents shall pay costs hereof.

(d) That the forms and service provided for by the rules of court shall not be dispensed with on account of the urgency of the matter.

(e) For further and or alternative relief.

It will appear that the dispute concerns what one will not strictly call an agreement of exchange but rather an agreement in terms of which this Applicant would surrender his site to the Respondent and the Respondent, with the assistance of the Commissioner of Lands, would cause another site to be allocated to the Applicant in exchange. It is clear in the papers that the Commissioner of Lands undertook to provide an alternative site to the Applicant for the Applicant's site which would be given over to the Respondent for the purpose of electricity installation activity. The Respondent is the major electricity supplier in the country. It is the sole supplier.

It is not denied that by the year 1994 this Applicant had already made improvements on his site. It is over this site which at that time overhead electric wires were already made to

run. It is not in dispute that such improvements existed. Neither is it in dispute that as a result this Respondent got into the process of negotiating an agreement with his Applicant which is more clearly confirmed in this application. The real gravamen of the dispute is this: Whether at the time of this Applicant's coming to Court, the whole process, that is from the beginning to date, had only been a process of negotiations. That is there had not been an agreement or contract strictly speaking but there was only this process of negotiating the terms of the agreement, that the site would be surrendered in the manner I have already described. That there still were negotiations for compensation to be paid to the applicant for the improvements on the site can only mean that the contract was not complete. That the fact that there was still disagreement over compensation for what one would call balance in value of the substituted site, the substituted site having been proved to have been deficient and smaller in area to the Applicant's original site in so many metres as has been shown in the papers is indicative of agreement having not been reached.

It has been contended by the Applicant's Counsel that in order to determine the facts that are common cause for the purpose of their application the Court must accept as correct the averments made in the affidavits filed by the Respondents together with such facts in the Applicant's affidavits as have not been

controverted. That is correct. But what I see as the real dispute is a matter of a technical nature of the law of contract as to whether an agreement had in fact been concluded.

May I begin with annexure C, on page 14 of the record, this being part of the Applicant's affidavit. This is a letter dated the 14th June 1994 from the Applicant to the Commissioner of Lands. The first paragraph reads:

> "Subsequent to a request made by the L.E.C. of my site adjacent to their sub-station in Mafeteng and the discussions we have had with you, I authorise transfer of my site to the L.E.C. having been convinced that a substitute site will be allocated to me immediately."

See the same letter on page 34 annexed by Respondent. Annexure B at page 12 concerns specific items and the materials spent on the Applicant's site. These the Applicant wants to be compensated for. It was submitted by the Respondent that at this stage agreement had already been reached. That furthermore this aspect constitutes a minor aspect of the execution of the agreement. The annexure C, at page 35 of the record reads:

> "As agreed earlier, L.E.C. will be allocated plot No. 06464008 for extending their existing sub-station and

> will be allocated plot No. 06464395 around hospital area." (my underlining)

It is a letter from the Physical Planner of the Commissioner of Lands dated the 11th April 1994. This, it was submitted was clear evidence of the whole agreement having been reached as early as at that date of the 11th April, 1994.

There is no doubt that as at the 4th October 1994, there had been a complete agreement as to the intended transfer of the respective sites, namely the alterative site set aside for allocation by the Commissioner of Lands to this Applicant and the Applicant's site to the Respondent. What I observe, as at that date, is that there was a figure arrived at as to the amount of compensation that was due to the Applicant. The letter D at page 36 reads:

> "I referred to your request for inspection and evaluation of the above order in order to determine the difference in value between the former which is commercial and the latter which is residential, the difference in value between the former which id commercial and the latter which is residential, the difference in value will represent the compensation able to Mr. Monare. We have now carried out the

evaluation exercise and have established that the difference in value of the two sites is M12,600.00. I trust that you will be in a position to process Mr. Monare's compensation payment." (my underlining)

This letter which is dated the 4th October 1994 certainly corroborates and folls logically in support my approval of the submission that as at 11th April 1994 there was already an agreement. Even if the agreement to pay compensation is a term of the contract, the amount is certainly not a material term of the contract. It means that the amount of compensation has always been "subject to negotiation". It is clear that at this stage what is being negotiated is not the terms of the agreement but what is being negotiated is the value or the compensation payable to the Applicant. I am not convinced that the letter annexure E at page 37 of the record that is the letter from the Commissioner of Lands to Mr. Monare is an indication that as at that stage the negotiations as between the Applicant and the Respondent were being carried on. This letter dated the 23rd January 1995, reads at, starting with the second paragraph: "The L.E.C. has in principle accepted the proposal that Mr. Monare be given a second residential substitute site. To expidite this matter it was resolved as follows:

1. That he should be given a second residential site as

compensation for all material losses incurred on that site.

2. That L.E.C. should pay for the lease preparation of both the residential sites.

3. That L.E.C. pays M15,000.00 as the difference in value between plots 008 and 395.

4. Having fulfilled 1, 2, and 3 above you will have satisfactorily been compensated and will willingly surrender plot 008 to the State to be developed for purpose." (my underlining)

The first paragraph is an improved offer. What remained was to resolve the amount in paragraph 3, as to amount only. I am not inclined to accept that the last paragraph of this letter is indicative of the agreement between the Applicant and Respondent having not been reached at that stage. My view is that the Commissioner of Lands probably wants the last word from the Applicant as to the amount of compensation (paragraph 2) and additional site (paragraph 1). It is clear that at about May or April 1994 there had been an intention to transfer by way of exchange in the nature of exchange (involving a third party) that ave described. The Respondent had agreed to surrender his

site. Paragraph 4 of Annexure E is therefore difficult to understand. It is also clear that by this month of January what was left was the aspect of damages or rather compensation to this Applicant. This is so when it is borne in mind that what is involved is the surrender and transfer of a site on the one hand and the allocation of the site, on the other hand, payment of compensation for expenses of improvements on Applicant's former site and payment of difference in value for the difference between the Applicant's site and the offered site being really ancillary.

The only purpose of this application would be, in my mind, a stratagem by which this Applicant seeks to cancel the contract. This is probably on the realization that while one has an option to enter into a contract it is not an easy one to cancel it. I am convinced that the balance of convenience dictates that the rule in the application be discharged. One of the factors I have considered is that the Applicant has not only reached agreement but has allowed the Respondent to occupy the site since April 1994 and I would clearly observe that the payment of difference between the two sites and damages are not a material term of the contract. It is something that can be agreed upon by a process of negotiation, assessment and valuation and can be litigated upon for due performance or damages without defeating the contract. Its breach is not a repudiation of the contract.

There is no basis upon which the Applicant seeks to cancel the Contract. See also OATORIAN PROPERTIES (PTY) LTD vs MAROUN 1973 (3) SA 709(A) 784 where Potgieter JA had this to say:

> "According to the well known principles therein enunciated rescission of a contract is only possible if a breach occurred of a term which goes to the root of the contract and the materiality of the breach is according to the authorities also a relevant factor in determination of whether rescission should be ordered or not (cf SPIES v LOMBARD 1950 (3) SA 469 AD at 488)."

At the time when the Applicant came to Court neither the Respondent nor the Commissioner of Lands were refusing to carry out the contract. (See AMOD BAYAT v DOHERTY 1919 NPD 44 at 47)

The Application is dismissed with costs.

T. MONAPATHI
JUDGE

8th March 1995

For the Applicant : Mr. Matooane

For the Respondent : Mr. Molete