CIV\APN\299\97

IN THE HIGH COURT OF LESOTHO

In the Application of :

LAZARUS POLAO TLALI **Applicant**

vs

CHAKA MAKAU **Respondent**

J U D G M E N T

Delivered by the Hon Mr Justice M L Lehohla on the 12th day of March, 1998

On 12-03-98 this Court minuted its decision on the above matter and read it to Counsel for respective parties as follows :

> "The points of law raised on behalf of the respondent are dismissed with costs. Judgment is entered in favour of the applicant".

The following are reasons for the above decision :

On 22nd August, 1997 the applicant approached this Court on notice of motion *ex parte* and obtained an interim order.

The notice of motion was couched in the following terms, to wit -

..... that application will be made ..... for :

1. The granting of a *Rule Nisi* calling upon the Respondent to show cause, if any, on a date to be determined ..... why

   (a) He shall not be interdicted and restrained from interfering in any manner whatsoever with applicant's rights of ownership and occupation and, specifically from erecting any structure on applicant's business site referred to as site number 57 Maputsoe, in the Leribe district.

   (b) The Applicant shall not be granted further or alternative relief.

2. Prayer 1(a) to have immediate effect.

In his founding affidavit the applicant avers that in May 1997 when he returned from his business operations in the mountain areas, he ascertained that the respondent had dumped some sand, crushed stones and cement slabs on his vacant business site numbered 67 (*sic*) at Maputsoe in the Leribe district, which he is about to develop.

The applicant avers further that notwithstanding the fact that the site in question was fully fenced in thus indicating that it was occupied, the respondent

nonetheless carried out the deed complained of above.

The applicant is thus reasonably apprehensive that the respondent will proceed to erect a structure on the said site unless immediately restrained. If not restrained it stands to reason that the respondent's apprehended deed would result in the applicant being subjected to irreparable harm at some later stage.

The applicant's fear is based on the fact that the respondent has stubbornly refused to heed the admonition of the Town Clerk of the area to desist from his said conduct as he was clearly not the owner of the site and had no legal title thereto that he could produce.

In his answering affidavit the respondent raised four points of law on the basis of which he prayed that the application be dismissed with costs.

The points of law raised are that :

(a) this application has been brought to the High Court against the provisions of section 6 of the High Court Act.

(b) the applicant has failed to establish a clear right in his application for an interdict.

© there are disputes of fact which cannot be resolved on affidavit and

which the applicant ought to have foreseen.

(d) the affidavit is a non-affidavit for non-compliance with the Oaths and Declarations Regulations of 1964.

Mr Makotoko for the respondent argued that in terms of the High Court Act 1978 section 6 no civil cause shall be brought to this Court if it falls within the jurisdiction of the subordinate court unless removed into the High Court

(a) by a judge of the High Court acting of his own notion, or

(b) with the leave of a judge upon application made to him in Chambers, and after notice to the other party.

He buttressed his argument by reference to section 29 of the Subordinate Courts Order 9 of 1988 listing matters which lie beyond the jurisdiction of the subordinate courts. These range from (a) to (f) and relate to dissolution of marriage, interpretation of wills, adjudication as to a person's mental capacity, prayer for an order for specific performance without an alternative of payment of damages, an order for a decree of perpetual silence and prayer for an order for provisional sentence. He thus submitted that an interdict prayed for in the instant application is not included in the list of items upon which the subordinate court has no jurisdiction. Thus this matter should, he said, have been dealt with by the subordinate court unless leave of the High Court had been obtained to deal with it here.

With regard to point (b) *Mr Makotoko* argued that the applicant is required in law to establish that he has a clear right, and further that such right has been invaded and lastly that he would suffer irreparable harm unless intervention by Court has been sought.

He argued that the applicant should have established his right by attaching a lease or a Form C to his right especially since paragraph 3 speaks about site 67 at Maputsoe while the Notice of Motion at 1(a) refers to site No. 57. So as this was raised in the answering affidavit the point was placed in issue.

In point © *Mr Makotoko* argued that the disputes raised in the forgoing matters ought to have been foreseen by the applicant. He argued that there is a dispute regarding the applicant's statement that he is the owner of the site. There he referred to the last sub-paragraph to Paragraph 3 and submitted that there are material disputes which required proof before the relief of the kind sought can be granted.

He however reconciled himself with the fact that there has been filed by the applicant a Ministerial consent but challenged the fact that this was not properly filed as it was only filed at the replying and not founding stage. Thus at this stage

the respondent is disadvantaged in that he cannot respond to it. I am however taken aback by this submission in view of the fact that no attempt was made by the respondent to seek leave of Court to respond and challenge this Ministerial consent.

With regard to point A reference to ***Albert Makhutla vs Agricultural Development Bank*** C of A (CIV) No.1 of 1995 (unreported) at page 3 would be of benefit where Browde J A said :

> " ..... Interference with the High Court's jurisdiction can only be effected by express provision or by necessary implication and any provision which purports to limit the jurisdiction of the High Court will be strictly construed".

Regarding point D *Mr Makotoko* challenged the fact that nowhere does the applicant commit himself as to the truthfulness of his deposition.

I hold the view that of relevance in the answering affidavit is the point raised in 3(b). There it is clear and it is not disputed that the lease was issued in David Sekaja's name.

Mr Sello for the applicant pointed out that the site was in the process of being transferred. All that was necessary was the Ministerial consent and that is attached to the applicant's replying affidavit.

Indeed Subordinate Courts have power to entertain interdicts. But the moot point is whether they have a right to grant permanent interdicts. In my humble view permanent interdicts stand in *pari materia* with orders for perpetual decrees of silence.

Mr Sello pointed out that the respondent had put in question the identity of the object of the dispute. He pointed out that the site is that of Marumo. This is the same site of Marumo that caused the intervention of the Town Clerk. It is the same site that the attention of this Court is focussed on. Thus it would seem the identity has been established. When there is certainty as to the site involved in the matter I am seized with there would appear to be little point in arguing that the number referred to in the papers differs from the other appearing in a different paragraph. A number is like a name. Presence of an object cures an error as to the name. In much the same way as a name a number is but a descriptive tag.

I am satisfied that the applicant's affidavits have been properly sworn to before a Commissioner of Oaths. I don't think there is an invariable rule requiring that a certain specific formula should be adopted in an affidavit for it to pass as reflecting the fact that the deponent thereto has committed himself to the truthfulness of what he says. In both affidavits the applicant has stated that he has made oath.

In any case the Concise Oxford Dictionary defines an affidavit as a *written statement, confirmed by oath, to be used as judicial evidence.* This Court regards the applicant's affidavits as falling well within the above definition by way of fulfilling the purpose of being judicial evidence.

As I indicated earlier the only matter of importance on which the entire case turns is centred around point "B" of the points raised *in limine* and in turn affects the main case as a whole.

It was for the above reasons that the points raised *in limine* were dismissed with costs this morning.

J U D G E
12th March, 1998

For Applicant: Mr Sello
For Respondent : Mr Makotoko