

CIV/APN/222/98

IN THE HIGH COURT OF LESOTHO

In the matter between:

AFZAL ABUBAKER

APPLICANT

and

SAMUEL MONKI

RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Acting Justice S. N. Peete

on the 30th day of June, 1998.

This application was brought on an urgent basis by the Applicant for an order in the following terms:-

1. That the Rules of Court relating to service in application papers be dispensed with by reason of the urgency of this matter.
2. That the Respondent be interdicted and restrained from interfering with

the Applicant's use and operation of certain business site situated at Lower Moyeni Quthing Urban Area in the district of Quthing.

3. That the Respondent be interdicted and restrained from interfering with and expelling from the aforesaid site agents and building contractors working on the plot.
4. That the Respondent be made to pay the costs of this application.
5. That the Applicant be granted such further and/or alternative relief that this Honourable court may deem fit.

It was common cause that on the 14th day of March 1994 and at Mafeteng the Applicant and Respondent entered into Deed of Sale wherein the Respondent sold to the Applicant a certain unnumbered site situate at Lower Moyeni Quthing the purchase price being M150,000.00 (One Hundred and Fifty Thousand Maloti) which was to be payable within fourteen (14) days of the signature either in terms of stock or money (clause 2 thereof). Clauses 3 and 4 upon which this application is based read :-

3.

- “(a) Possession of the property hereby sold shall be given to the Purchaser upon signature of this Deed of Sale.
- (b) All benefits and risks of ownership and the liability for all rates and taxes and ground rent levied on the property shall pass to the Purchaser from the date of possession.

4.

Occupation of the property shall be given to the Purchaser upon signature of this Deed of Sale”

It is also common cause that the Respondent (Seller in the Deed of Sale) issued summons CIV/T/318/96 on the 28th July 1996 in which he claimed for the sum of M90,000.00 being the balance on the purchase price. In the summons the Respondent had not claimed for the cancellation of the sale. In his plea dated 19th June 1997 the Applicant/Defendant states that he has in fact paid the

Respondent/Plaintiff an amount of M170,175.02 and that he had in fact paid M20,751.02 over and above the agreed purchase price. This civil trial is pending before this court the pleadings having been closed.

This is an application for a final interdict in which the Applicant seeks an order restraining the Respondent from excluding or expelling him from the site at Lower Moyeni. As stated by Allen J in **Tseliso Ramochela vs Moshoeshoe and others - CIV/APN/172/87**, “an Applicant for an interdict must satisfy the court on three matters:-

- (1) that he has a clear right on his part.
- (2) that an injury has actually been caused or there is a well-founded apprehension that an injury will be cause by the respondent; and
- (3) that there is no other remedy open to the applicant which will afford any adequate protection from the mischief which has been or is being done or is threatened” - **Moabi vs Moabi 1980 (2) LLR 407; Setlogelo v Setlogelo 1914 AD 221.**

In his founding affidavit the Applicant states (paragraph 6.1) that “Pursuant to the aforesaid agreement I have obtained occupation of the premises.” This is disputed by the Respondent. It is also clear that the payment of the purchase

price was not effected within fourteen days as stipulated in the Deed of Sale.

The very fact that the Respondent is suing for M90,000.00 as balance indicates that there is a dispute over this issue, which is the subject matter of CIV/T/318/96.

If the Applicant obtained possession and occupied the site in question and his quiet possession was disturbed by the Respondent and was thus despoiled he should have approached the court for ejection by way of action proceedings, if he foresaw that a dispute of fact existed and such action should have been brought in the magistrate's court - **Thabo Maitin vs Mary Barigye - 1993 - 94 LLR (Legal Bulletin) 270.**

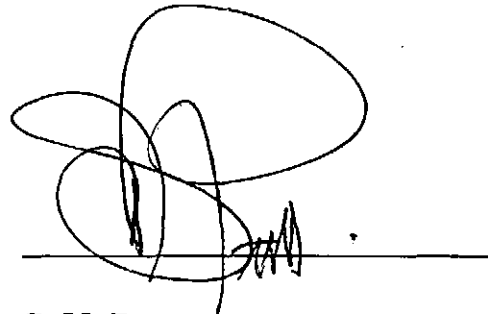
I am not convinced that the applicant has discharged the onus to show on a balance of probabilities that he has a clear right to be protected; moreover the applicant has not been candid enough in his application for relief; one example being he does not inform the court what form or extent did his occupation take to show that he had taken and was enjoying quiet possession. There seems to be a dispute whether after signing the Deed of Sale, the Applicant occupied the premises. This cannot be determined upon the affidavits as they stand.

It also seems that the Applicant foresaw and realised when launching his application that a serious dispute of fact incapable of resolution on the papers was bound to develop because in his founding papers he is candid about this and states:-

5.

“However the Respondent will dispute that I have complied with the terms of the agreement and has to that extent sued me in the above Honourable Court in certain case number CIV/T/318/96” and this court has a discretion to exercise whether to dismiss the application on that ground alone - **Nkhabu v Minister of Interior - 1993 - 94 LLR (Legal Bulletin) 480. (Room-Hire Co, (PTY) Ltd v Jeppe Street Mansions (PTY) Ltd - 1949 A 113 (T), Seloadi v Sun International (Bophuthatswana) LTD 1993 (2) SA 174.** In this case the Applicant proceeds by way of motion for a permanent or final interdict in a matter where it is obvious that the normal procedure was to proceed by way of action - **Thabo Maitin vs Mary Barigye 1993 - 94 LLR (Legal Bulletin page 270); Hyperama (PTY) LTD vs OK Bazaars 1991 - 1992 LLR (Legal Bulletin) 183 (C.A); Plascon-Evans Paints vs Van Reibeek Paints 1984 (3) SA 623.**

I would dismiss the application but I think the justice and convenience of the case demand that I exercise my discretion under Rule 8 (14) of the Rules of the High Court and I therefore order that the matter be converted into trial, the consolidation of such trial into CIV/T/318/96 will be ordered upon application of either the applicant or respondent. The present notice of motion and founding affidavits will stand as summons and the answering affidavit of the respondent will stand as plea. Order as to costs deferred to until end of such trial.

A handwritten signature in black ink, consisting of several overlapping loops and a final flourish, positioned above a horizontal line.

S. N. Peete

Acting Judge

For Applicant : Ms Thabane

For Respondent: Mr Ntlhoki