CIV/T/446/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

MAMATLAKALA MAPHISA	**PLAINTIFF**
AND	
PULE LECHEKO	**1ST DEFENDANT**
MAPUTSOE PROPERTIES (PTY) LTD	**2ND DEFENDANT**
COMMISSIONER OF LAND	**3RD DEFENDANT**
REGISTRAR OF DEEDS	**4TH DEFENDANT**
ATTORNEY GENERAL	**5TH DEFENDANT**
MINISTER OF HOME AFFAIRS	**6TH DEFENDANT**

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 21st January 1998

What I am aware of is that there had been before the original Court when this case was put before the High Court and before it went to the Court of Appeal an application by the Appellant that had to do with an interdict from carrying on confection works on Applicant's unnumbered business site situated at Ha Nyenye Maputsoe pending the finalization of the application and that other prayer dealing with the expansion of lease No. 2314020 registered in the name of the First Respondent and subsequently transferred to the Second Respondent under deed of transfer No. 23126 which appears

to have been registered on the 22nd December 1975 under deed No. 11309. The question of costs was reserved by the Court of Appeal itself under this No. C of A (CIV) No. 16/93 meaning that I was to deal with those aspects mentioned on page 8 -9 of the judgment of the Court of Appeal of the 28th July 1995 meaning that the question of costs stood over and that judgment having entitled as it did that the present Respondents could counter apply which was done by one of them. That counter application being get towards the cancellation of that title deed which was in favour of the Applicant's husband Patrick Lephethesang Maphisa. There was evidence led on both sides which can only be spelt out in my written judgment except that I am to deal with conclusions now towards my decision. I have said my full reasons will follow.

I have found it as proved that the Form C acquired by the Applicant's late husband was acquired irregularly with the Land Allocation Committee having set over an application and that committee having resolved to make an allocation for Plaintiff's husband. It was the sole act of the chief. I have also found it as proved that when the S.D.A. was registered it was registered in the circumstances that included that the Applicant was not informed and was not heard and was not invited to make any representations meaning that S.D.A. actually ignored the right of the Applicant as it existed in that Title Deed or over the property as it had not been cancelled and it had not been expunged. I find it as proved that there is no evidence indicating the Second Respondent could have been aware of the title of the Applicant's husband or the Applicant having been heir to her husband. The Second Respondent therefore became an innocent bona fide possessor. I will conclude that in as much as the Applicant and her husband appeared to have been not aware of

the defect no one explained that they were aware of the defect in the title. I find that they believed that they were the owners of the rights in the title. I found it as proved that the Plaintiff's have never occupied the site but only sufficed through his wife after the death of the Applicant having contacted the First Respondent, the Chief, Mr. Korotsoane and the Second Respondent which resulted in negotiations over so many aspects that included offers being made.

I did not regard that the fact that there was those offers by the Second Respondent an acknowledgement that the Appellant had title. I believed Mr. Korotsoane when he said that it was merely intended to end up in amicable settlement. I found that it was only after considerable improvement and building operation that Plaintiff sufficed now commences the application that came before the High Court that I have explained. It was said that this was only after nine or so of the commencement of the building. I did not find that it was important to actually make a specific finding over the stage of the buildings. Suffice it to say that it seemed to be considerable or almost complete. I have also spoken about the matter of the S.D.A. on this area and I might as well accept a submission by Mr. Nathane that this was an S.D.A. geared towards procuring in terms of that legislation a right over private property intended to result in private development not public development. I have also found fault with that S.D.A. in the way I have described that it appeared to ignore a registered title that was in favour of the Applicant's husband. I also found that S.D.A. that I found had been geared towards procuring a private interest was registered in favour of the First Respondent. That First Respondent who had caused registration over that piece of land to the Applicant's husband in terms of that agreement which was exhibited. I

might as well indicate that I did not find that there was any good in accepting the explanations that were given by the First Respondent as a witness explanations that concerned matters that were contained in the letter. I could only find that I would have to confine myself to what was recorded and I would not be influenced by matters that were parole in the sense that matters that were out of the record of agreement. I found that as a result of that lease the land was transferred to the Second Respondent's Company who I have described as a bona fide possessor. I have also concluded a way of repetition that the Second Respondent could have not known the adverse title of the Plaintiff's husband at least there was no such evidence. I have also spoken about my belief that this negotiations conducted by Mr. Korotsoane and Company and Plaintiff's husband could not have been an acknowledgement of title alternatively it was not an indication that Mr. Korotsoane had previously or at all a well known of the Plaintiff's title. I have also spoken about my finding that a title deed was duly registered. Form C was irregularly issued.

I will conclude that the Applicant's husband was not a citizen of Lesotho and her husband was not entitled to hold land or become citizens of the Republic of South Africa but I conclude even that they were bona fide possessors they believed that they had a right. I will be led to the conclusion when I recognise that despite their title which may have been faulty in some respects this title was only sought to be cancelled through proceedings issued after this Court of Appeal case and after that S.D.A. which had ignored the title of the Applicant's husband for whatever it meant so that what should happen to the Court is that the Court is supposed to balance the precedence of that title that is the title that the Second Respondent had as against the title

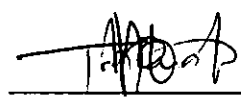
that the Applicant's husband now had. It is a question of saying which right would the Court should think should come first in the circumstances because my conclusion will be that the Second Respondent had innocent title. I have already said that my conclusion will be that the Appellant's husband did have innocent title. I did not find that the chief went more than indicating that there was anything equal to fraud or that there was ulteria motive in the action of themselves except that the chief was keen to give title in the way he did because as he said Maphisa was in a hurry.

I will find that the First Respondent knew of the title obviously of the Applicant's husband and deliberately closed his eyes to it when he transferred the lease the way he did. I will also conclude that it does not appear that the registering authority that is the authors of the registrars of the S.D.A. that is the Commissioner of Lands could have been alerted to the title that the Applicant's husband had this I would attribute to negligence on the part of the Minister and those who work under him. I have said that the First Respondent could clearly be mistaken to say that the Applicant's husband title was cancelled by breach of non appliance with the conditions as he did complain without the formal application. I would remark that he spoke of other conditions not included in that letter of agreement. The Applicant's husband probably abandoned their interest in the land and only reacted after improvements which were considerable in progress but I said I cannot ignore that the title remained registered in their name.

I have said that it is a probability that the Second Respondent was a bona fide occupier and could not have been aware of the Applicant's husband title. To that extent as far as his title is concerned it mattered not whether the

S.D.A. or the lease which was in favour of the First Respondent was faulty or irregularly obtained. I would not find fault with the Second Respondent who is the Company having not taken any action before the issue of the S.D.A. the lease and transfer because they could have not known that the title deed existed nor that the Form C was irregularly issued. I would say that the Applicant would be stopped from getting the prayer for interdiction. I would find that Applicant has succeeded to show that the S.D.A. was irregularly obtained. I would make the following order: That the title deed be cancelled. I would order that the S.D.A. be cancelled. I would order the Respondents 3, 4, 5, 6 or any of them as the law entitles to rectify the lease. He must rectify the lease and must also rectify the deed of transfer which shall remain in favour of the Second Respondent. I would say that the Applicant shall pay half of the costs. This I am persuaded to order by reason of the fact that she has proved the fault in the S.D.A. Her husband was not informed of the S.D.A. nor they contacted. The other part of the costs which I order against the Applicants is influenced by the "apparent" abandonment of the rights and the fact that when she came to Court it was considerably after buildings have commenced. That is why I was not able to grant the order for interdict. That is why I could only partially grant the prayer B that is about expulsion of the lease which I ordered could be rectified, I make the other order that this rectifications and the cancellations should go on immediately that the Second Respondent is formerly allowed to occupy the site as its own but one tenuous order remains it is that order that concerns the fact that the title deed would otherwise have been cancelled if the makers of the S.D.A. had approached the Applicant or her husband. They should have done that because the existence of the title was known to the First Respondent. I order that the Applicant should be paid damages that are equal

to the value of that site minus the improvements and if there is disagreements this matter be subjected to proof. If the parties do not agree proceedings must be filed for them to come to Court and contest that amount of the value. If when the S.D.A. was made the Applicant or her husband had been contacted I would say that they must be paid the improvements that they have made but I ask that there be a value fixed there be agreement or disagreement. These Applicant should be paid the value of the land minus the improvements. I don't know how are you going to arrive at that but this is the only fair order that I can make in the context of the fact that when the S.D.A. was registered you were not consulted it was not known that the title existed that man should have attended to the title and it did not this Applicant's husband title. As I have said although the title was faulty somehow the Applicant's husband appeared to be a bona fide possessor. There is someone who believes that he has good title the title may be wrong but he believes that he had title and he was led to believe by chief, the First Respondent and the Registrar of Deeds.



T MONAPATHI
JUDGE
21st January 1998

For the Plaintiff : Mr S. Mafisa

For the Respondents : Mr. Nathane