CIV/A/15/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

MAMOKUENA KALA

v

MOTLATSI KALA
OSIA KALA

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 13th November, 2000

This is an appeal from ruling of the magistrate's court for the district of Mohale's Hoek who had made the following order:

> It is the ruling of this court in the light of the arguments that, rather than dismiss the application with costs for the simple reason that applicant not only took the risk by coming to court by way of motion where a dispute of fact might reasonably be raised, he ought to have anticipated it. The court orders that the parties go to trial in the ordinary way,

/...

by way of action.
- The parties are to file pleadings.
- The question of costs is to be deferred until the final order."

On the 23rd March, 1995, the appellant's late husband had brought ejectment proceedings by way of application phrased in the following manner:

(a) That respondent be ejected from applicant's developed Site No.329 situated at Moeaneng in the Mohale's Hoek Urban Area in the district of Mohale's Hoek.

(b) That respondent pay costs of this application only in the event of contesting same.

(c) That applicant be given such further and/or alternate relief, as this Honourable Court may deem just.

For convenience, I will call her appellant, as the widow of applicant was substituted as applicant in the court below.

1. **Facts about this case**

In his founding affidavit appellant had said that second respondent was one of his children, and that second respondent was not even his eldest son. Appellant went further to say he has a developed site number 329 at Mohale's

Hoek Urban Area in which he has built flats for renting. Respondent was occupying two rooms on the said site without paying rent. He has been demanding that respondent vacate the said rooms since 1994. Instead of complying with this demand, respondent becomes belligerent and threatens him with violence. Indeed according to appellant, respondent has told him that he will not vacate the said premises even if appellant approaches the courts of law.

Appellant accuses respondent of gross ingratitude because in 1993 appellant acquired a site for respondent at Motsemocha in the district of Mohale's Hoek. Appellant then developed it for respondent and at his "sole cost and expense built a three roomed house" for respondent. Despite appellant's "effort to create a better life for him and his family (he is a married man) " respondent will not vacate the two room on site 329 so that appellant can lease those premises and in order that appellant can obtain income to live on from those premises. It hurts appellant (so he said) that respondent requites appellant's kindness with such ingratitude. It is for these reasons that appellant has to resort to ejectment proceedings because since September 1994 respondent refuses to vacate those premises.

Respondent denied each and every allegation and says although site 329 Mohale's Hoek belongs to appellant, he developed it himself in terms of a verbal agreement that he had with appellant in 1986. All materials and labour were respondent's. It was further agreed that in return for his expenses, he

would occupy the premises which he had built. These premises would be passed on to respondent's son Mphutlane when Mphutlane became of age.

The site at Motsemocha was obtained and developed (according to respondent) by respondent "without any assistance from plaintiff as he alleged or at all". There have been numerous family meetings in which respondent has insisted on compliance with this agreement between him and appellant. Appellant should not have proceeded by way of application because appellant knew there would be a serious dispute of fact. Consequently respondent asked that appellant's application be dismissed with costs.

In his replying affidavit appellant denied the agreement that respondent alleged. He said in 1985 when appellant developed the site, respondent was not yet married. The said Mphutlane was born on the 8th August 1992, consequently he could not have been part of the agreement. There has never been any family meeting about this matter. Appellant submitted, in his affidavit, that no genuine dispute of fact exists.

Before concluding this summary of facts, I observed as the matter progressed (but before hearing) that an application for amendment which was in essence an application for joinder of Osia Kala was made. In that application, the original first respondent Motlatsi Kala was turned into the second respondent. This was because Osia Kala had since occupied the rooms

that had been occupied by Motlatsi Kala, having been placed in them by Motlatsi Kala, the original first respondent. The record only shows a *rule nisi* was issued calling upon both Osia Kala and Motlatsi Kala to show cause why they should not be first and second respondents respectively. I will assume the rule was confirmed unopposed. I should have liked to know who Osia Kala is in the family tree.

1. **Can ejectment be correctly instituted by way of application in the Magistrate's court?**

As Benson J observed in *L.K. Theko v S.M. Theko* 1963-66 HCTLR 105 at 106E:

> "The Subordinate courts are created by statute and the extent of their jurisdiction must be looked for within the four corners of the statute, namely Proclamation 58 of 1938;"

The *Subordinate Courts Order* of 1988—Section 17(1) (which has taken the place of *Proclamation 58* of 1938) provides:-

> "Subject to this Order the court, with regard to causes of action, shall have jurisdiction,
>
> (c) in an action of ejectment against an occupier of a house, land or premises within the district;"

It is clear therefore that ejectment proceedings in the Magistrate's court should

be brought by way of action not by way of application. In the High Court the use of applications has been extended to any matter provided it is not disputed. Should the matter be disputed when it is one suitable for action proceedings, it might at the court's discretion be dismissed with costs. The High Court is a court of unlimited jurisdiction and is completely in charge of its procedure. As already stated the magistrate or Subordinate Court has no such freedom because it is a creature of statute.

In *Re Pennington Health Committee* 1980(4) SA 243 the Natal Provincial Division interpreted identical provisions of the South African *Magistrate Court Act* of 1944 to mean the magistrate court has no jurisdiction to hear ejectment applications. In that legislation (like the Lesotho one) action mean proceedings initiated by way of summons. Howard J in *In Re Pennington* at page 247H referring to the magistrate courts legislation concluded:

> "A perusal of all these sections shows that the legislature drew a clear distinction between actions and applications. Procedure by way of application is recognised, but the intention appears to have been to confer jurisdiction generally in actions (in the narrow sense) while authorising application proceedings only in specific cases."

In short application proceedings are intended for interdicts, arrests, attachments, mandament van spolie etc as more fully appears in Section 18 of the *Subordinate Court Order* of 1988. It was on this basis that Erasmus J in *Jordan & Another v Penmill Investments CC & Another* 1991(2) SA 430 found

that it was legally permissible for a magistrate to grant a temporary order of ejectment pending the finalisation of an ejectment action because this fell within the description of a mandatory or interlocutory interdict, because the "purpose for which an interdict may be granted are endless"—*Jordan & Another v Penmill Investments CC & Another* at page 435 G. In other words legal proceedings for ejectment from premises cannot be instituted (with the jurisdiction being what it is) in the magistrate court by way of application without violating the *Subordinate Courts Order* 1988.

From the aforegoing the magistrate was obliged to dismiss appellant's application on procedural grounds of a jurisdictional nature. By making the order,

> "...that the parties go to trial in the ordinary way, by way of action.... The parties are to file pleadings",

the magistrate was in fact dismissing appellant's application and ordering appellant to proceed by way of action. Costs of that dismissed application are to stand over until the final order on that action is made.

3. **Relevance of land laws to this case**

Mr *Mda* argued very vigorously that respondent had alleged a transaction of transfer of land which was unwritten contrary to the provisions of *Deeds*

Registry Act 1967 by saying Section 16 applied to it as agreement for the transfer of land. I was unable to grasp this argument because what was involved was occupation of land. It was not a long lease but rather an agreement (if proved) in terms of which respondent was put in occupation of applicant's site after respondent had developed it. Even if it was a transfer of land it would be an oversimplification if appellant thought being in *pari delicto* (in allegedly not complying with the law) he could be allowed to enrich himself at the expense of respondent by merely asserting its voidness in terms of the law. There was not even an allegation that the said site 329 was registered. If it was not, (being in an urban area) the said site should have reverted to the Basotho nation in terms of Section 15 thereby creating a situation in which none of the parties have a right to that site.

I thought Mr *Mda* was complicating this matter for appellant as well merely because he did not want the merits to be gone into. Even the provisions of the *Land Act* 1979 (as amended), the widow could not inherit rights that were greater than her late husband had. In other words the widow's beneficial right of occupation and use would be what she enjoyed during her husband's life time. Sufficeth to say the *Land Act* 1979 and the *Deeds Registry Act* 1967 are not always consonant because they embody land policies that are no more identical.

4. **Dispute of fact**

The dispute of fact is so clear from my summary of the facts that, I was puzzled that Mr *Mda* did not recognise it. The magistrate was right in holding there was a material dispute of fact, and the magistrate was therefore bound not to allow appellant's application to succeed. In view of my finding, this is not the only thing that is wrong with applicant's proceedings. I have already shown that in the magistrate's court ejectment proceedings cannot be brought by way of application. Section 17 of the *Subordinate Courts Order* of 1988 made this abundantly clear.

I am satisfied that the magistrate's order was correct. Appellant will have to issue summons. In fact had she not used her discretion in the manner she did, appellant's application in the magistrate's court should simply have been dismissed with costs. Appellant is lucky not to have to pay costs right away, I will not disturb the magistrate's order as I find it just, and there is no appeal against it.

ORDER

This appeal is therefore dismissed with the costs.

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WCM MAQUTU
JUDGE

For applicant : Mr Z *Mda*
For respondent : Miss M *Lehloenya*