CIV/APN/492/98

IN THE HIGH COURT OF LESOTHO

In the matter of:

SEA LAKE (PTY) LIMITED — **APPLICANT**

and

CHUNG HWA TRADING ENTERPRISE COMPANY (PTY) LIMITED — **1ST RESPONDENT**
YU-SHING SIU — **2ND RESPONDENT**

For the Applicant : Mr. S. Makhene
For the Respondents : Mr. L. Molete

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 10th day of July 2000

The Respondents hold rights to a certain plot number 1227+005/19, Maseru Industrial Area. The dispute between the parties concerned an agreement between the parties over the said plot.

This was an application in which the Applicant was seeking a Court Order compelling the Second Respondent or any official of the First Respondent to sign a deed of sale between the Applicant and the First Respondent, allegedly concluded on or about the 17th November 1998. The alleged agreement was for the sale of First Respondent's rights in a sublease of the said plot and that is why the Applicant asked Respondents to:

"perform in compliance with the terms of the said agreement."

A draft written agreement had been made but had since remained unsigned because of misunderstanding that followed after Mr. Lepholisa (the attorney who drew the agreement) had completed the draft. The Respondents were also to be interdicted from selling their rights and interest to whosoever other than the Applicant pending the determination of this application. A rule nisi had been issued which lapsed or the matter seemed to be no longer treated an urgent one since the 10th December 1998 when the rule was granted.

I indicated to Mr. Molete as early as before the completion of his argument that probabilities would incline to show that an oral agreement was in fact reached between the parties. That is why his client was given possession of a cheque of Two Hundred and Fifty Thousand Maloti (M250,000.00) allegedly for purchase price. Indeed his client declined to deal with the cheque as his on the ground of some disagreement which the Court decided not to go into. Consequently I discouraged Mr. Makhene from delving into the so called "external manifestations" of the parties conduct to determine whether a contract existed or not. I had however opined that there must have been some misunderstanding about some aspect of the oral agreement.

Counsel had to argue on the basis that there had in fact been an oral

agreement which was to be written and signed. It is this agreement which, it was safe to conclude, the Respondents were reneging on. As matters finally stood there was a draft written agreement which was unsigned. That is why the Applicants' deponent said in paragraph 12 of the founding affidavit:

> "The Applicant has not committed any breach of the said agreement and there is no basis of the 2nd Respondent's refusal to comply with the requirements of the said agreement except for malicious intention to renege on the said agreement."

Counsel also agreed that there had been no Minister's consent obtained in terms of section 35(b) of Land Act No. 17 of 1979. This would be inevitable to inquire into in the light of what was proposed in paragraph 1 of the draft agreement. It was therein written thus:

> "The seller shall immediately upon the signature of this agreement apply for the-appropriate Minister's consent in terms of section 35 of the Land Act to dispose of its rights, title and interest to the property referred to herein. In the event of the seller not succeeding in its application for Minister's consent and in the event of Minister's consent being refused, in which event the purchaser shall have the right to use and occupy this property for the duration of the existing Land Act lease as well as for the duration of the extended period thereafter."

The point being made would therefore be that it seemed from the agreement and it was supposed that certain benefits such as use and occupation of the property were saved in the event of the refusal of the Minister's consent. The futility of the provision of the agreement would surely be that the agreement remained invalid in the absence of the Minister's consent. See MOHALE AND ANOTHER v COMMISSIONER OF LANDS AND SURVEY AND OTHERS LAC (1985-89) 250 One reasons would be that such a sub-lease ought to be registered and it would

require the Minister's consent. See also section 35(1) (a) (iii) of the Land Act 1979. And see furthermore Deeds Registry Act 1967 Sections 24(1) and (2) about registration of long leases and consent of proper authority.

Most of Applicant's Counsel's argument centred on the issue of whether an oral or informal agreement had been reached by the parties before Mr. Lepholisa was approached and whether it was a binding and enforceable contract. I have already decided that an oral or informal contract was reached. Counsel also dealt with the law on an important question that had to be answered. It was whether or not the contract between the parties would only come into being after or upon the signature of the deed of sale.

When speaking about the validity of an oral agreement Counsel for Applicant referred the Court to the work THE LAW OF CONTRACT IN SOUTH AFRICA by A. H. Christie), 2nd edition page 122 and GROTIUS 3.14.26. Counsel submitted further, on the question whether there was no valid contract until the written contract has been drawn up and concluded by, referring to GOLDBRATT v FREEMANTLE 1920 AD 123 wherein Innes J said:

> "Subject to certain exceptions mostly statutory, any contract may be verbally entered into, writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that writing should embody the contract." (My underlining)

Then, most wisely, there resulted a concession on the point by Applicant's Counsel. It was that it seemed uncontestable that the validity of the parts agreement would only take form and materialise after the written agreement was signed by the parties. This had been was made even clearer by paragraph 9 of the draft

agreement which recorded that:

> "This is the sole and complete agreement between the parties and any term or condition thereof insofar as it refers to an obligation of any one the parties is a material term or condition, and any amendment of addition to, or substitution of any term or condition in this Agreement or to this Agreement, shall only be valid binding and enforceable upon the parties in the event of it being induced to writing and signed by both the purchaser and the seller each before two (2) witnesses."

I therefore found no need to address issues such as burden of proof as to what the intention of the parties were and the issue that would arise such as what transpired in the negotiations, where and how the parties could not have been ad idem. The latter would have been important in that the Respondents had cited misunderstanding on the aspect of the contents of the agreement as the reason for reneging on the agreement.

I agreed with Mr. Molete that there was nothing to enforce in the agreement and there was nothing which the Respondents would be compelled to perform based on the alleged agreement. I agreed further that the Applicant would probably be entitled to claim damages for alleged breach. This application which was for a form of specific performance in the circumstances was irregular and enforceable. I endorsed further that the granting of a specific performance of any nature was discretionary and depended on the circumstance of each case. The Court would therefore not grant specific performance when damages would adequately compensate the Applicant or when the thing claimed can be readily bought anywhere else. See FARMERS CO-OPERATIVE SOCIETY (REG) v BERRY 1912 (AD) 343 and HAYNESS v KING WILLIAMSTOWN MUNICIPALITY 1951 (2) SA 370 AD at 378H. This is even more so where the

Applicant did not contend that it would be difficult to assess his damages, that it was in the power of the Respondent to carry out his undertaking and that order was the only order that could do justice in the circumstances. See FARMERS CO-OPERATIVE SOCIETY v BERRY (supra) at 350. In HAYNES v KINGWILLIAMSTOWN MUNICIPALITY (supra) the order for specific performance was refused in the Court's discretion despite the existence of a valid contractual obligation. In the instant matter, as I have decided, the contract between the parties would be an unenforceable contractual obligation. See CASIMJEE v CASIMJEE 1947 (3) SA 701(N).

I could not therefore exercise the Court's discretion in favour of the orders sought because this was not a proper case.

On the 20th June 2000 I decided that the application be dismissed with costs.

T. MONAPATHI
JUDGE
10th July 2000 .