

IN THE HIGH COURT OF LESOTHO

The matter between:

ENTERPRISE INVESTMENT (PTY) LTD - APPLICANT

and

**AFRICAN METHODIST EPISCOPAL
CHURCH - FIRST RESPONDENT**

THE MINISTER OF HOME AFFAIRS - SECOND RESPONDENT

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. Guni on
this day of 26th February, 2002

The applicant is ENTERPRISE INVESTMENTS (PTY) LIMITED Company. (hereafter referred to as the company.) It is incorporated with limited liability in accordance with the company Laws of this kingdom. It's principal place of business is at 28 B MARKET STREET, BUS STOP, MASERU. Property development is their main business.

The first respondent is the AFRICAN METHODIST EPISCOPAL CHURCH. (hereafter referred to as the Church). It is a universitas personarum with a written constitution. As such it is a person capable of suing and of being sued. The second respondent was at that time the minister responsible for the administration of the LAND ACT 1979 AS AMENDED. The second respondent has no interest in this application because the dispute is between the church and the company who are parties to the contract which is the subject matter of this application. No papers were filed on behalf of the second respondent.

The contract which is the subject matter of this application, was concluded between the church and the company on the 26th NOVEMBER 1991 (SEE "ANNEXURE AS3 " at page 31 of the record). In this contract the church agreed to sell its interest on the land described in that sale agreement as A portion of site N0.36 MASERU Central, MASERU Reserve measuring 82m x 55m. This portion is situated at the extreme right hand corner of site N0.36. (The diagram where the site is indicated is attached to the DEED OF

SALE document - AS 3B at page 36 of the record.). It is marked site NO.36A.

The agreement of sale was signed on the 26th NOVEMBER 1991, by the duly authorised representatives of the parties. The church was represented by Bishop Richard Allen Chappelle SR. MR. Anver MAHOMED SAYANVALA signed on behalf of the company. The church is the seller. The company is the purchaser. (Refer to the Deed of sale -“Annexure AS 3B”- Page 31 of the record.

The purchase price of that property is two hundred and fifty thousands maloti (M250 000.00). The parties stipulated the terms of payment of the said amount. Those terms have been fully complied with by the company. At the time this proceedings were instituted the company had fully paid up the purchase price for the property sold to it by the church.

The contract entered into by the church and the company was conditional upon:-

- “(a) The grant to the Seller of a Lease as contemplated by Section 29 (1) of the Land Act, 1979;

- (b) The grant of consent, as contemplated by Section 35 (1) (b)
 - (i) to the transfer of the Seller's Lease to the Purchaser."

(Refer to the clause 1 paragraph (a) and (b) DEED OF SALE at page 31 of the record).

Clause 3 of the contract provides that the occupation of the property purchased shall be given to the purchaser immediately upon signature of the contract. (My underlining). At no time was the occupation of the property sold given to the purchaser. The physical occupation remained with the tenant -Lesotho Ads who carries on the printing business on those premises. Attempts to have the tenant pay the rentals to the purchaser were not successful .

The parties nevertheless continued to perform their duties in terms of their contract. e.g. the company continues to pay instalments of the purchase price as agreed even though it had not been given the occupation of the property. The church continued to receive and accept the said payments up to the very last instalment. Bishop Richard Allen Chappelle SR gave a power of attorney to O.K. MOFOLO & CO who were at the time acting on behalf of the church.

The attorneys were empowered and authorised in that power of attorney to:

- “1. Apply for a lease on behalf of the African Methodist Episcopal Church with respect to 82m x 55m (4,510 sm) of site N0.36 MASERU Central, MASER Reserve and do all that may be necessary to process such lease application.
2. To sign all Relevant documents on our behalf for the due processing of such lease;
3. To draw all relevant transfer documents for the transfer of said 82m x 55m (4,510 sm) of site N0.36, MASERU Central, MASERU Reserve from the AFRICAN METHODIST EPISCOPAL CHURCH to ENTERPIRDSE INVESTMENT (PTY) LTD;
4. To sign all relevant documents as may be necessary on our behalf for due processing of the transfer.
5. To sign the application for a building permit and all other documents pertaining to the development of the site 82m x 55m (4, 510 sm) of site N0.36) wheresoever we may be required to do in order to enable Messrs ENTERPRISE INVESTMENT (PTY) LTD to develop 82m x 55m (4, 510 sm) of the site N0.36, MASERU Central, MASERU Reserve.”

The attorneys applied for a Land Act lease for the new site N0.36A. The church was already a title holder to that land comprising sites numbers 36 and 37 MASERU Central. The procedure followed when making the said application is prescribed in Section 29 (1) LAND ACT 1979. The relevant portion to this matter reads as follows:-

- “(1) Whenever a person to whom section 28 (1) or (3) applies is desirous of granting or creating any interest in the land held by him or whenever section 30 or 31 applied to that person, “he shall apply to the Commissioner for the issue of a lease “ and shall produce with application:-
- (a) evidence that he is qualified to hold land under section 6;
 - (b) a description of the boundaries of the land in question (by reference to a plan or otherwise); and
 - (c) any one of the following documents:-
 - (i) a registered certificate of title issued by the Registrar of Deeds under the Deeds Registry Act 1967;”
 - (ii) that the applicant and his predecessors have been occupying and using the land for a period of at least 30 years;
 - (iii) any other official document evidencing that the applicant is in lawful occupation of the land.

There were various disputes within the church amongst its congregations and bishop Richard Allen Chappelle SR. Various factions of the congregations were each claiming title and control over the properties of the church. Various legal actions were instituted against Bishop Richard Allen Chappelle SR by some of the church congregations. The legal action slightly relevant to the present application is CIV/APN/440/92. In this application some members of the church opposed to the sale of this property to this company sued Bishop Richard Allen for the

purpose of stopping that sale. It will suffice merely to indicate that he was the successful litigant. The applicants in that matter were found by the court to have NO LOCUS STANDI. The bishop as the head of the church was the “church.”

Section 29 (1) placed a duty on a person who holds title to the land on which he is desirous of granting or creating any interest in that land to apply for a lease. The church is obliged to apply to the Commissioner of Lands for the issue of a lease in respect of site N0.36 A in terms of this provision, once it had that desire to grant the interest to the company on the land held by it. By instructing and giving a power of attorney to O.K. MOFOLO & Co. to apply for both the lease and its transfer the church was on route towards full compliance with the terms of the contract. It was also following the route which was prescribed by the provisions of section 29 (1) LAND ACT 1979. By taking those steps, the church was demonstrating its intention to pass over to the company its right or interest in the said piece of land.

The process of fulfilling the conditions of that contract of sale of that piece of land, was not a short one. While the application for a land act lease for site N0.36A was still under the consideration by the Commissioner of Lands, bishop Richard Allen Chappelle SR, wrote a letter to O.K. MOFOLO & CO. (see Annexure AS8 page 43 of the record) whom he had instructed to make that application. He sounded worried now that he had not been advised of the progress made so far in the obtaining of the said lease for the church in respect of site N0.36A. He pointed out that there is a bit of discussion about the sale of the property. He was in The United States of America at St. Louis when he wrote this letter. But he did not mention where the discussion, about the sale of the property was taking place. Presumably it was here in Maseru. He then pointed out that that property belongs to the church and as the head of that church he sold the property. (My underlining). He appears to be justifying or defending the sale of that property or himself for selling it.

Although the bishop indicated in his letter of 21/04/92 to O.K. MOFOLO & CO. that news have reached him that proper papers have been filed presumably with the Commissioner of Lands for the purpose of fulfilling the condition of sale of that property, he expressed fears that some members of EMANUEL AFRICAN METHODIST EPISCOPAL Church who have access in various government offices have capacity to alter, revise, or delete almost anything they desire. One gets the impression that the bishop was worried that those people might disrupt or prevent the issuing of a lease in respect of site N0.36A which he had instructed O.K. MOFOLO & CO to obtain.

Despite the bishop's endeavours to obtain the same, that lease was never issued. The years passed and the disputes regarding the contract and ownership of this property between the company and the church and amongst various church congregations went on. The bishop withdrew the power of attorney he had given to O.K. MOFOLO & CO on the 4th November 1994. O.K. MOFOLO & CO's mandate to obtain that

Land Act lease on behalf of the church for site N0.36A was therefore terminated before the issuance of the said lease for site N0.36A MASERU CENTRAL. The church now represented by a different firm of attorneys, their present attorneys of record dealt with this matter with WERKSMANS - a firm of attorneys in Johannesburg, who were at that time engaged by the company. They still failed to resolve the matter. The company engaged the firm of O.K. MOFOLO & Co. to pursue the application for the issuing of that land act Lease to the church and its transfer to itself. A lot of correspondence went on between various attorneys representing various church factions and the Commissioner of Lands. There was no resolution of the dispute within sight.

Finally this application was filed by the company. It's main prayers are that:-

- (1) The agreement of sale entered into by it and the church be declared valid.
- (2) The church apply within 10 days of service of the order upon it, to the Commissioner of Lands for the Land Act lease. (This would be resumption of the processing of that application for the issue of lease for site N0.36A - which was submitted by O.K.

MOFOLO & CO on behalf of the church in 1991).

- (3) The church should then apply for ministerial consent to have the lease transferred to the company.

The church is now opposed to this application. The defences raised are that the contract between the parties is invalid and therefore unenforceable. The church seems to question the company's qualifications to hold title to land in this kingdom. Right at this juncture I must point out that the qualifications of the company to hold title to land is the matter to be determined by the authority empowered to issue such titles, not the church. The company's shareholding entitles it to the issue of Land act Lease because it complies with the requirements set out in section 6 of the Land Act 1979. Another defence seems to be the denial of the existence of site NO.36A. In the deed of sale agreement the boundaries of the portion sold are clearly marked on the diagram annexed to the agreement. The size is stated with precision in the application for lease by O.K. MOFOLO & CO. as gleaned by them from the terms used in the agreement and the diagram attached thereon. The fax sent to O.K. MOFOLO & CO. by bishop Richard Allen Chappelle has a diagram

showing the properties of the church encompassing sites numbers 36 & 37. He made a rough but very clear sketch of the proposed sale parcel. The Land Act does not prohibit the creation of further or new interests on the land on which the party already holds title. (Refer to Section 29(1) LAND ACT 1979). The piece of land sold by the church to the company is clearly identified and demarcated.

The main question for determination seems to me to be whether or not that contract the parties entered into on 26th November 1991 is valid or not. The conditional contract is not invalid *per se*. It becomes invalid only when the condition fails to happen. The bishop accepted and acknowledged the fact that he sold the church property. He admitted this much in his affidavit in defence of his actions in CIV/APN/440/92. He intimated to O.K. MOFOLO & CO. that he was going to send them more ammunition to be in a position to defend adequately the position of the church for the sale of the property to the company (refer to "Annexure As 8" at page 43 of the record). The bishop had no doubt whatsoever in his mind that he had sold that piece of land to the company. He was convinced that as a

bishop he had authority to sell the property of the church on its behalf and he had successfully defended his actions in CIV.APN/440/92 where his authority to do so was confirmed. The church's intention to sell that property is in no doubt.

The actions of both parties - (The church and the company) at all material time demonstrated their intention to be bound by this agreement. They endeavoured to fulfil the conditions of the sale until in November 1994 when Bishop Allen Chapelle withdrew the power of attorney he had given to O.K. MOFOLO & CO. in order to obtain a lease on behalf of the church and obtain the ministerial consent to transfer the same to the company. It is by the church's own action of discontinuing to pursue its initial application for the issuing of a lease to the church in respect of site N0.36A that will bring about the failure of the fulfilment of the condition of sale. The church cannot rely on the breach of its duty to apply for the land lease because it was its desire to grant or create the interest on that land held by it which it sold to the company. It cannot now after so many years of enjoyment of the proceeds of the sale of that property turn away as if it was

obtaining money from the company by false pretences. The church and the churchmen are all honourable. The real honour. Not of the same kind as the one which Mark Antony in his speech at the funeral of Ceasar bestowed on Brutus and those who murdered Ceasar. The intention of the church was to be bound by the terms of this contract. Therefore it remains bound and must honour those terms. It has been argued on behalf of the church that the bishop was free to give and withdraw that power of attorney. I agree. It is his right to make choices freely. But in this case did he persist in his action to obtain a Land Act lease for site 36A after withdrawing that power of attorney? While exercising his right of free choice, he should not prejudice others in their rights. By his free will, he created an interest and passed a right to the company with respect to its site N0.36A. (JULIA MONYANE V. THE MANAGER – MAFETENG LESOTHO EVANGELICAL CHURCH PRIMARY SCHOOL AND ANOTHER CIV/APN/216/97). By his actions he cannot prevent the fulfilment of the condition and then rely on such none fulfilment as a ground for his failure to comply with the terms of the contract. (Re sisto Dairy (Pty) Ltd V. Anto Protection Insurance Co.Ltd 1963 (1) SA 632 A).

The party to a conditional contract, cannot be permitted to stop the fulfilment of the condition of that contract for the purpose of taking an advantage to resile from the said contract. The church's right to do as it pleases with that particular piece of land is now limited by the right it passed to the company when it sold the said piece of property to the company. The church is not entitled to change its mind and discontinue to pursue its application for the issue of a land act lease for site N0.36A. The change of mind should not be permitted to prejudice the right of the company to the said property. There is a duty imposed on the church by both the terms of the contract and the provision of section 29 & LAND act 1979.

The church has even gone further, by obtaining as shown by the deponent of the opposing affidavit, that Land Act lease but not for site N0.36A as was initially intended in the application submitted in 1992 by O.K. MOFOLO & Co. This confirms without a doubt the fears of changes, delitions, variation, and/or alterations that were expressed by the bishop in his letter to O.K. MOFOLO & CO. impossibility to perform on behalf of the church is being pleaded, reliance being

placed on the church's own actions of obtaining the said lease for the whole undivided site N0.36 instead of only that portion of it, that is N0.36A as initially intended. Bishop William DE VEAUX Avers in paragraph 7 of his affidavit that Land Act lease under N0.12284-203 was issued to the church on the 21st April 1995. This is for the whole site N0.36, including even that portion designated site N0.36A. It is claimed that the site is not divided and cannot be divided. Was this lease obtained in order to frustrate that Deed of Sale agreement entered into on the 26th November 1991 between the church and the company. This was done many years after the church had commenced enjoying the proceeds of the sale. It continues to enjoy both proceeds of the sale of the property and the rentals from the property it sold long time ago.

The issuing of this land Act lease for the whole site N0.36 according to the attorneys of the church will make it impossible to comply with the terms of the contract. This court will not allow the party to enter into a contract and then commit acts which directly cause the conditions of the contract not to be fulfilled. Why did the

church obtain the land act lease for the whole site with the full knowledge that portion of that same site has been sold to the company? I shall repeat the question I posed above. Was that done in order to frustrate the agreement between the church and the company particularly bearing in mind that it was obtained after the withdrawal of the power of attorney by the church from O.K. MOFOLO & CO., terminating their mandate to pursue the initial or first application for the issue of the land act lease for only that sold-out portion. Bishop Richard Allen in his letter of 21st April 1992 expressed fears that those disidents in his church may alter, revise, or do anything they desire to stop the sale of that property. There is no allegation or proof that anything of that sort happened. No such thing happened. He also said there were rumours that EMMANUEL Methodist Episcopal church - (which is another faction of the disidents in his church) has applied for Land Act lease to that portion of land which has been sold and the land on which the new church stands (refer to Annexure 8 at page 43 of the record). Let us hope and trust, that this did not happen. It was just a rumour. However these facts as alleged by Bishop William DE VEAUX, with regard to the obtaining of the lease for the whole site

confirms those fears expressed by Bishop Allen in his letters to O.K. MOFOLO & CO. at the time when that firm represented the church for the purpose of obtaining that lease for only that portion sold to this company. Even if it happened, it would not defeat the church's initial intentions to sell its interest on the designated portion. If this was not done by those disidents, it was an after thought by the church. Therefore it cannot be in the way to stop the fulfilment of that condition of the agreement of sale.

The church whether represented by bishop Richard Allen Chappelle or bishop William DE VEAUX cannot by its own actions commit acts which prevents the fulfillment of the condition and then claim impossibility to comply with the terms of that agreement. That would not be honourable or justified.

Bishop Richard Allen Chappelle in his letter to the Commissioner of Lands dated 29th August 1974 - (Annexure As 14 at page 55 of the record) pleaded with the Commissioner not to approve the sale if and when the matter comes to him. This is placing undue influence upon the Commissioner. Each application must be

considered on its own merits. The only considerations being those set out in Section 6 LAND ACT 1979. The bishop pointed out in that letter that he pleaded to have the sale rescinded. He does not mention with whom. I get the most unpleasant feel that the bishop wants the contract rescinded but it should not appear that he is the one who is rescinding it. This is most unfortunate. In no uncertain terms, he admits he sold portion of site N0.36 in 1991. It is in the common cause that it was to this company. He further claims that he did not file the complete and proper papers to effect the sale and transfer of that property. Seemingly suggesting that he did not intent to complete the sale and transfer. This sounds like the calculated and deliberate action to frustrate the fulfilment of the conditions of sale. The reason being his wish not to approve the sale. He claims that the Commissioner of Land's office records will show this. Certainly I must be wrong to get the bad impression that some fraud was being perpetrated or at least intended. It is established that when the power of attorney was withdrawn from O.K. MOFOLO & CO. no further papers were filed in respect of that application. Therefore that application was never pursued. May be this is what the bishop

mean. That is not honesty. The church was going out of its way to frustrate the fulfilment of the condition of sale. If it is correct, dishonesty is unbecoming a churchman. The reading of "Annexures As 14" (at page 55 of the record) gives me the impression that the bishop was using anybody and everybody to do what he would not want to be seen doing himself. The church must be bound to perform its obligations under that contract. There is a valid and binding contract. The attempts to create problems which will frustrate the fulfilment of the conditions are not acceptable and should not be permitted to prevail. The rentals from the tenant - Lesotho Ads have been received and kept by the church despite having sold that property to the company. The church is not entitled to rental from the date when the occupation should have been given to the company. The church did not give occupation to the company as agreed on or after the date of signature of the agreement. The withholding of the passing of the right of occupation in terms of the agreement was itself a breach of that agreement. The breach was being committed by the church. The church seems to rely on its breach of the agreement to support its claim that that agreement is invalid. This is improper.

There is a counter application. The prayers of the church in this counter application are identical with the prayers made on behalf of the church in the opposing affidavit in the main application, these prayers in the counters application are also dismissed for the same reasons set out above.

The application of the company succeeds and it is granted as prayed with costs.

K.J. GUNI
JUDGE



For applicant
For respondent

- Mr. Sooknanan
- Du Preez, Liebetrau & Co