CIV/APN/211/92
CIV/APN/83/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MAMORAPELI MONETHI (nee Mokhele)	APPLICANT
AND	
CHIEF BOLOKOE MOTS'OENE	1ST RESPONDENT
THE COMMISSIONER OF LANDS	2ND RESPONDENT
MINISTER OF INTERIOR (LOCAL GOVENRMENT)	3RD RESPONDENT
ATTORNEY GENERAL	4TH RESPONDENT
ASHRAF H.O. ANWARY	5TH RESPONDENT

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
On the 13th Day of February, 2002

The applicant and the 1st respondent entered into a very simple and straightforward agreement. It is one of the very few terms of the said agreement that the applicant should develop at his own cost and expense the portion of site N0.49 HLOTSE

LISEMENG. The said site belongs to the 1st respondent. The 1st respondent should in return for the development carried out on the site by the applicant, curve out a portion of the said site and transfer it to this applicant. According to their agreement the portion extending from the East side of the building which was erected by this applicant to the end of the said side-where it borders PULE RESTUARANT AND GENERAL DEALER forms that designated area of the site to be portioned off and transferred to this applicant. These were the entire terms of that agreement between the parties.

The building erected by the applicant on the 1st respondent's site in accordance with their agreement, was in March 1992, valued at seventy-four thousands and two hundred maloti (M74 2 00.00). This building was erected by the applicant on that portion of the 1st respondent's site-N0.49 HLOTSE LISEMENG which the 1st respondent wished to retain for his own use after dividing the site and giving the other portion to this applicant. The valuation process and the amount arrived

at, are not in any way effectively or satisfactorily challenged by the 1st respondent. It is however averred in the answering affidavit of the 1st respondent that the structure erected on the site by the applicant in terms of their agreement is "shoddy". The 1st respondent went no further than that bare allegation suggestive of the building being substandard or poorly made, without showing how and in what way is the structure shoddy. No alternative valuation has been suggested by the 1st respondent. The fact of the value of the building as at the time it was made, is therefore established.

The building of the business premises on the 1st respondent's site was completed by the application in 1989. At about the same time, the 1st respondent initiated the application for the ministerial consent to sublet or transfer that designated portion of his site to this applicant in accordance with their agreement. From 1989 the applicant rented out the said business premises which he had erected on the 1st respondent's site. The rentals of an amount of four hundred and fifty maloti

M450.00 per month were received and used by the applicant as set off against his costs and expenses of installing and connecting water and electricity to the premises. From February 1992, the rentals were received and used by the 1st respondent. The instructions to pay rentals to the 1st respondent were given to the tenant by the 1st respondent's wife. The building was in fact the 1st respondent's property in terms of the parties agreement. The 1st respondent's wife by giving the said instructions which have been followed and effected, in fact took control of the said building, indicating the 1st respondent's acceptance of the same.

It was at this stage that although the 1st respondent had applied for, and perhaps may have succeeded in that application for a ministerial consent to transfer portion of his site to this applicant, he in fact did not effect the said transfer. The dispute arose. The dispute between the parties seemed to have been made acute by the fact that the 1st respondent was now receiving the rentals which this applicant had been

happily receiving for a few years since 1989. There was nothing tangible in this applicant's possession by way of a benefit intended by the parties in their agreement. For those few years when the applicant had been receiving the rentals the 1st respondent also had nothing to show that the use of his site by this applicant will eventually benefit him too. Their mutual trust seemed to gradually slipaway.

According to the 1st respondent, he unilaterally cancelled the parties' agreement. He also proceeded to cancell the ministerial consent to transfer the designated portion to the applicant. The reason for taking the above-mentioned steps according to the 1st respondent, is because he never agreed to transfer as he insisted that the applicant abided by the agreement (see paragraph 5 of the Answering Affidavit). What exactly he meant by that remains a mystery because he was receiving rentals from the building erected by the applicant. He continues to reap benefits from the applicant's performance of his obligations in terms of their agreement. There was no

evidence that he ever complained of none compliance with the agreement to the applicant.

In 1992 the applicant - JOHN TAU LEFUME MONETH died. Prior to his death, he had approached this court by way of motion proceedings. This application was filed on the 11th June 1992. He sought an order of this court in the following terms:-

1. That the First Respondent be ordered to obtain ministerial consent for sub-division and transfer of the marked portion of his commercial site number 49 Lisemeng, Leribe District;

2. That the Third Respondent be ordered to consider the application in order to issue the said ministerial consent to the First Respondent;

3. That the Second Respondent be empowered to sign all documents for purposes of obtaining the said ministerial consent and transfer to the Applicant;

4. The First Respondent pay costs hereof. Other Respondents pay costs only in the event of their opposition hereof.

5. Further and or alternative relief.

Only the 1st respondent filed a NOTICE OF INTENTION to Oppose the said application. The other three respondents have not filed any papers. Their interests if any is to abide by the judgement of this court. No further papers were filed in this matter until seven years late - in 1999 when the 1st respondent filed the answering affidavit.

According to the applicant in the replying affidavit, she was substituted for her late husband in CIV/APN/83/99 unopposed. She further avers that after the filing of this application with this court, the 1st respondent indicated to her late husband that he was prepared to settle the matter out of court by effecting the transfer as agreed. Even after the death of JOHN TAU LEFUME MONETH the deponent of the replying affidavit alleges that the 1st respondent still persisted to her that he was going to settle the matter out of court by effecting the transfer of that portion as agreed.

In 1993, when this matter between the parties was already before this court but before the 1st respondent filed any opposing or answering affidavit, he proceeded to enter into another agreement to sublease the whole site (including that portion which he had designated for transfer to this applicant,) to MAHOMED SALIM KARIM. In 1998 the 1st respondent went further and entered into a contract of sale of the whole site with one ASHARAF HUSSAIN OSMAN ANWARY with the knowledge and consent of MAHOMED SALIM KARIM. The applicant when all these manoeuvres were being carried was never informed, consulted or her consent sought even though this application was still pending before this court. Meanwhile the applicant was being strung along with promises to settle the matter out of court but in terms of their agreement.

The attempt to reach out of court settlement was unsuccessful. The 1st respondent then filed an answering affidavit on the 16th November 1999 – seven years out of time,

without the consent of the applicant or the leave of this court. Another answering affidavit by ASHRAF HUSSAIN OSMAN ANWARY was filed perhaps in November or December 1999. It was also hopelessly out of time. He claims he was allowed to intervene as a respondent by court order as is the case with the application for substitution of this applicant. There is no allegation that an application to join him as a respondent was made and granted. There is no citation given of any application for joinder. There are no particulars of the application that was made to join him. The facts of this case show that he was not involved in this matter when it first came to court in 1992. Be that as it may, he is now the 5th respondent. He further claims in his affidavit that the agreement between the applicant and 1st respondent fell through. He alleges, without proving the same, that the applicant never complied with the terms of the contract. He claims again without proof that there was no valid contract between the applicant and the 1st respondent. He further raises an issue of substitution of 'MAMORAPELI MONETHI for her late husband JOHN TAU LEFUME

MONETHI. This is irrelevant. The issue should have been raised and dealt with in CIV/APN/83/99 which was granted unopposed. Perhaps even at that stage the 5th respondent had not yet come into the picture. The filing of opposing papers by him took place at the end of 1999.

At the hearing of this matter, the application to strike off the answering affidavit as an irregular process was made from the bar, orally and argued. The Rules of this court have prescribed the procedure to be followed by parties in motion proceedings. HIGH COURT RULES, Legal Notice N0.9 of 1980; (Rule 8.(10) (a) (b) (c), provides as follows:-

Any person opposing the grant of any order sought in the applicant's notice of motion shall:

(a) *Within the time stated in the said notice, give applicant notice in writing that he intends to oppose the application, and in such notice he must state an address within five kilometers of the office of the Registrar at which he will accept notice and service of all documents.*

(b) *Within fourteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit (if any), together with any other documents he wishes to include; and*

(c) *If he intends to raise any question without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question.*

The 1st respondent filed his Answering affidavit Seven (7) years after notifying the applicant of his intention to oppose the application. This application was brought on Notice to all respondents. In terms of rule 8(10) HIGH Court Rules (Supra) ASHRAF HUSSAIN OSMAN ANWARY should have complied with the procedure set out in this rule... The rule is applicable and binding to him. He is opposing the granting of an order sought by this applicant. That is why I underline these words "Any person opposing the grant of any order sought in the applicant's Notice of Motion Shall". It is therefore obligatory that these respondents who oppose the granting of the order sought by this applicant, should have filed their answering affidavits within the period prescribed by the rules. When this application was filed 5th respondent had not yet contracted to buy the site in question.

None of these parties who have appeared before court in this matter have paid the necessary attention to the rules of this court. For an example rule 30(1) High Court Rules (Supra) provides as follows:-

> *(1) Where a party to any cause takes an irregular or improper proceedings or improper step any other party to such cause may within fourteen days of the taking of such step or proceeding apply to court to have it set aside:*
>
> *Provided that no party who has taken any further step in the cause with knowledge of the irregularity or impropriety shall entitled to make such application.*
>
> *(2) Application in terms of sub-rule (1) shall be on notice to all parties in the cause specifying particulars of the irregularity or impropriety involved.*
>
> *(3) If at the hearing of such application the court is of the opinion that the proceedings or step is irregular or improper, may set it aside in whole or part either as against all the parties or as against some of them, and grant leave to amend or make any such order as it deems fit, including any order as to costs.*
>
> *(4) Until a party has complied with any order of court made against him, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.*
>
> *(5) Where a party fails to comply timeously with a request made or notice given pursuant to these Rules, the party making the request or giving the notice may notify the defaulting party that he intends after the lapse of seven days, to apply for an order that such request or notice be complied with, or that the claim or defence be struck out. Failing compliance within the seven days application may be made to court and the court may make such order thereon, as it deems fit.*

Without any formal application in terms of rule 30-(2) application to strike out as irregular the Answering affidavit in this matter, was made from the bar at the hearing of this main application. This was itself an irregular step and cannot be considered against the previous irregularity. By not taking an appropriate action at an appropriate time the applicant committed the same offence against the rules. What is the use for the kettle to call the pot black or vice versa. By filing the replying affidavit, the applicant condoned the irregularity. Thereafter, the matter was set down for hearing as if everything was in order. It is therefore proper to dismiss that application to strike off the answering affidavit. The proviso, in rule 30 (1) (Supra) disentitle the party from applying to strike off the irregular process, when by its own actions, such party has condoned an irregularity complained of. Now, I have to go into the merits of the main application.

The applicant's case seems to be as follows: - First of all, there is an agreement between this applicant and the 1st respondent. Amongst the terms of the said agreement, is that the applicant was obliged to develop the 1st respondent site on the portion that the 1st respondent was going to retain for himself. The undeveloped portion was, in terms of the agreement between the parties, to be cut off and transferred to this applicant. It is clearly shown on the sketch plan made to accompany the application for issuing of a lease and transfer of the said designated portion to this applicant. (See Annexure C to the founding affidavit). Once the applicant had developed the said portion, the 1st respondent was obliged to transfer the undeveloped portion as indicated in the agreement and as sketched out on the plan.

The parties embarked on the performance of their obligations in terms of the agreement round about 1989. The applicant performed fully and the 1st respondent began to enjoy the fruits of their agreement from February 1992. Instead of

effecting the transfer to the applicant of the undeveloped portion of the site as agreed, the 1st respondent claims in his affidavit that he cancelled the agreement and also the ministerial consent he had obtained pursuant to the agreement to transfer the same to this applicant. The grounds for this unbecoming behaviour have been pointed out earlier on - Annexure C.

The 1st respondent's case seems to be that there is no agreement between the parties. If there is an agreement it is vague and unenforceable. Should the court find otherwise, the 1st respondent have now committed himself to new and valid contracts by reason of which he will find it impossible to comply with the order to transfer the portion of his site as agreed. One of those individuals he has entered into new contracts with, is opposed to the granting of this application on the grounds that the widow of late JOHN TAU LEFUME MONETHI - is not his heiress and therefore not entitled to succeed after her late husband or inherit their estate. He

further claims that he entered into a valid contract with the 1st respondent without knowing that the applicant had any right to that site. He avers he has put up a building worth well over a Million Maluti first of all, the question of whether or not the widow of the applicant is entitled to be substituted should have been answered in CIV/APN/83/99. Neither the 1st respondent nor Mr. ASHRAF HUSSAIN OSMAN ANWAY OPPOSED the granting of that application for substitution of 'MAMORAPELI MONETHI for her late husband John Tau Lefume Monethi. This Mr. A.H. O. ANWARY believes that substitution of the applicant does not make her the heir: The relevant portion of the rule governing substitution reads as follows:-"

> *(1) No proceedings shall terminate merely by reason of the death, marriage or change of status of any party thereto unless the cause of such proceedings is thereby extinguished.*
>
> *(2) Whenever by reason of death or any change of status becomes necessary or proper to introduce a further party in such proceedings either in addition to or in substitution for the party to whom such proceedings relate, any party to such proceedings may forthwith by notice to such further person and to every other party and to the registrar, add or substitute such further person to the proceedings, and subject to any order made under sub-rule (6) of the Rule, such proceedings shall thereupon continue in respect of the party thus added or substituted as if he had been a party from the commencement thereof. All steps validly take before such addition or substitution shall be of full force and effect".*

He may be right. The question of who is the heir of the late John Tau Lefume Monethi does not arise here. Definitely it does not fall for determination by this court in this application. The land Act 1979 as amended by the Land (Amendment) Order 1992, Section 5 subsection (2) in fact give the widow the same right in relation to land as her deceased husband. The question of who is the deceased's heir is not available as a defence against this applicant's claim.

This applicant relied on the contract between the parties. The onus of proving the terms of the said agreement between the applicant and the 1st respondent rests upon the applicant. M.C. Williams V First Consolidate Holidings (PTY) Ltd 1982 (2) SA 1 (A). Applicant has Annexed to his Founding Affidavit copies of the signed contract. Both parties signed the said contract in its completed form. Da Silva V Jonowski 1982 (3) SA 205 (A) . The 1st respondent alleges that there were details, which were to be taken care of by their oral agreement. He has

not proved any of those details. He is the one who claims that there were additions. The onus rests upon him to establish his allegations. Mr. A.H.O. ANWARY on the one hand claims that the contract between the applicant and the 1st respondent fell through because applicant never complied with its terms. Almost in the same breath Mr. ANWARY alleges that without knowing that the applicant has any rights on the site in question, he entered into a contract with the 1st respondent. These averments bring Mr. ANWAR's bona fides into question. He seems to know that there was an agreement between the applicant and the 1st respondent. He even knew the terms of their agreement because he alleges that it fell through because applicant never complied with those terms. Did he satisfy himself with the correctness and truthfulness of the allegations he is making? He must have. If he did not he was reckless in making the same. The applicant has produced a signed agreement between the parties. This is the prove of the contract and its terms. (McWilliams V First Consolidated Holdings (Pty) Ltd (Supra). Contrary to the claims made by the

respondents the applicant has produced before this court the signed documents – as proof of their agreement and its terms. Therefore it is established that there was an agreement whose terms are those contained in the documents produced before this court.

The 1st respondent alleges that he cancelled that agreement for the breach of its terms. Mere allegation of the breach of the contract is not enough. There must be proof of the alleged breach. In addition the alleged breach must be proved to be material. NARAN & Another v. PILLAI N0.1974 (1) SA 283 (D). Alternatively there must be a cancellation clause whose provisions the 1st respondent must establish that he fully complied with in carrying out the alleged cancellation of the agreement. Venter V Venter 1949 (1) SA 768 (A) Van Zyl V Rossouw 1976 (1) SA 773 (NC).

Even though the 1st respondent is relying on the alleged cancellation of their agreement, he does not allege and prove

that he gave the applicant Notice of this alleged cancellation for the breach of their agreement. It must be clearly spelled out in the 1st respondent's papers that unequivocal notice of the alleged cancellation of the agreement was given to this applicant. SWART V VOSLOO 1965 (1) SA 100 A. MILLER and MILLER V DICKISNSON 1971 (3) SA 5.81(A).

The applicant was not given any notice of the alleged breach by the 1st respondent. On the contrary the 1st respondent's wife is alleged to have instructed the tenant who occupied the building constructed by this applicant on the 1st respondent's site, to deceased from paying rent to the applicant but to pay the same to the 1st respondent or herself. This, she must have done as the owner of the property. From February 1992 the rent was being paid to the 1st respondent. This is not denied. The applicant alleged that at no time, during the construction of the building or after its completion did the 1st respondent complain about the building as being a "shoddy structure". Accepting rentals from the tenant of the Boutique

1st respondent left no doubt in the applicant's mind that he accepts compliance with the terms of the agreement by the applicant. This clearly indicates his acceptance of the building. He cannot say he has not accepted it. Therefore it is only proper, that he also performs his obligations.

As far as the claim for retention by Mr. ANWARY on the grounds that he has put up a building worth over (1) one million, there is no proof. If he put up the building on the grounds that the applicant has no rights on that site because the agreement between the applicant and the 1st respondent fell through , without satisfying himself about the correctness of the same, he cannot be heard to claim any right on that basis. He took a deliberate and calculated risk. He knew that this application is pending before this court. He should have pursued and finalised the matter pending before this court before embarking on the alleged development. His actions were made to defeat the enforcement of the court order sought. He just cannot be heard to complain. But he is not totally with a

remedy. He can sue the person who gave him that incorrect believe and claim damages from him. He cannot use his alleged investment to deprive the applicant of her legitimate right on the site - JOY TO THE WORLD V. NEO MALEFANE C of A (CIV) N0.5 of 1996. It is not established whether or not the alleged improvements by this MR. ANWARY, are situated on the portion of the site designated for transfer to this applicant or not. If they are on the portion that the 1st respondent intended to retain for himself the matter does not concern this application. If the improvements are on the portion that was to be transferred to this applicant parties may negotiate if there is proof that that portion of the site is enhanced in its value. The burden of proving the enhancement of the value and its extend rests upon the respondents. This they have not proved.

The points in limine raised by the 1st respondent are also dismissed for the following reasons:-

(a) The alleged dispute of fact is nothing but mere allegations. No fact in dispute has been put before this court. There is no disputed fact which cannot be resolved by this court, with proper consideration of all the evidence contained in the papers filed of record.

(b) The terms of the agreement on which this applicant relies are contained in the documents produced before this court.

(c) The question of whether or not the applicant was involved in any kind of marriage does not arise or and/or fall for determination in this application.

Therefore the application must succeed. It is granted as prayed with costs.

K.J. GUNI
JUDGE

For applicant - K.K. Mohau
For Respondent - T. Hlaoli & Company