

IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) 3 of 2008

In the matter between:

MAHLAKISA MOTHOB
Appellant

And

ABIEL SEBOTSA
Respondent

CORAM: MELUNSKY JA
HOWIE AJA
MOILOA AJA

HEARD: 9 OCTOBER 2008
DELIVERED: 17 OCTOBER 2008

SUMMARY

Land Act 1979 - meaning of "dispose of" in section 35(1)(b)(ii) read with 36(5). On appeal,

Held: A contract for the sale of a lease without the consent of the Minister is of no

force or effect nor can the purported seller be compelled to obtain such consent.

JUDGMENT

MELUNSKY, JA

[1] The respondent in this appeal was the plaintiff in the High Court. He sued the appellant (the first defendant in the Court *a quo*) for the following relief *inter alia*:

“1. An order directing the first defendant to sign all necessary documents of title to enable second and third defendants [the Commissioner of Lands and the Registrar of Deeds respectively] to process the transfer of lease number 13294-030 into the name of plaintiff upon payment by plaintiff of the balance of the purchase price.

2. Directing second and third defendants to process the transfer of lease number 13294-030 into the name of plaintiff upon the receipt of all signed documents by first defendant”.

[2] The action, which was opposed by the appellant, was heard by Hlajoane J. After evidence was led she granted the respondent the aforesaid relief together with costs. It is against this order that the appellant now appeals.

[3] The appellant is the eldest son of the late Mamponentseng Mothobi (the deceased) who died on 24 December 1985. This appeal concerns the legal validity of an agreement which, according to the respondent, he entered into with the deceased as long ago as 24 June 1982. The respondent contends that the deceased held

a registered certificate of title (i.e. a lease) to occupy an urban business site in Maseru; that in terms of the agreement he purchased her rights and interests in the site and the improvements erected thereon for the sum of M14 000; that he paid a deposit of M7 000 and subsequent amounts to the deceased which, together with the deposit, totals M10 900. For the purposes of this appeal it will be assumed that the respondent has given a true account of the facts.

[4] After the deceased's death the appellant, as her heir, acquired a lease over the same property. It is this lease (number 13294-030) which the respondent alleges should now be transferred to him against payment of the balance of the purchase price. The appellant disputed the validity of the agreement between his late mother and the respondent on various grounds in the

Court *a quo* but only one of these needs to be dealt with in this appeal.

[5] Before considering the issue raised by the appellant there is another matter that needs to be mentioned. That is whether, assuming the agreement between the respondent and the deceased to be valid, it was competent for the respondent to claim transfer of the lease held by the appellant to himself. It seems to me to be at least arguable that he ought to have applied to set aside the appellant's lease and to have claimed registration of a new lease pursuant to his argument with the deceased. This aspect was not canvassed in the Court *a quo* nor was it argued on appeal and, save to the extent mentioned in paragraph [11] below, I leave it out of consideration.

[6] What has to be decided is whether, having regard to the provisions of the Land Act 1979, the 1982 agreement is valid and enforceable at the instance of the respondent. In terms of sub-section 35(1)(b)(i) of the Act a lessee is entitled

“(b) Subject to obtaining consent of the Minister -

(i) to dispose of his interests”.

The learned Judge *a quo* held in effect that this provision prohibited the transfer of the lease without the consent of the Minister but that it did not affect the validity of the agreement. This, too, was the submission of the respondents’ counsel in this Court.

[7] Depending on the circumstances the expression “dispose of” might refer to the contract for the alienation of property or to the actual transfer of the

property pursuant to a contract or to both. In construing the phrase, regard must obviously be had to the instrument in which the words appear. On occasions the words are defined but, if not, they fall to be interpreted according to the context of the statute, including other provisions in the same (or, possibly another) enactment. Purely by way of illustration, it was held in **Peri-Urban Areas Health Board v Tomaselli and Another** 1962(3) SA 346 (A) at 351 H that in the ordinance under consideration, the making of the contract and not the actual transfer constituted the disposal of the right, whereas in **Estate Osman v Registrar of Deeds and Others** 1958(3) SA 580 (N) it was decided that “dispose of” in a statute meant “part with” and that nothing short of actual transfer would constitute a disposition (at 583 D).

[8] But those cases are not helpful in the interpretation of the Land Act. Section 36(5) of the Act, however, indicates clearly what was intended. The sub-section reads:

“Any transaction conducted by a lessee without the consent of the Minister or contrary to the terms and conditions of a general consent shall be of no effect”.

Although the word “conducted” in the sub-section seems somewhat inappropriate and should probably be understood to mean “concluded”, it is clear that what is of no effect is “the transaction” and not the transfer. It is correct to hold, therefore, that a contract for the disposal of a lease without the consent of the Minister is of no force or effect. Moreover this is the interpretation that has been given to these provisions in two decisions of this Court.

[9] The first, **Vicenté v Lesotho Bank** (2000-2004) LAC 83 was decided on 13 April 2000. At 86 B-C Ramodibedi JA (as he then was) said the following:

“It is indeed common cause that there was no Minister’s consent to the purported transaction conducted between the lessee and the appellant in respect of the plot in question. Accordingly it stands to reason that the former could not dispose of his interest or to encumber the land leased by mortgage or to sub-let the land without the consent of the Minister”.

And at 86 I the learned Judge added:

“As previously pointed out section 36(5) of the Land Act 1979 clearly makes any transactions between the lessee and the appellant null and void and of no force and effect in law for as long as the Minister’s consent was not obtained”.

It may be that the learned Judge was of the opinion that the Minister’s consent could be obtained subsequent to the transaction but, if so, he clearly envisaged that this could only be done if both parties to the transaction consented thereto. For without such consent he emphasized that the transaction was null and void and of no force and effect. This being the case the lessee obviously cannot be compelled to obtain Ministerial consent after the conclusion of the invalid agreement.

[10] In the later appeal, **Sea Lake (Pty) Ltd v Chung Hwa Trading Enterprises Co (Pty) Ltd and Another** (2000-2004) LAC 190, decided on 13 October 2000, van den Heever JA observed at 193 G-H that “prior ministerial consent is required in terms of section 35 of the Land Act of 1979”. And she added that without the prior consent of the Minister a lessee is not entitled to dispose of his interest and the transaction whereunder he purports to do so is invalid.

[11] Counsel for the respondent eventually appeared to concede that the expression “dispose of” in section 35(1) related to the contract and not the transfer. He nevertheless submitted that the respondent was entitled to require the appellant to obtain such consent and that this relief was sought in prayer 1 of the declaration. There are two short answers to this

submission. The first is that the transaction between the respondent and the deceased was and remains null and void and without force or effect. The respondent cannot enforce the agreement and this Court cannot order the appellant to attempt to obtain the consent of the Minister. Secondly, the respondent's declaration does not contain a prayer for this relief. What is claimed is an order directing the appellant to sign all documents to process the transfer of lease number 13294-030 to him. This prayer in itself is of doubtful validity as I have mentioned earlier and, in any event, does not support counsel's submission.

[12] For the reason given the following order is made:

1. The appeal succeeds with costs;
2. The order of the Court *a quo* is set aside and is replaced with the following:

“The plaintiff’s claims are dismissed with costs”.

**L.S. MELUNSKY
JUSTICE OF APPEAL**

I agree:

**C.T. HOWIE
ACTING JUSTICE OF
APPEAL**

I agree:

**J.T.M. MOILOA
ACTING JUSTICE OF
APPEAL**

FOR THE APPELLANT:
MR. T. HLAOLI

FOR THE RESPONDENT:
MOFILIKOANE

ADV. L.A.

