

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) No.2/ 2012

In the matter between:

BENJ AMIN MAPHATHE

APPELLANT

AND

I, KUPER (LESOTHO) (PTY) LTD  
MASTER OF THE HIGH COURT  
THE ATTORNEY GENERAL

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT

CORAM:                   RAMODIBEDI, P  
                                  HOWIE, JA  
                                  FARLAM, JA

HEARD:                   20 APRIL 2012  
DELIVERED:            27 APRIL 2012

## SUMMARY

*Interdict – The first respondent applying for an interdict in the High Court restraining the appellant from interfering with its rights of occupation, possession, control and administration of Patsa Shopping Centre, Plots 06472 – 041 and 06472 – 222 as well as restraining him from collecting rentals from any of the tenants on the premises – The appellant challenging the first respondent’s sublease in respect of the premises on two bases, namely, (1) that there was no prior ministerial consent and (2) that the sublease was not registered – Sections 35 (1) (b) (iii) and 36 of the Land Act 1979 – Registration – Section 24 of the Deeds Registry Act 1967 as amended by s 94 of the Land Act 1979 – The appeal upheld with costs and the issue of registration remitted to the High Court for determination.*

## JUDGMENT

### RAMODIBEDI P

[1] The dispute in this appeal arose out of an agreement of a sublease concluded in 1990 by and between the late Dr Kenneth Thulo Maphathe as the sub-lessor and the first respondent as the sub-lessee. The sub-lease was in respect of a commercial property known as Patsa Shopping

Centre, Plots 06472 – 041 and 06472 – 222, situated at Mafeteng Urban Area.

[2] In terms of the sub-lease agreement, the late Dr Maphathe sublet the property to the first respondent for a period of 25 years, with two options to renew the agreement for two further periods of 10 years each.

[3] It is common cause between the parties that the late Dr Maphathe died in or about 2000. Furthermore, the parties are on common ground that in or about April 2003 the first respondent appointed the appellant as its agent to collect rentals and to manage the affairs of the Shopping Centre forming the subject matter of the dispute in this matter.

[4] It is the first respondent's case that it terminated the appellant's appointment as its agent on or about 10 October 2008. It contends, therefore, that the appellant has no authority to collect the rentals and to claim the Shopping Centre as his property. Consequently, it is the first respondent's case that the appellant is acting fraudulently and unlawfully in doing so. The appellant, who is alleged to be the late Dr Maphathe's son and heir, denies these allegations. He maintains that he did not accept the alleged termination of his appointment as the first respondent's agent.

[5] It is necessary to state that the appellant challenges the first respondent's sub-lease on two bases, namely:-

- (1) That there was no prior ministerial consent when the sub-lease in question was

concluded. The appellant seeks to rely on sections 35 (1) (b) (iii) and 36 of the Land Act 1979.

- (2) That the sub-lease was not registered. In this regard the appellant relies mainly on section 24 of the Deeds Registry Act 1967 as amended.

[6] In view of the conclusion I have arrived at in this matter, it is strictly not necessary to determine the appellant's first challenge relating to prior ministerial consent at this stage. That issue will have to await another day. It is instructive to observe, however, that this Court has dealt with a similar point in this session in the case of C & S Properties Ltd v Dr 'Mamphono Khaketla & Others C of A (CIV) 63/2011. It is also important to

observe further that in that case there was no uncertainty about registration. The sub-lease forming the subject matter of the dispute had duly been registered.

[7] In determining the appellant's challenge to the first respondent's sub-lease on the basis that it was not registered it is necessary to have regard to the affidavits of the respective parties.

[8] In paragraph 5 of his founding affidavit Ashraf Abubaker, who is the first respondent's Managing Director, deposed as follows:-

*"The agreement of sublease, Annexure "B", was properly registered against the Land Act Lease issued in favour of the late Maphathe as will more fully show from Annexure "C" hereto being a true copy of the Land Act Lease issued under number 06472 – 222 and 06472 – 041 Mafeteng Urban Area."*

[9] A perusal of Annexure “C” shows that it is in fact the original lease which was issued to the late Dr Maphathe. It bears several endorsements on page 2, including the first respondent’s name which is hand-written on the left hand top corner. It is, however, inconclusive on whether or not the sublease was registered in favour of the first respondent. It is not apparent from Annexure “C” whether or not the endorsement in question refers to the sub-lease in question. The parties hold divergent views on the issue.

[10] In paragraphs 4,5 and 6 of his answering affidavit the appellant made the following averments in response to paragraph 5 of Ashraf Abubaker’s affidavit quoted in paragraph [8] above:-

*“The contents herein [are] noted save to say that the sub-lease agreement was not registered for twenty five years in respect of the Applicant herein. I aver that the Applicant is put to [the] proof thereof. And I further aver that without the proof of the sub-lease agreement [having] been registered in respect of the*

*applicant the said agreement [is] not proper, and not enforceable in law, and as a result the applicant has no rights whatsoever in the estate of the late Maphathe.”*

[11] Section 24 of the Deeds Registry Act as amended by s 94 of the Land Act 1979 on registration requires quotation in full because of its importance to registration of long term agreements of leases or sub-leases in respect of immovable property. It reads as follows:-

*“24. (1) [Save as is otherwise provided in the Land Act 1979 or any other law], every agreement of lease or sub-lease of rights in or to immovable property which when entered into was for a period of not less than three years, or for the natural life of the lessee, or any other person mentioned in the lease or sub-lease, or which is renewable from time to time for periods which together with the first period amount to less than three years, shall be registered in the deeds registry.*

*(2) Such registration shall only be effected after the proper authority has consented in writing to the lessee occupying and using the land to which the lease refers, which consent shall not be unreasonably withheld.*

*(3) [Save as is otherwise provided in the Land Act 1979 or any other law], every agreement of lease or sub-lease of rights in or to immovable property and to which the proper authority has consented in writing shall be lodged for*



*registration in the deeds registry within three months of the granting of such consent.*

*(4) [Save as is otherwise provided in the Land Act 1979 or any other law], every agreement of lease or sub-lease of rights or to immovable property and to which the proper authority consented in writing prior to the commencement of this act shall be lodged for registration in the deeds registry within three months of the date of commencement of this Act.*

*(5) Failure to lodge such lease or sub-lease for registration within such extended period as the court may allow shall render the agreement of lease or sub-lease null and void and of no force and effect.*

*(6) [Save as is otherwise provided in the Land Act 1979 or any other law], any agreement of lease or sub-lease of rights in or to immovable property executed, attested or registered contrary to the provisions of this section shall be null and void and of no force and effect.”*

The square brackets, as is the custom, indicate amendments made to the section.

[12] There is, in my view, a genuine dispute of fact on whether or not the sub-lease in question was registered and whether the provisions of section 24 of the Deeds Registry Act as amended were complied with. These issues

were not properly investigated in the court below. It is in the interests of a just expeditious decision and that the parties be given an opportunity to do so by remitting the matter to the court a quo for the hearing of oral evidence.

[13] It follows that the appeal succeeds and the following order is made:-

- (1) The appeal is upheld with costs.
- (2) The order of the court a quo is set aside.
- (3) The matter is remitted to the court a quo for the hearing of oral evidence on whether or not the sub-lease in question was registered and whether the provisions of section 24 of the Deeds Registry Act 1967 as amended were complied with.

- (4) The parties shall be entitled to supplement the present papers as they deem fit.

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M.M. RAMODIBEDI  
PRESIDENT OF THE COURT OF APPEAL

I agree:

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C.T. HOWIE  
JUSTICE OF APPEAL

I agree:

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I.G. FARLAM  
JUSTICE OF APPEAL

For the Appellant: Dr. K.E. Mosito KC  
(with him Adv. M. Rafoneke)

For 1<sup>st</sup> Respondent: Adv. T. R. Mpaka