

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 63/2011

In the matter between:

C & S PROPERTIES (PTY) LTD

APPELLANT

and

DR. 'MAMPHONO KHAKETLA

1ST RESPONDENT

ESTATE LATE B M KHAKETLA

2ND RESPONDENT

MOHLABANI PROPERTY CO.(PTY) LTD

3RD RESPONDENT

CORAM: SMALBERGER, J A
HOWIE, J A
FARLAM, J A

HEARD : 19 APRIL 2012

DELIVERED : 27 APRIL 2012

SUMMARY

Land Act 1979 – lease and subsequent sub-leases – ministerial consent – whether validity of transaction requires consent prior to contracting – cession of sub-

lessor's rights – whether cession registered in terms of the Deeds Registry Act 1967.

JUDGMENT

HOWIE, J A:

[1] The appellant, C and S Properties (Pty) Ltd (“C and S”), is a company registered in Lesotho and carrying on the business of sub-letting commercial properties in this kingdom.

[2] The respondents are respectively Dr. Mamphono Khaketla (first respondent), the estate of the late Bennett Makalo Khaketla (second respondent) to whom I shall refer as “the deceased”, and Mohlabani Property Company (Pty) Ltd (third respondent) (“the company”).

[3] The deceased established the company so that it could acquire his right as titleholder in respect of

plot 13283-446, Maseru (“the property”) in terms of a registered lease bearing that number. He acquired the lease in 1987. It is not in dispute that the lease was valid in all respects.

[4] A series of written transactions followed in 1988.

The sequence was as follows. In March the deceased sublet the property to C and S (“the sublease”). In April he ceded the sublease to the company (“the cession”). In July he transferred the lease to the company. By reason of the cession and transfer (if both were valid) the company acquired the sublessor rights in respect of the sublease to C and S.

[5] C and S in the ensuing years entered into a number of transactions involving the property including mortgaging it to Firstrand Bank Limited (“the Bank”) in 2001.

[6] In September 2009 the respondents applied to the High Court for an order declaring the deceased's sublease with C and S and the subsequent cession by him to the company to have been invalid for want of compliance with the Land Act 1979 and the Deeds Registry Act 1967. (By this time the deceased had died and the first respondent was executrix of the second respondent.)

[7] In the event of the grant of the declaration of invalidity, various consequential orders of invalidity were sought in respect of transactions entered into by C and S including the mortgage to the Bank. Further relief sought included an order that the lease be "released" to the first respondent subject to payment of certain debts owed by the other respondents. It was also sought to restrain C and S from entering into further agreements in respect of the property.

[8] It will be apparent that the grant of all the consequential orders depended on the success of the invalidity points concerning the deceased's sublease to C and S and the cession. If those points should have failed then the application for the consequential orders had to fail as well.

[9] It would seem that by 2009 the respondents considered that various of the transactions after the cession were impacting negatively upon one or other of them in various ways and that this was the motivation for the application. Of course, those considerations are not relevant for present purposes. The crucial issue is whether the sublease and cession were indeed invalid.

[10] The application was heard by Mahase J who held that the sublease and cession were invalid because the provisions of ss 35 and 36 of the Land Act

required that Ministerial consent for a land transaction precede the transaction and such consent in this case was only granted on 13 June 1985. In construing the sections as requiring prior consent the learned Judge relied on this Court's judgments in Sea Lake (Pty) Ltd vs Chung Hwa Trading Enterprises Co (Pty) Ltd and Another LAC (2000-2004) 190 at 193 and Mothobi v Sebotsa LAC (2007-2008) 439 at 441 H-442B.

[11] As regards the cession, Mahase J considered that the papers showed that it was registered on 9 September 1988 under number 20983 but that it was, as I have mentioned, invalid by reason of the prior consent point.

[12] The Judge accordingly granted the application as prayed. C and S has appealed.

[13] In this Court counsel for C and S argued that the terms of ss 35 and 36 did not require prior Ministerial consent and that a transaction invalid for want of prior consent would become valid if consent were given subsequently. As for the cession, even if it was not registered, the deceased's lease rights were validly transferred to the company and that transfer also conveyed his sublease rights. In other words the transfer and the cession were separate and equally effective ways of making the company sublessor in respect of the sublease with C and S.

[14] Counsel for the respondents supported the High Court's judgment in regard to the invalidity argument based on prior consent and also persisted in the contention advanced in that court that the cession had not been registered. Counsel also advanced submissions concerning the mortgage to the Bank and certain other hypothecations but

those submissions had no relevant bearing on the relief sought in the court below or that court's reasons for holding that the sublease and cession were invalid. Such submissions therefore had nothing to do with the issues on appeal.

[15] Turning to the provisions of the Land Act, s 35 (1) provides (where relevant):

“A lessee shall be entitled –
(a).....
(b) subject to obtaining the consent of the Minister –
 (i) to dispose of his interest;
 (ii)
 (iii) to sub-let the land leased.”

[16] Section 36(5) states (where relevant) that:

“Any transaction conducted by a lessee without the consent of the Minister shall be of no effect.”

[17] Clearly there is no express requirement that Ministerial consent must precede the transaction. The enquiry then is whether such requirement, upon a proper construction, is necessarily implied.

[18] Section 24 of the Deeds Registry Act deals with registration of leases and subleases in respect of immovable property and conveys in subsections (2) and (3) that registration shall only be effected after ministerial consent. This means that such consent must precede registration. As subletting involves both an agreement which confers rights and registration in order to transfer those rights, s 35 (1) (b) (iii) of the Land Act also means no more than that consent must precede registration. In other words neither Act implies that consent must precede the sublease transaction.

[19] As far as s 36 (5) of the Land Act is concerned its terms are ambiguous. A transaction concluded (“conducted” must be so understood) “without consent” could mean that consent is absent when the transaction is concluded or, equally, it could

mean a concluded transaction that is never consented to.

[20] The overriding purpose of the Land Act is clear. In terms of ss107 and 108 of the Constitution all land is vested in the Basotho Nation and the power to allocate it vests in the King, who must exercise the power in terms of the Constitution or any other law. The Land Act is such a law. Section 3 states that the land vesting in the Nation is held by the State and no one other than the State shall hold title to land except as provided by customary law or the Act. The Act's purpose is therefore to control, no doubt with anxious official care, the conferment of title to land.

[21] It is not possible to discern how that purpose would, or even might, be defeated or impeded were consent to follow conclusion of the transaction. Nor were we

presented with any submission in this regard which advances the case for the need for prior consent.

[22] Plainly, informed consent would be better achieved by the Minister's first seeing the entire written transaction rather than after obtaining only an incomplete picture from a summary of the proposed transaction the details of which (perhaps important ones) might only be finalised after the grant of consent. Informed consent subsequent to a perusal of the concluded transaction clearly serves the Act's purpose better than prior consent. And if prior consent was truly the legislature's intended requirement, the best way to achieve the Act's purpose would necessitate providing the Minister with an unsigned copy of the complete proposed transaction and then after the grant of consent merely having the parties sign it. That stilted, irrational sequence does not commend itself as in

any way conducive to achieving the statutory purpose compared with presentation to the Minister of the concluded transaction in order to obtain consent.

[23] In my view, therefore, prior consent is not implied and s36(5) of the Land Act burdens with invalidity only a transaction that is never consented to.

[24] The decisions of this Court provide support neither for the judgment *a quo* nor the respondents' case. In *Vicente v Lesotho Bank* LAC (2000-2004) 83 there never was any consent. Ramodibedi JA (as he then was) said (at 86 I) that the transaction concerned there was null and void for as long as the Minister's consent was not obtained. By clear implication consent subsequent to its conclusion would have validated it. That decision was given in April 2000.

[25] In the Sea Lake case (*supra*) (the judgment was delivered in October 2000) the unsuccessful appellant had applied in the High Court for an order compelling the other party to a sale of rights in land to sign the deed of sale in respect of which sale no Ministerial consent had been given. Having referred to the parties' intention that the deed would not be binding until signed, Van den Heever JA went on to state (at 193 G-H):

“No registration of the rights in question is possible unless an appropriate document has been completed in order for that to happen; moreover prior ministerial consent is required in terms of s35 of the Land Act of 1979..... Ministerial consent is required before the first respondent was entitled to dispose of its interest (s35 (1) (b) (i) of the Land Act....). A transaction without that, is invalid.”

[26] It is clear that the learned Judge of Appeal in referring to prior consent meant consent prior to registration. And her reference to consent before disposal is consistent with what has been said above in relation to s35 (1) (b) (iii) and subletting. Both

disposal and subletting require, apart from an appropriate transaction, registration in the Deeds Registry and it is registration that must be preceded by ministerial consent. At the risk of repetition, no provision requires that consent must precede the relevant transaction.

[27] The *Mothobi* case (*supra*) (decided in 2008) was yet another case of a transaction for which consent had not been granted and where an order was sought compelling signature of the relevant document. This Court emphasised that without consent having been given there was no valid contractual provision which could be enforced and called in aid in order to compel signature. If Ministerial consent subsequent to conclusion of an invalid transaction was to be achieved both parties had to agree to that process.

[28] It follows that the court below erred in holding that the sublease and the cession were invalid for want of prior Ministerial consent.

[29] As far as registration of the cession is concerned the annexures to the founding affidavit include, as the Judge pointed out, a document entitled “Agreement of Sublease and Deed of Cession” (the two transactions in issue here) which bears the signed stamp of the Registrar of Deeds dated 9 September 1988 containing the inscription that the registration was allocated the number 20983. This was *prima facie* proof of the registration of the cession.

[30] However, this is not all that the record contains. There is also a signed Registrar’s stamp on the Deed of Transfer of the Lease from the deceased to the company (another of the annexures to the founding affidavit) which reads:

“Sublease entered into Between B.M. KHAKETLA and C&S PROPERTIES (PTY) LTD ceded to Mohlabani Properties Co. (Pty)Ltd per deed 20983.”

This provides confirmation that the sublease and the cession were registered together.

[31] Finally there is an annexure (K12) to the founding affidavit which is a page from some registered transaction (it is not clear which) bearing a cluster of signed stamps of the Registrar. One of them obviously refers to the transfer of the lease from the deceased to the company under number 20981 where registration was effected on 9 September 1988. Another stamp, also bearing the registration number 20981 has this inscription:

“Sublease ceded to Mohlabani Co (PTY) LTD per deed 20981”.

There was only one sublease ceded to the company and that was the sublease from the deceased to C and S. In other words this stamp refers to the

sublease and cession in issue in this appeal and is further proof, albeit under another number, of the registration of the cession. The cession having been given two numbers would appear to indicate that the Registrar considered that the cession was linked to both the transfer of the lease as well as the deceased's sublease to C and S. This is consistent with the appellant's submission that the cession was effected as a "belt and braces" measure, in other words to emphasise that the deceased's rights in respect of both the lease and the sublease were transferred to the company.

[32] The effect of all these inscriptions by the Registrar, unchallenged as they were, and they were all part of the respondents' own case, is that the cession was registered. One might add that it goes without saying that the sublease and cession, in order to be

registered, must have been consented to by the Minister.

Their validity was therefore adequately proved.

[33] It follows that the appeal must succeed. The following order is accordingly made:

1. The appeal is allowed, with costs.
2. The order of the court below is set aside and in its stead the following order is substituted:

“The application is dismissed with costs”

C.T. HOWIE
JUSTICE OF APPEAL

I concur:

J.W. SMALBERGER
JUSTICE OF APPEAL

I concur:

I.G. FARLAM
JUSTICE OF APPEAL

For the Appellant : Adv. K. J. Kemp SC
For the Respondents : Mrs. T. Sello-Mafatle