IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.16/13

In the matter between

JOY TO THE WORLD **APPELLANT**

And

NEO MALEFANE **1ST RESPONDENT**

DEPUTY SHERIFF **2ND RESPONDENT**

THE OFFICER COMMANDING

POLICE HLOTSE **3RD RESPONDENT**

THE COMMISSIONER OF POLICE **4TH RESPONDENT**

THE ATTORNEY GENERAL **5TH RESPONDENT**

CORAM: SCOTT AP
FARLAM JA
THRING JA

HEARD: 1 OCTOBER

DELIVERED: 18 OCTOBER

SUMMARY

Exceptiores judicata – when not upheld – useful improvements effected by bona fide possessor entitled to a ius retentionis writ of Ejectment directed at person other than person in occupation – efficacy thereof

JUDGMENT

SCOTT AP

[1] The appellant, a religious organisation, is a society registered as such according to the laws of Lesotho. As long ago as 12 February 1998 the appellant entered into a deed of sale with Mr Thabo Mphana in terms of which it purchased from the latter a residential site together with the improvements thereon. At the time of the sale the property was registered in the name of Mphana's father who by that time had died. Both parties to the sale appear to have been aware that the property was so registered. It was delivered, however that the deceased's estate was administered in terms of customary law and that Mphana became entitled to the rights to the property of without any

formalities. The appellant took occupation of the property on signature of the deed of sale or, if not then, very soon thereafter.

[2] It appears that Mphana did not acquire the rights to property as contemplated; instead, those rights were acquired by the first respondent, Mrs Neo Malefane, who purchased them from the registered holder of the rights, presumably Mr Thabo Mphana's father prior to his death.

[3] Malefane instituted proceedings for ejectment against Mphana. Default judgment was granted in her favour and on 6 October 1984 a warrant of ejectment was issued. By then, of course the appellant, not Mphana, was in occupation of the property. Nonetheless, Mphana applied for and was granted rescission of judgment on 17 May 1990 and the matter proceeded to trial. On or about 31 March 1994 judgment was entered in favour of Malefane. Although in occupation, the appellant was not joined in the proceedings.

[4] Two years later, 0n 8 March 1996, a warrant of ejectment was issued. (The delay is not explained). It was directed solely at Mphana. The attempt to serve the writ on the appellant prompted it to launch an application for an order restraining and interdicting Malefane from enforcing an executing the writ against it. The grounds upon which it relied two fold. The first was that it was in occupation of the properly, not Mphana and the second, that by reason of the improvements it had effected to the property it enjoyed a *jus retentionis.* The application was dismissed in the High Court. The appeal to this Court was similarly dismissed. Browde JA, writing for the court, held, with regard to the list ground, that the mere occupation of the property by the appellant did not confer on it a clear right, being an essential requirement for a final interdict, and as to the second ground, rejected it in the following terms:-

> *"Dealing only with those improvements which are admittedly on the site in issue, the appellant, in order to establish a light of retention, had to show that the property was enhanced in value by the improvements. Not every building is necessarily an improvement. No effort was made to tender proof of enhancement, the appellant contenting itself with alleging the cost of the buildings it elected. This evidence is irrelevant to its claim to exercise any right of retention."*

The judgment of this Court was delivered on 15 February 1997. Nothing appears to have been done until 1 August 2005 when the application giving rise to the present appeal was launched. Again there is no explanation for the delay.

[5] The order sought was that the present appellant and its agents be restrained and restricted from obstructing the deputy sheriff in the execution of the warrant of execution (being the warrant issued nine years previously against Mphana on 8 March 1996). Orders were also sought authorising the sheriff to use force to gain entrance to the site and directing the officer commanding and the commissioner of police to assist. Dr Rohini Knight, a member of the appellant's board, who deposed to an answering affidavit to the application, denied knowledge of any attempts to serve the writ and the need for the use of force to do so. In addition to the ground that it, and not Mphana, was in occupation of the property, the appellant opposed the application on the ground that it enjoyed a

light of retention by reason of the useful improvement it had effected to the property. It was on this issue that the Court a quo decided in favour of Malefane and granted the application as prayed.

[6] It appears that the matter was argued on 22 May 2006. According to the judgment it was delivered on 15 February 2013 the delay being due to the parties having said that they were trying to settle the matter and the file having disappeared. The matter was, however, not on the roll for 15 February 2013 and the parties were for some while unaware of its existence. In the meantime the appellant has issued summons for compensation for the improvements it effected in the property. The pleadings have long since been closed and case is set to proceed. The issue of improvements and the right of retention will accordingly be decided at the trial. The appellant has been in occupation of the property for some 25 years. In those circumstances, it seems a pity that the parties have been unable to reach an agreement that would allow neither Malefane's claim nor the eviction of the appellant to stand over until the issue of compensation had been resolved.

[7] The Court a quo rejected the appellant's claim to a right of retention on essentially two grounds: First, that the appellant had failed to shot that the value of the property had been enounced by the improvements brought about by the appellant and second, that the appellant was not bona fide because it had improved the property knowing it to be disputed and had accordingly lost it *ivs retentionis.*

[9] As regards the first ground, Nomngcongo J, after quoting the passage in Browde JA's judgment reproduced in paragraph 4 above, said the following:-

> *"The [appellant} does not seem to have advanced beyond asserting the cost of improvements to the building which the Court of Appeal has said is not sufficient."*

This is quite clearly not correct. Dr Knight in his answering affidavit says that when the appellant took occupation the site was not habitable; the house had been vandalized, all the windows had been broken and there were human faeces in almost every room. The appellant renovated and extended the house, levelled the

ground around the house, cleared in of bush and fenced the property. In addition, a new house was erected on the site. These allegations are supported by a number of photographs showing the house before it was renovated and photographs showing work in progress and the house as it looked after it had been renovated and extended. Also shown is the new house. Both are used as a school run by the appellant. Dr Knight's allegations are further supported by a valuation *"certificate"* by quantity surveyors, Rouse Lane Ntene, who valued the site at M30 000 and the improvements at M410 000. Malefane's response to these allegations in her replying affidavit was no more than a bare denial. On the basis of the aforegoing there can be no doubt that the value of the property was enhanced by the work undertaken by the appellant.

[8] There is some suggestion in the judgment of the court a quo that the issue of whether the appellant had a right of retention was *res judicata*. In my view it was not. The ratio *decidendi* of the judgment of Browdie JA on this issue appears from the passage quoted in paragraph 4 above. The Court's finding was that the appellant had failed to establish an essential element of its claim for a right of retention. It was the equivalent of a decree of absolution from the instance which is not a final judgment and does not find a plea of *res judicata*, (see e.g **Tsotaka v Matabola LAC 1985-1989) 217 at 222 J – 223 C**).

[9] The second ground relied upon by the court a quo was that the appellant was not a bona fide possessor when it was effected the improvements and therefore lost its right of retention. This issue received scant attention in the affidavits. No mention of the appellant's bona fide or otherwise is made in the founding affidavit. In his answering affidavit, Dr Knight says that at the time of the sale there was no dispute pending in the court. Elsewhere in his affidavit he says:-

> *"I must stress that the developments on the disputed site were carried out bona fide and not with the intention of defeating [Malefane's] rights".*

In her replying affidavit Malefane says simply that the appellant and to its agents knew perfectly were that they were buying a disputed site.

[10] It appears that in coming to the conclusion it did, the court a quo relied entirely on an *obiter dictum* in Browde JA's judgment which was quoted in the judgment. It reads:-

> *"It is common cause that for some years appellant was aware that the right to occupy the land was disputed but despite the knowledge it went on improving the property. The appellant was aware of warrant of ejectment from the property against the said Mphana as early as 1989."*

The warrant to which the learned judge refers was issued on 6 October 1989. It appears from the photographs, many of which are dated, that by October 1989 much work had been done on renovating and upgrading the original house. The inference that this had the effect of enhancing the value of the property is one that can be fairly made. (See the much quoted remarks of **Selke J in Goran v Skidmore 1952 (1) SA 732 (NPD)** at 734B – D.) To the extent that the is a dispute in the affidavits of Malefane and Dr knight as to the *bona fide* of the appellant, the normal rule in the **Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A)**, consistently followed by the Court, must apply. It follows that it must be accepted on the papers that until at least October 1989 the appellant enhanced the value of the property as a *bona fide* possessor and is entitled to a right of retention in respect of that enhancement.

[11] I should add that even after the first writ of ejectment was issued it would not necessarily follow that the appellant's conduct in continuing its building operations was *mala fide.* As observed above, Thabo Mphana's reaction was immediately to apply for and obtain the rescission of the default judgment and have the matter go to trial. It would only have been with the judgment in Malefane's favour on 31 March 1994 that the appellant could no longer have believed that it was entitled to the property. It is,

however, not necessary to decide whether the appellant was a *bona fide* possessor during the period October 1989 to 31 March 1994. Nor is it desirable to do so in view of the pending trial action. It is similarly unnecessary and undesirable to express a view on the right of a *mala fide* possessor to compensation or a *jus retentionis*.

[12] Counsel for the respondent submitted, however, that even if it were to be accepted that the appellant had enhanced the value of the property as a *bona fide* possessor it could not resist ejectment in the face of lawfully issued writ and that its remedy was to have set the writ aside.

He acknowledged that the writ referred to Mphana and not to the appellant submitted that the writ was to be constived as authorising the sheriff to eject not only Mphana but also anyone who occupied the property through or under him.

[13] In terms of the writ the sheriff is *"authorised and required to put [Malefane] in possession of [the property] by removing there from the defendant",* namely Mphana. In **Ntai and Others v Vereeniging Town Council and Another 1953 (4) SA 579 (A)** Van den Heever JA emphasised that the primary object of ejectment proceedings was to put the plaintiff in possession, regardless of whether the defendant or some other person holding under the

defendant was in occupation. The learned judge observed (at 580 D-F)

> *"This is usually done by removing the defendant from the premises, since he is the only person claiming possession adversely to the plaintiff. But it is not necessarily expressed to warrant the removal of his wife and children, his servants, guests or persons whom he was allowed to occupy the premises or portion thereof precario, for their right to occupy is dependant upon his; they can have no greater rights than he has."*

After referring to a number of Roman-Dutch authorities to the effect that an action for ejectment was essentially a *"a real action"* and the relief afforded vindicatory in nature, the learned judge conclude (at 592 F-H):

> *"Naturally in the normal course the defendant will be ejected being the person who claims adversely to the plaintiff, but that does not mean that the owner would have to take separate action against every licensee of the defendant professing to be on the premises by the defendant's authority. Ex hypothesi the defendant has no right to occupy and I fail to see why alleged rights derived from a non-existent right should be protected by law. Where persons other than the defendant actually do have rights of tenure they could either intervene or, if they have no knowledge of the proceedings at the time, subsequently move to have the writ set aside."*

In the present case Mphana purported to transfer his "*rights*" to the property to the appellant and the latter proceeded to occupy the property by virtue of those rights. But the rights proved to be non-existent. The only rights of tenure the appellant has arise by virtue of the improvements it subsequently effected. The writ cannot be ignored on that account. The appellant's remedy is to move to have the writ set aside. Until then the writ must be obeyed.

The appeal is accordingly dismissed with costs.