

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO.2/2013

HELD AT MASERU

In the matter between:-

'MAMOEKETSI LENONO

APPELLANT

and

INVESTMENT TRIANGLE (PTY) LTD

1ST RESPONDENT

KHOELI MOTEBANG

2ND RESPONDENT

CORAM: SCOTT AP

HOWIE JA

FARLAM JA

HEARD : 1 October 2013

DELIVERED: 18 October 2013

Summary

Absolution wrongly granted at the end of the plaintiff's case on the basis of considerations of credibility and probability and despite the plaintiff's essential allegations having been unanswered.

JUDGMENT

HOWIE JA:

- [1] The late Lenono Moketsi Lenono sued Investment Triangle (Pty) Ltd (the company) and Khoeli Motebang, together with four governmental officials in their respective official capacities, in the High Court for various forms of relief relative to site 14304-004 situate at Masianokeng, Maseru. (There was a second plaintiff whose involvement is irrelevant.)
- [2] In his declaration Lenono alleged in summary that he was at all material times the lawful holder of the rights to the site, having inherited it from his deceased father, and that by way of a series of misrepresentations by Motebang he was fraudulently induced to transfer the site, unknowingly, to the company. He accordingly claimed orders respectively declaring

him to be the lawful holder of the site and cancelling the transfer.

- [3] Attorneys Mohaleroe, Sello and Co. filed a notice of appearance to defend on behalf of the company and Motebang. In due course a plea was filed, ostensibly only on behalf of the company. The sole defence raised against Lenono's claim was that he had no *locus standi*. On the pleaded allegations thus summarized, the matter went to trial.
- [4] Before the matter was heard Lenono died and his widow 'Mamoeketsi Lenono was substituted as the plaintiff.
- [5] On the 12 December 2012 T. Matooane and Co., who had been substituted as attorneys for the company and Motebang, filed a notice of intention to amend the plea. For the first time it was sought issuably to plead to the plaintiff's essential allegations. In the proposed amendment the allegations of fraud were denied and it was alleged that the deceased had sold the site to the company in return for shares and a directorship.

- [6] Two days later the trial began before Peete J. Mrs Lenono gave evidence. Her counsel then closed his case and absolution was sought. No reference was made to the intended amendment. After hearing argument on the absolution application, Peete J. reserved judgment.
- [7] On 17 December 2012 the plaintiff filed a notice of objection to the amendment.
- [8] On 19 March 2013 Peete J granted absolution. The amendment application has all along remained pending.
- [9] The plaintiff now appeals and argues that, the allegations essential to the claim having been left unanswered, there was plainly a case for the defendants to meet and absolution was accordingly wrongly granted.
- [10] Despite allegations in the declaration that the deceased had been deceived by Motebeng and that the transfer was “fraudulent” and therefore unlawful the learned Judge held that fraud was not alleged in the declaration. That finding, notwithstanding the inelegant formulation of the allegations, was clearly not correct.

[11] The Judge also held that it was not necessary to amend the plea and proceeded to find adversely to the plaintiff on the basis of the credibility of the deceased, having regard to an affidavit made by him in previous proceedings in which he apparently said that he sold the property to the company, of which he was a shareholder. That was a consideration that would certainly be material in evaluating the issues after both sides have closed their cases but, as is trite, save in rare instances credibility is not a material factor when absolution is sought at the end of the plaintiff's case.

[12] The Judge also held it against the plaintiff that no evidence had been adduced that the deceased had been cheated in any respect, this despite the essential allegations in the declaration having been unanswered.

[13] Finally, there is the finding made by the Judge that in determining the probability of the plaintiff's version the deceased's affidavit weighed heavily against her. Once again, this was the wrong approach to the absolution issue.

[14] Unsurprisingly, Mr Matookane fairly conceded before us that the appeal ought to succeed. The respondents did not offer to abandon the absolution order and the plaintiff was obliged to resort to the appeal to achieve relief.

[15] This Court's order is as follows:-

1. The appeal is allowed with costs.
2. The order for absolution is set aside and in its stead the following is substituted:
"The application for absolution is refused with costs."
3. The matter is remitted to the trial court for further hearing.

C.T. HOWIE
JUSTICE OF APPEAL

I agree

D.G. SCOTT
ACTING PRESIDENT

I agree

I.G. FARLAM

JUSTICE OF APPEAL

For the Appellant : **Dr K.E. Mosito KC**

For the Respondents : **Mr T. Matooane**