IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) No. 34/2013

In the matter between:

HAROON ABDULLA MAHOMED	**APPELLANT**

AND

KPMG HARLEY & MORRIS JOINT VENTURE N.O. (Liquidators of Lesotho Bank)	**1ST RESPONDENT**
LESOJANE FRANCIS LEUTA	**2ND RESPONDENT**
THE REGISTRAR OF DEEDS	**3RD RESPONDENT**
THE COMMISSIONER OF LANDS	**4TH RESPONDENT**
THE ATTORNEY-GENERAL	**5TH RESPONDENT**
RELEBOHILE LIPHOTO	**6TH RESPONDENT**

CORAM: SCOTT, A.P.
FARLAM, J.A.
THRING, J.A.

HEARD: 8 OCTOBER 2013
DELIVERED: 18 OCTOBER, 2013

SUMMARY

Double sale of rights to immovable property – First purchaser usually entitled to enforce sale to him – Interdict restraining interference with his possession of the property.

JUDGMENT

THRING, J.A.

[1] This case is about a double sale of leasehold rights in certain land in the Maseru Urban Area. Initially, the whole of this piece of land was held in terms of a lease numbered 12282 – 084. Four houses were built on it. They were numbered 78 A, B, C and D respectively. The registered lessee of all this land was and still is the Lesotho Bank (to which I shall refer as "the bank"). In or about 1996 the bank decided to dispose of its rights in the land. A land surveyor was instructed to subdivide the land into four parts, each part to correspond with one or other of the four houses on it. He commenced doing so. The piece of land on which house 78 B stands, was numbered 12282 –

469, and that on which house 78 D stands, was numbered 12282 – 470. For the sake of brevity, I shall refer to these pieces of land as "plot 469" and "plot 470" respectively.

[2] In the meantime, during 1996 the second respondent had put in a tender for "Plot number 12282 – 084 78 D Maseru Central". On 2 January, 1997 he was advised by the bank that he had won the tender, i.e. that it had been successful. He says in his affidavit that before putting in his bid he had requested the bank to include in the property for whose rights he was bidding the front or southern portion of Plot No. 78B (which subsequently became plot 469). He says that the bank agreed to this. His allegation is not denied on the papers, and, indeed, it is corroborated by the land surveyor, Mr Maleka, who says in his affidavit that he received a letter from the bank dated 16 March, 1998 (a copy of which is annexed to the second respondent's affidavit) in which he was instructed to re-survey plot 469, which he had already surveyed, into two portions, a northern and a southern. On the northern portion stood house 78 B, whilst the southern portion was undeveloped. The latter, southern, portion was to be

incorporated into plot 470. He carried out the necessary surveys and prepared a plan of these new sub-divisions, a copy of which is annexed to his affidavit. Later, however, he was instructed by the bank to take no further steps in these sub-divisions, and they were therefore not proceeded with to finality.

[3] On 22 July, 1998 the sixth respondent was informed by the bank that his bid for "house No. 78B" had been successful. On 4 November, 1998 a formal deed of sale was signed in terms of which the bank sold to the sixth respondent "Plot number 12282 – 469 situated at Maseru-West in the Maseru Urban Area," subject to a suspensive condition of ministerial consent to the transfer of the property being obtained. Such consent was subsequently obtained. It is clear that the sixth respondent was purchasing rights to the whole of plot 469, including the southern portion thereof, which Mr Maleka had been instructed by the bank to subdivide off and incorporate into plot 470, pursuant to the sale to the second respondent.

[4] On 11 August, 1999 the sixth respondent sold to the appellant "a residential house situate at Maseru-West as presently held by Lesotho Bank … under lease No. 12282-469 …"

[5] None of the sales to which I have referred above have yet been registered in the Deeds Office.

[6] The bank is now in liquidation. Although nothing is said about this in the papers, I assume that the liquidators of the bank have elected not to resile from either of the sales to the second or the sixth respondents: had they elected otherwise they, as the first respondent, would certainly have let this be known to the Court *a quo*.

[7] The appellant brought an application in the Court *a quo* for orders, *inter alia*-

(a) directing the first respondent, as the bank's liquidators, to prepare and present the conveyancing documents necessary to effect

transfer to the appellant of all property rights to plot 469;

(b) interdicting the second respondent from interfering with the registration process, or obstructing the appellant's occupation of plot 469;

(c) interdicting the second respondent from changing the boundaries of plot 469 or removing or moving any fence or boundary structure to any place other than the boundary lines allocated by the Chief Surveyor in terms of the site diagram held by the Chief Lands Surveyor.

The relief claimed in paragraph (a) above is clearly specific performance of the sales to the sixth respondent and, subsequently, to the appellant, of the whole of plot 469. That claimed in paragraphs (b) and (c) above is incidental and ancillary thereto.

[8] In the Court *a quo* the application was dismissed on the narrow ground of the appellant's failure to comply with

the provisions of the Land Act, No. 8 of 2010 or of the Land Court Rules. However, Mr Loubser, who appears for the second respondent in this Court, did not contend that the order of the Court *a quo* could be supported on this ground. I think that his concession was well made. The application was launched in the Court *a quo* on 10 June, 2010. The Land Act came into operation only eight days later, on 18 June, 2010 and the Land Court Rules were promulgated only in 2012. Sec. 89 of the Land Act provides that:

> *"Where a case relating to land was pending before the High Court … prior to the coming into effect of this Act, the case may continue to be heard by the High Court … until completion…"*

The Court *a quo* therefore erred, in my view, in dismissing the application on the ground, in effect, that it lacked jurisdiction to hear the matter. However, in my opinion the application had to fail on its merits.

[9] It is clear that, as regards the southern portion of plot 469, which Mr Maleka was instructed to sub-divide off and incorporate into plot 470, there was a double sale: the

rights to this land were sold by the bank, first, to the second respondent and, later, also to the sixth respondent. As I have said, the transfer of these rights has yet to be registered in the Deeds Office. Consequently both the second and the sixth respondents have a personal contractual right to claim such transfer from the bank (or, now that they have apparently elected to abide by the contracts, from its liquidators). And the appellant, in turn, has a personal contractual right to claim transfer of these rights from the sixth respondent.

[10] The general principle which applies in a situation such as this is expressed in the maxim *qui prior est tempore, potior est jure.* **Christie**, "**The Law of Contract in South Africa**", 3rd Edition (the latest edition available to me) says succinctly at 582:

> *"…it can now be taken as settled law that the possessor of the earlier right is entitled to specific performance unless the other [later purchaser] can show a balance of equities in his favour…"*

See, also, **Krauze v Van Wyk en Andere, 1986 (1) SA 158 (AD)** at **171 G – J.**

[11] The appellant, via the sixth respondent, is competing with the second respondent for transfer of the rights to the southern portion of plot 469. The first purchaser of those rights was the second respondent. *Prima facie*, as being *prior in tempore*, he is entitled to an order of specific performance, whilst the appellant, as the second – comer, must content himself with a claim for damages against the sixth respondent. Has the appellant shown a balance of equities in his favour such as to disturb this position?

[12] I think not. On the contrary, on the papers the equities seem to me rather to favour the second respondent. He says in his opposing affidavit that in 1998 the sixth respondent was employed by the bank as a junior official in its property division under the control of a Mr Tsoaeli, the bank's property manager, that he (the sixth respondent) was directly involved with Plot 78 and must have been aware of the sale of plot 78 D to the second respondent, including the latter's agreement with the bank that the sale should include the southern portion of plot 469. Later Tsoaeli left the bank and the sixth respondent

was then required by the bank to ensure that the subdivision of the plots took place, and to provide the new "owners" with leases for their respective plots. Only Plot 78B, now plot 469, has so far been issued with a lease: the land surveyor was instructed not to finalise the further subdivision. The second respondent avers that this was as a result of the interest and intervention of the sixth respondent. None of these allegations are denied by the appellant in reply. Consequently, they must be taken to be true.

[13] If, as would appear to be the case, the sixth respondent purchased the rights to the whole of plot 469 knowing that the rights to the southern portion thereof had already been sold to the second respondent, and thereafter abused his position in the bank to attempt nonetheless to acquire rights to the whole of plot 469 he was *mala fide* and dishonest, and it certainly cannot be said that he has shown a balance of equities in his favour. The subsequent sale by the sixth respondent of his rights to plot 469 to the appellant must, at least to some extent, in my view, be tainted with the former's bad faith, inasmuch as the sixth

respondent could not transfer to the appellant greater rights than he, the sixth respondent, himself had. Again, in my opinion it cannot be said that the appellant has shown any balance of equities in his favour.

[14] There is a cross-appeal by the second respondent against the decision of the Court *a quo* to make no order as to costs. The appellant's application was, in my view, correctly dismissed by the Court *a quo*, although for reasons which differ from those which I have set out above. The reason why the learned Judge *a quo* decided to make no order as to costs was presumably because she dismissed the application on a ground which had not been raised or relied on by the second respondent in the papers, viz. lack of jurisdiction. That, I find, was not a sound reason for dismissing the application: it ought to have been dealt with and dismissed on its merits. Had that happened, the approach of the Court *a quo* to the question of costs ought to have been different. In the absence of some or other distinguishing circumstance one would normally expect a costs order to follow the result. There were no such distinguishing circumstances present, nor

was Mr Mpaka, who appears for the appellant, able to point to any. It follows, I think, that there was no good reason why the unsuccessful applicant/appellant ought not to have been ordered to bear the costs of the application. The cross-appeal must consequently succeed.

[15] For these reasons:

(a) The appeal is dismissed, with costs.

(b) The cross-appeal is upheld, with costs. The order of the Court *a quo* is altered to read as follows:

"The application is dismissed, with costs."

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W.G. THRING
JUSTICE OF APPEAL

I agree

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D.G. SCOTT
ACTING PRESIDENT

I agree

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I. G. FARLAM
JUSTICE OF APPEAL

For Appellant : T. Mpaka

For Second Respondent : P. J. Loubser