

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) 57/2013**

In the matter between

**BERENG MAKOTOKO**

**1<sup>ST</sup> APPELLANT**

**LESOTHO POULTRY AND  
COOPERATIVE SOCIETY**

**2<sup>ND</sup> APPELLANT**

and

**LESOTHO DEVELOPMENT AND  
CONSTRUCTION (PTY) LTD**

**RESPONDENT**

**CORAM** : HOWIE JA  
FARLAM JA  
CLEAVER AJA

**HEARD** : 6 OCTOBER 2014

**DELIVERED** : 24 OCTOBER 2014

## **SUMMARY**

*Bona fide possessor – entitled to compensation and lien over property until compensation paid –rental received in respect of leases of improvements on property not to be deducted from compensation.*

## **JUDGMENT**

### **FARLAM JA:**

[1] The respondent in this matter brought an application in the High Court against the appellants for *inter alia*, orders:

- (a) interdicting them from collecting rentals from a company which was occupying a shop which is part of business premises in Maseru (the company concerned which was cited as a respondent in the application abided the decision of the Court and took no part in the proceedings);

(b) that the company concerned be ordered to pay rentals in respect of the shop it was occupying to the respondent; and

(c) interdicting the appellants from interfering in any manner whatsoever, except by due process of the law, with the respondent's possession of the business premises in question.

[2] It was common cause that the respondent had been in occupation of the business premises since 1998 and that it had developed the site on which they were constructed. (There was a dispute as to what that development consisted of. The respondent said it demolished existing structures and constructed an entirely new building while the appellants' case was that it merely covered the existing building with sand- stone bricks and broke down the interior walls. **Molete J** in the Court below correctly held that the dispute was immaterial.)

[3] It was also common cause between the parties that for about thirteen years the respondent collected

rentals from all the tenants of the shops in the premises until 2011 when the first appellant, purporting to act on behalf of the second appellant, which holds the lease over the plot on which the business premises are situated, started collecting rental from the company which has abided the decision of the Court.

- [4] There was a dispute on the papers as to whether the respondent is a bona fide possessor of the premises. It relied on an unregistered sub-lease between itself and the second appellant for an initial period of 30 years renewable for a further ten years. The appellants alleged that this sub-lease is a forgery but I agree with **Moleté J** that the appellant's allegation in this regard can be rejected on the papers in view of the fact that it is common cause that the respondent occupied the premises without any disturbance from 1998 onwards. As a consequence I am satisfied that the appellants' allegations in this regard are so far-fetched and clearly untenable that the Court is justified in rejecting them merely on the papers. See **Associated South African Bakeries (Pty) Ltd v**

**Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere**

1982 (3) SA 893 (A) at 924A. I am accordingly satisfied that despite the fact that the sub-lease in its favour was not registered the respondent's allegation that it was a bona fide possessor of the premises was correctly accepted in the Court below.

[5] It was not suggested that the second appellant had paid any compensation to the respondent for the improvements it had effected to the property.

[6] The learned Judge said that in all important respects this case is similar to the case decided by this Court in **Constituency Committee BNP Mafeteng and Others v Farooq Issa** C of A (CIV) 16/2011, delivered on 21 October 2011, as yet unreported. In para 16 of the judgment Howie JA, with whom Scott and Hurt JJA concurred, said:

*'The remaining question is whether Issa effected the improvements as bona fide possessor or occupier. He was at least the latter and in either event entitled to compensation for the*

*improvements and a lien to enforce his claim: **Rubin v Botha** 1911 AD 568; **Fletcher and Fletcher v Bulawayo Waterworks Co Ltd** 1915 AD 636, **Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd** 1960 (3) SA 642 (A) at 649 B-E.’*

- [7] Applying that decision **Moleté J** held that the respondent was entitled to compensation for the improvements it had effected to the second appellant’s property a lien to enforce this claim. As long as it had the lien it was entitled to possession of the property and accordingly to the relief it sought.
- [8] Mr **‘Moro**, who appeared for the appellants, contended that the decision in the **BNP Mafeteng** case was distinguishable. In support of this contention he referred to the fact that there was in that case (a) no dispute over the bona fides of the occupier; (b) no allegations of fraud against it; (c) no disputes on the facts as to the kind of improvements and (d) no issue as to the costs of the improvements vis-a-vis the rentals already collected.

[9] I do not agree that the **BNP Mafeteng** case can be distinguished. The first two grounds of distinction on which Mr **'Moro'** relied fall away in the light of the Judge's finding, with which I agree, that the respondent is a *bona fide* possessor.

[10] The other two grounds of distinction depend for their acceptability on a submission Mr **'Moro'** made to the effect that the rentals the respondent received from letting the premises fall to be deducted from the compensation he is entitled to receive for effecting the improvements to the second appellant's property. A *bona fide* possessor is entitled to retain fruits gathered before **litis contestation** (**Rademeyer v Rademeyer** 1967 (2) SA 702 (C) at 706 F-707C). He has to deduct from the compensation to which he is entitled the value of fruits derived from the property occupied (**Fletcher and Fletcher v Bulawayo Waterworks Co Ltd** 1915 AD 636 at 651). 'Fruits' include so-called 'civil' fruits', i.e., rentals received from letting out the property (**Barnett and Others v Rudman and Another** 1934 AD 203 at 210). Fruits derived from improvements made by him 'cannot be set off

against a claim for compensation' (**Fletcher's** case at 651).

[11] In this case the rentals received by the respondent clearly were produced by the improvements made by the respondent and the amounts received in respect thereof did not have to be deducted from the compensation due to it. It follows that the third and fourth grounds on which Mr Moro sought to distinguish the **BNP Mafeteng** case are also incorrect and that **Molete J** correctly applied the ratio of that case to the present.

[12] In the result the appeal must fail with costs.

[13] The following order is made: The appeal is dismissed with costs.

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**I.G. FARLAM**  
**JUSTICE OF APPEAL**



I agree:

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**C.T. HOWIE**  
**ACTING PRESIDENT**

I agree:

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**R.B. CLEAVER**  
**ACTING JUSTICE OF APPEAL**

For Appellants : Mr R.A. 'Moro

For Respondent : Mr S. Ratau