IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.55/2013
CIV/APN/351/2009

In the matter between:

BEN RADIOPELO MAPHATHE	**APPELLANT**
and	
I.KUPER (LESOTHO) (PTY) LTD	**FIRST RESPONDENT**
THE MASTER OF THE HIGH COURT	**SECOND RESPONDENT**
ATTORNEY-GENERAL	**THIRD RESPONDENT**

CORAM: FARLAM JA
THRING JA
LOUW AJA

HEARD: 15 OCTOBER 2014

DELIVERED: 24 OCTOBER 2014

SUMMARY

Cession of all right, title and interest in property in rem suam, out and out divests cedent completely of his right of action and claims for interdictory relief concerning the property – Prior accrued rights to an account, debate thereof and payment of balance not however defeated by cession.

JUDGMENT

THRING J.A.:

[1] The procedural history of this matter is Byzantine in its complexity. This is the third occasion on which this case has featured on the roll of this Court. To avoid further confusion I shall refer to the parties herein as they were in the Court a quo. A host of issues arose there, many of which have fortunately fallen away or have become irrelevant. Very briefly, the relevant procedural events can be summarised as follows:

(a) In August, 2009 the applicant, I. Kuper (Lesotho) (Pty) Ltd brought an urgent application in the Court a quo in which it sought, in effect, a rule nisi against the first respondent, Mr B.R Maphathe, in the following terms, inter alia:

> *"2. That the first respondent be interdicted and restrained to [sic] in any way interfere with the applicant's rights of occupation, possession, control and administration of Patsa Shopping Centre, Plot 06472-041 and 06472-222, Mafeteng, and its present tenants;*
>
> *3. That the first respondent be interdicted and restrained from collecting rental from any of the tenants occupying any area of Patsa Shopping Centre, Plot 06472-041 and 06472-222, Mafeteng, and or from renting out in his own name any shop or letable [sic] area of Patsa Shopping Centre, Mafeteng.*

4. *That the first respondent be interdicted and restrained from holding himself out as the owner, manager or the agent of the owner or rightful occupant of Patsa Shopping House, Plot 06472-041 and 06472-222, Mafeteng or as having any authority to manage, control or administer any of the affairs or tenants at Patsa Shopping Centre, Mafeteng."*

There was also a prayer for an order:

"7. *Directing the first respondent to account to the applicant for all monies received from tenants at Patsa Shopping Centre, Mafeteng from April 2003 to date and to debate such accounting with the applicant and to pay all amounts received by the first respondent to the applicant which he is not entitled to."*

(b) The applicants' case is founded on its averment that during or about 1990 it entered into an agreement of sub-lease, as sub-lessee, with the

first respondent's late father, Dr. K.T. Maphathe of certain commercial property at Mafeteng Urban Area, being Plots 06472-041 and 06472-222. For the sake of convenience I shall refer herein to this property as "the property". The sub-lease was for a period of 25 years, with two options to renew it at the applicant's election for two further periods of ten years each thereafter. It transpires from the signed copy of the sub-lease, which was somewhat belatedly placed before the Court a quo by the applicant, that it was actually signed on 1 March, 1991. The first respondent's late father was the lessee of the property by virtue of a lease which he had concluded with His Majesty the King in terms of the Land Act, 1979 on 16 July, 1990. According to the applicant the sub-lease was properly registered in the Deeds Registry in terms of s. 24 of the Deeds Registry Act, No. 12 of 1967, although this remains in dispute. The first respondent's late father died in 2000, but it is not disputed that the applicant's rights as sub-lessee of the property, if any, would have survived his death.

(c) The applicant avers further that, without any entitlement to do so, the first respondent is collecting rent from the applicant's sub-tenants in respect of various shops on the property, which are rented out by the applicant to such sub-tenants, that in one case the first respondent has himself concluded a sub-lease as sub-lessor with a third party in respect of one such shop, claiming to be the lawful heir of his late father, and that he is exercising unlawful control over a certain vacant area of the property. These actions of the first respondent are alleged to infringe the applicant's rights as sub-lessee under the sub-lease which it concluded with the first respondent's late father in 1991. I interpose here the undisputed fact that during or about April, 2003 the applicant appointed the first respondent as its agent to collect rentals and to manage the affairs of the shopping centre, and the first respondent accepted the mandate and collected the rentals. The applicant says that

this mandate was terminated on or about 10 October, 2008.

(d) On 27 August, 2009, apparently by consent, the Court a quo granted the applicant a rule nisi substantially in the terms set out in its notice of motion.

(e) On 22 October, 2010, on the extended return day of the rule nisi, the Court a quo (Hlajoane, J.) dismissed the application with costs, apparently finding that the applicant had failed to join the necessary parties, and that it had no locus standi.

(f) This order was brought on appeal to this Court by the applicant. This Court "ordered a retrial", as the Court a quo put it.

(g) The application was then re-heard in the Court a quo, again by Hlajoane, J. This time, on 15

December, 2011 she ruled that the application succeeded with costs.

(h) It was now the turn of the first respondent to take the latter order on appeal to this Court. On 27 April, 2012 this Court upheld the first respondent's appeal, with costs, set aside the order of the Court a quo, and remitted the matter to that Court-

> *"... for the hearing of oral evidence on whether or not the sub-lease in question was registered and whether the provisions of section 24 of the Deeds Registry Act 1967 as amended were complied with."*

(i) On 26 and 27 September, 2012 the Court a quo (again, Hlajoane, J.) once more re-heard the remitted matter and this time heard viva voce evidence on the question of the registration of the sub-lease and on the related question of the required ministerial consent to the sub-lease.

(j) On 17 October, 2013 the Court a quo gave judgment. Its conclusion was as follows:

> *"The Court thus finds that there has been compliance with the provisions of section 24 of the Deeds Registry Act 1967 and that the sub-lease agreement was duly registered in terms of the Land Act 1979."*

That is as close as the Court a quo came on this occasion to making an order. It is against this judgment that the first respondent brings the present appeal.

[2] The first ground of appeal on which the first respondent relies is that the Court a quo erred and misdirected itself in not upholding the first respondents' objection to the effect that the applicant had no locus standi to bring the application because it had ceded its rights under the sub-lease to a third party on 1 September, 2008. In the view which I take of this matter it is necessary to consider only this ground, since it is conclusive of the whole case.

[3] The cession, as I have said, was signed on 1 September, 2008. It was registered at the Deeds Office on 1 July, 2009. We are told that it took effect only on registration, and I accept that that is so. Indeed, it would appear to be so from the terms of cession. The cedent is the applicant. The cessionary is Mafeteng Property Group (Pty) Ltd. Its terms are abundantly clear and unequivocal. After recording that the cedent is the lawful owner of certain rights to the registered sub-lease of the property, that the cedent has agreed with the cessionary to sell its interests in the property, and that the parties have agreed to transfer such right to the cessionary by registration of the cession against the sub-lease, clause 1 of the document proceeds:

> *"The cedent hereby cedes to the cessionary, who hereby accepts the cession of all the cedent's right, title and interest in the property, in rem suam, out and out and upon signature hereof. The cessionary shall be fully vested with the rights ceded as the lawful owner thereof upon registration of this cession."*

[4] The effect of the cession was that when, in August, 2009 the applicant launched its motion against the first respondent in this matter, the cession had taken effect and the rights referred to therein had already been transferred to Mafeteng Property Group (Pty) Ltd.

[5] The applicant dealt with the cession in an affidavit deposed to by Mr Abubaker, its managing director. He said:

> *"The cedent and cessionary never intended irrespective [sic] the wording of the deed of cession, for the right to secure vacant possession of the premises to be transferred and whatever the wording of the written deed, never intended the right and obligation to secure vacant possession of the premises to be ceded and delegated to the cessionary. I say this as the directing mind of the cedent…*
>
> *Because of the applicant's failure to provide such vacant occupation, the cessionary demanded compliance by the applicant and the parties in accordance with their common intention agreed*

> *that the applicant would proceed to rectify the failure to deliver in its own name. The applicant therefore acts in terms of such agreements. It has locus standi and a legal interest in the application."*

The applicant attached a letter to this affidavit dated 16 July, 2009 from the cessionary to the applicant in which it was confirmed that:

> *"… we have concluded that yourselves [sic] shall do whatever necessary to secure and hand over to us the full rights, occupation and lost revenue for the part of Patsa Shopping Centre, illegally occupied and / or controlled by one Mr. Benjamin Maphathe of Mafeteng."*

[6] In my view, the applicant's contentions in this regard cannot succeed. In the first place, the terms of the cession are perfectly clear, inasmuch as they record unambiguously that all the applicant's "right, title and interest in the property" are ceded in rem suam and "out and out" to the cessionary, who shall be fully vested with the rights ceded "as the lawful owner thereof". This document (the deed of cession)

was duly registered in the Deeds Registry to serve as notice to the world of its terms. It simply does not lie in the mouth of the parties to the cession now to take up the attitude that those were not its true terms, and that they had privately and informally agreed on the side, as it were, that the terms of the cession would be different, in that the applicant was to retain some rights to the property, i.e. a right of action against the first respondent, notwithstanding the clear contents of the written, registered cession. In Waikiwi Shipping Co. Ltd v Thomas Barlow and Sons (Natal) Ltd and Another, 1978 (1) SA 671 (AD) Jansen, J.A. said at 675 D-E:

> *"Today a cession, absolute in terms, does serve to divest a cedent completely of his right of action, even of the action directa which at one time was thought to remain in the cedent, albeit temporarily."*

It is not legally competent for the parties to a cession to agree that the cedent will retain a right of action against a third party such as to enable the cedent, after the cession, to sue the third party as a sort of agent for the cessionary.

[7] To my mind, then, when the applicant commenced these proceedings it had already divested itself of any right of action which it might previously have enjoyed against the first respondent in respect of prayers 2, 3 and 4 of its notice of motion.

[8] The same does not apply, however, to prayer 7, the claim for an account, debate thereof and payment of any balance found to be due. The deed of cession did not have the effect of ceding the applicant's right, vis-à-vis the tenants, to rentals already accrued before the cession. These it can therefore recover, notwithstanding the cession. In my view prayer 7 of the notice of motion ought to have been granted in the Court a quo in qualified terms. The rest of the application had to be dismissed because of the cession.

[9] The applicant was entitled to some of its costs in the Court a quo, but not to all of them. I consider one-quarter to be a fair proportion.

[10] For these reasons the appeal is allowed, with costs. The decision of the Court a quo is set aside and in its place is substituted the following:

> *"(1) The first respondent is ordered to account to the applicant for all monies received by the first respondent from tenants at the Patsa Shopping Centre, Mafeteng from 1 April, 2003 to 10 October, 2008, to debate such account with the applicant and to pay to the applicant any balance which may be found to be due to the applicant after such accounting and debate.*
>
> *(2) Save as aforesaid, the application is dismissed.*
>
> *(3) The first respondent is ordered to bear one-quarter of the costs.*

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W. G. THRING
Justice of Appeal

I agree

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I.G. FARLAM
Justice of Appeal

I agree

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W. J. LOUW
Acting Justice of Appeal

For Appellant: L.A. Molati

For First Respondent: K.J. Kemp, S.C