IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 42/2015

In the matter between

ALEX MANELI **APPELLANT**

And

NTSEPENG TSITA **RESPONDENT**

CORAM: FARLAM AP
CHINHENGO AJA
MOKGORO AJA

HEARD: 19 APRIL, 2016

DELIVERED: 29 APRIL, 2016

SUMMARY

Appeal against orders of Land Court made without hearing parties despite contradictory documentary evidence – Orders of Court

issued without written reasons – Matter remitted to Court a quo – to be heard by another Judge if proceeded with.

JUDGMENT

MOKGORO AJA:

[1] This matter comes as an appeal against the orders of Sakoane AJ, made in the Land Court on 27 May, 2015 and 6 August, 2015. An application for condonation of the late noting of the appeal was made from the bar and granted with no order as to costs.

[2] The applicant is Mr Alex Maneli (Mr Maneli) and the respondent Ms Ntsepeng Tsita (Ms Tsita).

[3] The appeal is against two orders made in chambers. The first was made during an abortive pre-trial conference on 27 May 2015, where, for some logistical reasons proffered, legal representative of Mr Maneli could not attend. The second order was similarly made in chambers on 6 August, 2015. On that day the legal representatives of both parties were in attendance.

[4] With only the legal representative of Ms Tsita's in attendance on 27 May, 2015, the learned Judge was presented with

documentary evidence submitted by Ms Tsita only. Without more, an order was made, in the following terms:

"1. The application is dismissed in terms of Rule 54 of the Land Court Rules except that where the claims admitted by the respondent is granted in favour of the applicant. Therefore prayer 1 and 2 are granted in that

(a) The applicant is declared as the lawful owner of plot 13282-834 situated at Motimposo Urban Area Maseru.

(b) The respondent is ejected from plot 13282-834 situated at Motimposo Urban Area Maseru of which the respondent is in wrongful and unlawful occupation.

2. 50% of the costs are awarded to the respondents.

[5] Briefly, the events leading to this application are as follows:

Mr Zakia Namane (Mr Namane) had been the title holder of the site, plot 13282-834, about 907m² in size (the property) situated at Motimposo Urban Area Maseru and held in terms of Section 29 of Land Act, 1979.

[6] On 2 September, Mr Namane sold 184m² of the property to Mr Maneli.

[7] A year later, on 1 September 2009, he sold the remaining 728m² to Ms Tsita. On registration, Ms Tsita caused the

entire 907m² property to be transferred in her name, contrary to the sale of interest between her and Mr Namane.

[8] Responding to threats of ejectment by Ms Tsita from his portion of the property, Mr Maneli applied on an urgent basis for protection from the Land Court.

[9] His prayer was that he be declared the rightful owner of his portion of the property. He also prayed for the ejectment of Ms Tsita from occupying his portion of the property on the basis that she is in wrongful occupation thereof. He also claimed for costs and further and alternative relief.

[10] A pre-trial conference was dated on 27 May 2015 which was attended only by Ms Tsita's legal representative. Mr Maneli's application was dismissed as already indicated, on the basis of Rule 54 of the Land Court Rules and in the terms outlined in paragraph [4] above.

[11] In essence, the Land Court declared Ms Tsita the lawful owner of the entire 907m² property, which included the portion bought from Mr Namane by Mr Maneli. The Court also ordered his ejectment, declaring his occupation of that portion wrongful and unlawful.

[12] On 2 July, 2015 Mr Maneli, citing the Deputy Sheriff as second respondent made an urgent application to the Land Court by notice of motion for a rule nisi, calling upon Ms Tsita to show cause why, among others, the Deputy Sheriff shall not be interdicted and restrained from executing the ejectment, if any, pending the finalisation of the urgent application.

[13] Important in that application was the order calling on Ms Tsita to correct the order made on 27 May, 2015 which they filed with the Registrar, and have it "set aside" as not reflecting the order made by the learned Judge on that day.

[14] It turned out that at the pre-trial conference, held in the Judge's chambers on 27 May 2015, the learned Judge had made notes of the order issued. Be that as it may, counsel for Ms Tsita, at a later stage, requested audience with the learned Judge for elaboration on his order which had not been clear. From that elaboration the order was drafted and signed by the Registrar. That order was then presented to Mr Maneli's legal representative.

[15] Based on what Mr Maneli viewed as a startling entry in the order, indicating that he admitted Ms Tsita's ownership of the property, giving the impression that he acknowledges Ms Tsita's ownership of the entire 907m² property, including his

own 184m², Mr Maneli's counsel approached the chambers of the learned Judge to compare notes. It is there that the difference between the contents of the Judge's notes and that of the order signed by the Registrar was picked up.

[16] Accounting for the difference, Ms Tsita's explanation was that the order signed by the Registrar had incorporated the judge's oral elaboration of the earlier unclear order reflected in the notes. It was that corrected order signed by the Registrar, which was served on Mr Maneli on 17 June, 2015.

[17] Having accessed the learned Judge's notes, Mr Maneli was not impressed with the difference between the order and the Judge's note, and demanded in a letter that the order be corrected within 3 days. The bone of contention in essence being that the order actually strips him of his rights without having been heard.

[18] Further, the learned Judge arrived at his conclusions on rights vested in the property without hearing the contentions of the parties regarding the contradictory documentary evidence. Based on these contradictions, the learned Judge concluded that Mr Maneli made particular admissions and denials regarding rights in the disputed property. Thus, Mr Maneli's complaint in this regard was that: the Judge based his order on contradictory documentary evidence which gave

rise to disputes without hearing them, resolving the existing disputes without them, regarding rights over the specific portions of the properly.

[19] Mr Maneli demanded in a letter that Ms Tsita cause the learned Judge's order to be corrected in a way that would reflect the Judge's notes, within 3 days of the date of the letter. Failure to do so, he contended, will cause him to approach the courts to have that order reviewed and set aside.

[21] In response, the letter penned by Ms Tsita's legal representative urged that they take whatever step they deemed necessary as they cannot take the matter any further.

[22] On 28 July, 2015, after Mr Maneli brought an application for a review of the Court order filed with the Registrar on 27 May 2015, the learned Judge confirmed, in chambers, and again without hearing the parties, that the order was correctly reflective of the order made in his notes.

[23] As a result, Sakoane AJ then made an order dated 6 August 2015, dismissing Mr Maneli's application with costs. It is this order together with that of 27 May, 2015 which Mr Maneli has brought before this Court on appeal.

[24] In this Court, Mr Maneli, among others, made similar arguments to those contended in the Land Court. In essence, his major contention is that the learned Judge should not have arrived at the conclusions and decisions he made, and should not have made the resultant orders on 27 May, 2015 and 6 August, 2015, notwithstanding the contradictions reflected in the documents before him.

[25] Suffice to add that, in particular, he should not have declared Ms Tsita the lawful occupier if the entire 907m² property, when she could only show that she had contracted and paid for 728m² of the 907m² property. More particularly, he argued, the orders should not have been made without hearing the parties on the points of dispute existing between them.

[26] Besides, he further submits, the likelihood that Ms Tsita might have enriched herself unduly is a live issue and there was no opportunity provided to make submissions.

[27] The short-comings of the approach of the learned Judge in addressing the issues which resulted in the two orders he made respectively, do seem to concern questions of fact which should have been canvassed and taken into account

and considered, to arrive at the conclusions and make the orders that the learned Judge made.

[28] What compounds the issues is that the learned Judge made the orders with no written reasons and the justification for the orders is not immediately discernible, if at all, in the wake of the contradictory evidence presented to him, admissions, denials, assumptions which could have been made, including the likelihood that the learned Judge might have made mistakes, as was contended by appellant. All of these might have translated into the basis for the orders made by the court a quo.

[29] Besides, if Mr Maneli is not a lawful title holder of the 184m² portion of the property, he might, it seems be entitled to some compensation for improvements. See in this regard, Pheiffer and Others v Van Wyk 2015 (5) SA 464 (SCA).

[30] With regard to all these possibilities, evidence must be provided and may have to be led. For that reason alone, this matter falls to be remitted to the court a quo where evidence may have to be canvassed and led, to bring clarity to the issues raised herein and more, if the matter will be proceeded with once remitted there.

[31] Concerning costs, there was strong contestation between the two counsel regarding the terms of a possible cost order. Both counsel argued strongly for the other to pay the costs. Considerations that Mr Maneli's applications were twice dismissed in the court a quo, leading him to come before this court and Ms Tsita having not been sufficiently candid with the learned Judge in the court a quo regarding her rights to title in the property, creating a basis for possible mistakes made there, became points of vigorous argument in this Court. In my view however, both parties have some role to play in the matter coming before this Court, making it reasonable for an order where each party must bear his or her own costs.

[32] In the result, the following order is made:

The appeal is allowed

1. The orders of the court a quo in favour of the respondent are set aside
2. The matter must be remitted to the court a quo
3. The parties, or one or other of them may commence this matter afresh, in which event it must be heard by another Judge.
4. Each party is to bear his or her own costs.

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J.Y. MOKGORO
ACTING JUSTICE OF APPEAL

I agree:

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I.G. FARLAM
ACTING PRESIDENT

I agree:

_____

M. H. CHINHENGO
ACTING JUSTICE OF APPEAL

For the Appellant: Mr E. M. Kao

For the Respondent: Mr N.S. Molapo