

IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) NO.35/2017
LC/APN/93/2013

Held at Maseru

In the matter between:-

NTSIUOA JOYCE MOHAPELOA

APPELLANT

and

LERIBE LODGE (PTY) LTD

RESPONDENT

CORAM : CHINHENGO AJA
MTSHIYA AJA
PEETE JA

HEARD : 21ST November 2018

DELIVERED: 7th December 2018

SUMMARY

Land Act No.17 of 1979 – Deed of Sale – Purchaser lacking citizenship of Lesotho – Section 6 of the Land Act 1979 – Ministerial consent lacking – Nullity of Deed of Sale after nine

months – Occupational rent – Recovery of payment of rent requires no citizenship status.

Where the Appellant who lacks Lesotho citizenship enters into a Deed of Sale agreement, the Deed of Sale is null and void ab initio and is rendered so by failure to obtain ministerial consent within nine months in terms of Deeds Registry Act 1967.

JUDGEMENT

Peete JA:

[1] This appeal raises an important land issue in Lesotho -**Quiz:** whether a non –citizen can acquire title to land in Lesotho. As in most African countries, land in Lesotho is an important national asset to be enjoyed by its citizens and nationals; with economic development evolving in Lesotho, the traditional land tenure system has gradually been adopted to modern leasehold land practices. Laws of Parliament have been enacted in this regard, the latest being the **Land Act No.8 of 2010** which has broadened the notion of occupational titles and long leases over land.

Land is vested in the Basotho Nation and is inalienable

[2] Section 107 of the **Constitution of Lesotho 1993** solemnly declares that “...all land in Lesotho is vested in the Basotho Nation.” This section is specially entrenched in the Constitution.¹ Prior to 1993, Section 3 (1) of the **Land Act No. 20 of 1973** candidly declared:

“3. Without prejudice to any allocation and land made before the commencement of this Act and subsisting immediately before such commencement or to any interests in or rights in or over land that

¹ Section 85 (3) (a) of the Constitution of Lesotho

were otherwise vested in any person immediately before such commencement and without prejudice to any allocation of land or any grant of any interest or right in or over land that may be made after the commencement of this Act, all land in Lesotho is vested in the Basotho Nation. (Our underline)

Section 3 of the **Land Act No. 17 of 1979** in turn read:

“3. (1) *Land in Lesotho is vested absolutely and irrevocably in the Basotho Nation and is held by the state as the representative of the Nation*”

Section 4. (1) of the **Land Act No.8 of 2010** in turn reads:

“4. (1) *Land in Lesotho is vested in the Basotho National and is held in trust by the King.*”

[3] This **Constitution of Lesotho 1993** is therefore the juristic foundation or anchor for the relevance or requirement of Ministerial consent in the transfers of titles over land in Lesotho – so as to ensure that the Basotho Nation is never divested of its ownership of all land in Lesotho. The legal issue on the rights of non-citizens over land in Lesotho was discussed in the Court of Appeal of Lesotho by **Melunsky JA²**. At para [7] the learned Judge of Appeal states:-

“Section 6 (1) (a) of the Land Act 1979 (“the Land Act”) as amended by s 4 (a) of the Land (Amendment) Order 1986 provides that no person shall be capable of holding a title to land except a citizen of Lesotho who is a Mosotho.”

A Factual Matrix

² LAC (2007-2008) 203 AT 206 ([Para 6 etc.] see also **Maphisa v Lecheko** – [1991-1996] LLR Vol. 1,p.571

[4] The chain of transactions can be narrated as follows:- *Leribe Retailers (Pty) Ltd* was the original owner of a **Plot No.19** located in *Lisemeng, Hlotse*. On the 18th April 1990, *Leribe Retailers (Pty) Ltd* entered into a *Deed of Sale* over **Plot No.19** wherein *Leribe Lodge (Pty) Ltd* - then currently being registered as a company - **No. 90/76** - was purchasing the said **Plot No.19**. The purchase price was agreed at **M100, 000.00** and payment of instalments were agreed upon as: **M50, 000.00** first down payment on 1st May 1990; five equal monthly instalments of **M10, 000.00** each – first instalment of **M10, 000.00** on 1st June 1990. Occupation was given to the *Leribe Lodge (Pty) Ltd* on 1st May 1990.

[5] It is not in dispute that **Ms. Ntsiuoa Joyce Mohapeloa** succeeded an Irish gentleman **Mr. Andrew Ernest Salm** in occupying the premises whose lease had been acquired on 28th December 1998 as Lease No. 25122-301, the monthly rental being **M1, 050.00**.

[6] On 19th July 1995 /a *Deed of Sale* was concluded between **Leribe Lodge (Pty) Ltd** as seller and **Ms. Ntsiuoa Joyce Mohapeloa** as purchaser. The purchase price was agreed at **M140, 000.00**. It is not in dispute that this amount was not fully paid – instead **Ms. Ntsiuoa Mohapeloa** paid a /deposit of **M28, 000.00**. In passing, it can also be mentioned that a guarantee from Lesotho Bank had been secured by **Ms. Mohapeloa** in the sum of **M140, 000.00** (covering mortgage bond) for **M112, 000.00**.

[7] It is important from the onset to note that all transactions purportedly performed over **Plot 19** at Lisemeng, Hlotse Leribe happened whilst the appellant **Ntsiuoa Joyce Mohapeloa** did not enjoy the citizenship of Lesotho, the status which - it is common cause - was only obtained by her sometime in 2006. Section 6 of the **Land Act 1979** solemnly prescribes:-

- “6. (1) *No person shall be capable of holding title to land except:*
- (a) *a citizen of Lesotho;*
 - (b) *the holder of a permit for indefinite sojourn granted under section 6 of the Aliens Control Act 1966;*
 - (c) *a company incorporated or registered under the Companies Act 1967³ and carrying on business in Lesotho and of which remains, at all times in the hands of citizens of Lesotho;*
 - (d) *a company incorporated or registered under the Companies Act 1967 and carrying on business in Lesotho and of which a majority share-holding of at least 51% is, and remains, at all times in the hands of citizens of Lesotho; Lesotho of which a majority shareholding is held by non-citizens of Lesotho, but only in relation to land held by such company at the commencement of this Act;*
 - (e) *a corporation established under Lesotho law;*
 - (f) *a partnership of which the majority of the partners are citizens of Lesotho;*
 - (g) *subject to the approval of the Minister, commonwealth or foreign government or public international organisations for purposes relevant to activities approved by the Government of Lesotho or to their missions in Lesotho.*
- (2) *Subsection (1) shall not be construed as prohibiting any person disqualified under it from holding any right subsidiary to a lease, including a sub-lease or mortgage, subject to the consent of the minister being obtained where so required under this Act. (Our underline)*

³ Replaced by the Companies Act No.18 2011

[8] A direct implication of *Section 6 (1)* of the **Land Act 1979** was that Appellant as a non-citizen lacked the essential capacity to enter into a *Deed of Sale* purporting to bestow upon herself any rights over immovable property on land. Such a *Deed of Sale* was rendered *null and void ab initio* and of no legal consequences. This indeed in our view is an important statutory requirement which the Appellant – then admittedly a South African national – should have been timeously advised about by her legal advisor.

[9] In the Originating Application **CC/APN/93/2013** before the Land Court, it is stated that *Leribe Lodge (Pty) Ltd* was a product of an agreement between *Leribe Retailers* and *Leribe Lodge (Pty) Ltd*; and that on the 27th April 1990 a “**Deed of Sale**” (**LL1**) was entered between *Leribe Retailers (Pty) Ltd* and *Leribe Lodge (Pty) Ltd* in terms of which the *Leribe Retailers* agreed to sell to *Leribe Lodge (Pty) Ltd* interest in *Plot 19 Lisemeng Hlotse Leribe*.

[10] Clause I of the Agreement states:

“This agreement of sale and purchase is conditional upon-

- (a) the conversion of the sellers existing title Deed into a Lease as contemplated by the provisions of Section 29 (1) of the Land Act of 1979; and*
- (b) the grant of Ministerial consent to the disposal by the seller of its interest in the aforesaid land to the Purchaser, as contemplated by Section 35 (1) (b) (i) of the said Act.*

The Seller shall, immediately upon signature of this present contract, apply for the conversion of the existing title deed and for the Ministerial consent to the transfer referred to above, and the

Seller shall prosecute these applications to a conclusion as soon as reasonably possible.

If either or both of the aforesaid applications should fail, through no fault on the part of the Seller, this agreement shall be regarded as null and void and in that event the Seller shall immediately refund the purchase price to the Purchaser and the Purchaser shall immediately restore occupation of the property to the Seller.” (Our underline)

[11] The purchase price was agreed at **M100, 000.00** and it is not in dispute that **Andrew Salm** took occupation immediately and lived thereat until he left for his fatherland **Ireland** sometime later.

[12] Site **No.19** was later surveyed and a lease document issued in the names of *Leribe Retailers* as **Plot No.25122-301** dated 19th July 1995.

[13] During 1995, *Leribe Lodge (Pty) Ltd* resolved to sell its interest in **Plot. No.25122-301** to **Ms. Ntsiuoa Joyce Mohapelo** who – it is not in dispute – was at that point in time occupying the premises on a month to month tenancy agreement of **M1,050.00** per month. It should again be stated that **Ms. Mohapelo** did not at the time have citizenship of Lesotho.

[14] On the 19th July 1995 *Leribe Lodge (Pty) Ltd* authorised one **Garth Lotz** to conclude another *Deed of Sale* with **Ms. Mohapelo** as the purchaser. The *Deed of Sale* in particular took cognizance of the tenancy arrangement between *Leribe Lodge (Pty) Ltd* and **Ms.**

Mohapelo and “carried over that tenancy into the terms of the Deed of Sale.”

[15] The purchase price of **Plot No. 25122-301** was **M140,000.00** which was to be payable on the date of registration of transfer for which the Appellant was to provide a bank or other financial institution guarantee or letter of undertaking acceptable to *Leribe Lodge (Pty) Ltd* as Seller.

[16] The *Deed of Sale* of 19th July 1995 further reads:

“*This Agreement is subject to the following conditions precedent:-*

The grant by the Minister of his consent as contemplated in Section 35 (1) of the Land Act, 1979 to the disposal and transfer of the interest in the property by the Seller to the Purchaser;

Upon signature of the Agreement, the Seller shall apply without delay for the consent of the Minister referred to above, for which application he hereby appoints Messrs Webber Newdigate, Attorney’s and Conveyancers of Maseru, to attend to the application, the costs of such application to be borne by the purchaser. Should the application for consent in terms of Section 35 (1) of the Land Act 1979 be unsuccessful within 9 (NINE) months of the date of signature hereof, through no fault on the part of the Seller, this Agreement of Sale shall be null and void and the Seller shall be obliged to refund to the purchaser any deposit paid in terms of clause 1 above, without delay and on demand.” **(Our underline)**

[17] It is not in dispute that when the Appellant **Ms. Ntsiuoa Joyce Mohapelo** purported to sign a *Deed of Sale* she lacked

Lesotho citizenship. It can safely be assumed that this deficiency was the reason or cause why Ministerial consent was not forthcoming – until the nine months’ statutory period expired.

[18] By operation of law (*ex lege*) under Section 35 of the **1979 Land Act** and under its Clause 3, the *Deed of Sale* became effectively *null and void* on the 19th March 1996 (9 months later).

[19] More importantly Clause 5.2 of the **Deed of Sale** reads:

“5.2. should the date of occupation be before the date of registration of the transfer of the property into the name of the Purchaser and payment in full of the occupational rental in the amount of M1,050.00 per month, which rental shall be payable monthly in advance to the Seller’s conveyancers as hereinafter appointed. Should occupation take place subsequent to the date of registration and payment in full of the purchase price, then the Seller shall be obliged to pay the said monthly occupational rental to the Purchaser for the period from the date of registration of the transfer and payment in full of the purchase price until the date of occupation of the property by the Purchaser.

No doubt the monthly payment of **M1, 050.00** was only an occupational rent and was not being paid in terms of any sub-lease agreement.

[20] Para 11 of the **Deed of Sale** further reads:

“Should the condition precedent as set out in clause 3 above not be fulfilled then the Purchaser shall vacate the premises within 14 (FOURTEEN) days of the day on which the Purchaser is advised that the said condition has not been fulfilled.

In the event of this contract being null and void as a result of non-fulfilment of the aid condition precedent set out in cause 3 above, the purchaser shall nevertheless remain liable for the costs of this Deed of Sale and for occupational interest until the date of vacation of the property by the Purchaser.”

[21] Whether the Appellant as purchaser in the *Deed of Sale* complied with the conditions precedent is essentially a question of fact – e.g. whether Ministerial consent was obtained within nine months after the signing of the *Deed of Sale* on the 19th July 1995. We know that Ministerial Consent was never obtained.

Proceedings before Leribe Subordinate Court

[22] Seemingly, the Applicant continued occupying **Plot No. 25122-301** until *Leribe Lodge (Pty) Ltd* filed summons CC: 137/07 in the Leribe Subordinate Court on the 3rd August 2007 for (a) cancellation of the sale agreement between *Leribe Lodge (Pty) Ltd* and the Appellant **Ms. Ntsiuoa Joyce Mohapelo** and (b) for her eviction (ejectment) from **Plot No. 25122-301** situate at *Lisemeng Hlotse Leribe*.

[23] The proceedings before the learned **Magistrate Khaketla** aborted when she resigned from her magisterial post. In its particulars of claim *Leribe Lodge (Pty) Ltd* alleged in the main that **Ms. Mohapelo** had failed to obtain Ministerial consent within nine months after signing the *Deed of Sale* and had also failed for a long period to pay occupational rent in terms of the *Deed of Sale*.

[24] *En passant*, it can be mentioned that the learned magistrate had even issued an ejectment order in default on the 4th day of

February 2009. A rescission of the ejectment order was however later granted when the Appellant explained to the court that her non-appearance was due to the fact that she had been hospitalised in Bloemfontein South Africa for injuries she had suffered in a motor accident in South Africa.

[25] The matter thereafter seems to have shuttled from one judge to another without respite and this persisted until the then **Chief Justice Majara** on the 11th day of June 2015 formally designated the matter a commercial matter in terms of the *High Court Amendment Rules 2000* and that pleadings should stand as they were and that the file be transferred to the Commercial Court. This was almost 20 years after the original signing of the *Deed of Sale* on the 19th July 1995.

[26] On the 19TH September 2016, the *Commercial Court Judge Justice Molete* heard submissions of **Advocate Setlojoane** for *Leribe Lodge (Pty) Ltd* and **Advocate Molapo** for 1st Respondent (*present Appellant*) and on the 23rd May 2017, the learned Judge made the following order:-

“IT IS HEREBY ORDERED THAT

1. *The agreement, annexure LL2 be and is hereby declared null and void and of no force or effect and it is set aside;*
2. *Such an agreement was not a sublease agreement and is hereby set aside and cancelled in so far as it relates to a sublease agreement between the Applicant and 1st Respondent;*

3. *The First Respondent or whoever claims under her be and are hereby directed to vacate forthwith the premises and house situated at **Plot No. 25122-301 Lisemeng Hlotse** in the district of Leribe district;*
4. *The First Respondent be and is hereby ordered to pay costs including those of the Land Court on the scale as between party and party.*

BY ORDER OF COURT

.....
THE HONOURABLE JUDGE
REGISTRAR

[27] The Judge noted that both *Leribe Lodge (Pty) Ltd* and **Ms. Mohapeloa** should have timeously been vigilant to recognise that their *Deed of Sale* had been rendered *null and void* nine months after it being signed and “*the Applicant should have returned the deposit of **M28,000.00** to **Ms. Mohapeloa** who should have vacated the premises. This was not done.*”

[28] The learned Judge concluded that the agreement between *Leribe Lodge (Pty) Ltd* and the present Appellant on the 19th July 1995 was not a sublease and what the Appellant was paying was occupational rent pending transfer of title and that even if it was sub-lease, it had never been registered in terms of *Section 15 and 16 of **Deeds Registry Act 1967*** and *in casu* registration could not be achieved timeously because the ministerial consent was not forthcoming and all Appellant’s effort were running against the wall.

[29] The learned Judge also rejected the Appellant’s contention that *Leribe Lodge (Pty) Ltd* had no title and that instead it was the *Leribe Retailers* who had title to lodge any claim “***rei vindicatio***” holding that *Leribe Lodge (Pty) Ltd* nevertheless could enforce its right of possession without having to prove ownership.” The Learned Judge founded his reasoning upon a clear fact that the *Deed of Sale* was *void* for non-compliance with ***Land Act 1979*** read together with ***Deeds Registry Act 1967***⁴ which mandatorily require Ministerial Consent to the transfer.

[30] The learned Judge continues to state “...[15] *I think one may even go further to inquire into whether there was any valid Deed of Sale between the parties in the light of the admission that at the time of entering into the contact, the 2nd Respondent was disqualified from owing land in Lesotho, by the fact that she was not a citizen. What should have happened as in the unreported case of **Archie Salley vs Stadtbucher***⁵ is that

“... as soon as it became clear that the Respondent did not qualify to hold title to land, the Applicant should have claimed restoration of this property. In that case he ought to have refunded the purchase price ... Parties hereto did not do that, and their deadlock means that 2nd Responded has now been in occupation of the premises without paying rent. It can be said she has been enriched at the expense of the Applicant for a very long time.”

[31] The Appellant gravely suffered legal disqualification to hold title to land – it was a disqualification which even the Ministerial Consent could not cure! The learned Judge correctly reasons

⁵ CIV/APN/121/90

that occupational rent was only a temporary measure before parties could finalise the sale transaction. In our view, even if Ministerial Consent was obtained within 9 months, it could be easily be set aside if it was later shown that the Applicant was in fact not a citizen of Lesotho in 1995 when the *Deed of Sale* was concluded, and “... *there was never any enforceable contract to begin with, because Applicant was disqualified from owning land in Lesotho at the time that it was concluded.*”

It is sad that the Appellant finally succeeded to secure her Lesotho citizenship in 2006; but in 1995 it was really the job of her legal adviser to have advised her accordingly.

[32] The lack of Lesotho citizenship suffered by the Appellant **Ms. Ntsiuoa Joyce Mohapeloa** was her “*Achilles’ heel*” which destroyed all her claims and cast “a long dark shadow” on her efforts to secure title over **Plot 19** at Lisemeng, Hlotse Leribe.

Cross-Appeal re: occupational rental

[33] In its cross-appeal, **Leribe Lodge (Pty) Ltd** submits that the Learned Judge *a quo* was not correct in refusing to direct that present appellant pay Applicant (respondent) occupational rentals for her occupation of premises at **Plot 19** in terms of *Deed of Sale (LL2)* in the sum of **M100, 800.00** for period commencing 1st October 2005 to 31st October 2013.

[34] The learned Judge had made a definite finding in his judgment that the **Deed of Sale** was “...*null and void and of no force or effect and it is set aside.*” Consequently no claim could be entertained under a void *Deed of Sale*. “*It is not possible to treat the*

Deed of Sale as a sub-lease because it was never the intention of the parties to enter into such an agreement Applicant cannot be granted relief of payment rentals to date as there was never a sublease agreement between the parties. On the other hand, 1st Respondent has overstayed in the premises and had the use thereof for a very long time. She will therefore have to forfeit the amount of deposit already paid. Each party is free to institute proceeding for damages suffered.”

[35] *En passant* it can be noted that a tenancy agreement conveys no title upon the tenant and is not affected by the citizenship clause 6 of the **Land Act 1979**.

[36] Once it is held that the Deed of Sale between **Leribe Lodge (Pty) Ltd** and **Ms. Ntsiuoa Joyce Mohapela** was *void ab initio*, no reliance can be made upon its clauses dealing with occupational rent. That claim is a “*different kettle of fish*” which can be instituted in separate claim for damages, which could be set off with the **M28, 000.00** already paid by appellant as deposit to the purchase price to **Plot 19**.

Severability of occupational rental

[37] If a *Deed of Sale* contains a clause specifying occupational rent pending transfer of title over the property (res) and the *Deed of Sale* declared *null* and *void* for whatever reason, the clause re: occupational rent cannot survive the declaration of nullity, unless it can be argued convincingly that severance of the clause from the

invalid *Deed of Sale* can survive the declaration of nullity.⁶ The test to be applied was stated by **Goldin J in *Cameron v Bray Gibb (Pty) Ltd.***⁷ It can be noted that the tenancy agreement could be enforced separately from the *Deed of Sale*. But the issue of severance was neither pleaded nor explored at the trial.

Order

[38] 1. The main appeal is dismissed with costs.

2. The cross-appeal re: arrear rental for the period 1st October 2005 to the 31st October 2013 succeeds and the Appellant is ordered to pay the amount of **M100,800.00** as claimed in the court *a quo*.

S.N. PEETE
ACTING JUDGE OF APPEAL

I concur:
JUSTICE M. CHINHENGO
ACTING JUDGE OF APPEAL

I concur:
JUSTICE N. MTSHIYA
ACTING JUDGE OF APPEAL

⁶ *Bhengu v Alexander* – 1947(4) SA 341.

Premier, Free State v Firechem Free State – 2000 (4) SA. 413.

Munn Publishing (Pty) Ltd vs Zimbabwe Broadcasting Corporation – 1995 (4) SA per Gubbay CJ
⁷ 1966 (3) SA 675; *Wille – Principles of South African Law*

For Appellant : Mr. L Molapo

For Respondent : R. Setlojoane