IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru **C of A (CIV) NO. 51/2018**

(CIV/APN/61/09

In the matter between:

THREE ZEDS (PTY) LTD **APPELLANT**

and

LINEO 'MANTSATSI RANTHOCHA **1ST RESPONDENT**

PROPERTY INTERNATIONAL (PTY) LTD **2ND RESPONDENT**

MINISTER OF LOCAL GOVERNMENT **3RD RESPONDENT**

COMMISSIONER OF LANDS **4TH RESPONDENT**

REGISTRAR OF DEEDS **5TH RESPONDENT**

ATTORNEY GENERAL **6TH RESPONDENT**

CORAM: MUSONDA AJA
CHINHENGO AJA
MAHASE ACJ

HEARD : 14 JANUARY, 2019

DELIVERED: 1 FEBRUARY, 2019

Summary

Parties having entered into an agreement of sale of rights in Land- seller disposing of same rights to a third party and buyer suing to enforce its rights in terms of the agreement of sale and set aside sale to third party

Point of law raised that Ministerial consent required before conclusion of agreement of sale; judge deciding the point of law in favour of Seller holding that in terms of ss 35 and 36 of Land Act 1979 such consent is a prerequisite to validity of agreement of sale

On appeal held no Ministerial consent required prior to concluding agreement of sale; decision of court a quo set aside and matter referred to that court for determination of the merits

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] This is an appeal from a decision of the High Court in which the court dismissed with costs the appellant's claim for the cancellation of a Deed of Transfer registered in the name of the 2nd respondent at the instance of the 1st respondent, in respect of Plot No. 22124-107 situated at Maputsoe, Urban Area, Leribe, and for the registration of the plot in the appellant's name. It sought other ancillary orders, such as an order directing the Minister of Local Government (3rd respondent) to grant the necessary consent for the transfer of the Plot to the appellant. All the relief sought by the appellant was refused and the application accordingly dismissed with costs.

[2] The learned judge's decision revolved around the question whether a failure to obtain ministerial consent to transfer the Plot was fatal to the appellant's case. In a short judgment consisting of six paragraphs, the learned judge rendered himself, in the relevant part, in these words:

> "5. I need not go further than to say that the applicant's case is based on a so-called deed of sale between itself and the first respondent. It is upon the "sale" that I am asked to cancel the deed of transfer and to order the Minister to grant the necessary consent to the transfer of the Plot to the applicant. The law in this regard was settled by the Court of Appeal in *Mothobi v Sebotsa* LAC 2007-2008 439 where it was held that a purported sale agreement of leased land between the respondent and appellant's successor in title is invalid because the Minister's prior consent was not sought and obtained pursuant to s 35(1)(b) read with s 36(5) of the Land Act 1979.
>
> 6. That is exactly what happened *in casu*. I cannot compel the Minister to grant consent. The application must therefore be dismissed. It is dismissed with costs."

[3] It is clear from the judge's reasons that the appellant's application in the court *a quo* was dismissed solely for the reason that no ministerial consent had been sought or obtained before the sale was concluded and that, for that reason, the court could not compel the Minister to give his consent. Dealing with the application on this narrow ground meant that the judge did not analyse the evidence or make findings of fact on several issues raised in the affidavits. The learned judge proceeded on the basis that the appellant and the 1st respondent entered into a deed of sale that could not be given effect to because of the absence of ministerial consent and consequently the appellant did not acquire any rights under that deed of sale.

Background

[4] The deponent to the appellant's founding affidavit, Yasin Yusuf Vallybhai (Vallybhai) tells a long story about the events that resulted in the appellant bringing the respondents to court in February 2009.

[5] In brief, it is the appellant's case that in 1997, Vallybhai's friend, Mohammed Salim Karim (Mohammed) introduced him to the 1st respondent who was disposing of her rights in the Plot. Vallybhai and the 1st responent thereafter entered into an agreement of sale of the Plot for M500 000.00. Of this purchase price, Vallybhai paid M250 000.00 as follows. He paid off the 1st respondent's indebtedness on a mortgage bond with Lesotho Bank 1999 in the sum of M188 000.00. He paid the sums of M20 000.00 and M12 000.00 on different dates in cash. He set-off the amount of M30 000.00 for rent arrears owed to him by the 1st respondent. Vallybhai said that the deed of sale that he entered into with the 1st respondent was witnessed by Mohammed and that Mohammed retained the proofs of the cash payments and the deed of sale. I will call this deed of sale 'the first deed of sale'.

[6] Vallybhai said that after the conclusion of the first deed of sale and payment of one half of the purchase price, he took occupation of the Plot in 1997. At that time there was a tenant on the Plot, Lewis Stores (Pty) Ltd. The parties agreed **that** tenant was now to pay rentals to Vallybhai. All this happened before the appellant came into existence.

[7] The appellant was registered in 1996 as a family business. Vallybhai said that in 2002 he and the 1st respondent agreed that the Plot would now be transferred directly into the names of the

appellant and, on 25 **August** 2002, the appellant and the 1st respondent entered into another deed of sale (the second deed of sale) after the appellant paid the balance of the purchase prize. The payment was made in kind. The appellant made over to the 1st respondent a house in Ficksburg South Africa and two 4x4 Hilux motor vehicles. The signing of the deed of sale of 25 August 2002 was witnessed by two people, Nthabiseng Mofolo and Majed Yusuf. The deed is annexure "TZ1" to the founding affidavit.

[8] It is averred on behalf of the appellant that the Plot was not transferred to the appellant after payment of the full purchase prize because the Plot was still registered in the names of the 1st respondent's late husband, Vincent Mkha Ranthocha. The registration into the names of the 1st respondent only took place on 23 November 2007.

[9] In October 2008, a few months before the appellant instituted the present proceedings, Vallybhai visited the Community Council Secretary, Teboho Molefe, at his office to seek guidance on the process of transferring the Plot to the appellant from the 1st respondent. On this first visit, he was advised to come back to the office with the 1st respondent. He did so and he and 1st respondent held a meeting with Molefe. The 1st respondent advised them that Mohammed's son, Hoosen, had approached her claiming that he had been sent by his father on behalf of Vallybhai and that Vallybhai had registered a new company, the 2nd respondent, to which the rentals payable by Lewis Stores were now to be paid. Hoosen also gave her some documents which she signed without reading them. These documents, it turned out, were a deed of sale and associated documents for the sale and transfer of the Plot by the 1st respondent to the 2nd respondent. According to the appellant therefore the 1st respondent, who knew of the friendship between Vallybhai and Mohammed, was

duped into believing that the documents she was asked to sign by Hoosen related to the sale of the Plot by her to the appellant. Molefe, soon after the meeting, sought confirmation from the Land Survey and Physical Planning office and established that indeed the 1st respondent had transferred the Plot to the 2nd respondent on 24 January 2008. The deed of sale is annexure "TZ3". It is then that the appellant learnt that the transfer from her late husband to the 1st respondent had taken place on 23 November 2007 as shown in annexure "TZ4".

[10] In order to ensure a record was kept of what the 1st respondent advised Vallybhai and Molefe they asked her to depose to an affidavit to that effect. She obliged and deposed to an affidavit before Senior Inspector Teboho Masile of Muputsoe Police Station. Present at the commissioning of the affidavit was Nthabiseng Mofolo and of course Vallybhai himself.

[11] The appellant's affidavit, deposed to by Vallybhai, was supported by Majed Yusuf, Teboho Masaile and Teboho Molefe. They all identified themselves with the contents of that affidavit to the extent that it referred to them. Another affidavit, supporting the appellant's averment that the 1st respondent was indebted to Lesotho Bank 1999, was filed by Sekhohola Nkhethoa who was an employee of the Bank between 1986 and 1999. Clearly this was not an affidavit by the Bank or by an official authorised by the Bank.

[12] It is on the basis of the above averments of fact that the appellant contended that the transfer of the Plot to the 2nd respondent is null and void: at that time the 1st respondent no longer owned the Plot and had sold it to the appellant. It is contended that the 2nd respondent was aware that the Plot did not belong to the 1st respondent but to the appellant, based on the

knowledge possessed by Mohammed and Hoosen of the earlier dealings between the 1st respondent and Vallybhai or the appellant. As further proof of the fact that the Plot belonged to it, the appellant produced annexure "TZ6" showing that Vallybhai paid for insurance cover for the Plot.

[13] The 1st respondent admitted only a few and inconsequential averments of fact by the appellant. She admitted that she had known Vallybhai through Mohammed and that she attended the meeting at Molefe's office. She however denied entering into or signing the first deed of sale with Vallybhai or the second deed of sale with the appellant. She denied that she deposed to an affidavit before Masaile. She denied ever receiving any money from Vallybhai or the appellant as purchase prize of the Plot. In fact she disputed all material averments of fact made by the appellant. She contended that the application was "riddled" with material disputes of fact "that were clearly foreseeable" and which could not be resolved on the papers, and prayed for the dismissal of the appellant's claim on that basis.

[14] The deponent for the 2nd respondent, Mohammed, filed an affidavit supporting the 1st respondent. He stated therein that he has "no knowledge of the appellant ever acquiring any rights in plot no. 22124-107, nor did I take any part in the said alleged acquisition. To my knowledge the plot was lawfully acquired by our company, second respondent."

[15] I do not consider that it is necessary for me to deal with the 1st and 2nd respondents' denials of fact in further detail. The appeal is essentially against the learned judge's decision on a point of law. The factual background above gives a perspective against which the decision of the learned judge can be

understood. At least one fact is established. It is that the appellant and the 1st respondent entered into some deed of sale and that that deed of sale was not implemented as between those two parties. This was the position taken by the judge *a quo*. That is at least the assumption, if not a finding of fact he must have made for him to then deal with the single question whether or not ministerial consent was required before the parties, appellant and 1st respondent, could enter into the agreement of sale. His conclusion was that they required ministerial approval before they could do that.

[16] It must be recalled that the appellant commenced these proceedings in the High Court by way of urgent motion proceedings back in 2009. This procedure has become ingrained in that court and is resorted to even where urgency has not been established. In the application the appellant sought to stop the Registrar of Deeds (5th respondent) "from facilitating the transfer of Plot No. 22124-107 … to any person other than the applicant"; that the Deed of Transfer between the 1st respondent and the 2nd respondent in respect of Plot No. 22124-107 be cancelled; that the 1st respondent be compelled to give effect to the terms of the Deed of Sale between her and the appellant and that the Minister, 3rd respondent, be directed to grant the necessary consent for the sale and transfer of the Plot to the appellant.

[17] A provisional order was granted on 23 February 2009 interdicting the 5th respondent as prayed in the notice of motion pending the finalisation of the proceedings. The application was finally heard two years later on 28 March 2011 and judgment handed down more than seven years later on 30 August 2018. There is no explanation as to why it took nine years to finalise a matter commenced on urgency, and seven years from the date of hearing, to hand down a decision in such a matter. Courts should

ensure that genuinely urgent matters only are allowed to be heard ahead of other matters on the court's roll and that, once adjudged to be urgent, a matter must be dealt with expeditiously. Taking seven years to hand down a judgment is simply beyond the pale.

[18] The appellant's first ground of appeal that the judge erred in holding that one of the reliefs sought by the appellant was that the 5th respondent be interdicted from facilitating the transfer of the Plot to the 2nd respondent: that could not be so as would conflict with the prayer to set aside the transfer of the Plot to the 2nd respondent. This ground of appeal is really neither here nor there. The appellant clearly sought to interdict the transfer to any other person. It was common cause that the transfer to the 2nd respondent had already taken place and what the appellant sought was to stop a further transfer or further transfers to other persons. The judge misunderstood this to include a transfer to the 2nd applicant, hence his statement at paragraph [1] of the judgment that "this prayer untenable as such transfer to the second respondent has already been executed in its favor." This minor misconstruction of the relief sought in paragraph 2 of the notice of motion is inconsequential. The judge understood the substance of the dispute between the parties and dealt with in accordance with his understanding of the applicable law.

[19] The second, third, and fourth grounds of appeal address two related matters and can be dealt with together. The two matters are whether ministerial consent is required before parties may enter into a deed of sale of rights in land, and whether, where a deed has been entered into without ministerial consent, the Minister may, in a proper case, be compelled by a court to grant such consent.

[20] The learned judge relied exclusively on the decision of this Court in *Mothobi v Sebotsa.* He was correct in doing so. The law was laid down, not only by *Mothobi*'s case but by other cases referred to with approval in *Mothobi,* namely *Vicente v Lesotho Bank* (LAC 200o-2004) 83 and *Sea Lake (Pty) Ltd v Chung Hwa Trading Enterprises Co. (Pty) Ltd and Another* LAC (2000-2004) 190. The judge cannot be faulted for his understanding of these cases because any cursory reading of those cases leads to a similar understanding meaning of those cases. Although the judge handed down his decision in 2018 having heard the matter in 2011, it seems he did not become aware of the latter case *C & S Properties (Pty) Ltd v Dr. 'Mamphono Khaketla and 2 Others* C of A (CIV) 63, which was heard by this Court on 19 April 2012 and judgment delivered on 27 April 2012. Had the learned judge become aware, I have no doubt that he would have reached a different decision.

[21] All the four cases were concerned with the correct interpretation of sections 35 and 36 of the Land Act 1979 the common question being whether these provisions required that Ministerial consent for a land transaction precede the transaction. In *'Mamphono Khaketla* MAHASE J, in the court below, had relied on *Sea Lake* and *Mothobi* cases and held that in terms of ss 35 and 36 of the Land Act, Ministerial consent was required for any transaction relating to land – for example, an agreement of lease or sublease – to be valid. On appeal this Court came to a different conclusion and laid out the law in these terms:

> "[15]Turning to the provisions of the Land Act, s 35 (1) provides (where relevant):
>
> > "A lessee shall be entitled –
> >
> > (a).....

(b) subject to obtaining the consent of the Minister –

(i) to dispose of his interest;

(ii) .....

(iii) to sub-let the land leased."

[16] Section 36(5) states (where relevant) that:

> "Any transaction conducted by a lessee without the consent of the Minister ... shall be of no effect."

[17] Clearly there is no express requirement that Ministerial consent must precede the transaction. The enquiry then is whether such requirement, upon a proper construction, is necessarily implied.

[18] Section 24 of the Deeds Registry Act deals with registration of leases and subleases in respect of immovable property and conveys in subsections (2) and (3) that registration shall only be effected after ministerial consent. This means that such consent must precede registration. As subletting involves both an agreement which confers rights and registration in order to transfer those rights, s 35 (1) (b) (iii) of the Land Act also means no more than that consent must precede registration. In other words neither Act implies that consent must precede the sublease transaction.

[19] As far as s 36 (5) of the Land Act is concerned its terms are ambiguous. A transaction concluded ("conducted" must be so understood) "without ... consent" could mean that consent is absent when the transaction is concluded or, equally, it could mean a concluded transaction that is never consented to.

[20] The overriding purpose of the Land Act is clear. In terms of ss 107 and 108 of the Constitution all land is vested in the Basotho Nation and the power to allocate it vests in the King, who must exercise the power in terms of the Constitution or any other law. The Land Act is such a law. Section 3 states that the land vesting in the Nation is held by the State and no one other than the State shall hold title to land except as provided by customary law or the Act. The Act's purpose is therefore to control, no doubt with anxious official care, the conferment of title to land.

[21] It is not possible to discern how that purpose would, or even might, be defeated or impeded were consent to follow conclusion of the transaction. Nor were we presented with any submission in this regard which advances the case for the need for prior consent.

[22] Plainly, informed consent would be better achieved by the Minister's first seeing the entire written transaction rather than after obtaining only an incomplete picture from a summary of the proposed transaction the details of which (perhaps important ones) might only be finalised after the grant of consent. Informed consent subsequent to a perusal of the concluded transaction clearly serves the Act's purpose better than prior consent. And if

prior consent was truly the legislature's intended requirement, the best way to achieve the Act's purpose would necessitate providing the Minister with an unsigned copy of the complete proposed transaction and then after the grant of consent merely having the parties sign it. That stilted, irrational sequence does not commend itself as in any way conducive to achieving the statutory purpose compared with presentation to the Minister of the concluded transaction in order to obtain consent.

[23] In my view, therefore, prior consent is not implied and s 36(5) of the Land Act burdens with invalidity only a transaction that is never consented to.

[24] The decisions of this Court provide support neither for the judgment *a quo* nor the respondents' case. In *Vicente v Lesotho Bank*LAC (2000-2004) 83 there never was any consent. Ramodibedi JA (as he then was) said (at 86 I) that the transaction concerned there was null and void for as long as the Minister's consent was not obtained. By clear implication consent subsequent to its conclusion would have validated it. That decision was given in April 2000.

[25] In the *Sea Lake* case (*supra)* (the judgment was delivered in October 2000) the unsuccessful appellant had applied in the High Court for an order compelling the other party to a sale of rights in land to sign the deed of sale in respect of which sale no Ministerial consent had been given. Having referred to the parties' intention that the deed would not be binding until signed, Van den Heever JA went on to state (at 193 G-H):

> "No registration of the rights in question is possible unless an appropriate document has been completed in order for that to happen; moreover prior ministerial consent is required in terms of s 35 of the Land Act of 1979... Ministerial consent is required before the first respondent was entitled to dispose of its interest (s 35 (1) (b) (i) of the Land Act....). A transaction without that, is invalid."

[26] It is clear that the learned Judge of Appeal in referring to prior consent meant consent prior to registration. And her reference to consent before disposal is consistent with what has been said above in relation to s 35 (1) (b) (iii) and subletting. Both disposal and subletting require, apart from an appropriate transaction, registration in the Deeds Registry and it is registration that must be preceded by ministerial consent. At the risk of repetition, no provision requires that consent must precede the relevant transaction.

[27] The *Mothobi* case (*supra)* (decided in 2008) was yet another case of a transaction for which consent had not been granted and where an order was sought compelling signature of the relevant document. This Court emphasised that without consent having been given there was no valid contractual provision which could be enforced and called in aid in order to compel signature. If Ministerial consent subsequent to conclusion of an invalid transaction was to be achieved both parties had to agree to that process.

> [28] It follows that the court below erred in holding that the sublease and the cession were invalid for want of prior Ministerial consent.

[22] Counsel for the respondents referred to *C & S Properties* in his heads of argument and in his submissions to us, but it seems to me that he either did not read the judgment thoroughly or he misunderstood or misconstrued its import and effect. The judgment explains the decisions in the earlier cases and very clearly articulates the law as set out therein – that Ministerial consent is not required before parties can enter into deeds of sale or subleases and similar transactions. Sections 35 and 36 require such consent only in respect of registration of transfers of title to land. The judge *a quo* fell into the same error as MAHASE J. His decision cannot stand.

[23] Having now reached the conclusion that the judge *a quo* erred as set out above, the danger which a lower court runs is laid bare where it chooses to decide points of law only and not to deal with the merits of the case: it runs the danger that if the appellate court upsets it on the points of law, it then is called upon to decide the matter on the merits, a task it should have performed in the first place. Had the learned judge dealt with the merits this Court would have been in a position to finally dispose of the matter and the parties would not have to be exposed to further costs of litigation. As for the costs of appeal, the general principle that costs follow the cause, should apply.

[24] In the result –

(a) The order of the court *a quo* is set aside and the following is substituted –

"The point of law to the effect that in terms of ss 35 as read with s 36 of the Land Act 1979, Ministerial consent is required before a deed of sale of rights in land is concluded is incorrect and is accordingly dismissed."

(b) This matter is remitted to the High Court for determination of the merits before NOMNGCONGO J to finalise it within 3 months from the date of this order.

(c) The 1st and 2nd respondents shall pay the costs of the appeal jointly and severally, the one paying the other to be absolved.

MH CHINHENGO

Acting Justice of Appeal

I agree

MAHASE ACJ

Justice of Appeal (*Ex Officio*)

I agree

P MUSONDA

Acting Justice of Appeal

For Appellant: Adv P.T. Nteso

For Respondents: Adv S Ratau