IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C of A (CIV) NO. 53 OF 2017**

In the matter between:

KEL PROPERTY **APPELLANT**

AND

MONKI LETHOLE **RESPONDENT**

CORAM: PT DAMASEB, AJA
DR P MUSONDA, AJA
M CHINHENGO, AJA

Heard: 13 OCTOBER 2020

Delivered: 30 OCTOBER 2020

Summary

On rival claims to title over land originally allocated under customary law, High Court holding that failure to register lease in terms of land registration act 1967 read with deeds registry Act 1967, rendering lease void and possessor of Form C having prior title over land. Held that the registration regime under two acts not necessarily rendering unregistered lease void and that, in any event, Form C title established on balance of probabilities to have been acquired fraudulently.

JUDGMENT

PT DAMASEB AJA:

Common cause facts

[1] This appeal involves a rival claim to ownership of a lease in respect of Plot No.19223-561 at Teyateyaneng Urban (the disputed land).

[2] There are rival claims to the disputed land between the appellant in the appeal who was the first respondent *a quo* and who I shall hereafter referred to as KEL, and the respondent in the appeal who was the applicant a quo. I shall henceforth refer to the latter as Monki Lethole.

[3] Monki Lethole is in possession of a Form C lease issued in 1982 and KEL is in possession of a lease issued in 1997. KEL acts

as a holding company for the Lesotho Evangelical Lutheran Church (the Curch) in respect of the latter's immoveable property.

[4] KEL has for a considerable length of time occupied the disputed land prior to the proceedings commenced a quo by Monki Lethole. In fact, servants of the Church lived on the disputed land before 1960.

Pleadings

[5] In an originating application in terms of the Land Court Rules, the Monki Lethole initiated proceedings in the Land Court claiming that he acquired 'rights and interests in' the disputed land through an inheritance from this parents after their death.

[6] According to Monki Lethole, after inheriting the disputed land he entered into an agreement in 2005 with 'Marelebohile Lethole (ML) to develop the land. It was after that development occurred that 'some members of the first respondent started fighting ML'.

[7] Monki Lethole alleged that KEL's lease is null and void as it was acquired fraudulently. He accordingly sought the following relief:

> *'1. A declaratory order declaring the purported registration of [the disputed land] in the name of the 1st respondent null and void.*
> *2. An order directing [the Land Administration Authority] and the [Land Registrar] to register [the disputed land] into his name.'*

[8] KEL opposed the application and denied the allegation of fraud. It denied that the disputed land ever belonged to the respondent's parents. According to KEL, the disputed land always belonged to it as holding company for the Church and that 'at no point was the Church ever lawfully deprived of its title to the disputed property.'

[9] KEL pleaded that Monki Lethole was a 'front' for a lady known as Puseletso 'Marelebohile Lethole who in the past was a tenant of KEL at the disputed land but sought 'to cling on to' it after the termination of her tenancy.

[10] KEL challenged Monki to prove the authenticity of Form C.

Pre-trial minute

[11] The parties agreed at the pre-trial conference that the following issues fell for decision:

(a) Whether Monki Lethole was allocated the disputed land in 1982;

(b) Whether KEL's lease was legally acquired; and

(c) Whether the Land Administration Authority (second respondent a quo) and Land Registrar (third respondent a quo) are obliged to deregister the disputed land and register it in Monki Lethole's name.

[12] The matter went to oral evidence.

Onus and standard of proof

[13] Since this is a civil claim, he who alleges had to prove his claim to ownership on balance of probabilities. It was held in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734:

> *[I]n finding facts or making inferences in a civil case, it seems to me that one may . . . by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable, even though that conclusion be not the only reasonable one.'*

[14] In the present case, the versions of the protagonists are mutually destructive, each accusing the other of fraud in the manner they obtained title to the disputed land.

[15] In making findings of fact where two versions are mutually destructive, the *locus classicus* is *Stellenbosch v Farmers' Winery Group Ltd and another v Martell et Cie and another* where Nienaber JA explained the applicable test as follows*:*

> *'The technique generally employed by courts in resolving factual disputes [is the following]. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail'.*

[16] It is trite that in coming to a decision one way or the other, the trier of fact must take into account all materially relevant evidence and not disregard some evidence in preference for the other without explaining why she did so.

The trial

[17] At the trial, the certain crucial facts favourable to KEL were not disproved by Monki Lethole as the party bearing the evidential and legal onus: That KEL had been in occupation of the land dating back to the 60s. KEL is reflected as the allottee in a register kept by Teyateyaneng Urban. Records in respect of allottees in Teyateyaneng area shows the Church as alottee of the disputed land and not Monki Lethole's parents. Form C which is the basis for Monki lethole's claim of title is totally at variance with the shape and size of the disputed land on the area map.

[18] In 1997 and 1998 the disputed land was developed by KEL on behalf of the Church and that the respondent offered no objection thereto. The very person that the respondent claimed to have allowed to develop the land, ML, had in the past rented the

disputed land from the Church. ML happens to be a relative of the respondent.

[19] Monki Lethole conceded at the trial (a) that his actual parents were different people from the ones he said were his parents, (b) his actual parents' home was at Ha Makoanyane and not where the disputed land is situated, (c) his actual parents never held title to the disputed land.

High Court's findings

[20] Sakoane J found in favour of the first respondent. The learned judge found that the respondent inherited the disputed land from his parents; that he obtained Form C lawfully in 1982; that KEL failed to register its certificate of lease contrary to s 11 of the land Procedure Act 1967, read with s 15 of the Deeds Registry Act 1967. That failure rendered its allocation null and void.

[21] Despite the factual matrix recorded in paras [17]-[19], Sakoane J made adverse findings of fact against KEL. Although said in the criminal context, the following dictum by Nugent J applies with equal force to a civil case:

> What must be borne in mind, however, is that the conclusion which is reached …must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'[1]

[22] The totality of the evidence received at the trial showed that it was more probable than not that KEL's claim to the land was superior to that of Monki Lethole, but for the legal requirement of registration. In fact, the conspectus of the evidence establishes on a balance of probabilities that if Monki Lethole's Form C was issued by a person duly authorised thereto, the underlying causa for its registration is fraudulent.

[23] The High Court was satisfied about two things. First that respondent had proved that the Form C evidencing his lease was valid. Secondly, that although KEL was in occupation of the land prior to Monki Lethole's acquisition of Form C and obtained a lease, KEL had failed to register the lease under the new registration regime and thus rendering it null and void.

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[1] 1999 (2) SA 79 (W) 82E; approved in *S v Van Aswegen* 2001 (2) SACR 97 at 101, para 8.

[24] It becomes necessary therefore to considered whether the High Court was correct that the 'failure' by KEL to register its lease over the disputed land under the new registration regime rendered KEL's lease invalid and thus giving Monki Lethole better title.

[25] If the High Court's finding is wrong and that in fact KEL's lease is not null and void, then it must follow that Monki Lethole's Form C is invalid and thus giving KEL better claim to title which it can still register under the new registration regime in so far as it may be necessary. The outcome of the appeal therefore depends on whether the High Court correctly found that KEL's admitted non-registration of its lease rendered it null and void.

[26] That the Church was in occupation of the disputed land prior to the coming into force of the new registration regime is not in dispute. It is also not in dispute that the Church was allocated the disputed land under customary law. The evidence also showed that the person who actually orchestrated the respondent's presence on the land had been a tenant of the Church and by that fact accepted its valid title to the land.

[27] The evidence at the trial established that Monki Lethole was dishonest about how he became entitled to the land. Such is the backdrop against which the case came to court.

[28] The appellant's appeal is not opposed but this court must nevertheless be satisfied that the High Court was wrong.

[29] In light of the observations I made in para 25 above, I will confine the remainder of the judgement to the appellant's attack against the court a quo's finding on the non-registration of KEL's lease.

[30] Adv Mohau KC attacked the court's judgement on that issue on several grounds.

[31] In the first place, he contended that the court did not invite the parties to address it on the applicability of the new registration regime. In my view, nothing should turn on that because it is a legal issue the court was bound to consider.

[32] The second point made by counsel for the appellant is that KEL's lease was not caught by the new registration regime. The argument went thus:

> 'Section 13(1) of the Land Procedure Act, 1967 instructively exempts things (including allocations) done under customary law, from being invalidated by the provisions of the Act. It is the appellant's case that the [Church] was allocated the disputed piece of land in 1884 when it established the TY mission station. Allocations done at the time were done according to customary law and would not have been evidenced by a certificate of allocation as contemplated under section 11 of the Land Procedure Act, 1967. The appellant's allocation is thus covered, and saved from invalidity, by s 13 of the Land Procedure Act, 1967.'

[33] As counsel further developed the argument, the High Court's approach has far reaching consequences. It is bound to disenfranchise scores of Basotho who held title to land under customary law prior to the coming into force of the new registration regime. In fact, I would go as far as to say that it could encourage fraudulent transactions in land: People might obtain and register leases over land well knowing that another person lives thereon and could well have a right to prior consideration.

[34] As Mohau KC submitted, when the registration regime was enacted, the legislature was aware that many Basotho held title to land under customary allocation. Parliament could not have intended to disadvantage those Basotho.

[35] Counsel submitted:

> *'If it was the intention of the Legislature to compel the registration of allocations made under customary law failing which they were to become invalid, section 15 would easily have said so. It is …trite that provisions that curtail rights have to be interpreted restrictively. ..*
>
> *The Deeds Registry Act 1967…was enacted with a view to affirming, and not detracting from rights to immoveable property. Registration of title under section 15 does just that; and in the same spirit of affirming title, subsection 15(4) while providing that failure to register a certifacte of allocation will result in it becoming null and void…goes on to empower the Registrar and the court to extend the period within which to register title. It is significant that section 15(4) does not require the extension to be made before the expiry of the three months period provided for under section 15(3).'*

[36] Mr Mohau further submitted that s 15(4) imports fairness, reasonablenes and justice and that invalidating a certificate of lease can only follow upon proper notice being given to an allottee to afford them the opportunity either to rectify the omission of registration or to make representations as to why registration had not been done within the statutory period. I agree.

[37] The High Court therefore misdirected itself in invalidating the appellant's lease in the manner that it did. I reiterate that on the evidence KEL had established on balance of probabilities that Monki Lethole had no valid causa for registration of tile resulting in Form C. On that basis alone his application should have failed.

The order

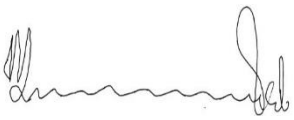
[38] I accordingly propose the following order:

1. The appeal succeeds and the judgment and order of the High Court are set aside and replaced with the following: *'The application is dismissed.'*

2. Costs are awarded to the appellant consequent upon the employment of instructing and one instructed counsel.

P T DAMASEB AJA
ACTING JUSTICE OF APPEAL

I agree:



DR P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

M CHINHENGO
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: Adv K K Mohau KC

FOR THE RESPONDENT: Adv N H Sepiriti