

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU  
59/19**

**C OF A (CIV)**

**CCT/0257/201**

**5**

In the matter between

**LESOTHO DEVELOPMENT AND CONSTRUCTION:  
COMPANY (PTY) LIMITED**

**APPELLANT**

**AND**

**LESOTHO POULTRY COOPERATIVE SOCIETY:  
RESPONDENT**

**1<sup>ST</sup>**

**GOLDING INVESTMENTS (PTY) LIMITED :**

**2<sup>ND</sup> RESPONDENT**

**CORAM: DR. MUSONDA AJA**

**DR. WESTHUIZEN AJA**

**MTSHIYA AJA**

## SUMMARY

*Land law-Innocent possessor making improvements to property-lien subsists and entitles him to compensation and fruits of the improvements until paid for proved expenses-exercise of discretion by the primary court-appellate courts are slow. to interfere nor can appellate courts pedantically circumscribe the exercise of discretion by primary courts.*

## JUDGEMENT

### **Dr. Musonda**

[1] This is an appeal against an interlocutory order granted to the respondents by the learned Judge in the court a quo on the 19<sup>th</sup> OF August, 2019, in terms of Section 16(1) Of the High Court Act.

[2] The first and second applicant approached the court a quo seeking the following orders:

1. That the normal modes and periods of service be dispensed with due to the urgency of the matter;
2. A rule nisi be issued returnable on the date and time to be determined by the Honourable Court, calling upon the Respondent to show cause if any why;

- (a). It shall not be declared that the lien that the respondent holds over Plot No. 13283-1487 Cathedral Area, Maseru be relinquished; and
- (b). That the respondent be ordered to vacate Plot No. 13283-1487, Cathedral Area, Maseru.

Alternatively,

- (c). That the rentals accruing from Plot No. 13283-1487 Cathedral Area, Maseru, be paid into the trust account of an independent Attorney, pending determination of the value of compensation due to the respondent, for the improvements done on Plot No. 13283-1487 Cathedral Area, Maseru in CCT0257/15;
- (d). That the respondent be ordered to pay costs of the application; and
- (e). that the applicants be granted such further and/or alternative relief as this honourable Court deems fit.

3. That prayer 1 operates with immediate effect as an interim relief.

[3] The Court a quo granted an order, in which it directed that the payment of rentals by the tenants to plot 13283-1487, be paid to a firm of attorneys, Harleys and Morris, in an account specified at Standard Chartered Bank, pending the valuation of the improvements and the compensation due to the appellant.

**[4] Factual matrix**

The 1<sup>st</sup> respondent is the lawful registered holder of Plot No. 13283-1487, situated in Cathedral Area Maseru. In or around 1998, the 1<sup>st</sup> respondent sublet the said property which was then developed by the appellant.

[5] Pursuant to the said lease, the appellant took occupation of the plot and made improvements thereon by renovating the structure that was already existing on the plot and extending it into the single storey building. The sublease was never registered, though it was in excess of three (3) years.

[6] The appellant placed tenants on the plot from whom he was collecting rent estimated by the 1<sup>st</sup> respondent to be Sixty Thousand Moloti (M 60,000,00) per month, which he has collected for almost two decades.

[7] In 2011, the 1<sup>st</sup> respondent appointed Advocate Makotoko, to collect rentals from the same tenants, without seeking a Court order. The appellant filed an application in the court a quo, to interdict Advocate Makotoko, which was successful before Molete J.

[8] The appellant was successful before Molete J, that he retains the plot until compensated for the improvements he had effected on the plot, pursuant to the sublease. Advocate Makotoko and the 1<sup>st</sup> respondent unsuccessfully appealed to this Court.

[9] Meanwhile, the 1<sup>st</sup> respondent executed a sublease with the 2<sup>nd</sup> respondent, which was registered, but the 2<sup>nd</sup> respondent could not take occupation as the appellant had still a lien on the property, claiming Six million Moloti (M6,000,000.00).

[10] Frustrated by the non-occupation of the premises, the 2<sup>nd</sup> respondent took out proceedings in the court a quo under Cause No. CCT/0257/15 after paying into Court as security, the sum of One Hundred Thousand Moloti (M100,000.00).

[11] To say both the applicant and the 2<sup>nd</sup> respondent plucked the figures out of air is not an unkind phrase to use, as there has been no demonstrable basis for

arriving at the figures of Six million (M6,000,000.00) and One hundred thousand Moloti (M100,000.00)

[12] The appellant has been adamant in insisting on the fact that they expended Six Million Moloti (M6,000, 000. 00). The appellant in their opposing affidavit said there was no urgency in the matter and that the value of lien needed viva voce evidence. They insisted on the right to collect rentals.

[13] The learned Judge after reading the papers and having heard both arguments, ordered that the matter proceed to trial and more significantly, ordered that the rentals with effect from 31<sup>st</sup> August, 2019, be paid to Harleys and Morris Attorneys, in a specified Standard Chartered Bank account.

It is this order, which generated this appeal.

### **Appellant's case**

[14] It was argued that the appellant, as this court found, was entitled to collect rentals in respect of the property, while exercising the said lien. The 2<sup>nd</sup> respondent was seeking to terminate the lien in favour of the applicant to enable it (2<sup>nd</sup> respondent) to take occupation of the land, pursuant to a land lease it had concluded with the alleged owners of the property, which was registered with the land Administration Authority. The appellant defended the action and pleadings were closed on the 12<sup>th</sup> of February, 2016.

[15] During the currency of the negotiations pending trial, surprisingly, the 1<sup>st</sup> and 2<sup>nd</sup> respondent, suddenly and unprocedurally filed an application alleged to be urgent. Prayers 2(a) and (b) sought for a declaration and ejectment respectively. This, it was argued, was an abuse of court process. In 2017, the parties in the trial

resolved that the appellant would withdraw the special points in *limine*. The parties explored settlement of the dispute without success.

[16] Advocate Teele KC, deprecated the Court a quo's granting of an order in terms of which, it directed that payment of rentals by tenants to plot 13283-1487 be paid to a firm of attorneys, Harley and Morris, in an account specified at Standard Chartered Bank, pending the valuation of the improvements and the compensation due to the appellant.

[17] It was strenuously argued that the orders of this Court were rescinded by the order of the court below which lacks jurisdiction to do so.

[18] The Court's discretion to release the property upon the payment of security has no application to the present matter, as the Court a quo had not determined that M100,000 is the fair amount of security against which the lien must be relinquished.

[19] This Court was urged not to decide whether the case cited, on the aspect of release of the property, retained upon payment of security is good or bad law, as that is the very case pending before the court a quo.

[20] Advocate Teel KC heavily relied on para 10 of this Court's Judgment in **Mokotoko and Another v Lesotho Development Construction (Pty) Ltd**<sup>1</sup>, in which this Court, citing Howie JA's judgment in **Committee BNP Mafeteng and others v Farooq Issa**<sup>2</sup> with whom Scott and Hurt JJA concurred said:

The remaining question is whether Issa effected the improvements as a bona fide possessor or occupier. He was at least the latter, and in either event entitled to compensation for the improvements and a lien to enforce his claim: **Rubin v Botha 1911**

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<sup>1</sup> (2013-2014) LAC 358.

<sup>2</sup> C OF A (CIV) 16/2011 Delivered on 21 October, 2011.

**AD 568, Fletcher and Fletcher v Bulawayo Waterworks Co Ltd 1915 AD 636, Kommissari's Van Binndandse (OFS) Housing v Anglo American (OFS) Housing Co Ltd 1960 (3) AS 642 (A) at 649 B-E.**

**[21] Respondents' case**

It was submitted on behalf of the respondents that grounds 1, 2 and 3, are capable of being treated as one in their context. The three grounds attack the Court a quo for granting the order as it did, for reasons that such rentals are fruits of the appellant's improvements lien as found by this court. In grounds 4, 5 and 6, the appellant is aggrieved by the Court a quo's granting of the substantive prayers. In grounds 7 and 8, the appellant alleges abuse of the court process.

[22] This Court decision in **Mokotoko** *supra* did not mean that the appellant was entitled to remain on the premises collecting rentals as fruits for as long as he wished because he has never, after the decision made attempts to have the respondents pay him his expenses so that he can vacate the premises.

[23] Advocate Setloj'oane referred this Court to a plethora of authorities on the subject. In **Pheifter v Van Wyk**<sup>3</sup>, the South African Supreme Court of Appeal stated the position thus:

The lien holder is entitled to retain possession until his enrichment claim has been met. It is an established principle of law that the owner of the property subject .to a right of retention may defeat the lien by furnishing adequate security for payment of the debt.

In **Spritz v Kesting**<sup>4</sup>, it was held that:

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<sup>3</sup> (2015) (5) AS 464 SCA at para 12.

<sup>4</sup> 1923 WID 45.

The court in exercising its discretion will have regard to what is equitable under all circumstances, bearing in mind that the owner should not be left out of his property unreasonably and on the other hand should not be given possession of his object, after getting possession to delay the claimant's recovery of expenses.

In **Sandton Square Finance (Pty) Ltd and Anor v Vigliotti and others**<sup>5</sup>, De Villiers J, citing Voet 16.2-21 with approval said:

But one who has a right of retention held liable to restore the thing to his opponent whenever the latter tenders sound security, for the refund of expenses or the payment of wages. It appears that it ought to be left to the discretion of a circumspect Judge accordingly, as it shall become clear from the circumstances either that he who ought to restore, is deliberately aiming at holding back possession of the thing too long under cover of expenses or wages, or on the other hand, that the person owing the expenses has it in mind, to recover the thing under security, and then by a lengthy and pettifogging protraction of the suit to make the following up of the expenses, wages and the like, a difficult matter for his opponent.

In **Ford v Reed**<sup>6</sup>, it was held that:

The apparent hardship of giving a lien for continuous keep in such cases as these is much mitigated if not obviated, by the value that the owner can obtain his property upon giving security according to the discretion of the court, which is to see that the owner is not kept unreasonably out of his property nor the claimant harassed by prolonged and unnecessary litigation.

[25] In **Rhode v Neil De Kock and Another**<sup>7</sup>, the Court commenting on lack of evidence to support claimed expenses had the following to say,

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<sup>5</sup> 1997 (1) SA 826 (w).

<sup>6</sup> (1922) TPD at 172 to 3.

<sup>7</sup> 45/12 [2012] LASCA 179 (29<sup>th</sup> November, 2012).



It was submitted that so far as useful expenses are concerned, the amount of compensation is limited to the amount of which the value of the property has been increased or the amount of the expenses incurred by the appellant.

It was Advocate Setloj'oanes' argument that the appellant is entitled to the actual amount of expenses it incurred, not what it says it incurred. There has to be some form of evaluation into whether those expenses are really the expenses, because one has a feeling that the amount claimed is actual used to have the appellant staying longer and enjoying the fruits of the premises. It is therefore the Court a quo to determine the exact value of the improvement.

#### [26] **The Issues**

1. What was the tenor of this Court's judgment in Motokoto's case?
2. Is the order appealed against a reversal of the Court's decision in Motokoto?
3. In granting the Order, did the learned Judge exercise his discretion judiciously?
4. When does a lien terminate?

#### [27] **Consideration of the Appeal**

This Court said in **Motokoto** that:

*A bona fide* possessor is entitled to retain fruits gathered before *litis contestation* (**Rademeyer v Rademeyer** 1967 (2) SA 702 (C) at 706 F-707C). He has to deduct from the compensation to which he is entitled, the value of fruits derived from the property occupied (**Fletcher and Fletcher v Bulawayo Waterworks Co Ltd** 1915 AD 636 at 651). Fruits so-called 'civil fruits' i.e, rentals received from letting out the property (**Barnett and Others v Rudman and Another** 1934 AD 203 at 210). Fruits derived

from the improvements made by him cannot be set off against a claim for compensation,(  
**Fletcher** case at 651) Para. 10.

[28] This court went on and said:

Applying that decision, Molete J held that the respondent was entitled to compensation for the improvements he had effected to the 2<sup>nd</sup> appellant's property a lien to enforce his claim. As long as it had the lien, it was entitled to possession of the property and accordingly to the relief it sought.

[29] The learned Judge in the Court a quo's disposition is that, the appellant is entitled to compensation and the fruits of his improvements. Any suggestion to the contrary as can be discerned from the appellant's arguments is erroneous. The learned Judge is not dealing with the right of the appellant to recover expenses expended on improvements and the fruits of their improvements, but with the quantum. When the total amount is due, either party has been paid a "Release Lien Document" should be generated.

[30] The exercise of discretion by the Court to make interim orders has two limbs;

(i.) The court has unlimited power to make interim orders which are expedient to do justice to the case; and

(ii.) The appellate Court will be slow to interfere with the exercise of discretion by the lower court.

In **Wilson and others v Ministry of state for Trade and Industry**, the House of Lords held that;

The flexible exclusion of a judicial remedy by preventing the court from doing what is just in the circumstances of the case, is disproportionate to the legitimate policy objectives.

[31] The principles underlying the appellate Court's review of discretionary exercise of discretion were laid down in the Australian case of **House v King**<sup>8</sup>, where it was said that:

It is not that the Judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed, and the appellate court may exercise its own discretion in substitution for his, if it has materials for doing so. It may not appear how the primary Judge has reached the result embodied in his order, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer in some way, that there has been a failure to properly exercise the discretion which the law imposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground, that a substantial wrong has in fact occurred.

[32] The learned judge has unrivalled familiarity of the matter, as he first handled it. He determined that the appellant was entitled to compensation and rentals, as fruits of the appellant's improving the property. This Court affirmed that decision in the **Makotoko** case *supra*, that was more than seven (7) years ago. Circumstances have substantially changed, as the respondents have paid security in the sum of One Hundred Thousand Moloti (M100,000). The position is not clear as to who is indebted to the other. This is a triable issue, as it is at the heart of settling this perplexing litigation.

[33] Both parties have plucked their figures from air, the Six million Moloti (M 6,000,000.00) and the one hundred thousand Moloti (M100,000) have no basis i.e. bill of quantities (BQ's). The learned Judge has prudently ordered that the rentals

<sup>8</sup>(1936) 55 CIR 499 at pp 504-505.

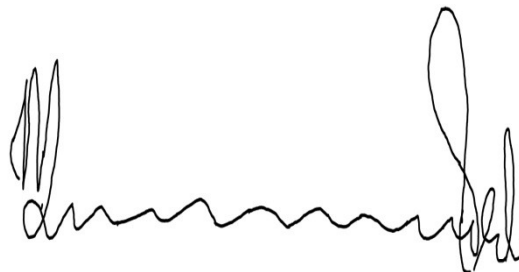
be paid to a third party and after trial the successful party will have his money intact. To interfere with such exercise of discretion, the appellate Court will be pedantically circumscribing the exercise of discretionary power of primary courts.

[34] We do not agree that given the changed circumstances and the appellant's collection of rent for seven (7) years, the same Judge who green-lighted the collection of rent by the appellant can without good reason undermine his decision and that of this Court. There was security paid, which may be adequate or inadequate, that is an issue before him for determination.

[35] The lien is a charge which is dischargeable after payment of the sums due and cannot remain in perpetuity. We are indebted to Advocate Setloj'oane for the industrious research and his forensic brilliance in arguing for the respondents.

**[36] Conclusion**

1. The appeal is dismissed with costs.
2. The matter is remitted back to the High Court for the continuation of the trial.

A handwritten signature in black ink, appearing to read 'Dr. Phillip Musonda'. The signature is fluid and cursive, with a prominent loop at the end.

**Dr. PHILLIP MUSONDA**

ACTING JUSTICE OF APPEAL

I agree

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Dr. JOHANN VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

I agree

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NOVEMBER MTSHIYA

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT : Advocate M.E. Teele KC

FOR THE RESPONDENTS: Advocate R. D. Setlojoane