CIV/APN/340/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

JOY TO THE WORLD	**APPLICANT**
AND	
NEO MALEFANE	**1ST RESPONDENT**
DEPUTY SHERIFF - MOHLABANI	**2ND RESPONDENT**
DEPUTY SHERIFF - MOSHEA	**3RD RESPONDENT**
REGISTRAR OF THE HIGH COURT	**4TH RESPONDENT**
THABO MPHANA	**5TH RESPONDENT**

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 12th day of February 1996

This is an ex-parte application brought on behalf of the Applicant society. In the prayers two main objectives become apparent. Firstly, the first four Respondents must show cause why they should not be refrained and or interdicted from enforcing and executing a Writ in CIV/T/266/88 ISSUED AGAINST - Thabo Mphana pursuant to the judgment entered against him in the said CIV/T/266/88. Secondly, the four Respondents must show cause why they should not be directed to restore to this Applicant the possession of that unnumbered residential site

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handed to the respondents as a result of the judgment and the warrant of execution in CIV/T/266/88.

This is one of those cases that have been in this court for many years. This matter in different forms has been handled by numerous hands within these walls. Some matters are brought to this court for resolutions of the problems and for the purpose of obtaining a relief from those problems. This is the main purpose of bringing cases to court. There are unfortunately mishaps, and delays which cause some disruptions in the due process of litigation. In some matters, the party or parties are determined, not only to come to court, but to come to court and stay. Matters like this one, an effort is being made to find a permanent residency for it within the walls of this court. That is very bad news.

On 5th April 1988 the Plaintiff who is the 1st Respondent herein issued out summons for ejectment or eviction of Defendant/5th Respondent herein. For sometime even though Appearance to Defend in that case was entered, the Defendant/5th Respondent did nothing. Notice to file plea was issued against the Defendant who was apparently content with his inactivity. The other puzzling steps were taken on behalf of Plaintiff in an attempt to bring the matter to a finality. Eventually on 11th September 1989 well over one and half years later the Default Judgment was entered against the Defendant/5th Respondent herein.

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Previously in 1984 there has been a similar case at the magistrate court in Leribe. 5th Respondent herein was the Defendant once again in that case. The Magistrate's court granted an absolution from the instance on the grounds that neither the Plaintiff nor the Defendant had a lawful claim of title to the very same unnumbered site the subject matter in dispute in this application. The Plaintiff in the magistrate's court was the son of one of the Malefane girls whose mother was the person to whom the site was lawfully allocated according to the records of the area chief and according to the judgment of this court in CIV/T/266/88.

According to the allegations made in the Founding Affidavit the Applicant herein, became aware of the Default Judgment entered against Defendant/5th Respondent herein as early as 1989. That Default Judgment was rescinded on 17th May 1990. The court by setting aside that judgment opened an opportunity for Applicant herein to take steps to protect its rights if it had any by then.

It is significant to note that as early as 1984 at the Magistrate's court in Leribe, the 5th Respondent became aware that his claim of title to this unnumbered residential site at Hlotse - Leribe, cannot stand the test in court. What did he do? Did he take steps to rectify the defects of his title? May be, may be not. The problem may have been too much for him. He

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needed a relief. He unloaded it to someone else. The Magistrate's court when it threw out both claimants, it was made clear to both of them that none had a lawful claim or title to that site. 5th Respondent herein must have been aware that he had no title and therefore he could pass no title to anyone.

According to the averments in the Founding Affidavit deposed to by one ROHINI KNIGHT described as the chairman of the Applicant society a Deed of Sale of the very same unnumbered site at Hlotse Leribe was entered into on 12th February 1988 between Applicant and 5th Respondent herein.

The deponent of the Applicant's Founding Affidavit goes on to say that the office bearers of the Applicant Society were shown title Deed in the name of TEFO MPHANA, the father of the 5th Respondent. Despite clearly observing that the 5th Respondent does not appear as the holder of the title, it was accepted on behalf of the Applicant Society that 5th Respondent is the heir and successor to the title of his father - TEFO MPHANA.

To subject the bona fide beliefs held on behalf the Applicant Society to further strain the deponent of the Founding Affidavit, alleged that there is a further stipulation in that Deed of Sale, to the effect that the sale is conditional to the fact that Ministerial consent is obtained as required by law.

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Despite this condition the Applicant took possession and occupation of the site. Not only that, the Applicant went on to embark on new developments on the site (if at all this is correct there is no proof - nor value of such development.)

In 1989 a Deputy Sheriff came to evict the Society from the site. Applicant and its office bearers became aware then that 1st Respondent has succeeded on an action to evict 5th Respondent from the occupation and possession of the said site. Steps were immediately taken according to the deponent of the Founding Affidavit of this Applicant Society to safeguard and protect the Society's interests.

Applicant thought it prudent and correctly so to instruct the attorney to make an application for intervention so that it could protect its interests in CIV/T/266/88. The attorneys so instructed were those acting for 5th Respondent. The Attorney so instructed did take steps. The steps taken were the application for Rescission of Judgement in CIV/T/266/88 in pursuant of which the Writ evicting Applicant herein from the site was issued. May be, in the wisdom of the said attorney, the action taken by them was to protect the interest of this applicant according to the instruction as it will become apparent later. It is further averred on behalf of the applicant that assurances that Application for intervention in CIV/T/266/88 will be made were made by the attorneys concerned.

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Affidavit was sworn to by the same deponent on 28th May 1990 for that purpose. No application for intervention was ever made in CIV/T/266/88 on behalf of applicant herein. Since the Writ for the eviction of the applicant had been frustrated, by rescission of default judgement in CIV/T/266/88, weeks, months and years went by the status quo being maintained. The law and its enforcement agencies had gone into deep sleep after the Default Judgment had been rescinded on 17th May 1990. Nothing was done for almost five years. In 1995 it is only then that the Applicant chairman learned the senior member of the firm of attorneys engaged to protect the interests of the applicant herein have left the office and this country. The Chairman of the Applicant society did not wake up on his own. He was prompted by the service upon the society of the warrant of execution issued in pursuant to the judgment obtained by the Plaintiff/1st Respondent for the second time. That is why he had to look for his attorneys. Before the chairman of the Applicant Society became aware of the absence of their attorney from the office and the country, the 1st Respondent had once again obtained a judgment against the 5th Respondent in that CIV/T/266/88 where Applicant according to its chairman should have been joined.

There was a trial. Plaintiff who is now 1st Respondent had called 4 witnesses. Defendant/5th Respondent herein appeared alone and was the only witness who testified on behalf of the

defendant. He did not disclose in that trial that he has passed the title in this property to someone else. He defendant the case as the owner-occupier of the property. The attempt to try to change defendants now must fail. The Plaintiff cannot be frustrated by change of the jockeys of the same horse. Defendant/5th Respondent had no title. The Applicant herein derived no title from Defendant/5th Respondent. There is no ground on which to stand against the claim of 1st Respondent herein.

It must be noted that the chairman of the Applicant Society engaged 5th Respondent's attorneys to act for the Applicant as legal representative of the Applicant. This is the firm of attorneys which had the mandate to act on behalf of this Applicant Society. It is averred that this firm of attorneys had prepared papers for the purposes of filing with this court an application for leave for the applicant herein to intervene in CIV/T/266/88. Those papers remained in the Applicant's file in its attorney's office. They were never delivered. The reasons given varies. Firstly it was decided the Defendant/5th Respondent should fight the case to its final conclusion alone. Secondly, in 1988 when the Deed of Sale was entered into between Defendant/5th Respondent and the Applicant herein the Applicant took possession, occupation and ownership of that property. The occupier should have been the person to sue. Ignorance on the part of the 1st Respondent as regards who at any time is in

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possession of her property, should not help her claim to evict the person found on the premises at the time the Writ for eviction is being served. The defective title cannot be lawfully passed. It is in material how many people claim to have lawfully purchased this property during the period of this dispute. Applicant cannot claim separate title from that of 5th Respondent from whom he claimed to have acquired this property.

The Rules of Court give authority to any person entitled to join as a plaintiff or liable to be joined as a defendant, to give Notice to the other parties, at any stage of the proceedings, and apply for leave to intervene as a defendant in this case. This applicant was aware that its interest will be affected and instructed the attorneys to ~~making~~ make the necessary papers for the purpose of effecting its desire to intervene in CIV/T/266/88.

Now that the Applicant Society through its chairman had instructed its own attorneys to take legal steps to protect its interests and its attorneys failed to act as instructed, who is to be penalised for their failure? No one but themselves. The 1st Respondent should not suffer any further prejudices for the negligence of the Applicant and its attorneys. This litigation in this matter has gone on for too long. The patience of Plaintiff/1st Respondent is being unduly taxed. It is her endurance which is now on trial.

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It is correct as advocate Teele urged this court that in the ejectment and/or eviction proceedings the Plaintiff who is the 1st Respondent herein should have alleged and proved ownership of the site CHETTY v NAIDOO 1974 (3) SA 13 at 20. This the 1st Respondent did, that is why she succeeded in that Action. In the second place 1st Respondent should have alleged and proved that the Defendant was in possession of the site at the time the summons were issued. The 5th Respondent who was defendant in that Action claimed he was in lawful possession. In his evidence before court at the trial he told the court about the legal Action instituted to evict him from that site, and concluded by claiming that the absolution from the instance that was entered by the Magistrate's court left him in possession in 1984. 1st Respondent correctly issued the summons for eviction against Defendant/5th Respondent herein in 1988. 5th Respondent who was defendant in CIV/T/266/88 claimed in that trial that he was left in possession of that property.

In this application an interim order was granted. This judgment is for the confirmation or discharge of that rule. In an interdict application the interdict order is granted pending action provided the Applicant establishes in his Application

(a) a clear right on his part.

(b) An injury actually committed or a well-founded apprehension that an injury will be committed by the respondents.

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(c) That there is no other remedy open to the Applicant which will afford adequate protection from mischief which is being done or threatened SETLOGELO V SETLOGELO 1914 AD 221.

HAS the Applicant herein any clear right? The Applicant's claim is based on the deed of sale they entered into between itself and 5th Respondent. The copy of the said Deed of Sale Agreement is annexed. The documents evidencing the title of the seller clearly show that title holder as someone else not the purported seller. There is a stipulation in the Agreement that the sale is conditional on the ministerial consent being secure for the transfer of title from the owner to the purported seller. Before 5th Respondent had acquired legal title to the said site, he had no title or right to sell in that site. The seller may have spoken words of Angels but at that stage or any time, he had no title or right to sell that site. This is apparent on the face of the documents used and relied on for the so called a Deed of Sale Agreement. On this point alone, lack of clear right, this interim order to interdict the respondents must be discharged.

On the question of injury actual or about to be committed, it is clear that the action to be taken by the respondents is the lawful enforcement of the judgment of the court of law and the writ issued in pursuant there to. What injury will the Applicant

suffer? Damages in the sum of M110,000. It was not denied that these damages if at all were incurred the Applicant incurred these expenses well aware that 5th Respondent's title purportedly sold to him was defective. The parties, this Applicant and 5th Respondent had one common Attorney who was engaged and instructed by them both to protect their interests. The defects in the 5th Respondent's title were a matter of common knowledge to them. They had hope that 5th Respondent will win the Action. They were wrong. He failed. What they failed to achieve by lawful means in court, they claimed and took by themselves by making or alleging they made improvements on that site. That should not be allowed.

In the Magistrate court in 1984 when Defendant's and another person's claims were thrown out of court, defendant became well aware that his claim of title to that site cannot stand in court. In 1989 when the judgment was obtained against him at the High Court this was the second time. Shouldn't he have accepted that his title is not good at all? Now the Applicant asked for this order pending the appeal. This is the second time judgment is entered against the 5th Respondent who at no time had the right to give the title because he never held such a title in the first place. This court does not see it fit to protect any party against the injury, if any, brought about by the enforcement of the judgment. The Applicant is not a party to the Appeal which it is claimed will give him a right. I do not

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believe Applicant has a chance of success in an Appeal where it is not a party.

On the question of the availability of adequate protection by any other means, this court has found that the Attorney engaged by Applicant to apply for leave to court for Applicant herein to be joined as co-defendant in CIV/T/266/88 negligent, in their action and decision to refrain from applying for Applicant's intervention. The Applicant has a right to sue his attorneys and recover from them the damages occasioned by their negligence. Further the Applicant may apply to cancel the purported Deed of Sale Agreement on the grounds that the seller had no right or title to sell in that property which he purportedly sold to him. I need not list all the remedies available to the Applicant herein. Those few will suffice.

The lengthy and costly litigation which the 1st Respondent herein has been involved in has become a punishment. The maxim "Justice delayed is justice denied" becomes a gross-understatement of the actual suffering imposed upon the party which is denied its rights for as long as this one was denied such right. This court extended indulgences to 5th Respondent at the time he demonstrated lack of interest in the matter by keeping out of touch with his attorneys whose communication never arrived to him up until they withdrew from acting on his behalf. He changed and engaged another firm of attorneys jointly with

Applicant herein. These tactics caused undue delays in this matter. The Applicant herein having been aware of the problems of the seller's defective title cannot be allowed by this court to cause further undue delays. Although it is claimed that there are grounds of Appeal annexed, none appear on this application. What chances of success the purported seller to this Applicant has in that appeal are not mentioned in this application. It is suggested that 1st Respondent start the Action afresh and issue out summons against this applicant. That will be part of the continuing abuse of due process of law. These parties are determined to cause these unreasonable delays to wear out the 1st Respondent. Especially that now she is to continue the same litigation of her title in the same site but this time with a new party which was almost at all times aware of the proceedings but decided not to take part but to claim now to be allowed to start the matter ab initio. That cannot be allowed.

The rule is discharged with costs.

K.J. GUNI

JUDGE

For the Applicant: Mr. Mathafeng

For the Respondents: Mr. Mafantiri