CIV/APN/376/96

IN THE HIGH COURT OF LESOTHO

In the matter between

STELLA KAKA	**APPLICANT**

and

LESOTHO BANK	**1ST RESPONDENT**
JOHN KHOTLE	**2ND RESPONDENT**
COMMISSIONER OF LANDS	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**
TŠELISO DONALD KAKA	**5TH RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

On the 14th day of April, 1997.

On the 17th October, 1996 the Applicant filed an urgent application with this Honourable Court praying for an order against the first four respondents in the following terms:-

"1. The rules of Court as to forms and service be dispensed with on account of the urgency of the matter.

2. A Rule Nisi shall not be issued calling upon Respondents to show cause why.

(a) The deed of sale between First and Second Respondent pertaining to property situate at Maseru East plot number 13281-312 shall not be declared nul (sic) and void and of no effect.

(b) First Respondent shall not be ordered to give Applicant first option to buy back the property referred to in (a) above.

© The Commissioner of Lands shall not be restrained from processing the application for ministerial consent for transfer of plot 13281-312 pending the outcome of these proceedings.

(d) The Registrar of Deeds shall not be restrained from registering the transfer of the above mentioned property in favour of the 2nd Respondent.

(e) First and Second Respondent shall not pay costs in the event of opposing this Application.

(f) Applicant shall not be given further and/or alternative relief.

3. THAT prayers 1 and 2(c) operate as InterimOrder with immediate effect."

On the 18th October 1996 I duly granted the Rule Nisi as prayed but mero motu ordered that Tšeliso Donald Kaka be joined as 5th Respondent in as much as

he clearly had a direct and substantial interest in the matter. It was his house that was the subject matter of the mortgage bond in question.

After several extensions of the Rule the matter was finally argued before me on 14th March 1997.

I turn then to deal with the facts of the case.

It is common cause that the Applicant and 5th Respondent were husband and wife until this Honourable Court granted their divorce on the 2nd November 1992 in case No. CIV/T/442/92 thereof.

The following scenario is further common cause in the matter:

On the 17th November, 1986 the 5th Respondent duly executed and registered a "Reducible Mortgage Bond" hypothecating immovable property in favour of Lesotho Building Finance Corporation which has now been taken over by the 1st Respondent. The subject matter of the said mortgage bond was 5th Respondent's house referred to in prayer 1(a) of the Notice of Motion namely plot number 13281-312 situated at Maseru East. As against this mortgage bond the 1st Respondent loaned the sum of M51,000-00 to the 5th Respondent.

At the time the marriage between Applicant and 5th Respondent was terminated by a decree of divorce on 2nd November, 1992 as aforesaid the parties annexed a Deed of Settlement to the divorce order to the effect that their aforesaid property would be transferred to the two minor children born of the marriage and that custody of the minor children be awarded to the 5th Respondent. The said

Deed of Settlement was duly made an order of court. The said minor children are still living with the 5th Respondent. I should mention that notwithstanding the fact that the said mortgage bond was still in effect at the time of the divorce between Applicant and 5th Respondent no attempt was made to have the bond cancelled nor was the consent of Lesotho Building Finance Corporation or 1st Respondent sought in the matter. I shall return to this aspect later.

In certain case number CIV/T/64/96 the 1st Respondent sued the 5th Respondent for the amount owing on the aforesaid mortgage bond which amount had by then escalated to M102,330.28. It also prayed for an order declaring that the said property specially mortgaged by the latter under the Deed of Hypothecation thereof be declared executable.

The 5th Respondent's response to the claim by the 1st Respondent was an unequivocal consent to judgment in the following terms:-

"Consent to Judgment

I, the undersigned

DONALD TŠELISO KAKA

I am an adult Mosotho male of Stadium Area, the Defendant in the above mentioned matter and I admit I am liable to the Plaintiff as claimed in the summons or in the amount of M102,330.28 and costs to date and I consent to judgment accordingly.

Dated at Maseru this 16th day of February 1996.

Signed: Kaka

Defendant"

Judgment was accordingly granted by consent on the 15th day of April 1996.

It is significant that the Applicant does not challenge the validity of the bond in the matter. On the contrary she concedes that the 1st Respondent is indeed entitled to recover the money owing to it.

She submits however that she "ought to have been given the first option to buy the property" in question. Apparently this is in reference to the fact that following a writ of execution issued by 1st Respondent against the 5th Respondent in the matter the property in question was sold by 1st Respondent by private treaty to the 2nd Respondent with the express written consent of the 5th Respondent in the following words:-

"M.T. Matsau & Co.
8th Floor Lesotho Bank Tower
Kingsway
Maseru

Dear Sir,

Re: Lesotho Bank/Myself

Please note that I have agreed with Mr.J. Khotle on the purchase price of the house in Maseru East as R180,000 (one hundred and eighty thousand Rand only)

Yours faithfully

Signed: T.D. Kaka"

Although this letter is undated it nevertheless bears the "Received" date stamp of 18th September 1996.

The Applicant's case as I understand it is based on two (2) legs namely:

(1) that she is the co-owner of the property in question in as much as her marriage to the 5th Respondent was one in community of property there having been no division of property as yet;

(2) that the property in question is the home of the minor children of the marriage by virtue of the aforesaid Deed of Settlement at the dissolution of the marriage.

It proves convenient at this stage therefore to review the legal position in the matter particularly with regard to mortgage bonds. In this regard I shall bear in mind the principles of special mortgages as defined by Wille in the Law of Mortgage and Pledge in South Africa: 2nd edition. The learned author states as follows at page 107:-

"The effect of a special mortgage of immovable property, duly executed and registered, is that it affects the property itself so that it passes to any alienee subject to the mortgage, whether the alienee acquired the property by an onerous or by a lucrative title, and whether he was aware of the mortgage or not. It follows that as long as a duly registered special mortgage bond is in existence over immovable property, such property is subject to the bond, and no alienation of the property can deprive the mortgagee of his mortgage."

Gibson: South African Mercantile & Company Law: 6th Ed at p 621 defines mortgage as a real right which a creditor has over the property of his debtor in order to secure performance of the obligation. On this test therefore I find that the 1st Respondent has a real right over the property in question by virtue of the aforesaid mortgage bond. By the same token I find that until the bond has been cancelled both the Applicant and the 5th Respondent have no right to the property other than the balance of the proceeds of the sale of the property in question. Accordingly the Applicant's remedy lies against the 5th Respondent only as regards the balance of the sale. This disposes of the first leg of the Applicant's contention.

I deal now with the Applicant's contention that the property in question is the home of the minor children of the marriage by virtue of the Deed of Settlement at the dissolution of the marriage.

It is common cause however that at the time when the said Deed of Settlement was made an order of court the mortgage bond in question was still in effect and that the consent of the 1st Respondent was neither sought nor obtained. I find that this Deed of Settlement in effect amounted to a further burden or an

encumbrance of the mortgaged property in contravention of Clause 20 of the mortgage bond which reads thus:-

> "The mortgagor/s shall not pass any further bonds on the mortgaged property nor further burden or encumber the mortgaged property in any way without the written consent of the corporation."

In United Building Society Ltd and Another NO v Du Plessis 1990 (3) S.A. 75 Wulfsohn AJ stated the following proposition at p 79:-

> "---if the property be both mortgaged and subject to the usufruct, the debtor could not transfer the property unless the mortgage bond be cancelled."

With respect, I entirely agree.

See also Wille: The Law of Mortgage and Pledge in South Africa at p 107 (supra).

In the circumstances therefore I find that the aforesaid Deed of Settlement cannot stand as against the mortgage bond in question.

In any event, following the law of priority in real rights as propounded by De Villiers CJ in Wiber v Mahodini (1904) S.C. 645 the mortgage bond passed in favour of the 1st Respondent must be admitted to rank as a preferent over any rights that the Applicant and the minor children may have. It is the duty of the court therefore to protect the former from being prejudiced by the latter.

See United Building Society Ltd and Another NO v Du Plessis (supra).

Mrs. Kotelo for the Applicant has made an impassioned plea to this court to consider the interests of the minor children in the matter. I do not think however that sympathies and emotions have any part to play in a matter such as this. In any event I am not persuaded that the said minor children have no alternative accomodation. As earlier stated they are living with their father namely the 5th Respondent who is the custodian parent in terms of the said Deed of Settlement. He has not complained that the children have no accomodation and this is a factor which this court cannot simply ignore.

As earlier stated the Applicant seeks to persuade this court to order the 1st Respondent to give her "first option to buy back the property.... on behalf of her minor children." Well apart from the fact that, as earlier stated, this court is bound to give effect to the aforesaid preferent mortgage bond in favour of the 1st Respondent, the applicant's application has come too belatedly having regard to the long history of the matter. As earlier stated the debt has been outstanding since 1986 which is more than ten (10) years now. There is no evidence that the Applicant has ever paid any portion of the debt for all this period to date. Nor is there evidence that she is prepared to match or outbid the 2nd Respondent in the offer he has made to the 1st Respondent namely M180,000-00 which is far more than the mortgage debt itself. In the circumstances I consider therefore that for me to accede to her request would be unjust and prejudicial to the 1st Respondent and would also further delay the finality in the matter that has been outstanding for so long already.

It follows from the aforegoing that the Applicant is not entitled to any of the

relief sought by her in the Notice of Motion.

In the result therefore the Rule is discharged and the application dismissed with costs.

M.M. Ramodibedi
JUDGE
14th day of April 1997

For Applicant: Mrs. Kotelo
For Respondent: Mr. Matsau