CIV/APN/310/96

IN THE HIGH COURT OF LESOTHO

In the matter between

THABO LETSIE **APPLICANT**

and

MAFONYOKO LETSIE **1ST RESPONDENT**

RAFIC ISSA **2ND RESPONDENT**

JUDGMENT

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

On the 9th Day of June 1997.

On the 27th August 1996 the Applicant filed with this Honourable Court a Notice of Motion seeking an order in the following terms:-

"1. Settling (sic) aside the purported sale by the 1st Respondent to the 2nd Respondent of business premises situate on a certain numbered site at Ha Motjoka, Teyateyaneng, in the Berea district, the property of the Defendant (sic) registered in the

Deeds Registry Office, Maseru under number 5921 on the 11th July, 1968.

2. Interdicting the 2nd Respondent from letting, collecting rent from tenants in the said premises or interfering in any manner whatsoever with applicant's rights of ownership of the same save by due process of law.

3. Setting aside any agreement of lease that may have been entered into between the 1st and 2nd Respondent with respect to the said premises or part thereof and ejecting the 2nd Respondent therefrom.

4. Granting the Applicant the costs of this Application against the Respondents jointly and severally."

The application is not only opposed by both respondents but the First Respondent has in fact filed a counter application in the following terms:-

"1. Interdicting and restraining the Respondent from interfering in any way whatsoever with the 1st Applicant's occupation of certain unnumbered site Ha Motjoka, Teyateyaneng, and with the tenants occupying the premises, pending the outcome of an action the 1st Applicant intends to institute against the Respondent to set aside title documentation held by the respondent, and declaring the 1st Applicant the lawful owner of the site referred to herein.

2, Authorising the 1st Applicant to collect rental in respect of all tenants occupying the premises referred to in paragraph 1 above.

3. Directing that the Respondent pay the costs of this Application.

4. Further and/or alternative relief."

The matter was argued before me on the 19th May 1997 and after hearing submissions from both counsel in the matter I duly reserved judgment to today.

The Applicant and the First Respondent are father and son. First Respondent is the father while the Applicant is the son. The dispute between them concerns a certain residential side at Ha Motjoka, Teyateyaneng in Berea district.

It is common cause that the disputed site was duly registered in the Deeds Registry Office in the name of the Applicant Thabo Zakaria Letsie on the 11th day of July 1968. This notwithstanding though the Respondents deny that the Applicant is the lawful owner of the site in question.

In Matšeliso Mbagamthi v Buta Phalatsi C of A (Civ) No.7 of 1982 Goldin JA had this to say:

"The Respondent being the registered owner of the land an onus rests upon the Appellant to rebut the presumption of respondent's rights of ownership."

I respectfully agree.

See also Khalaki Sello v Pitso Pitso and Another CIV/A/1/95 (unreported).

For his part the Respondent relies upon an affidavit Annexture "TZL2" sworn to by one Michael Liketso Masupha on the 2nd day of March 1984. Mr. Buys for the Respondent submits that this affidavit is a form C evidencing Respondent's allocation of the disputed site. I do not agree and in this respect it is necessary to examine the provisions of Sections 5 (5) and 17 of the Land Act 1979 as amended in so far as they relate to form Cs.

Section 5 (5) relates to allocations of land in respect of rural areas and it provides as follows:

> "Where a decision is taken in respect of a residential allocation of land under Part II of this Act, the allocating authority shall issue a certificate of allocation (Form CC 2 in the Third Schedule)."

Section 17 relates to allocations of land in respect of urban areas and it reads:

> "The chairman of the allocating authority which grants title to land shall issue or cause to be issued to the allottee a certificate which shall be either in Form "C1" or "C2" or "CC2" in the third schedule as appropriate."

The form Cs appearing in the Third Schedule to the Land Act 1979 as amended significantly bear the following words:

"Certificate of allocation

This is to certify that .....of ..... has been granted an allocation of land which allows the allotee.....to use and occupy the land known as .....and situated at ....."

On the other hand Annexture "TZL2" is not a certificate but clearly an affidavit bearing the following words:

"THE LAND ACT 1979

Section 29 (1) © (vi)

A F F I D A V I T

I, the undersigned

Michael Liketso Masupha

.....

do hereby make oath and say that:-

1. I am the Town Clerk for the urban area of Teyateyaneng and as such I am a member of the Teyateyaneng Urban Land Committee.
2. I made a thorough investigation regarding an numbered site 368 situated at Ha Motjoka Teyateyaneng Urban area and my findings are that this unnumbered site was lawfully allocated to Mafonyoko Letsie who now occupies it.
3. I make this affidavit pursuant to section 29 (1) © (vi) of the Land Act 1979.

Dated at Teyateyaneng this 2nd day of March 1984.

Deponent (signed)

Signed and sworn to before me this 2nd day of March 1984 with the deponent having acknowledged that he understands the contents of this affidavit.

(SIGNED)

COMMISSIONER OF OATHS."

I am satisfied that Annexture "TZL2" is not a Form C nor is it a certificate of allocation as contemplated in either Section 5 (5) or Section 17 of the Land Act 1979 as amended.

Then what is the effect of the affidavit Annexture "TZL2"? To answer this question it is necessary to examine the provisions of Section 29 (1) © (vi) on which this affidavit is based. That section provides as follows:

29. (1) Whenever a person to whom section 28 (1) or (3) applies is desirous of granting or creating any interest in the land held by him or whenever Section 30 or 31 applies to that person he shall apply to the Commissioner for the issue of a lease and shall produce with his application:-

(a) .....

(b) .....

© any one of the following documents :-

(vi) any other official document evidencing that the applicant is in lawful occupation of the land."

It is clear to me therefore that the Section upon which "TZL2" was based does not even authorise an affidavit. It would perhaps be understandable if "TZL2" was based on subsection (iv) of Section 29 which reads as follows:-

"(iv) an affidavit by the Chief or other proper authority that the applicant lawfully uses or occupies the land."

It is significant however that subsection (iv) does not use the words "has been granted an allocation of land" as the certificate of allocation namely a form C does. This is because Section 29 presupposes a proper allocation of land. In other words the Section cannot be resorted to where there has been no allocation of land. That is precisely the reason why Section 29 is read with Section 28 (1) or (3). It is therefore important to examine the latter.

Section 28 (1) or (3) provides :-

"28. Titles to land in urban areas, other than land predominantly used for agricultural purposes, lawfully held by any person on the date of commencement of this Act shall be deemed to be

converted into leases.

(3) Titles to land in rural areas used solely for residential purposes lawfully held by any person at the date of commencement of this Act shall be deemed to be converted into leases."

The use of the words "title" and "lawfully held" have left me in no doubt that a lawful allocation of land must first be proved before an affidavit can be resorted to.

In any event it is clear to me that the deponent in Annexture "TZL2" is relying on hearsay. This is so because he specifically says "I made a thorough investigation regarding an (sic) numbered site 368 situated at Ha Motjoka, Teyateyaneng urban area and my findings are that this unnumbered site was allocated to Mafonyoko Letsie who now occupies it." Well nothing can be clearer that the deponent is testifying to what he was told by others in his "investigations." He is not relying on personal knowledge nor does he make a token averment that the matter is within his personal knowledge as such. He does not even rely on any documents at all.

In the circumstances I have come to the conclusion that the affidavit Annexture "TZL2" is not only inadmissible as hearsay but is also not a form C nor is it a document evidencing title to land.

I have also taken into account the fact that the First Respondent does not allege anywhere in his opposing affidavit that he was ever lawfully allocated the disputed site in question. He merely makes a bare unsubstantiated allegation that

he is the owner thereof. He then claims that there is a dispute of fact. I do not think however that there is a genuine, bona fide dispute of fact here. As I see it the First Respondent has not only failed to prove that he was allocated the site in question but he has also failed dismally to rebut the presumption of the Applicant's rights of ownership flowing from his Title Deed as aforesaid.

In fairness to Mr. Buys for the Respondents he conceded that Applicant has made out a prima facie case for ownership based on the Title Deed in question and that consequently the Applicant has established a clear right. The concession was properly made in the circumstances of the case.

Mr.Buys contends however that the Applicant has not shown that the First Respondent was intending to sell the disputed site to the Second Respondent and that it was not shown that the Applicant had no alternative remedy. He submitted therefore that the application should be dismissed.

It seems to me that Mr. Buys is trying to base his submissions on the authority of Setlogelo v Setlogelo 1914 AD in which Innes JA stated the requirements for an interdict as follows:

(a) a clear right

(b) injury actually committed or reasonably apprehended and

© the absence of similar protection by any other ordinary remedy.

In my view these requirements were never meant to be considered in isolation. They certainly interact and must therefore be considered cumulatively in the context of each particular case. Moreover it must always be remembered that

the remedy for interdict is discretionary although of course the court must exercise its discretion judicially and not arbitrarily or capriciously.

I proceed then to examine the facts of the matter before me with a view to determining whether the Applicant has made out a case for an interdict. In doing so the court must look at the case as a whole.

In paragraph 8.1 of his founding affidavit the Applicant states as follows:

> "8.1 During about June, 1996, I received a report as a result of which I went to Teyateyaneng and ascertained that 1st Respondent had purported to sell the said immovable property to 2nd Respondent."

Paragraphs 9.1 and 9.2 of the Applicant's founding affidavit are also significant and they merit repetition here. The Applicant states therein:

> "9.1. I respectfully submit that the purported sale and or transfer of the said immovable property by the 1st Respondent is invalid, void and of no effect and that 1st Respondent's conduct in this regard has been actuated by malice, spite and a desire to have his own back at me for having refused to allow him to carry on an adulterous relationship before my sight and that of my children.
>
> 9.2. I respectfully submit further that the said purported sale is nothing but the result of collusion between the Respondents and

> that 2nd Respondent has, in the process, acted in bad faith as he is fully aware of the fact that the property in question is mine and not that of the 1st Respondent."

The 1st Respondent's reply to this allegation appears in paragraph 17 of his opposing affidavit in which he states:

> "17
>
> I draw the Honourable Court's attention to the fact that we specifically agreed that the aspect of ownership of the site would firstly be contested in Court before the parties took any action either to claim ownership to the site or to convert the Form C which I hold (here the deponent was in fact referring to the aforesaid affidavit Annexture "TZL2") to the land into a Land Act lease, and before I proceed with finalisation of the Agreement of Sale I have with the 2nd Respondent."

There cannot be any doubt in my mind therefore that the First Respondent actually admits that he is purporting to sell the disputed site to the 2nd Respondent and that there is already an "Agreement of Sale" in that regard. In my view the situation accordingly calls for the intervention of the Court by way of interdict.

What is more I attach due weight to the fact that nowhere has the First Respondent denied the damaging allegations made against him by the Applicant namely that "The purported sale is nothing but the result of collusion between the Respondents and that 2nd Respondent has in the process, acted in bad faith." Accordingly I am satisfied as to the inherent credibility of the Applicant's factual

averment as aforesaid and I proceed then on the basis of the correctness thereof.

See Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) S.A. 623 (AD) at 635.

The collusion between the Respondents is certainly a matter for concern and I consider that it is one of the factors the court must take into consideration in granting the interdict sought.

I consider that this is a typical case of a continuing wrong in as much as it is not disputed that the First Respondent has "leased" the disputed site to the 2nd Respondent who remains in occupation thereof despite Applicant's protestations. It is my considered view therefore that in a case such as this an interdict is called for and that it is the duty of the Court to protect the real right that vests int he owner of registered immovable property.

Applicant's claim is vindicatory by nature. In such a case it is strictly not necessary for the Applicant who is also a registered owner of the property in dispute to prove an actual or well grounded apprehension of irreparable loss if no interdict is granted. This is presumed to be the case until the contrary is shown.
See UDC Bank v Seacat Leasing and Another 1979 (4) S.A. 682 (T) at 688 per Herman J.

I am further respectfully attracted by the remarks of Bekker J in Kenitex Africa (Pty) Ltd. V Coverite (Pty) Ltd. 1967 (3) S.A. 307 AT 308 to the following effect:

"It was next urged that interdict proceedings were inept because

applicant had another remedy available, viz. A claim for damages. But damages is not always an adequate remedy. Where the assessment of damages or proof thereof would in the circumstances of a particular case be difficult, the courts have held that damages is not an adequate alternative remedy."

These remarks are apposite to the case before me. Indeed I consider that the purported sale of the disputed site by the 1st Respondent to the 2nd Respondent would obviously be such a drastic step as to deprive the Applicant of his rights thereof completely. In my judgment, damages or compensation should not ordinarily be allowed to force the owner to part with his rights.

Lastly Mr. Buys argued that the Applicant should have instituted proceedings for ownership of the disputed site first and not applied for an interdict adding that this was the agreement of the parties. In my view this submission is no more than the last kicks of a dying horse. There is absolutely no substance in this submission at all. This is so because the 1st Respondent himself says in the last sentence of paragraph 18 of his opposing affidavit:-

"18

..... we therefore agreed that the Applicant would institute whatever proceedings he thought necessary to establish and prove his ownership to the site."

The words "whatever proceedings" in my view include the present interdict proceedings. That disposes of the 1st Respondent's complaint in that regard.

The case for the 2nd Respondent is even worse. He simply has no defence in the matter and this is so because he first tried to buy the disputed site from the Applicant. He then subsequently switched sides and "colluded" with the 1st Respondent as earlier stated.

In the result I am satisfied that the Applicant has made out a case for the relief sought on the Notice of Motion and that on the other hand the 1st Respondent has failed to make out a case for the counter application. Nor has the Court overlooked the fact that 1st Respondent's counter application was made "pending" the outcome of the action he allegedly intended to institute against the Applicant. It is almost nine (9) months since this counter application was filed yet the 1st Respondent has still not instituted the so called action. Consequently I am driven to the reasonable conclusion that the counter application was not bona fide but a mere stratagem to frustrate the Applicant in the enjoyment of his rights to the disputed site.

Accordingly the Applicant's application is granted as prayed with costs against the 1st and 2nd Respondents.

The 1st Respondent's counter application is dismissed with costs.

M.M. Ramodibedi

JUDGE

9th Day of June 1997

For Applicant : Mr. Sello
For Respondent : Mr. Buys