

**CIV/T/313/2011**

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**LIKOTSI MAKHANYA**

**Plaintiff**

**vs**

**MALEETSANE PHEKO**

**Defendant**

**and**

**GREEN BIRD CONSTRUCTION AND CIVILS**

**(PTY) LTD**

**Applicant**

**vs**

**LIKOTSI MAKHANYA**

**1<sup>st</sup> Respondent**

**THE DEPUTY SHERIFF (MRS PAKISI)**

**2<sup>nd</sup> Respondent**

**Coram:**

**Hon. Hlajoane J**

**Date Hearing:**

**29 November, 2011.**

**Date of Judgment:**

**9<sup>th</sup> February, 2012.**

**Summary**

*Judgment by default – Attachment of immovable property – Notice of sale of same – Third Party intervening as having bought the property to be sold – Validity of that deed of sale – Non-compliance with provisions*

*of section 36 (5) of the Land Act – Effect thereof – Application dismissed with costs.*

### **JUDGMENT**

- [1] This case started by way of a trial action in which plaintiff sued the defendant for payment of an amount of M160,000.00. The amount claimed being a result of defendant unlawfully removing water pipes and a metre installed within plaintiff's premises. And also for cutting electric cables which affected plaintiff's property and resulting in more consumption of electricity units unnecessarily.
- [2] The summons were duly served on the defendant's wife at Mazenod Ha Paki on the 27<sup>th</sup> June, 2011 and the wife even appended her signature on the original copy as proof of service.
- [3] The defendant filed no appearance to defend. And the three days for filing of such notice had lapsed.
- [4] Plaintiff's counsel set the matter down for hearing on default judgment. The matter was set down to 8<sup>th</sup> August, 2011 and postponed to 11<sup>th</sup> August 2011, when plaintiff filed an affidavit in support of his claim and a supplementary affidavit showing the break down of his claims.

- [5] The Court on the 11<sup>th</sup> August, 2011 granted judgment by default as requested.
- [6] The writ of execution for movable property was issued on the 22<sup>nd</sup> August, 2011. A return of service dated 25<sup>th</sup> August 2011 was filed. The return showed that the defendant had no movable property to be executed.
- [7] Writ for immovable property was then issued resulting in the attachment of defendant's site.
- [8] Notice of sale in execution for the said site was made by the Deputy Sheriff on the 5<sup>th</sup> October, 2011.
- [9] On the 17<sup>th</sup> November, 2011 the present applicant filed its application for setting aside the attachment of the site in question and stay of execution of sale.
- [10] It would be interesting to note that though the application is for setting aside of the attachment of the site it has not challenged the granting of judgment by default.

[11] The main reasons for applying for stopping the sale of that property being that the land or rights to land had already been passed over to the applicant. That the defendant was no longer the owner or in possession of the site as there has been a deed of sale between applicant and the defendant on the 22<sup>nd</sup> February, 2011.

[12] Also to be noted is the fact that applicant in its papers has not shown as to when he came to realize that the property in issue had been attached and put up for sale in execution on the 19<sup>th</sup> November, 2011.

[13] The 1<sup>st</sup> respondent in opposing the application has raised the following in his answering papers:

- (a) That there is no proof of payment made by the company to the owner of the land.
- (b) There is no resolution which authorized the deponent to act on behalf of the company. So that in the absence of such resolution the contract of sale is rendered null and void, and of no force and effect.
- © That the sale of land could not be a valid one in the absence of Ministerial consent in writing. That since no such consent has been attached to the papers the contract of sale is not one recognizable in law.

- (d) Also that the company still has another remedy, being that of suing the defendant in the main for the return of the money paid for the aborted sale of land.
- (e) The property has yet not been registered in the name of the purported purchaser.
- (f) In such disposal or transfer of rights the chief of the area has not been involved as would normally be expected rendering the whole transaction a nullity.

[14] In response to the absence of resolution by the company that deponent represents the company, the applicant has shown that there was no need for any specific resolution as the Deed of Sale clearly stipulated that the company was represented by the deponent to founding affidavit.

[15] Applicant further argued that since what was sold between the parties was not land but rights in the land, there was no need for seeking Ministerial consent. The agreement was for ownership and possession to pass pending finalization in terms of the Land Act.

[16] There are authorities for the proposition that contracting in the absence of special resolution from a company would render the

contract that follows null and void. **Wing On Garments (Pty) Ltd v LNDC<sup>1</sup>**.

[17] In its founding papers at para 5 thereof, applicant has shown that the deed of sale of the site in question was entered into on the 22<sup>nd</sup> February, 2011. That being the case it would be clear that the law governing the whole transaction is the **Land Act<sup>2</sup>**.

[18] This fact was well known to the defendant when he purportedly entered into the deed of sale with the applicant on the same site. This fact became even clearer from the reading of his replying affidavit at para 3 thereof where applicant said;  
“The agreement was to the effect that formal requirement would be done afterwards.”

[19] Unfortunately for both parties to the agreement of sale of land, they were not aware that non-compliance with some provisions of the Land Act rendered the agreement null and void.

[20] **Section 28 of the Land Act<sup>3</sup>** is about conversion of existing titles. The section reads as follows:

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<sup>1</sup> 1995 – 99 LAC 753

<sup>2</sup> Land Act 1979

<sup>3</sup> Land Act 1979

“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.”

- [21] In granting titles to land there are some statutory conditions that go with the granting of such title.
- [22] **Section 35 (1) of the Act** gives rights to a lessee such as the right of disposing of his interest.
- [23] **Section 36 (5) of the Act** dictates that a transaction concluded by lessee without the consent of the Minister shall be of no effect.
- [24] For the applicant to have said that since what was sold to him was not land per se but rights in the land, could be taken as a misstatement, because all allocations to land give rights to land.
- [25] It was not correct for him therefore to have expounded further in his argument to say because in transferring land to another since what will be transferred would be rights there would therefore be no need for any Ministerial consent.

[26] The Lesotho Court of Appeal in **Mothobi v Seboka**<sup>4</sup> clearly interpreted the import of **section 36 (5) of the Act**, to say that what is said to be of no effect is the transaction and not the transfer.

[27] The Court also observed in the case of **Sea Lake (Pty) Ltd v Chung Hwa Trading Enterprises Co (Pty) Ltd and Another**<sup>5</sup> that prior consent by the Minister in terms of **section 36 of the Land Act** is a prerequisite. That without that prior consent of the Minister, a lessee is not entitled to dispose of his interest otherwise if he purports to do so all that follows would be a nullity.

[28] On the basis of what I have pointed out above on the question of the deed of sale between the applicant and the defendant in the main action, the whole transaction of that sale is declared invalid and of no effect for non-compliance with the provisions of the Land Act. The defendant remains to be the owner of that property and it was in order for the deputy sheriff to have attached such property as belongings to the defendant as judgment debtor.

[29] I have already shown above that what was challenged in the application proceedings was the property attached and not the judgment that was granted by default in the trial action.

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<sup>4</sup> C of A (CIV) No.3 of 2008

<sup>5</sup> 2000 – 2004 LAC 190



[30] The application is thus dismissed with costs.

**A. M. HLAJOANE**  
**JUDGE**

For Applicant: Mr Moro

For Respondents: Mr Habasisa