**IN THE HIGH COURT OF LESOTHO**

**CIV/APN/24405**

**CIV/T/266/88**

In the matter between:

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| **NEO MALEFANE** | **APPLICANT** |
| **AND** | |
| **JOY TO THE WORLD** | **1ST RESPONDENT** |
| **DEPUTY SHERIFF** | **2ND RESPONDENT** |
| **THE OFFICER COMMANDING POLICE HLOTSE** | **3RD RESPONDENT** |
| **THE COMMISSIONER OF POLICE** | **4TH RESPONDENT** |
| **THE ATTORNEY GENERAL** | **5TH RESPONDENT** |

**JUDGMENT**

**CORAM : Hon. Nomngcongo**

**Date of hearing : 22nd May, 2006**

**Date of Judgment : 15th February, 2013**

[1] The applicant approached court seeking relief in the following terms.

1. That the First Respondent and its agents be restrained and restricted from obstructing and/or hindering the Deputy Sheriff of this

Honourable court in the execution of the warrant of ejectment in CIV/T/266/88

2. That the third and fourth respondents be enjoined and directed to assist the second respondent in the execution of the warrant of ejectment in CIV/T/266/88

3. That the second respondent be enjoined and authorized to use the necessary force to break open the gate of the premises at the subject matter hereof and situate at Sebothoane Hlotse in the district of Leribe so as to carry into execution the warrant of ejectment in CIV/T/266/88.

4. That the first Respondent pay costs hereof and that second to fifth respondents also pay costs … in the event of their opposition hereto.

[2] The facts leading up to his application are simple and straight forward and are by and large common cause and they could not be better summarized than in the judgment of Browdie J.A. in C of A (civ) N0.5 of 1996 between the same parties as in this application.

[3] In April 1988 the present applicant instituted ejectment proceedings against one Thabo Mphana. On the 31st March 1994 judgment was entered for her against Thabo Mphana by default. Mphana applied for rescission which was granted and the case went to trial. Again the respondent succeeded. Pursuant to that judgment by Maqutu J. a warrant of ejectment was issued. The 1st respondent herein resisted execution contending that it, and not Thabo Mphana was the occupant of the property and therefore that it could not be ejected upon a warrant directed at Mphana.

[4] First respondent eventually launched an application in this court to give effect to this contention and further claiming a Sight of retention to the property as it claimed that it had effected certain improvements to it. The application was dismissed by the High Court and the respondent went on appeal.

[5] The appeal was dismissed on the grounds that it did not satisfy the grounds of an interdict as laid down in the celebrated case of **Setlogelo V Setlogelo 1914 A4 192.**

[6] The applicant then says that after the appeal she made "*all and every attempt to execute the warrant of ejectment but all in vain. She goes*

*further to say that she used to accompany Deputy Sheriffs who went to execute."* On all the occasions the agents of first respondent pointedly told the Deputy Sheriff that they would not vacate the premises. They sometimes locked themselves in and denied him entry.

[7] The first respondent's answer to this is a bare denial and an equivocation that if there were such attempts the applicant should have moved contempt proceedings against it. I am sure the respondents reply would have typically been that it was not party to those proceedings and therefore it could not be held in contempt. This is what it did when it was confronted with the warrant of ejectment. The answer did not engage the applicant issuably here.

[8] After all has been said and done, there is no dispute as to the ownership of this property. All that the 1st respondent holds onto is that he has a right of retention because of the improvements made on the property. That issue was answered by the court of appeal in the matter between them. Browdie J.A. said in that regard:

> "*The appellant has also alleged that it has erected certain improvements on the property in respect of which it claims a right of*

*retention. Once again there is a dispute of fact since the respondent alleged that certain improvements were erected on an adjoining site.*

*Dealing only with those improvements which are admittedly on the site in issue, the appellant (respondent herein) in order to establish a right of retention had to show that the property was enhanced by the improvements. Not every building is necessarily an improvement. No effort was made to tender proof of enhancement the applicant contending itself with alleging the cost of the buildings it erected. This evidence is irrelevant to its claim".*

[9] The first respondent does not seem to have advanced beyond asserting the cost of improvements to the building which the Court of Appeal has said is not sufficient.

[10] During argument the court asked Counsel for 1st respondent, if its occupancy of the building was not *mala fide* in view of the comments made by Browdie J.A. that:-

"*It is common cause that for some years appellant was aware that the right to occupy the land was disputed but despite the knowledge it went on improving the property. The appellant was aware of a*

*warrant of ejectment from the property against the said Mphana as early as 1989".*

[11] In response to this inquiry Counsel submitted that the court will realize that the Court of Appeal finding was not relied upon as part of the applicant's case and that the procedure is that a party will stand or fell by what appears in his founding affidavit. But surely, this is the very basis upon which applicant approached court. She says as much in *paras*. 11.2 and 12.1 when she alleges that after the 1st respondent's appeal was dismissed she then issued a warrant of ejectment. She even goes on to annex the judgment of the Court of Appeal. That is how I made the inquiry that I did.

[12] Counsel further goes on to say that the Court of Appeal does not say which of the developments were made after the respondent was aware of litigation and therefore its dinding does not settle any matter between the parties. But the Court of Appeal did say that it affected the 1st respondent's contended right of detention. Counsel concludes by saying that a *mala fide* possessor may in certain circumstances retain his right of retention. For this I was referred to the works of ***Joubert the law of South Africa Vol. of par. 87*** where it is said:-

"*A mala fide possessor has apparently no such ins retentions to enforce his claim for compensation unless the owner was aware of his activities and failed to protect".*

[13] I entirely agree with the learned author a *mala fide* possessor cannot have a right of retention ordinarily and by way of example he refers to a situation whereby an owner sits by watching a person in possession develop his property perhaps in the hopes that he will benefit from such developments. In such a situation he would himself be *mala fide* anyway.

[14] From the evidence we see an owner who has been relentlessly trying to get hold of her property on the one hand and another who continued to make improvements on the property well knowing of the activities of the owner. I hold that an occupier who makes improvements to property which he knows to be disputed cannot be a ***bona fide*** and therefore loses his *ius retentionis* to enforce his claim for compensation.

[15] I cannot end this judgment before pointing out that the file in the matter, and this is not unusual, disappeared from my desk. While a search was conducted, I was assured by Counsel for the 1st respondent that the parties were in the process of finalizing some sort of settlement. It was not

difficult to accept that this was indeed the case in line with **Browdie J.A.'s** exhortation to explore such a course. I was only disabused that such was not the case, atleast as far as the applicant was concerned because she went so far as to complain to the Ombudsman about the delay in the delivering of this judgment.

[16] Finally the application is granted in its entirely with costs.

**T. NOMNGCONGO**
**JUDGE**

**For Applicant : Mr Phafane**
**For Respondents : Mr Teele**