

**IN THE HIGH COURT OF LESOTHO
(Commercial Division)**

In the matter between:

**LESOTHO DEVELOPMENT AND
CONSTRUCTION (PTY) LTD**

APPLICANT

AND

BERENG MAKOTOKO

1ST RESPONDENT

HONG GHUN IMPORT AND EXPORT (PTY) LTD

2ND RESPONDENT

**LESOTHO POULTRY CO-OPERATIVE
SOCIETY**

3RD RESPONDENT

JUDGMENT

Coram : L.A. Molete J
Date of Hearing : 19th March, 2013
Date of Judgment: 22nd October 2013

SUMMARY

Applicant bona fide occupier of premises – whether entitled to compensation and lien to enforce its rights – 1st Respondent having disturbed its possession – His actions held to amount to spoliation – Apparent misconduct by legal practitioner – Insufficient facts before court to justify punitive costs order – Relief sought by Applicant granted.

ANNOTATIONS

CITED CASES

**Constituency Committee BNP Mafeteng and Others vs Faroog ISSA C of A
(CIV) NO16 of 2011**

Rubin v Botha 1911 AD 568

Fletcher v Bulawayo Waterworks Co ltd 1915 AD 636

**Benjamin Maphathe vs I Kuper (Lesotho) (Pty) ltd and Others C of A
(CIV) NO2/2012 LSCA14**

STATUTES

Deeds Registry Act 1967

BOOKS

[1] This is an application in which Applicant seeks an order which may be summarised as follows;

- (a) That first and third Respondents be interdicted from unlawfully collecting rentals from second Respondent in respect of premises described as plot NO.B 26 Cathedral Area, Maseru.
- (b) That second Respondent be ordered and directed to pay the rentals to Applicant and no other person.
- (c) The first and third Respondents be restrained and interdicted from interfering in any manner, except by due process of law, with

Applicants possession of the business premises on plot NO.B 26 at Cathedral Area in the Maseru urban area.

- (d) That First Respondent be ordered to show cause why he shall not be ordered to pay costs on the attorney and client scale.
- [2] The interdicts were sought to operate with immediate effect as interim relief pending the outcome of the application.
- [3] At the first appearance of the parties a time-table was set of the filing of opposing papers, and heads of argument. The Applicant was represented by Advocate S. Ratau, the 2nd Respondent was represented by Advocate P.L. Mohapi and Advocate R.A. 'Moro represented 1st and 3rd Respondents.
- [4] During that first appearance in addition to setting the time-table for filing, the parties also agreed that the rentals be paid to the instructing attorney of 2nd Respondents Counsel, because it transpired that 2nd Respondent was really not interested in who received the rentals, and was prepared to abide by the decision of the court. I should also mention that the long delay in the judgment in this matter was a result of the misplacement of the file when the Commercial Court transferred to its new premises.
- [5] It is to be noted that on the return of service, the Deputy Sheriff Mr M. Pakisi filed his report on service of the Application papers on the 1st and 2nd Respondents, but went on to report that, "3rd Respondent was not served because it doesn't exist anymore." A resolution was attached authorising counsel to represent 3rd Respondent; though it seems to have

been signed by one of the two parties whose authority is disputed. They are the only two members of the executive committee.

- [6] The material facts relevant to this Application are that the Applicant and Lesotho Poultry Co-op entered into a thirty year sublease agreement in respect of the disputed plot. The agreement was not registered as required by law¹, but it was signed in September 1998 and provided that immediately after signature thereof the sub-lessor shall apply for ministerial consent (presumably for registration) and for the building permits.
- [7] It was further a pre-condition of the agreement that the sub-lessee shall be granted immediate access to the vacant site and existing buildings, which it was authorised to demolish and thereafter develop the site by constructing a single storey building.
- [8] In the building the Applicant was obliged to provide a specified area as shop space for the co-operative and the parties further agreed that no rentals would be payable to either party for the premises, which were to be used for conducting commercial business.
- [9] The sub-lessee was also obliged to pay any charges levied for water, electricity, assessment rates, ground rent and to generally maintain and repair the premises from time to time without being entitled to compensation by the sub-lessor; and to also insure the premises for full

¹ Deeds Registry Act 1967

replacement value. It was also entitled to further sublet the property, in order to have its return on investment.

- [10] It is common cause that the agreement subsisted for at least fourteen years. During that time Applicant enjoyed undisturbed possession of the premises. The tenants all paid their rentals to the Applicant. They were four in all. This was until one of the tenants decided to sublet one of his two shops to 2nd Respondent herein even though he had no right to sublet further.
- [11] The tenant, Paseka Selonyane who traded as Lesotho Music Centre was the occupant of shops NO1 and NO4 in the premises. He sublet shop NO4 to the second Respondent, who took immediate occupation and had a further sublease agreement with the said Selonyane.
- [12] Applicant took the matter up with Selonyane and the 2nd Respondent, who in turn sought the Legal Advice of counsel Mr Mohapi. It is alleged that while waiting for counsel's intervention, it came to the knowledge of Applicant that 1st Respondent had "coerced, intimidated and/or cheated 2nd Respondent into paying rentals to him on the false pretence that he represents Lesotho Poultry and that Lesotho Poultry was the owner of the premises."
- [13] The first Respondent is an Advocate, who it is fair to assume, ought to be aware that he would not be authorised to collect rentals for anybody because he has no trust account. Even if he could collect rentals, for any person, he should be able to at least produce an agreement between the parties which entitles him to do so. It was thus understandable that

Applicant concluded that he “coerced, intimidated and/or cheated 2nd Respondent,” to pay to himself.

- [14] There was simply no justification for 1st Respondent to demand any rentals from the 2nd Respondent in the circumstances, because even if he represented the Lesotho Poultry Co-op, and it owned the premises, he acted unlawfully at the very least because he knew that no agreement of sub-lease; cession, or other transfer of rights existed between his client and Applicant, 3rd Respondent or any other party. Ownership *per se* is neither sufficient nor conclusive.
- [15] The 1st Respondent justifies his actions on the basis that he had instructions to represent the Co-operative and that his mother and another were the elected officials thereof. Even if that were so, there was still no necessary legal link or *nexus* between the Co-operative and 2nd Respondent, or any of the other tenants. Though alleged, no sub-lease agreement was annexed to the papers.
- [16] 1st Respondent had apparently sought and obtained an eviction order against Applicants tenants by default; but the orders were subsequently rescinded and it appears that nothing further was ever done. The matters are still be pending before the Magistrate Court.
- [17] It may be concluded that in fact no sub-lease agreement existed between any of the tenants and the 3rd Respondent. This appears from paragraph 20 of the opposing Affidavit of 1st Respondent where he says;

“When 2nd Respondent came into the picture, I approached it, like I had approached all the other tenants there, armed with a copy of the lease to the place as well as the fraudulent and unregistered copy of the sub-lease agreement between the applicant and the 3rd Respondent.”

Further down in paragraph 23 he says

“It was under these circumstances that 2nd Respondent, per the advice of its Lawyer..... entered into a sub-lease agreement with the 3rd Respondent on whose behalf I now collect the rent”.

However no copy of the sub-lease agreement was annexed to the papers. Furthermore, the 2nd Respondent already had a sub-lease with Selonyane t/a Lesotho Music Centre which was never ceded or cancelled.

[18] Applicants case was based on the fact that as *a bona fide* occupier of the property he had made substantial improvements thereon; and being in possession; it was entitled to claim compensation for the improvements and was therefore entitled to a lien to enforce such a claim. The company was entitled to spoliation relief in this case because its possession was disturbed unlawfully.

[19] The Applicant was in exactly the same position as Respondent in the Court of Appeal case of **Constituency Committee BNP Mafeteng and Others vs Farooq ISSA**², in which the Court of Appeal dismissed the

² C of A (CIV) NO16 of 2011

appeal by the **Constituency Committee BNP Mafeteng** on the grounds that *a bona*

fade occupier who had made improvements on another's land was entitled to compensation for improvements and that any disturbance of his possession amounted to spoliation.

[20] The cases of **Rubin v Botha 1911**³ and **Fletcher and Fletcher v Bulawayo Waterworks Co. Ltd 1915**⁴ are authority for that proposition and were adopted by the Court of Appeal of Lesotho.

[21] The Respondents on the other hand relied heavily upon the ownership of the plot by 3rd Respondent and the fact that Applicant had failed to register a long term lease. They also relied on what they alleged was a fraud in the first place in that they claimed that the signature of their official at the time, Mr Makhaola Nkau Lerotholi was not his genuine signature.

[22] It was on the basis set out above that the 1st Respondent in his Affidavit maintained that he was as the legal representative of the 3rd Respondent entitled to collect rentals from the 2nd Respondent. Counsel quoted the provisions of the Deeds Registry Act 1967 on the mandatory requirement of Registration and the case of **Benjamin Maphathe vs I Kuper (Lesotho) (Pty) Ltd and Others**⁵. It was held in that case that failure to register a long term sub-lease renders such agreement null and void.

³ AD 568

⁴ AD 636

⁵ C of A (CIV) NO2/2012 LSCA14

[23] The Respondent's counsel also pointed out some disputes of fact, which he submitted could not be resolved on the papers and therefore warranted dismissal of the Application as the Applicant should have foreseen them.

[24] The Court was however persuaded that the matter could be resolved on the basis of the common cause facts. The disputes of fact in this case are not so material as to justify referral to evidence, and even less to the dismissal of the Application.

[25] The following facts were common cause and sufficient to enable the court to make a determination

- (a)** That 3rd Respondent is the owner and of Plot NO.B26.
- (b)** There was an agreement between the Applicant and a duly authorised representative of the 3rd Respondent which was signed in 1998. The agreement was not registered.
- (c)** That as a result of the agreement Applicant developed the site referred to as Plot NO.B26 situated at Cathedral Area, Maseru. The dispute over what the development was is immaterial. Applicant says he demolished existing structures and constructed an altogether new building; while Respondent maintains that the existing building was merely covered with sand-stone bricks and had the inside walls broken down.
- (d)** That at all material times until about 2011, the Applicant was the one collecting rentals from the tenants. The 2nd Respondent

occupied the premises in 2011, and it was at this time that 1st Respondent purporting to act on behalf of 3rd Respondent started collecting rentals from him and paying the money into his own account.

[26] There is no evidence placed before the court to support the allegation that the agreement Applicant entered into with 3rd Respondent was fraudulent. The facts before me prove the contrary because of the length of time that Applicant occupied the premises without any disturbance. The company having been given access by an official of 3rd Respondent and having improved the plot.

[27] In all important respects this case is the similar to the Constituency Committee of the BNP, Mafeteng case. On the authority of that case I am bound to grant the Application as prayed.

[28] On the aspect of costs, I consider the tactics used by the 1st Respondent as unacceptable, particularly in the light of the pending trial for eviction of the tenants. It appears he not only collected the monies unlawfully, he seems to have misled the 2nd Respondent and abused his position as Advocate of this Court.

[29] There are allegations to the effect that he connived with the erstwhile members of the cooperative to use the resources of Lesotho Poultry for their own personal benefit. That he acted in cahoots with his mother and their neighbour to personally gain from the resources of the Poultry Association which they knew was defunct. These allegations are in the replying affidavit and he did not have the opportunity to respond. If they

were proved the court would certainly grant the Applicant his costs as between attorney and client against him.

[30] I therefore, make the following order;

(a) The Application is granted as prayed in prayers (a) (b) and (c).

(b) The costs are awarded against the 1st and 3rd Respondents on a party and party scale.

L.A. MOLETE

JUDGE

For the Applicant : Mr S. Ratau

For Respondents (1 & 3) : Mr R.T. Mmoro