IN THE HIGH COURT OF LESOTHO

(LAND COURT)

HELD AT MASERU **LC/APN/126/14**

In the matter between:-

'MAMOSHE LIMEMA **APPLICANT**

AND

SHALANE SHALE & 5 OTHERS **RESPONDENTS**

JUDGEMENT

Date of hearing : 11 August 2014

Date of judgment : 21 August 2014

SUMMARY

Application for interdict, declarator and cancellation – two leases having been issued in respect of the same plot by the 2nd Respondent – a double allocation having been made in respect of the same plot – the issue being whether the plot was lawfully registered and allocated in favour of either the Applicant or the 1st Respondent – both parties seeking cancellation of a lease document issued in favour the other party.

Held: The application granted in favour of the Applicant and the counter-application dismissed with costs.

ANNOTATIONS

CASES:

Haroon Adulla Mahomed v KPMG Harley and Morris Joint Venture N.O. (Liquidators of Lesotho Bank) and Others (C of A (CIV) NO. 34/2013)

Tsotako v Matabola (C. of A. (CIV) No.10 Of 1986),

Mphofe v Ranthimo C of A (CIV) No. 22 of 1988

Tleletlele v Matekane 1991 - 96 LLR 1655.

BOOKS:

Christie, the Law of Contract in South Africa, 3rd Ed. At 582

STATUTES

Basutoland Order (1965)

Constitution of 1966

Regulation 15 of 1965

Land Procedure Act of 1967

Land Administration Act No.16 of 1973

Land Act No.20 1973

Land (Advisory Boards Procedure) Regulation, 1965

Land Act 1979

Land Act No. 8 of 2010

Systematic Land Regularisation Regulations of 2010

MOSITO AJ

1. INTRODUCTION

1.1 This is a rather involved application. It is an application for an order in the following terms:

> "(a) interdicting and restraining the 1st Respondent or any one acting on his behalf from entering and/or vandalising the said site.
>
> (b) Directing the 1st Respondent to remove his steel posts on the Applicant's site failing which Applicant

with the assistance of the Messenger of Court and the Police shall be charged to remove such posts.

(c) Demolition of all immovable structures erected by 1st Respondent and removal of movable property of 1st Respondent on Applicant's site.

(d) Ordering 2nd Respondent to produce files for both applications of leases numbers 13302-716 and 13302-1433 to enable the Court to make an informed determination.

(e) Declaring the Applicant as rightful owner of the site at Lithabaneng Maseru.

(f) Cancellation of lease No. 13302-716.

(g) That prayer (a), (b), (c) and (d) operate with immediate effect as interim orders

(h) Costs of suit.

(i) Further and/or alternative relief."

1.2 This application is opposed by the 1st Respondent only. The 1st Respondent also filed a counter-application in which he claims cancelation of Lease No. 13302-1433 which belongs to the Applicant in respect of the very same site at Lithabaneng. The Applicant also claims cancelation of Lease No. 13302-716 which belongs to the 1st Respondent in respect of the same site subject of the dispute. In other words the parties appear to be holding leases bearing different plot numbers in respect of the same site. However, the plot numbers are different while the cadastral number is the same.

1.3 It is perhaps convenient to mention as early as now that this application arises out of a long drawn out legal conflict between the parties. By way of background it is worth mentioning that around February 2014, the 1st Respondent sued the Applicant in the District Land Court seeking for her ejectment and interdicting her from using the site in dispute. The Court refused to pronounce itself in the merits of the case and dismissed the

matter for lack of jurisdiction. The 1st Respondent proceeded to uproot the Applicant's fence and erected his own. It is from the above background that this application culminates. The matter was heard on a preliminary urgent basis wherein this Court issued an interim Court order directing the 1st Respondent to desist from vandalising the site pending finalisation of the matter. 2nd Respondent was also ordered to produce files 13302-716 and 13302-1433 to enable the Court to make an informed decision.

2. THE FACTS

2.1 The facts that led to the present application are as follows herein below.

2.2 The Applicant and her now deceased husband bought the site in dispute from one Ernest Marole and later fenced it. A Form C dully signed by then Chief Mothobi Mothobi was issued as proof of allocation. The Applicant lost the Form C in respect of the site together with some other important documents. Desirous of acquiring a lease, the Applicant went to the then LSPP to apply for a lease. However she was advised that the Lithoteng area had been selected for Systematic Regularisation Adjudication process and that the office would soon go to the village to facilitate applications of leases.

2.3 She also went to the Chief of Lithoteng Chief Lepibi Mothobi and informed him of her lost Form C. The Chief together with one Lelia Mothobi attended to the Applicant's site and measured it. The Chief then wrote a letter to the then office of the LSPP in favour of Applicant's application for a lease. The Applicant eventually entered her application on or around 23rd March 2011.

2.4 Around September 2011, some six months after her application, the Applicant was called to the Chief's place where she was told that the 1st

Respondent's wife claimed the site belonged to her and had a Form C to that effect; therefore the site belonged to her. At the time the Applicant had already applied for her lease. However, sometime around June 2013 the Applicant received an SMS from the office of the LAA informing her that her lease in the number 13302-1433 had been issued and ready for collection.

2.5 By way of letter dated 30th January 2013, the 2nd Respondent informed the Applicant that the 1st Respondent was claiming rights to her site and had a lease to that effect. The matter was taken before LAA for mediation which yielded no results as shown by annexure "5" page 2 of the originating application.

3. ANALYSIS OF THE EVIDENCE

3.1 Applicant was the only witness on behalf of her case. She testified that in 1976 she and her husband bought the site in dispute from Ernest Marole and they fenced same later. The site was dully allocated them and a Form C was duly issued. She testified further that she lost all her important documents including the said Form C. She informed the Chief about the loss of her Form C and the Chief wrote a letter in the Form of Annexure "2" addressed to LSPP and attesting to her rights on the site.

3.2 She testified that around March 2011 she approached 2nd Respondent in a desire to apply for a lease and she was advised that her village would soon be declared an area of Systematic Regularisation and 2nd Respondent would therefore go to the village to facilitate applications of leases. Indeed this was done and around 23rd March 2011 she applied for her lease through Systematic Regularisation Adjudication process.

3.3 The Applicant indicated to the Court that around 30th January she was informed by 2nd Respondent through a letter in the form of Annexure "5" that Mrs Shale claimed the site was hers and was in possession of lease to that effect. Mediation was instituted but Applicant could not disclose details of same as she was advised that mediation process were confidential. She testified that around June 2013, 2nd Respondent sent her a text message advising her to collect her lease since it had been issued. However, her lease was not released to her until sometime in July 2014 after numerous attempts to secure it.

3.4 She further attested that around February 2014, 1st Respondent began to dig holes on her site simultaneously serving her with an originating application wherein 1st Respondent had prayed among others for her ejectment from the side and for an interdict restraining her from use of the site. That application was dismissed for lack of prosecution.

3.5 The 1st Respondent to counter Applicant's arguments called in three witnesses, himself as 'RW1', 'Malerato Marole as 'RW2' and Lelia Mothobi as 'RW3'. 'RW1's testimony was full of contradictions and was contrary to the truth. He contradicted himself primarily in respect of when the site in dispute was allegedly bought by him. In his originating application in CIV/DLC/MSU/16/14 he claimed that he bought the site in the 1980's, however in his answer in the present application, he claimed to have bought the site in 1976 whereas in Court he testified that it was in 1977. 'RW1' tried to explain the contradictions by saying the 1980's in the District Land Court papers was a mistake. This is dubious since one hardly makes a mistake by referring to a collective period of years. Had he attributed the purchase to one particular year, the mistake would have been more convincing. However, even assuming that was a mistake; it

does not explain why he said the sale was in 1976 in his answering paper in the present application. That cannot be explained as a mistake since he referred to 1976 twice, in paragraph 10 of his answer and in paragraph 1 of his List of witnesses and documents.

3.6 'RW1' further contradicted himself in that he asserted in paragraph 10 of his answer that Applicant never fenced the site, however, by his admission under cross examination, Applicant had a "loose fence" erected on the site. Loose fence by no means refers to absence of a fence. Further 'RW1' claims that he did not resort to self help since the Court in CIV/DLC/MSU/16/14 decided that even though the Court was aware that the site belonged to him, it lacked jurisdiction. This was clearly untrue since the Court had specifically refused to pronounce itself on the merits of the case in paragraph 36 of the judgment in that case. 'RW1' was clearly not a credible witness as he tended to manipulate the truth to try to explain his mostly fabricated story. His evidence must therefore be disregarded by this Honourable Court.

3.7 'RW2' 'Malerato Marole testified that she sold the site to 1st Respondent and his wife and personally drew papers to that effect even though she did not produce same. She testified that she was completely certain that her husband did not sell the site to Applicant and her husband. 'RW2's testimony cannot be accepted as convincing firstly because she refuses to admit that she could not have known if her husband sold the site to Applicant and her husband when that is more probable than her submission that she knew with absolute certainty everything her husband did at any given time, which is highly improbable.

3.8 It seems her testimony was geared towards corroborating everything 1st Respondent was saying even if his record of events did not add up. This is

evidence because in CIV/DLC/MSU/16/14, 'RW2' was prepared to testify for the 1980's sale, in this application she was prepared to testify in favour of the 1976's sale as apparent from the 1st Respondent's List of Documents and witnesses in both applications. Further she attested to the fact that Chief Lebipi allocated the site to 1st Respondent even though the Chief at the time was Chieftainess 'Malebipi as 'RW3' testified. Her testimony was therefore not true and highly biased in favour of the 1st Respondent.

3.9 'RW2' has no reason to testify for the 1st Respondent in total denial of Applicant's position because in all honesty, she could not have reasonable known of this prior sale. It was by her admission under cross-examination that she was never present during allocations, she would not therefore know if Applicant and her husband were allocated same site.

3.10 Lastly, 'RW2' testified under cross-examination that she does not remember some of the people they sold the sites to, however she wants to deny with absolute certainty Applicant's purchase of the site without consideration that she could be one of the people she forgot. It is apparent therefore that her evidence is heavily biased in favour of the 1st Respondent, she is merely testifying to what she has been told to testify and not what she actually knows. Her evidence must therefore also be disregarded especially in as far as it denied Applicant's purchase of the site in question.

3.11 'RW3' who is Lelia Mothobi largely testified against the 1st Respondent than for him. It was he who revealed under cross-examination that Chieftainess 'Malebipi Mothobi was Chief in 1977. Chief Lebipi could not therefore have allocated the site to 1st Respondent in1977. 'RW3' confirmed Applicant's record of events and the fact that Applicant was

not afforded a hearing if she was having her allocation revoked. However, 'RW's testimony as far as it regards Chief Lebipi must be disregarded because he cannot speak on behalf of the late Chief. For example, he could not explain how Chief Lebipi would write Annexure "5" on behalf of the Applicant when he is alleged to have allocated 1st Respondent the site in dispute.

3.12 In the 1st Respondent's list of witnesses it has been indicated that 'RW3' would testify that Applicant was never allocated the site in dispute, however, 'RW3' failed to advance this position. Instead he admitted that he was not present when either Applicant's husband was allocated the site or when 1st Respondent was allegedly allocated same. In essence, his testimony neither rebuts Applicant's allocation nor confirms 1st Respondent's allocation.

4. THE LAW

4.1 Land is Lesotho is not subject to individual ownership. The allocation of land has been fraught with irregularities that the legislature has not yet addressed. Before the 1966 and the current Constitution, attempts had been made to involve villagers in rural areas in the allocation of land so that the Chief does not act alone. The Resident Commissioner by powers vested in him by Section 13 of **Basutoland Order (1965)** promulgated **Regulation 15 of 1965** the **Land (Advisory Boards Procedure) Regulation, 1965**. A system of election of advisors of chiefs and headmen on land allocations and revocations was introduced. It provided for keeping of land registers by chiefs and the issuing of certificate of allocations. The certificate of allocation was in a prescribed form known as Form "C". The Register of Allocations and grants of Land was in the form known as Form D. This Regulation 15 of 1965 was replaced by the **Land Procedure Act of**

1967. The Land Registers were never properly kept or at all. But certificates of allocation Form "C"s were extensively issued. No comprehensive system of land administration was ever undertaken or funded by government. The result was that there was often an allocation of the same piece of land to more than one person. There were therefore numerous land disputes before the Courts. In any event since land was not surveyed, irregularities and errors were inevitable. In recognition of this chaotic situation of land allocations and to protect people who had developed the land and invested heavily in it by inter alia building houses, Section 82 of the Land Act 1979 was enacted.

4.2 The **Land Act No.20 1973** had reaffirmed that the Land vested in the Basotho nation. But land administration (i.e. allocation and revocation of rights over land) vested in the King whose powers shall be exercised by chiefs and headmen. In the exercise of those powers chiefs were in terms of Section 4 (2) of the Land Act 1973 "be subject to such duties and have such further powers as may be imposed or conferred on them by this Act or any other law." Confusion in the land administration is confounded by the fact that the **Land Administration Act No.16 of 1973** had previously said in Section 2 contrary to what is in the subsequent Land Act No. 20 of 1973 that:

> "It has hereby confirmed that the ownership of land is irrevocably vested in the Nation, represented by the State of Lesotho."

4.3 The **Land Administration Act No. 16 of 1973** was repealed by the Land Act No. 17 of 1979 before it could come into operation. I am drawing attention to section 2 of the **Land Administration Act of 1973** because the King is at the head of the State which is represented by the Central government - while he is also head of the chiefs who up to now have been

customary law rulers of rural areas - albeit with reduced powers. Land has been administered by chiefs as both the **Constitution of 1966** and the **Land Act No.20 of 1973** show. What is significant is that the Land Administration Act No. 16 of 1978 tried to remove land and its administration from the King and Chiefs by replacing them with government. After the Parliament of the day had passed a law, it changed its mind and superseded the **Land Administration Act No. 16 of 1973** with another law - without repealing it or bringing it into operation. The **Land Act No. 17 of 1979** seems to have phrased the issue of land in a language slightly different from that of Section 2 of the **Land Administration Act No. 16 of 1973**. This is because Section 3 (!) and (2) of the **Land Act No. 17 of 1979** state:

> "3. (1) Land in Lesotho is vested absolutely and irrevocably in the Basotho Nation and is held by the State as representative of the Nation of the Nation.
>
> (2) As a corollary to the principle stated in Subsection (1) no person, other than the State, shall hold any title to land except as provided for under customary law or under this Act."

4.4 The illegal sale of land is a reality that has been overlooked from the inception of the **Land Act 1979** up to the present. People with better rights have successfully claimed their sites or lands even after the Minister and Commissioner of Lands have issued long leases which are supposed to have extinguished prior titles. See the cases of **Mphofe v Ranthimo C of A (CIV) No. 22 of 1988** (unreported) and **Tleletlele v Matekane 1991 - 96 LLR 1655.**

4.5 The present case is basically about double allocation. The general principle which applies where there is double allocation can be found in section **82 of the Land Act 1979**. That section provides as follows:

> "Where at the commencement of this Act, any land or part thereof has, whether by error or otherwise, been the subject of two or more allocations, the allottee who used the land and made improvements thereon shall hold title to the land in preference to any allottee who left the land unused and undeveloped."

4.6 The essence of the case is that the rights in the plot were sold to either the one or the other of the parties by its earlier owner. It is apparent that that same site was sold to both the Applicant and the 1st Respondent. The general principle which applies where there has been a double sale of rights to immovable property is clearly articulated in the case of **Haroon Adulla Mahomed v KPMG Harley and Morris Joint Venture N.O. (Liquidators of Lesotho Bank) and Others (C of A (CIV) NO. 34/2013).** In the aforementioned case, the Court of Appeal adopted the principle expressed in the maxim qui *prior est tempore, potier est jure* which translates that one is prior in time has a superior right in law.

4.7 The learned counsel for the Applicant also referred this Court to Christie, the **Law of Contract in South Africa, 3rd Ed. At 582** where the learned author writes that "it can now be taken as settled law that the possessor of the earlier right is entitled to specific performance unless the other (later purchaser) can show a balance of equities in his favour...". I find myself in respectful agreement and association with the principles expressed both by the Court of Appeal and the learned author mentioned above.

4.8 It follows that in determining the issue as to who of the parties is entitled to the occupation of the site in law; one has to ascertain which of the two

parties has a prior right. I must point out from the beginning that the issuance of a lease in Lesotho according to the evidence follows the issuance of a certificate of allocation. Commonly known as Form C.

5. APPLICATION OF THE LAW TO THE FACTS

5.1 The first issue to consider is as to who between the parties has a prior right to the occupation of the site. The Applicant has testified that she was allocated the site after she bought it in 1976. The Respondent ultimately settled on having been allocated the site in 1977. As to the question of balance of equities, it has been established through evidence that the 1st Respondent has never been in occupation of the site. In his own words he said, "There was a loose fence on the site in dispute" admitting Applicant's prior occupation thereon. By his admission during cross-examination, 1st Respondent testified that he only fenced the site after the decision of the District Land Court in CIV/DLC/MSU/16/14.

5.2 The obvious fact is that the Applicant was already in occupation of the site when the 1st Respondent went to remove her loose fence and mount his own structures on the site. When the 1st Respondent mounted his own fence on the site, he was aware of the fact that the Applicant had already had her fence on the site. The law places preference on the party that was prior in time inasmuch as the Applicant was the first buyer of the rights to the site. This she did before the 1st Respondent who purchased the site subsequently. I am of the opinion therefore that, the 1st Respondent would only have a remedy as against the seller which will arise *ex contractu*.

5.3 It is clear therefore that the site was allocated to her prior to the 1st Respondent. The applicable maxim being, *qui prior est tempore, potier est jure.* Applicant is therefore entitled to be declared the rightful owner of

the site at Lithabaneng Maseru as she was first to purchase the site. The Form C that 1st Respondent attempts to rely on as having been issued to him was obviously issued upon a site which had already been allocated to the Applicant. It is also apparent that the 1st Respondent relies upon a Form C which is said to have been issued by Chief Lebipi at the time when Chief Lebipi himself was not the chief of the area. A Form C was clearly a forgery and it could not be evidence of allocation of the site to him. As was said in **Tsotako v Matabola (C. of A. (CIV) No.10 Of 1986),** this Court cannot rely on such a Form C and the evidence given by the 1st Respondent was clearly dishonest in testifying that the Form C had been issued to him in 1977 and/or that, such Form C had been lawfully issued to him. In the Tsotako's case (supra) the Court of Appeal held that once the defendant is found to have been dishonest in this respect, doubt is thrown unto his entire testimony. I respectfully agree. I therefore hold that the purported allocation of the site in dispute to the 1st Respondent in 1977 was clearly null and void as the site had already been allocated to the Applicant.

5.4 The next issue is as to which of the two lease documents were properly issued. Prima facie, the two leases were properly applied for and therefore properly registered. However, the representative of 2nd Respondent testified that the Applicant applied for her lease by way of Systematic Regularisation whereas the 2nd Respondent applied sporadically. He testified further that they caused to be published sites in the area in accordance with **Regulations 5 and 16 of the Systematic Land Regularisation Regulations of 2010.** When there had been no objections they duly caused the lease to be registered in accordance with **Regulation**

17(1). He indicated further that the Systematic Regularisation procedure was fairly longer than in sporadic applications.

5.5 **Section 68 of the Land Act of 2010** therein provides that all land for the time being not under systematic adjudication would be presumed to be under sporadic adjudication. It is obvious from the above provision therefore that the site in dispute was not under sporadic adjudication since it had been declared an area for systematic adjudication as the officer of 2nd Respondent testified. It was wrong for 2nd Respondent therefore, to allow an application through sporadic adjudication in an area declared to be under Systematic Regularisation process. **Section 69 of the Act** provides that where the Minister declares an area to be an adjudication area for purposes of systematic adjudication, then section 68 shall automatically cease to have effect in respect of all land defined in the said notice.

5.6 It is common cause that this site in dispute is under Systematic Regularisation; it means therefore that applications by way of sporadic adjudication ceased to have effect. 1st Respondent's application for a lease was therefore unprocedural and contrary to the provisions of the Land Act 2010 and 2nd Respondent made an error in registering his lease. It follows therefore that the issuance of the lease in favour of the 2nd Respondent in an area which had been declared an area for Systematic Regularisation would violate section 69 of the Land Act, it was therefore unlawful.

5.7 It was also common cause that the 1st Respondent did not lodge an objection to the Applicant being issued with a lease in respect of this plot if he was opposed to the Applicant's lease application. **Regulation 16(5) of the Systematic Land Regularisation Regulations of 2010** corroborates

this position. This would have allowed 2nd Respondent the opportunity to undertake adjudication in terms of **section 65 of the Land Act** which provides that "Every registration of a lease under this Part shall be precede by an adjudication of the rights relating to that land."

6. CONCLUSION

6.1 In conclusion therefore, it is clear that the view that this Court takes is that the present application ought to succeed. In the result the following order is made:

(a) The 1st Respondent or any one acting on his behalf is interdicted from entering and/or interfering with the site subject of dispute and which has been allocated to the Applicant.

(b) The 1st Respondent is directed to remove his steel posts from the said site with the assistance of the Messenger of Court and the Police should ensure compliance with this order.

(c) 1st Respondent is directed to demolish all immovable structures erected by him and remove all movable property from the Applicant's site.

(d) The Applicant is declared the rightful owner of the disputed site at Lithabaneng under lease No. 13302-1433.

(e) Lease No. 13302-716 issued over the same site by the 2nd Respondent is hereby cancelled as having been issued in error.

(f) The 1st Respondent's counter claim is dismissed with costs.

(g) The 1st Respondent is to bear the costs of this application.

_____

DR. K.E.MOSITO
ACTING JUDGE

For Applicant : Adv T. Toeba and Adv. L.M.A. Lephatsa

For 1st Respondent: Mr M.W. Mukhawana