IN THE LAND COURT OF LESOTHO

Held at Maseru

LC/APN/76/2014

In the matter between:

'NOI KULEILE **APPLICANT**

And

LYDIA MOHLOBOLI **1ST RESPONDENT**

LAND ADMINISTRATION AUTHORITY **2ND RESPONDENT**

CORAM: **S.P. SAKOANE AJ**

DATES OF HEARING: **17 OCTOBER, 20 NOVEMBER and 12 DECEMBER 2014, 22 APRIL 2015**

DELIVERED: **09 DECEMBER, 2015**

SUMMARY

Claim of land by a lease-holder from an occupier who has no certificate of title – whether the lease-holder's rights have terminated by failure to register the lease in the Deeds Registry – occupier having made improvements on the land – whether mala fide occupier has a lien that entitled her to remain in occupation until compensated – Land Act, 1979 and Deeds Registry Act 1967.

ANNOTATIONS

CITED CASES:

LESOTHO

Constituency Committee BNP Mafeteng And Others v. Issa [2011] LSCA 24 (21 October, 2011)

Mbangamthi v. Phalatsi LAC (1980-84) 179

Mphōfe v. Ranthimo And Another LAC (1970-79) 464

Molapo v. Molefe LAC (2000-2004) 771

Nthako v. Motlamelle 1981 (1) LLR 130 (H.C)

Putsoane v. Lekatsu LAC (1990-94) 204

Shuping v. Abubaker LAC (1985-89) 186

Tsotako v. Matabola LAC (1985-89) 217

SOUTH AFRICA

Chetty v. Naidoo 1974 (3) SA 13 (A.D)

De Beers Consolidated Mines v. The London & South African Exploration Co. (1893) 10 SC 359

Fletcher And Fletcher v. Bulawayo Waterworks Co. Ltd 1915 AD 636

Lydenburg Properties Ltd v. Minister of Community Development 1963 (1) SA 167 TPD

Quarrying Enterprises (Pvt) Ltd v. John Viol (Pvt) Ltd And Others 1985 (3) SA 375 (ZHC)

STATUTES:

Deeds Registry Act No.12 of 1967

Land (Procedure) Act No.24 of 1967

Land Act No.20 of 1973

Land Act No.17 of 1979

Lesotho Citizenship Order No.16 of 1971

Lesotho Constitution, 1993

JUDGMENT

I. INTRODUCTION

[**1**] The applicant holds a lease to a plot in dispute. The lease was registered in the Deeds Registry on 10th September, 2004 but its date of operation is 9th August, 1988. She is not in occupation of the land. The 1st respondent is as she took occupation in 1998 after allegedly buying the land from her brother-in-law in 1994. She has since developed the plot by building a seven-roomed house, a chicken run, a V.I.P. toilet and fenced it.

[**2**] The applicant claims the following reliefs:

"*1. Warrant of ejectment of the 1st Respondent and anyone from Applicant (sic) site and/or in which Applicants (sic) has rights namely Plot No.14271-346 situated at Khubetsoana Maseru Urban area.*

2. An order confirming that Applicant is the one having title to and/or in the piece of land Plot No.14271-346.

3. Declaring the occupation of site Plot No.14271-346 by 1st Respondent and or any person as unlawful and wrongful.

4. Interdicting the 1st Respondent from exercising any possession, ownership and or in any way whatsoever holding herself out as having any right in respect of the site in question.

5. Directing that the site Plot No.14271-346 be restored to Applicant by Rei Vindicatio.

6. Costs of suit.

7. Further and alternative relief."

[**3**] It is common cause that the applicant holds the lease to the land and that the 1st respondent is in occupation and has since developed it. The land is situated in an urban area. The parties want the Court to determine who between them has lawful interests and rights in the land.

II. THE FACTS

[**4**] The applicant, *'Noi Kuleile* testified that she is a Mosotho who resides in Cape Town, South Africa and works there. She has been working there for the past 25 years. She acquired the site by way of sale from the *Khiba*

family in 1985. She was issued a Form C. She subsequently applied for a lease which was granted in September, 2014.

[**5**] She instituted these proceeding after she heard from her sister *Mannyatsu* that there was someone interfering with the site. Her sister investigated and reported to her that she had met with the 1st respondent. She thereafter went to the site and found a big house and that it was fenced. Her sister told here that the 1st respondent resides there. She has not allowed the 1st respondent to stay there. She is then unable to take control of the site.

[**6**] She does not know the 1st respondent and first saw and met her at the Court and greeted her. She did not ask her her name.

[**7**] Under cross-examination, she stated that she did not register the site within three months after acquiring the Form C. She disputed the suggestion that her rights over the site were lost for failure to register the site. She would not confirm that apart from the house, there was a chicken run and a toilet. She went further to say that she did not know that the 1st respondent bought the site from her brother-in-law.

[**8**] The applicant stated that she was born in 1954 and got married to a South African in 1984. She acquired the site in 1985 but by then she was not a South African. She became a South African in 1988 and continues to be so by choice. She thought she disclosed her being a South African when she applied for the lease.

[**9**] *Mannyatsu Kuleile* is the second witness. She stated in her evidence-in-chief that she is the sister of the applicant. She resides at Maseru East. She knows the 1st respondent and has met her before about the site. She first met her in January 2000 on the instructions of the applicant to do so. She had a letter to this effect.

[**10**] On arrival there she found a woman she did not know then who told her to go away as she was talking nonsense. She then reported back to the applicant and requested the applicant to provide proof. Applicant gave her documents which were in the form of letters in relation to the site. She then went to the Mabote Project where she got applicant's file. After that she went back to the 1st respondent. This time around the 1st respondent told her she did not have any documents herself but had been given the site by *Ntabejane*. This witness then said she reported this to the applicant. No resolution was reached because the 1st respondent never came back to her.

[**11**] Under cross-examination, *Mannyatsu* testified that she knew the previous owner of the site, one *Zakaria* who is the chief of Khubetsoana. This she knew because *Zakaria* used to come to her home in the company of her sister's husband. However, she does not know about any transaction concerning the application to the site as she was not present. The only authority who allocated the site was the chief and this was done in 1985. She went further to say that the chief was the allocating authority despite the site being in an urban area. She disagreed that the chief was not the allocating authority.

[**12**] She would not know that the 1st respondent acquired the site from her brother-in-law *Ntabejane* or that she built the house on it in 1995. But she did see the house. She also could not dispute that there is a toilet outside and a chicken shack. She also could not dispute that 1st respondent got a Form C to the site in October 1994. Neither could she dispute that when the applicant was issued with a lease in 2004, all the improvements mentioned had already been made. Furthermore, she conceded that since a 16 year period of occupation, neither the applicant nor allocating authority ever issued a notice to the 1st respondent to vacate the site.

[**13**] That was the end of the case for the applicant.

1st Respondent's case

[**14**] The 1st respondent, *Lydia Mohloboli* testified in her evidence-in-chief that she resides at Khubetsoana Bochabela 3. She has resided there since 1998. She bought the site where she stays from *Shallai Ntabejane* in 1994. The documents she has are a Form C and a written contract.

[**15**] She said she has made improvements on the site in the form of a house, a poultry shack, a VIP toilet outside, a septic tank, paving of the front yard and a fencing by brick and iron. Since 1998 she has been staying at the site peacefully without any interference. The chief also knows that she resides at the site.

[**16**] When she bought the site from *Ntabejane* it was a field and did not have trees. She then planted maize and beans. This she did without any interruption.

[**17**] In 2012 *Mannyatsu* approached her about the site.

[**18**] Cross-examined, the 1st respondent testified that she could not produce the signed written contract of sale with *Ntabejane*. She had misplaced it. She has never applied for lease as she did not know about it. She only got to know about it in 2014. The Form C was issued to her by chief *Hlathe*. She

had not produced it in Court but will try to get it. She does not deny that the applicant has a lease to the site but does not know that the applicant bought the site in 1985 and continues to pay ground rent. She developed the site as she knows it as belonging to her and has been residing there for a number of years. She did not know that she has to tell the Court about the purchase price and parameters of the site.

[**19**] That was the end of 1st respondent's case

III. ANALYSES

[**20**] The 1st respondent resists the claim of the applicant on three grounds:

(1) that the applicant's lease is a nullity because by the time it was issued in September 2004, the applicant's Form C issued in 1973 was not registered in the Deed Registry and has thus lapsed and the site reverted back to the Crown by operation of law;

(2) she acquired the site by sale from her brother-in-law in 1994 who had a Form C;

(3) she has been in undisturbed possession and peaceful occupation during which period she has made improvements to the land;

(4) she is a *bona fide* occupier.

Has the applicant's title terminated by operation of law?

[**21**] There is no counter-application for the cancellation of the applicant's lease. The pleaded defence is that by the time the applicant applied for the lease and the Commissioner issued it after being satisfied with the applicant's *bona fides* pursuant to section 29 of the **Land Act, 1979**, the applicant had long lost rights in the land.

[**22**] The validity of this defence turns on whether or not the applicant satisfied the requirements of section 29 and not whether she had no rights or interest because her Form C had not been registered. No evidence has been adduced to gainsay the applicant's version that she acquired the site in 1985 and not 1973 and got a Form C. This evidence establishes the fact of her having been lawfully issued with a Form C which she then used to apply for a lease under section 29 (1) (c) (iii). Having been so satisfied by the applicant's *bona fides* in the matter, the Commissioner was, under section 29 (2), duty-bound to cause the issuance of the lease. Nothing has been shown to suggest that her 1985 Form C is not one of the documents the applicant produced when applying for the lease.

[**23**] If there was any delay in the registration of the Form C in the Deeds Registry within the prescribed period of three months, the blame should be put at the door of the Commissioner for Lands and not the applicant. I say so because the Commissioner has the powers to condone delays in application for leases under section 32 and, under sections 75 (4) and 81 registration of titles is the prerogative of the Commissioner – notwithstanding the requirements of section 15 (2) of the **Deeds Registry, Act, 1967**. In fact, the provisions of the **Land Act, 1979** trump section 15 (2) of the **Deeds Registry, Act** by virtue of section 93. Moreover, leases issued under section 29 take effect from the date of issue and not registration. This, to my mind, says that issuance of a lease confers rights for use and occupation immediately and not upon registration. In other words, delivery and transfer of land take place simultaneously upon issuance of a lease.

[**24**] Thee **Land Act, 1979** has jettisoned any positive duty on a Form C-holder to apply for its registration as was the case under section 11 (2) of the **Land (Procedure) Act, 1967** and section 15 (2) of the **Land Act, 1973**. By taking the duty to apply for registration away from a person issued with a Form C and putting the duty on the Commissioner, the legislature would not have contemplated loss of rights on the part of the Form C-holder in

the event of the Commissioner's non-compliance with the law. It follows that the applicant cannot loose her rights for not doing what the law does not require of her: cf **Mphofe v. Ranthimo And Another** LAC (1970-79) 464; **Molapo v. Molefe** LAC (2000-2004) 771

[**25**] A suggestion was made during cross-examination that the applicant did not qualify to hold land because her marriage to a South African in 1985 disqualified her in terms of section 6 (1) of the **Land Act, 1979**. That line of cross-examination had no basis in the pleaded case of the 1st respondent nor foreshadowed in the entire spectrum of both the originating application and the answer.

[**26**] Over and above this, under both section 2 (a) of the **Lesotho Citizenship Order No.16 of 1971** (later repealed) and re-enacted in section 41 (2) (a) of the **Lesotho Constitution 1993**, citizenship is not lost by an act of marriage. Parliament is also constitutionally barred under section 42 (2) (a) and (b) from depriving citizens of their status acquired by birth or descent. Thus, this category of citizens cannot be hit by section 84 of the **Land Act, 1979** which provides that loss of citizenship leads to loss of title to land.

Does the 1st respondent have any title to the plot?

[**27**] The second defence put up by the 1st respondent is that she acquired the site from her late brother-in-law through a written agreement of sale and, further, that she has a Form C. No documentary evidence was adduced in support thereof. She also did not produce any documents when *Mannyatsu* confronted her with applicant's documents in January 2000 indicating that the latter had title to the site. There is no acceptable reason or explanation proffered for 1st respondent's failure in this regard. If her brother-in-law had a Form C when the alleged sale agreement was executed or, alternatively, the 1st respondent acquired her own Form C thereafter, originals thereof must have been forwarded to the Commissioner and copies retained by the seller and the buyer: refer to sections 5 (4) and 27 of the **Land Act, 1979**. In any event, if the plot was allocated to her by Chief *Hlathe* who even issued her a Form C, such allocation and issuance of a Form C are nullity as that is the statutory function of the Urban Land Committee alone in respect of land in urban areas: See **Putsoane v. Lekatsu** LAC (1990-94) 204. I, therefore, find that there is no written contract or a Form C to entitle the 1st respondent to lay a claim of title to the site. She has not discharged the necessary onus: **Mbangamthi v. Phalatsi** LAC (1980-84) 179.

Is the 1st respondent a *bona fide* occupier or a *mala fide* occupier?

[**28**] The third defence is that of a *bona fide* occupier. It is not in dispute that the 1st respondent has been in occupation and use of the site. Initially she planted trees on it and after occupying it in 1998, she built a seven-roomed house and made other improvements like fencing, paving, erecting VIP toilet, a septic tank and a chicken shack. These improvements were seen by *Mannyatsu* when she went to the site in January, 2000 on a mission of the applicant.

[**29**] The 1st respondent's evidence is that she has been in undisturbed use and peaceful occupation for a period of upwards 16 years. The applicant was unaware of 1st respondent's occupation until *Mannyatsu* tipped her. It is not said when she became aware. What is certain is that the first time that the 1st respondent must have realized that the applicant was claiming the site should have been in January 2000 when an encounter between her and *Mannyatsu* took place. I pause to observe that given the lease-hold nature of the land tenure system in this Kingdom whereby, rights and interests in land are controlled by the Crown and occupation without proper authority is a criminal offence, prescription is not available as basis to acquire rights to land.

[**30**] Before the January 2000 encounter, the 1st respondent used and occupied the site peacefully and made improvements on it. This can come about if and when the person issued a certificate of title to land does not secure it in compliance with the statutory conditions for leases provided for in the First Schedule to the Act. Among the conditions are that the fencing and developments of the site be commenced within 12 months of the date of grant. It is possible for a grantee in possession of a Form C who is as yet to apply and be issued with a document to delay fencing and developing the site until he/she has in possession a lease.

[**31**] This possibility becomes real when regard is had to the fact that a certificate of grant of title in the urban areas in the nature of Form C 3 is not a lease document although it certifies that the grantee "has been granted a lease/ a licence and evidence of this title will be issued by the Commissioner in the near future." This should be contrasted with certificates of allocation in rural areas in the nature of Forms "C1" and "C2" which certify that upon being granted an allocation of land, this "allows the allottee with effect from the date of this certificate to use or occupy".

[**32**] It is amidst such uncertainties that unscrupulous persons, chiefs and allocating authorities engage in illegal acts of selling land to third parties

and thereby perpetuate the problem of double-allocations. It is, therefore, not surprising to me that there are many cases in this Court wherein a certificate of allocation and grant to one site is held by two or more people. And where such is the case, section 82 of the **Land Act, 1979** resolves the problem by providing that "the allottee who has 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."

[**33**] But as I have indicated earlier, this case is not about dual-allocation because, firstly, the 1st respondent has not produced any proof of grant of title. Secondly, section 82 does not avail her because, as held by the Court of Appeal in **Tsotako v. Matabola** LAC (1985-89) 217 @ 2.22 G-I:

> *"Firstly, it applies only where the land in question has been the subject of two conflicting situations.* ***The purpose of the section is to cut the Gordian knot when there have been two, valid allocations****, not to avoid a factual enquiry as to whether one or other of the allocations was in fact made…. In any event it is, to say the least, doubtful whether the section can apply where one allottee wrongly dispossesses another allottee who is in occupation, and the other takes immediate effect and continues to challenge the occupation of the rival allottee."* [Emphasis applied]

[**34**] I find that the 1st respondent possesses the plot but has no certificate of title – let alone a valid one. She can only claim undisturbed possession from the person who sold – with the alternative for the return of the purchase price and damages: see **Nthako v. Motlamelle** 1981 (1) LLR 130 (H.C.);

Shuping v. Abubaker LAC (1985-89) 186. What is important is that an agreement to "sell" land and transfer title of "ownership" in it is legally unrecognizable and unregistrable under section 15 (1) of the **Deeds Registry Act, 1967**. What is registrable is a disposal of interest in the land subject to acquisition of official consent. As far the applicant is concerned, proof of a grant of title or lease suffices for purposes of an action for *rei vindicatio*. As held by the Appellate Division of the Supreme Court of South Africa in **Chetty v. Naidoo** 1974 (3) SA 13 (A.D) at 20 B-D:

> *"…one of its incidents of (i.e. ownership) is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property where found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a rei vindicatio need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res – the onus being on the defendant to allege and establish any right to continue to hold against the owner (cf.* ***Jeena v. Minister of Lands*** *1955 (2) SA 380 (A.D) at pp. 382 E, 383). It appears to be immaterial whether, in stating his claim, the owner dubs the defendant's holding "unlawful" or "against his will" or leaves it unqualified (****Krugersdorp Town Council v. Fortain*** *1965 (2) SA 335 (T)".*

[**35**] It is submitted by Miss *Pheko* for the 1st respondent that the 1st respondent is a *bona fide* occupier who has made improvements on the plot with the reasonable belief that she was entitled to occupy it. Mr. *Malefane*, for the

applicant, counters by submitting that absent any proof of sale or possession of a Form C by the 1st respondent, she cannot claim any *bona fides* in her use, occupation and development of the plot. For reasons expatiated hereinafter, I reject the submission of Miss *Pheko* and accept that of Mr. *Malefane*.

[**36**] I have already found that there is nothing before me which proves that the 1st respondent occupies the plot by virtue of any certificate of allocation or grant. There is not even proof of the alleged agreement of sale which would have made her to have a reasonable belief that she is entitled to occupy the plot. She, therefore, does not qualify to be a *bona fide* occupier. I am fortified in this view by the following *dictum* in **Lydenburg Properties Ltd v. Minister of Community Development** 1963 (1) SA 167 (TPD) at 172 G-H:

> *"It is true that it is said that the petitioner believed, until advised in 1960, that it lawfully owned the property. Even if this belief was genuine it is nevertheless based on a mistake of law. It has been held that a man who possessed in an honest though mistaken view of the law was not a bona fide possessor, as the grounds for his belief, being wrong in law, could not be said to be reasonable (see* ***B.C v. Commissioner of Taxes****, 1958 (1) SA 172 (S.R.) at p. 179, and the cases there quoted). In the same case it is pointed out that a person who is doubtful as to his rights to possess because he fears an adverse claim is not a bona fide possessor."*

Should the 1st respondent be ejected?

[**37**] The issue that remains for determination is whether, as a *mala fide* occupier, the 1st respondent is entitled to compensation for necessary expenses (*impensae necessariae*) enforceable by means of a lien (*uis retentionis*). Put differently, does a *mala fide* occupier deserve to remain in occupation and not be evicted until compensated by the applicant for developments necessary to preserve and protect the plot?

[**38**] The answer that the common law gives on the issue is that:

> "*(2) A mala fide possessor who has affixed materials to the land and, before demand is made by the owner, has disannexed and removed them, is not deemed to have parted with his ownership in the materials.* ***After demand, he no longer has the right to retain the land or remove the materials from the land, nor is he entitled to compensation except for such expenditure as he may necessarily have incurred for the protection or preservation of the land****. If, however, the rightful owner has stood by and allowed the erection to proceed without any notice of his own claim he will not be permitted to avail himself of his fraud, and the possessor, although he may not have believed himself to be the owner, will have the same rights to retention and compensation as the bona fide possessor."* [Emphasis added]: from **De Beers Consolidated Mines v. The London & South African Exploration Co.** (1893) 10 SC 359 @ 372; see also **Quarrying Enterprises (Pvt) Ltd v. John Viol (Pvt) Ltd And Others** 1985 (3) SA 375 (ZHC) @ 581 A-G

[**39**] *In casu*, the applicant being the rightful owner, only became aware of the occupation of her plot by the 1st respondent by January 2000. By then the 1st respondent had erected fixed structures to the plot. However, the applicant had not stood by and allowed erection to proceed without notice of her own claim. In January 2000 when the applicant claimed her plot, the 1st respondent retained the right to disannex and remove the structures she built thereon if this would be possible without damage to the plot. But if from the nature of things it was not possible to disannex and remove the structures, the improvements inure to the benefit of the applicant. Thus, the applicant is not liable to compensate the 1st respondent for the improvements if such are not useful and are expensive. The liability can only arises if the applicant intends to sell the plot at a substantially higher price by reason of the improvements: see **Fletcher And Fletcher v. Bulawayo Waterworks Co. Ltd** 1915 AD 636 at 648. But no claim for compensation and proof of the value of improvements are before Court. They must await determination for another day. What arises in these proceedings is that the 1st respondent has a lien (*uis retentionis*).

[**40**] In the premises, the 1st respondent is entitled to remain on the plot until compensated for any necessary expenses incurred for its protection and preservation: See **Constituency Committee BNP Mafeteng And Others v. Issa** [2011] LSCA 24 paras [16] and [20] (21 October, 2011).

IV. DISPOSITION

[**41**] In the result the application succeeds but only in respect of prayers 2, 3, 4, 5 and 6 in the originating application.

S.P. SAKOANE
ACTING JUDGE

For the Applicant: L.R. Malefane instructed by T.L. Mpopo & Co.
For the 1st Respondent: N. Pheko instructed by T. Maieane & Co.