

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

LAND COURT DIVISION

LC/APN/39/2013

In the matter between:-

MOLISE LEPOTA

APPLICANT

AND

VINCENT MASOABI

1ST RESPONDENT

WHITE SAND (PTY) LTD

2ND RESPONDENT

MAZENOD AOB COMMUNITY COUNCIL

3RD RESPONDENT

CHIEF TSIU MOPELI

4TH RESPONDENT

LAND ADMINISTRATION AUTHORITY

5TH RESPONDENT

RULING

Coram : Hon. Mahase J.
Date of hearing : various dates
Date of Judgment : 26TH August, 2015

Summary

Land Court – Land Court Procedure – Applicant seeking declaratory order – cancellation of allocation - cancellation of a lease document and ejectment of 2nd respondent from field in question. Application for absolution from the instance – Effect on application.

ANNOTATIONS

CITED CASES:

- **Likotsi Civic Association and 14 Others C of A (CIV) No. 14 of 2010**
- **Gascoyne v. Paul and Huder 1917TPD 170**
- **Dorbyl Vehicle Trading Finance Co. (TPY) LTD v. Maisa Mats’aba, CIV/T/659/1992 dated the 30/08/1996**
- **Supreme Service Station (1969) (TY) LTD v. Fox and Goodridge (PTY) LTD (1971) (4) S.A. 90 at 93**

- **Swiss Borough Diamond Mines (PTY) LTD Another v. LHDA 2000 LLR-LB 432,**

STATUTES:

- **Land Court Rules, No. 1 of 2012**

BOOKS:

- **Herbstein and Van Winsen :- The Civil Procedure of the Supreme Court of South Africa 1979, 3rd Edition page 463**

[1] Facts

This case was once filed in the District Land Court under case number CC953/2009 on the 29th July 2009. Default judgment was later granted against the first respondent. However, before execution of the judgment, the second respondent joined the proceedings. It later successfully applied for stay of the execution of the judgment obtained by default.

[2] Consequently, and by agreement between the parties, the case was transferred to the High Court – The Land Court after it was by agreement withdrawn from the District Land Court in Maseru.

[3] This Court has not been furnished with a copy of the original proceedings in the District Land Court. As a result it is not possible to say whether or not the parties did invoke the relevant provisions of both Land Court in having withdrawn and having the case launched in the Land Court.

[4] In withdrawing their applications, parties should have sought leave at any-time after institution of an application to so withdraw the application. Refer

to Rule 60 of the District Land Court Rules of 2012. Be that as it may, none of the parties raised any objection to none compliance with the provisions of that Rule.

- [5] The application was later heard in the Land Court. The applicant then had his case closed after it had led evidence of three witnesses in support of its case. The first respondent had not been personally in attendance in court due to ill health but his attorney was in attendance.
- [6] The Director of the second respondent had personally been in court, so also was its attorney. This Court had on numerous occasions suggested to counsel of the first respondent to consider substitution of the first respondent by someone nominated by his family. This was in vain because even though it was clear that due to his old age and illness, the first respondent could not attend court and assist his counsel by giving him further instructions wherever necessary, this was never done. Well, it was their choice which choice they are entitled to exercise.
- [7] At the close of the applicant's case, an application for absolution from the instance was moved on behalf of the applicant. Reasons for and in support of that application are contained in the applicant's application of notice to amend, dated the 24th August 2014.
- [8] The net effect of this applicant for absolution from the instance is that the applicant, who has not annexed all the documentary evidence he wished to rely upon wants to reintroduce these documents at this late hour of the proceedings. The applicant also wished, through this application to amend

the list of witnesses and the evidence/points they will attest to. It also wished, through this application to reintroduce all the proceedings which it had relied upon in support of its case in the District Land Court in what was styled CIV/DLC/MSU17/2013. Refer to pages 2 up to 3 of this notice.

- [9] The application was opposed by counsel for the first and second respondents. It was argued in this regard that; firstly the procedure for application of absolution from the instance has not been prescribed anywhere in the Rules of both the District and Land Courts.
- [10] Secondly, they argue that the applicant has since realized that it has failed to comply with the Rules of this Court and now that it realizes the deficiency in its application it moves for absolution from the instance much to the prejudice of both the first and the second respondents.
- [11] Counsel further argue, and correctly so in the view of this Court that, should this application be granted, then the proceedings will have to be started afresh as the court will have no option but to recall all of the witnesses who have already testified in support of the applicant's case; much to the prejudice of the first and second respondents.
- [12] To compound the problem, so it was argued, counsel for the applicant has not even applied for leave of court, in terms of the provisions of Rule 13 (5) for it to so amend. Neither has applicant demonstrated before court and to its satisfaction that there are now in existence exceptional circumstances which make it necessary for such an amendment.

[13] The Law:

The Rules of this Court make provision with regard to annexes in the originating application. Rule 13 (5) in so far as is necessary and relevant provides that:

“(5) Notwithstanding the provisions of sub-rule (1), under exceptional circumstances, with leave of court or by consent of parties, a list of witnesses may be amended and further documents may be filed”.

[14] In the instant application neither leave of court has been obtained; nor has the applicant obtained the consent of parties to amend and to file further documents. (My underlining).

[15] The applicant’s application for amendment is therefore defective for a number of reasons as submitted by counsel for first and second respondents. It is also defective for want of leave of court and for want of consent of the parties.

[16] The provisions of Rule 13 are couched in mandatory terms; so they have to be complied with to the letter by litigants. There is no explanation of whatever nature as to why the applicant has not, at the very beginning complied with the provisions of Rule 13 of the Rules of this Court.

[17] Assuming without conceding that the applicant had obtained leave of court or consent by the parties; in the absence of the existence of exceptional circumstances, it would not be possible for this Court to grant the application for absolution so as to assist the applicant to cure a defect of none

compliance with the rules of his Court at this late hour after it has closed its case.

[18] The above, coupled with the fact that this court has not been convinced that the procedure for removal of this application from the District Land Court where it had initially been launched has been complied with, compounds the problems of the applicant further.

[19] The application for an amendment which has been moved on behalf of the applicant and the proposed amendments are an abuse of the court process because the applicant is in fact curing the deficiencies in his pleadings after it has closed its case.

[20] He proposes to introduce evidence which he should otherwise have attached to his originating application; as well as changing the testimony of all his witnesses who have already testified and been cross examined. This will prejudice the first and second respondents who have not only already filed their answers, but have already cross examined all the witnesses who have testified on behalf of the applicant.

[21] Put differently, the applicant is trying to introduce evidence which he had not included in his originating affidavit. This he seeks to do after closing his case and without leave of court and without the consent of the other parties.

[22] This is not only irregular but it also defeats the objectives for the promulgation of the Land Act 2010 and the related rules; which among others is the speedy disposal of land matters.

- [23] The applicant has not explained nor disclosed in his application any exceptional circumstances in support of this application.
- [24] Such exceptional circumstances ought to have been disclosed and specified very clearly so as to allow this court as well as other parties and their counsel to respond to same. This is the only way in which the court could be able to make a finding on whether or not such circumstances are in existence. Currently, due to none disclosure and or because the fact of the existence of such exceptional circumstances has not been raised nor argued, this Court is not able to accede to the applicant's application.
- [25] Counsel for the applicant has denied that the respondents will suffer any prejudice should the amendments be allowed. Reliance in support of this argument is placed on the provisions of Rule 76 of the Rules of this Court. She argued that the proposed amendment of the list of witnesses and what each witness will attest to is in line with the provisions of this Rule.

It provides that:- (I quote)

“The court may at any stage of the legal proceedings recall any witness who has been examined and may put to him such questions as it thinks fit”. My emphasis.

- [26] With the greatest respect, this argument is misplaced. The said Rule deals with a situation where the Court may recall and examine witnesses. This may be done by the Court and not by the applicant or respondent.

- [27] In terms of Rule 77, it is the Court before which a party is appearing which is empowered to pronounce judgment against such a party or to make such order in relation to the application as may be just.
- [28] This application cannot even be dealt with in terms of Rule 68 of the Rules of this Court; which rule is not even very clear except that it deals with failure by either party to produce additional evidence.
- [29] In this application, applicant wants to introduce evidence which it left out from the very beginning in its originating application. It is not additional evidence as contemplated by Rule 68.
- [30] These two Rules do not at all deal with issues pertaining to an amendment nor to the application of absolution from the instance. Even Rule 75 of the Rules of this Court does not apply to the instant application. This Court is enjoined by the law to exercise its discretion between the parties. Rules of procedure are therefore made to ensure that justice is done between the parties, and so far as is possible courts should not allow rules of procedure to be used to cause an injustice.
- [31] In the instant application, the applicant already had knowledge of the kind of evidence it had to present in order to successfully support its case but it left that evidence out and now seeks to re-introduce it in order to cure the irregularity such as exists in its application.
- [32] Mindful of the fact that counsel and its client/applicant already had such evidence in their possession and disposal in the CC953/2009 which was later

withdrawn by consent, it is an abuse of court processes for applicant to apply for absolution from the instance so as not only to amend the list of witnesses but to also amend the points such witnesses will attest to. This, it seeks to do after all witnesses who testified on its behalf have testified and been cross examined. This is indeed a novel practice.

[33] This, the applicant seeks to do without having explained why in the first place he did not comply with the provisions of Rule 13 of the Rules of this Court. The applicant has been in possession of such document since around the year 2009 when it had the application filed in the Maseru Magistrates' Court. Why it decided not to annex them to its originating application until after its witnesses have testified and been cross examined has not been disclosed to court.

[34] It is almost a period of five years since parties herein were in court over subject-matter in question; and two years since the application was first prosecuted before this court. The reasons why the applicant now applies for absolution from the instance so as to re-introduce all of its documentary evidence as alluded to above and to also amend a list of witnesses and their testimony at this late hour has not been explained.

[35] What the net effect of this application is, is that the prosecution of this application will have to begin afresh. This will surely mean that this litigation will not come to an end as other parties will also have to be allowed to introduce other witnesses and documentary evidence ad infinitum. This should not be allowed, because among other things such a move delays the finality of the case thereby defeating the spirit and purpose for which the

Land Act and its attended Rules are created; namely the speedy, final prosecution of Land related matters.

[36] Should this be allowed to go on unchecked, the respondents will indeed be prejudiced, particularly because the business of the first and second respondents on the site in question has long come to a standstill due to this application.

[37] For the foregoing reasons, and for the reason that this application is an abuse of court processes, the application is dismissed with costs to the first and second respondents who are the only parties who are opposing the application. The rest of the other respondents have not filed any answers and it can therefore be assumed that they will abide by the judgment of this court.

M. Mahase

Judge

For Applicant:	Advs. Lephatsa and Jonas
For 1 st Respondent:	Advs. Rantlo and 'Mako
For 2 nd Respondent:	Adv. Shale Shale
For 3 rd up to 5 th Respondents	No Appearance