

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

In the matter between

CITY MARKET (PTY) LTD	1st APPELLANT
MOHAMMED AYOB OSMAN	2nd APPELLANT
HUCSTER (PTY) LTD	3rd APPELLANT

AND

FAMIDA IMRAN	1st RESPONDENT
MAGISTRATE (HLABANYANE)	2nd RESPONDENT
ATTORNEY GENERAL	3rd RESPONDENT

JUDGMENT

Coram : L.A. Molete J
Date of hearing : 6 December, 2016
Date of Judgment: 28th September, 2017

SUMMARY

Ejectment – Appeal against judgment of Magistrate – Question whether Magistrate erred in law or fact – Appellants relying on sublease agreements which have expired – Respondent holder of a lease in terms of Land Act 2010 – Lease is prima facie proof of ownership – Becomes conclusive proof in the absence of valid competitive title.

ANNOTATIONS

CITED CASES

Rustenburg Platinum Mines Ltd vs Commission for Conciliation Mediation and Arbitration 2007(1) SA 576

Teaching Service Commission v Judge of the Labour Appeal Court LAC (2007-2008)

STATUTES

- [1] This is an appeal against the judgment of the Subordinate Court handed down by **Magistrate Hlabanyane** in November, 2016
- [2] The Magistrate ordered the ejectment of the Appellants from **plots 13283-030** and **13283-031** situated at Pitso ground in the Maseru district, after considering the matter and concluding that Plaintiff as the owner of the plots was entitled to eject the Defendants.
- [3] The Plaintiff in the matter had issued summons against each of the three Defendants for ejectment from the plots, and in due course the matters were consolidated. This was convenient for the Court and the parties.
- [4] On the evidence, 1st Defendant occupied two shops on plot number 13283-031, 2nd Defendant occupied two shops on **plot number 13283-030**, and 3rd defendant occupied two shops on **plot number 13283-031** and one shop on **plot number 13283-30**.
- [5] The learned Magistrate found as a fact that Plaintiff was the owner of the two plots having purchased them from **Mr and Mrs Mthembu** more than ten years previously; and that the three Defendants had previously occupied the

premises by virtue of sublease agreements they had with the previous owners which however had expired.

- [6] It is clear that in order for them to be on the plots or premises legally they have to get the permission or authority of the new owner, some arrangement must be made, but it was the finding of the Court that they occupied the plots illegally and it was the Court's judgment that they must be evicted.
- [7] The Respondents' submission that the only question in the appeal must be whether the decision is wrong or right, and that in an appeal the Court is bound by the record of proceedings in the *court a quo* is a correct one.

Rustenburg Platinum Mines Ltd vs Commission for Conciliation Mediation and Arbitration¹

Teaching Service Commission v Judge of the Labour Appeal Court²

- [8] In their grounds of Appeal, the Appellants seem to dispute the right of the 1st Respondent to own the property and submit the procedure giving her title was flawed. They raised arguments about the irregularity of the transfers as well as non-joinder.
- [9] The non-joinder referred to is that of the Master of the High Court and the previous owner of the plot **Mrs Mthembu**. This was never raised in the plea that was filed for the Defendants in the Subordinate Court. It therefore is a

¹ 2007(1) SA 576

² LAC (2007-2008)

new matter which cannot be raised on appeal for the first time. Therefore it must fail.

[10] On the question of ownership of the two plots by Plaintiff in the *Court a quo*, there were attachments to the summons relating to the sale of each plot. The Plaintiff has all along been in possession of the Leases for the plots, as well as Deeds of Transfer into Plaintiff's name. This is *prima facie* and probably even conclusive proof in the absence of any better title that ownership of a plot vests in the transferee. Evidence of the Leases; Certificates of Consent to Transfer and Deeds of Transfer was put before the Court and it concluded on the basis thereof that Plaintiff was entitled to the ejectment order.

[11] It is quite surprising to observe that none of the Defendants gave evidence at the trial of the matter. Instead they preferred to call **Mrs Mthembu** to give evidence on their behalf, which however turned out to be quite contrary to what was expected since it favoured Plaintiff's more than the Defendants' case.

[12] I would only refer to her cross examination to highlight this and starting from page 84 of the record she said in reply to Plaintiff's counsel;

“**Q:** I put to you that your husband signed the Deed of Sale, Deed of Transfer and the Lease has been transferred in the plaintiff's name, can you dispute that fact?

A: No, I cannot.

Q: You have indicated that you in your own right had signed a second Deed of Sale with the plaintiff, am I correct?

A: Yes.

Q: And that you did sign a transfer something?

A: Yes.

Q: I want you to look at the document, deed of transfer, is it the deed of transfer you made with the plaintiff for **031**?

A: Yes.

Q: At the time you entered into this agreement it was on the **25/03/13**.

A: Correct.

Q: Can you tell us the year of the passing away of your husband.

A: **09/04/2011**.

Q: You indicated in your testimony that you are married in community?

A: Yes.

Q: Could I be wrong that all his property now rightfully belongs to you?

Mr. Sekatle: This is a legal issue that could be dealt with properly and in accordance by lawyers.

Ms. Molapo: I shall rephrase.

Q: Do you consider any property that belonged to your husband as yours?

A: Yes.

Q: Would I be correct to say that all the property you own you can do as you please with it.

A: Yes Madam.

Q: You indicated in your testimony that after concluding sale of agreement with plaintiff you wrote a letter seeking to cancel that sale.

A: Yes.

Q: You were asked a direct question what prompted you to do so. You said you could not agree with the family, your husband's brothers?

A: Yes.

Q: And you said earlier that you can do as you please with your property, is this allegation of consultation well-placed?

A: I take that is a family property.

Q: Were they right or wrong?

A: I view that they were right.

Q: You said that after writing a letter to plaintiff you did not get an account number to reimburse them?

A: Yes.

Q: Did you ever approach the Court of law for cancellation of Deed of Sale and subsequent documents?

A: No.

Q: So the sale between you and the plaintiff has never been cancelled?

A: I was still waiting for them.

Q: Has it been cancelled?

A: No.

[13] This evidence in my view resolves the question of the plots in dispute in favour of the Plaintiff/Respondent. This witness and the husband and perhaps even the extended family are the only ones who could challenge the validity of the transfer to the Plaintiff. They did not do so and I conclude that the Magistrate was correct to accept as a fact that the property belongs to the Plaintiff.

[14] It was therefore correct for the learned Magistrate to order ejection of the Respondents from the premises because they had no agreements to entitle them to be there and their previous subleases with the **Mthembus** had already expired.

[15] The Respondent asked for costs on the attorney and client scale *de bonis propriis* against Appellants. This is because of the actions of the Appellants and their Counsel was said to be extremely unreasonable in the circumstances.

[16] I agree that the Respondent was drawn into unnecessary expenses by the Appellants and they should not have been made to incur any costs in case where the Appellants could not even support their claim to title in Court. They failed to give evidence of any of their allegations. The person who gave evidence on their behalf did not help their case.

[17] On the question of costs *de bonis propriis*, it would have been fair and it is established that Counsel should first be called upon to show cause why such

an order may not be made against him. That was not done in this case and I therefore only make the following order.

- (a) The appeal is dismissed with costs.
- (b) The costs of the appeal are awarded to the Plaintiff on the attorney and client scale.

L.A. MOLETE
JUDGE

For Appellants : Mr B.M. Sekatle

For Respondents : Mr L. Molapo