

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

In the matter between

**THABISO MAKEPE**

**APPLICANT**

**And**

**LEBOHANG THOTANYANE**  
**FIRST NATIONAL BANK-LESOTHO**

**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Coram** : **L.A. Molete J**  
**Date of hearing** : **04<sup>th</sup> August, 2017**  
**Date of Judgment:** **31<sup>st</sup> August, 2017**

**Summary**

*Agreement of sale of plot – Whether Commercial Court has jurisdiction – Plaintiff seeking specific performance in terms of a contract – Agreement of the parties giving possession to Applicant prior to formal transfer – Respondent refusing to facilitate transfer.*

## ANNOTATIONS

### CITED CASES

**Lephema v Total Lesotho (Pty) ltd and Others C of A (CIV) No:36/2014  
Mafube Investment Holdings (PTY) ltd vs Mashamole Letaoa and two  
Others LC/APN/137/2014**

**Peterson v Cuthberth and Co ltd 1945 AD 420**

**Room Hire Co (PTY) v Teppe Street Mansions (PTY) ltd – 1949(3) SA  
1155**

### STATUTES

**Land Act No.8 of 2010**

### BOOKS

- [1] The Applicant in this case asks for an order that 1<sup>st</sup> Respondent be ordered and directed to take the necessary steps to pass transfer of plot held under **lease NO: 12281-338**, situated at arrival centre, within the Maseru Urban Area. Alternatively if he fails to do so, the Deputy Sheriff be authorised to do so.
- [2] After a number of interlocutory applications and objections, the parties finally became ready to argue the matter. I need only to mention that both parties are married people and initially their spouses were not joined. This prompted a point of non-joinder of the spouses; and misjoinder of the bank as Respondents.
- [3] The Court encouraged the parties to agree on most of the initial points raised and when the matter was heard, there only remained the matter of jurisdiction and material disputes of fact which the respondents insisted to argue as they could dispose of the matter.

- [4] The jurisdictional point should be dealt with first because if it lacks jurisdiction the Court need not go into any other aspect of this case.
- [5] The High Court has unlimited jurisdiction to hear and determine all matters before it, except where the jurisdiction is ousted by any other law. The question is therefore whether the Land Act No.8 of 2010 disqualifies this Court from adjudication in this matter.
- [6] The Land Act is clear that matters already pending before any of the Courts that had jurisdiction before its coming into effect shall be heard by that Court to completion and shall be effective as if made after the coming into effect of the Act.
- [7] Interestingly, in Section 89(2) the interpretation of adjudication is defined:-

“.....the process which establishes, recognises, and confirms with certainty and with respect to any particular parcel or plot of land, what rights or interests exist and by whom they are exercised and to what limitations, if any, they are subject;

‘land’ includes land covered with water, all things natural or manmade growing on land, an buildings or other structures permanently affixed or attached to land.”

- [8] In the case of **LEPHEMA v TOTAL LESOTHO (PTY) LTD AND OTHERS**<sup>1</sup> the Court of Appeal of Lesotho said that;

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<sup>1</sup> C of A (CIV) NO 36/2014

“In regard to the jurisdiction issue, the inquiry as to whether the expressions ‘relating to land’ or ‘concerning land’ must therefore focus on the provisions of the Act. It is clear, in my view, that the Act is concerned (apart from the presently irrelevant matter of allocations unaccompanied by the grant of the title) with title to land, derogations from title and rights which override title..... Those expressions are of wide and general import but they must be interpreted in their context so that disputes to which they refer are disputes involving claims to title, claims relying on derogations from title or claims to rights overriding title.”

[9] In the case of **Mafube Investment Holdings (Pty) Ltd v Mashamole Letaoa and two Others**<sup>2</sup> in the Land Court, **Sakoane AJ** as he then was, had this to say;

“The claim for specific performance herein is an entrancement of the Plaintiff’s common law right to demand specific performance of contractual obligations in respect of which it has been said;

“in our law, a Plaintiff has a right to specific performance, with the Court retaining a discretion to refuse it if in the circumstances of the case it is not a

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<sup>2</sup> LC/APN/137/2014

proper and appropriate remedy. Although the Court will as far as possible give effect to the Plaintiff's choice in claiming specific performance, it has a discretion in a fitting case to refuse it, leaving Plaintiff to claim his *id quod* interest.”<sup>3</sup>

- [10] The above case was very similar to this one presently before me. It was a case where after executing the agreement, the 1<sup>st</sup> Respondent sought to renege on it by refusing to sign the requisite transfer documents. It was said that Applicant was willing to settle the outstanding balance but could not do so due to the deliberate act on the part of 1<sup>st</sup> Respondent of defeating the sale.
- [11] In that case, the Court held that it had no jurisdiction and dismissed the application with costs for that reason. In other words **Sakoane J** confirmed that where specific performance is sought the proper forum has to be the Commercial Court.
- [12] Mr Rasekoai for the Respondent argued that the matter is in the jurisdiction of the Land Court. That was quite surprising because he was involved in the case referred to above before Sakoane J.
- [13] His argument was that because there was no consent to transfer the property; therefore the matter is not within the jurisdiction of this Court but should go to the Land Court. This seemed to be his interpretation of the section and authorities referred to. It is untenable.

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<sup>3</sup> Erasmus and Van Loggerenberg – Jones and Buckle the Civil Practice of the Magistrates' courts in South Africa Vol 1, 8<sup>th</sup> edition page 180

- [14] If that argument is correct, then a party to an agreement of sale of land would never be entitled to a specific performance order where the seller breached the agreement by refusing to take the necessary steps to pass transfer, even in cases where he deliberately and intentionally breaches the contractual terms by simply refusing to sign over the transfer.
- [15] The case before me could be such a case when one considers that full payment was made, and the parties even agreed that Applicant would be given occupation of the plot notwithstanding that the formal transfer was not yet registered.
- [16] I am of the view that this is a case wherein the Applicant seeks specific performance and that it is within the jurisdiction of this Court to grant Applicant an appropriate remedy.
- [17] In the case of **Mafube Investment Holdings (Pty) Ltd, Sakoane J** had this to say;

“The sale agreement; I consider, a business contract containing the suspensive statutory condition of consent from the Commissioner of Lands. And like any alike contract, it is enforceable immediately upon conclusion by specific performance or cancellation against either party for breach of contract.”

- [18] I agree with this statement; and therefore Applicants argument that he is entitled to claim specific performance in the circumstances is a valid one.

[19] The Respondents' only other point to consider is the alleged possible disputes of fact in the proceedings and submission that the matter should have been brought by way of summons instead of an application, or that it be referred to oral evidence.

[20] It is established in our law that where any dispute of fact is alleged, the Court must examine the case and determine whether in truth there is a real and material dispute of fact which cannot be satisfactorily determined without the aid of oral evidence. If this is not done a Respondent might be able to raise fictitious issues of fact and thus delay the matter to the prejudice of Applicant.

(a) See **Peterson v Cuthbert and Co ltd 1945 AD 420**,

(b) **Room Hire Co (Pty) v Tepe Street Mansions (Pty) ltd – 1949(3) SA 1155.**

[21] In such cases, the Court is required to inquire into the common-cause issues to be able to determine whether the disputes are so material as to deny the Applicant the relief he seeks.

[22] Both parties are agreed and it is common cause that;

(a) They entered into an agreement of sale of immovable property, namely plot 12282-36 situated at Arrival Centre, Maseru urban area.

(b) The purchase price was the sum of M2,378,000-00 (Two Million Three Hundred and Seventy Eight Maloti payable in two instalments.

- (c) The first of M1000,000-00 (One Million maloti) was payable as a deposit within 21 days of the agreement and the balance against registration of the transfer into the name of the Applicant as the purchaser.
- (d) Notwithstanding the above specific term of their agreement, the Applicant proceeded to pay the balance of the purchase price before registration of the transfer, and he was given vacant possession of the property by Respondent.
- (e) It was a further term of the contract that  
*“transfer of the property shall be done in the customary form as soon as possible after signature hereof. Registration of transfer shall be attended to by Naledi Chambers Inc”.*
- (f) Subsequent to full payment and taking possession of the property Applicant saw no progress in the registration of transfer and went to seek legal advice, causing his lawyers to write a letter of demand for transfer of the plot to himself.
- (g) The response came from the Respondents lawyers stating that;  
*“Client has given us instructions to cancel the contract as he is no longer desirous of transacting with your client on account of your client being **in mora** in so far as the implementation of the contract is concerned. Client thereby holds your client responsible for the failure of the conclusion of the contract. Client is ready to reimburse you the monies that are legally due within 30(thirty) days.....”*



[23] It was then that the Applicant sought the intervention of the Court to enforce the agreement between the parties. The Applicant attached to the notice of motion the agreement itself and also copies of the bank payments into the account of Respondent as well as the correspondence between the parties through their lawyers.

[24] On the above facts the Court was obliged to discover what breach the Respondent refers to in order to determine that Applicant is in fact “*mora*”. The Respondent has not shown anything of a violation on the part of Applicant, and I am not persuaded that Applicant acted in any way into breach of the agreement. *Moreso* because the Respondent does not specify the fault which he accuses Applicant of.

[25] It follows therefore that this is a case of a fictitious dispute of fact intended to delay the matter. I am of the view that Applicant is entitled to the relief he seeks, except that upon failure of the Respondents to comply further proceedings of contempt may be instituted. This is because the Deputy Sheriff cannot be required to sign the transfer in a case where he was not involved to begin with.

[26] The Application is granted in terms of prayers 1a) (c) and 2, save to say the costs are awarded on the ordinary scale.

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**L.A. MOLETE**  
**JUDGE**

**For Applicant** : Adv. B.E. Sekatle  
**For Respondents** : Adv. M.S. Rasekoai

