IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/A/32/11**

In the matter between

MABOKANG MOKULUBETE **APPELLANT**

AND

NTSANE MATSOSO **RESPONDENT**

JUDGMENT

CORAM **:** **HON. J.T.M. MOILOA J.**

DATE OF HEARING **:**
DATE OF JUDGMENT **:** **10 MARCH 2017**

ANNOTATIONS:

Cases

1. Joy to the World v Neo Malefane and Another CIV/APN/472/13
2. Hata-Butle vs Frasers Lesotho Ltd. 1995/1999 LAC 698
3. National Director of Public Prosecutions vs Phillip and Others 2002(4) SA 60 @ 106
4. Alphedie Investments (Pty) Ltd. v Greentoys (Pty) Ltd v. Greentoys (Pty) Ltd. 1975(1) SA 161

[1] **INTRODUCTION**

This is appeal against an ejectment order granted in favour of Respondent in 2008. In 2008, Appellant Mabokang Mokulubete who was the respondent in the court aquo, was served with summons in the Magistrate

Court at the instance of the Respondent (Plaintiff).Respondent alleged in his particulars of claim that the appellant was in anunlawful possession of plot No. 22608 which is situated at Qoaling Ha –Letlatsa which he (Respondent) was the rightful owner and alloteeof. He alleged that appellant had taken occupation of the plot without his consent and she had already made developments on the same. He therefore sought an ejectment order against the appellant and costs of suit.

[2] After consideration of the pleadings of both sides and their respective evidence presented, the Magistrate gave judgement on the 09th June 2009 granting an ejectment order sought.Aggrieved with the order, Appellant noted an appeal to this court and the grounds of the appeal are articulated on the notice of appeal filed of record.

[3] <u>BACKGROUND</u>

A summary of what transpired is gathered from the evidence led at the trial court. It is common cause that the plot which is the subject matter of the dispute belonged to TaeloMatsoso who was the Chief of Qoaling who has died. It is situated at Qoaling. It is also common cause that the Appellant bought the plot in question fromMamoeketsiMatsoso, the wife of TaeloMatsoso sometime in 2006. It is also not in dispute fact that several meetings were held which attempted to resolve the dispute between Mamoeketsi and the Respondent over the same plot until Mamoeketsi admitted that indeed the plot belonged to Respondent. It seems that the late Chief Taelo was related to Respondent.

[4] There are four grounds of appeal but basically the first two groundsare to the following effect. The gist of the appeal isthat the magistrate erred in

finding that the respondent was rightful owner of plot 22608 without any documentation produced by the Respondent. Further that Magistrate failed to consider the fact thatAppellant had already made the improvements thereon and this fact was not taken into account when an ejectment order was granted. The last point is to the effect that the purported verbal agreement between the late Taelo and the Respondent is null and void because it was not done in accordance with the law. Counsel for Appellant submitted that at the time of the purported agreement between the late Taelo and Respondent, the applicable law was the **Land Act 1979 and section 21 (1) of the Act** had to be fulfilled becauseQoaling was an urban area. He went to show that the law requires that the land committee is vested with the power to grant title to land in urban areas and the Minister has to give the consent to the before the land could be allocated.He therefore submitted that failure for both Respondent and Taelo to abide by this law renders this agreement null and void.It was submitted further that even if the land was not allocated but rather transferred, the transfer was not done in accordance with the law, and said the transfer is equally invalid.

[5] On the day for the arguments to be addressed to Court on merits, Counsel for Respondent came prepared to argue condonation which was long granted by Chaka-Makhooane J. For that reason,there were no heads of argument filed on behalf of the Respondent on this appeal.

[6] I now deal with the issues raised by the Appellant.The Appellant's first contention is that the Magistrate erred in granting the order which give the Respondent ownership when he did not have any documentation to prove that the land belonged to him. From the evidence adduced at the trial Court, the issues as to why the Respondent was not in possession of

the documentation was canvased and it became clear through Respondent's witness that the wife of the late Taelo was not cooperative despite several attempts made to give the Respondent title to land. Plaintiff witnesses during trialcorroborated each other on the facts and proved that Appellant knew that indeed Plaintiff was given the site by the late ChiefTaelo but it seemed that there were someunresolved issues between Mamoketsi and Respondent.In one meetingthat was held, a family made a resolution that the site belonged to the Respondent and it was ordered that the Respondent together with Mamoeketsi should compensate the Appellant since she already made a foundation on the plot.Among the people who signed that resolution Mamoeketsi was included. One of the conditions on the resolution was that the Appellant be given another site which stipulation was accepted by Mamoeketsi. It must be remembered that at the time therewere no developments on the site only a foundation. The Appellant at the trial court confirmed that she was told after the meeting that she will be allocated a different site and be compensated for the development made.She went further to show that herself, Tšabalira who was the acting Chief of Qoaling at the time and Mamoeketsi went to a different site as promised but the measurement of that site couldnot fit measurements of the previous site. In other words they found the plot to be small compared to the disputed site. Appellant indicated that when compensation was not forth coming as agreed, she and Mamoeketsi decided that Appellant continue making the development though they both knew that the matter was unresolved.

[7] This evidence shows that Mamoeketsi not only signed the resolution but she abided by it. The only issue that made her to change her mind was when the Respondent failed to compensate the appellant for the improvements made on the site.She did not deny that she made an

undertaking to allocate another site to the appellant. Evidence clearly indicated that indeed Respondent was at some point given this land by the late Chief Taelo which evidence was never denied. When Mamoeketsi gave her testimony, she indicated that she called the respondent and told him that she is going to subdivide the disputed site and respondent could not agree with her. She further said, she told the respondent that he should accept anything given to him since it was gift. From this evidence it is clear that Mamoeketsiknew that the site belonged to Respondent. It could not be true that she was forced to sign the resolution for the sake of peace when she abided by the terms of the same resolution. So the contention that the Magistrate erred in granting the Respondent title to land without documentation is without merit and falls to be dismissed because Respondent was maliciously denied documentation by the person who was supposed to help him.

[8] This brings me to the second issue on the grounds of appeal, namely, that the Magistrate failed to take into consideration the fact that some improvements were already made on the site when an ejectment was granted.Ejectment proceedings and an action for compensation on the developments made are two differentthings founded on two distinct grounds of action.After the order was granted against Appellant, she ought to have instituted new proceedings where she could have attempted to prove that she had made *bona fide* improvements on the plot unaware that the plot in question had been allocated previously to someone else. It must be noted however that there has to be evidence that she made those improvements not knowing that the plot in question has the owner.For this reason, this ground as well falls off. See the case of **Joy to the World v Neo Malefane and Another CIV/APN/472/13** by Hon. N. Majara CJ on the 25th January 2016. In this case the Court had occasion

to deal with the right of retention over property until the Applicant was fully compensated for the development it made on the property.

[9] The last ground of appeal was that the site in question was not allocated in accordance with the provisions of the **Land Act 1979** and for that reason the transfer be declared null and void. His addresses, Counselreferred the court on several sections of the Land Act which ought to have been followed before the transfer was effected. This is issue, in my view is a serious issue that ought to have been raised at the courta quowhere the Respondent would have had an opportunity at the trial of his case and then plead a completely new and different one on appeal. It is not permissible. A party is bound by his pleadings for pleadings are intended to define issues for determination by the Court. See **Hata-Butle vs Frasers Lesotho Ltd. 1995/1999 LAC 698** to deal with it fully both in pleading to it and when giving evidence. It is trite that a litigant must plead his cause of action of defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. A litigant who fails to do so may not thereafter advanced a contention of law or fact which his opponent has failed to place before Court because he was not sufficiently alerted to its relevance.See **National Director of Public Prosecutions v Phillip and Others 2002 (4) SA 60 at 106** I am of the view that the issue was supposed to be canvassed at the trial to allow the Respondent to give evidence to that effect.The Court will not look kindly or benevolently upon a litigant who litigates by ambush tactics. Such a view was expressed, inter alia in the case of **Alphedie Investments [Pty]Ltd v Greentops [Pty] Ltd 1975 [1] SA 161 T** at 1. TheCourt stated that the issues as defined by must not be lost sight of and a party cannot rely on causes of action or on defences which were not put in issue and were

consequently not fully investigated.To allow this point is to prejudice the Respondent because he cannot deal with this issue now which was never an issue at the court aquo.

[10 For the reasons stated above the appeal is dismissed with costs to Respondent.

J.T.M. MOILOA
JUDGE

For Appellant :

For Respondent :