

**IN THE HIGH COURT OF LESOTHO****HELD AT MASERU****CIV/APN/238/19**

In the matter between

**LESOTHO OBSERVATORY FOUNDATION****APPLICANT**

And

**HATA-BUTLE (PTY) LTD****1<sup>ST</sup> RESPONDENT****PUMA ENERGY LESOTHO (PTY) LTD****2<sup>ND</sup> RESPONDENT****FELIX PETROLEUM****3<sup>RD</sup> RESPONDENT****JUDGEMENT**

Coram: Banyane AJ

Heard: 16/08/19

Delivered: 05/09/19

**SUMMARY**

*Point in limine of lack of jurisdiction - Jurisdiction of the High Court on the one hand and the Land Courts on the other-effect of creating specialist Land Courts being ouster of the High Court jurisdiction in land disputes - what constitutes same - where the basis for the claim of possession and interdict is title to Land, the claim becomes one of title to land and as such justiciable in the Land Courts.*

## **ANNOTATIONS**

### **CITED CASES**

Lephema V Total Lesotho (Pty) Ltd & others C of A (CIV) 36/14

Motumi V Shale C of A (CIV) No.32 of 2017

Moletsane V Thamae C of A (CIV) 23/2017

Ts'eliso Motebele V Mampho Matekase LC/APN/152/2014)

Leseteli Malefane V Roma Valley Co-operative Society C of A (CIV) 8 of 2016

Thamae V Moletsane

Paper, Printing, Wood & Allied Workers' Union & Pienaar NO 1993 (4) SA 621

Vice Chancellor NUL V Professor Lana C of A (CIV) No. 10 of 2002

Tseliso Mokemane V Tlhako Mokhorro LC/APN/30B/2013

Alice Mphutlane v Mosa Seoli & 5 others (LC/APN/18/2014).

### **STATUTES**

The constitution of Lesotho 1993

The High Court Act, No of 1978

The Land Act No.8 of 2010

Land (amendment Act) No.16 of 2012

### **BOOKS**

Silberberg & Schoeman's: The Law of Property; 3<sup>rd</sup> Edition, 1992, Butterworths, Durban

## **Introduction**

**1]** The applicant approached this court on urgent basis, seeking an order in the following terms;

1. Dispensing with the rules pertaining to the modes of service and time limits provided for in the Rules due to the urgency hereof and disposing of the matter at such time and place and in such manner and in accordance with such procedures as this honourable Court may deem fit.
2. That a *rule nisi* issue returnable on a date and time to be determined by the honourable Court calling upon the respondents to show cause, if any, why:
  - 2.1 the second respondent shall not be ordered and directed to stop forthwith all construction, renovations, repairs of the applicant's premises or use the applicant's premises or use of the applicant's premises situated at Roma, known as Roma Filling station opposite the National university of Lesotho for conducting business of fuel dispensation or any other business without the applicant's consent.
  - 2.2 the second respondent shall not be ordered to remove all its construction equipment and other materials including stock of whatsoever description from the applicant's premises forthwith pending finalisation of this application.
  - 2.3 the second and third respondents shall not be ordered to return the premises known as Roma Filling station to the physical possession of the applicant and hereby ordered to stop disturbing the applicant's possession.

### FINAL RELIEF

3. it is declared that the second respondent was not entitled to effect the improvements on the applicant's property without authorisation and consent of the applicant.

4. The second respondent is ordered to remove signage, branding decals, structures that are easily removable without damage to the property, fuel tanks, fuel dispensers and other items which have been brought to the applicant's property at Roma, near Roberto's and Hata-Butle Business centre in the District of Maseru.
5. Directing the second and 3<sup>rd</sup> respondents to immediately vacate the commercial building known as Roma filling Station, Roma, near Hata-Butle Business centre in the district of Maseru and to return vacant, peaceful and undisturbed possession of the said property and its surroundings to the applicant.
6. Interdicting and restraining the 2<sup>nd</sup> and third respondent from interfering with the applicant's ownership and property rights in and to the premises known as Roam Filling Station situated at Roma opposite national University of Lesotho adjacent to the Hata-Butle Business complex.
7. That prayers 1.2.1 and 2.2 operate with immediate effect as interim Court order pending finalization hereof.
8. That the applicant be granted cost of this application including costs consequent upon the employment of counsel.
9. Further and/ alternative relief.

**2]** This application was served on the respondents on 12/07/19 and they entered their notice(s) of intention to oppose on 16/07/19. When the parties appeared before me on the 16<sup>th</sup> July 2019, they agreed on the dates for filing of answering affidavits and further pleadings as well as heads of argument. The rule was therefore not sought nor issued in respect of the interim reliefs sought.

In their respective answering affidavits, the respondents raised the following objections/points in limine;

- a) lack of urgency
- b) disputes of fact
- c) lack of jurisdiction

**3]** On the date appointed for hearing of this application, parties agreed that the Court should first deal with jurisdictional issue and only in the event that it is dismissed, the parties would proceed to address the merits of the application. Arguments were therefore confined to this point. This judgement accordingly focuses on the said point only.

**4]** The allegations founding jurisdiction appear at paragraph 6 of the founding affidavit deposed to by one **Moejane Mahlaha**, who describes himself as the "chairperson of the executive committee of the applicant", a registered association. They are as follows;

*"The honourable Court has jurisdiction to entertain this matter in as much as the cause of action arose and/or the parties are resident within its area of jurisdiction. Alternatively, the honourable Court has jurisdiction over this matter in as much as the value of the property in question is in excess of M3 000 000.00(three million Maloti) and in particular because the applicant seeks specific performance of an act as stated in the notice of motion without an alternative prayer for damages."*

### **Submissions and Analyses**

**5]** The respondents' objection to the competence of the High Court to hear this matter is in essence that this matter is actionable in the Land Courts, either District Land Court or the Land Court because it revolves around land and is a claim of title to Land. The case of **Lephema V Total**

**Lesotho (Pty) Ltd & Ors C of A No.36/14** was cited in support. The cases of **Leseteli Malefane V Roma Valley C of A(CIV) 8 of 2016**, **Moletsane V Thamae C of A (CIV)23/2017** were also cited to support the contention that the Land Courts (district land court) included have power to grant even declaratory orders. This submission is based on an argument that the applicant's cause of action is *rei vindication* in terms of which the applicant must prove that he is the owner of the disputed property. The cases of **Tlali Phakisi V Motlatsi Tlapana CIV/A/30/30 and Goudini Chrome (Pty) Ltd V MCC Contracts (Pty) Ltd 1993(1) SA 77** and others were cited in support of this contention. It was further argued that the applicant's claim is in no way a specific performance claim because there is no contractual relationship that exists between the parties. It was further submitted on behalf of the respondents that it is not proper for the applicant to claim repossession of property in circumstances where another party also claims ownership of such property.

**6]** Counsel for the applicant, Advocate Letsika controverts the respondent's challenge by submitting in the first place that; a proper approach to be adopted. In determining the validity of the point of Law raised, is to limit the court's attention to the applicant's affidavit only. He argued therefore that the applicant, as gleaned from the founding papers is only seeking an interdict and specific performance in the form of *mandament van spolie*; to put it in other words; he only seeks restoration of possession that it had always enjoyed which the respondent had unlawfully removed.

**7]** He argued further that the applicant is not seeking an order that he be declared as the owner of the property in question and as such this Court is not called upon to determine the adverse claims on Land as contemplated under Rule 8 of the District Land Court Rules 2012, that is to say; who the

true owner of the property is. He submitted consequently that there is no basis for suggesting that the applicant's claim relates to or concerns land.

He went on to say; the District Land Court, being a subordinate Court does not have power to hear a matter in which a specific performance is sought. He submitted therefore that the cases on which the respondents; counsel rely are irrelevant for purposes of this case.

**8]** The only issue raised by these submissions is whether or not the dispute before court involves a claim of title to Land and therefore justiciable in the Land Courts.

For better appreciation of the issues raised by counsels' submissions, it is pertinent to visit the statutory provisions of the Constitution 1993, the High Court Act 1978 and Land Act 2010 to find out exactly, what jurisdiction is conferred unto the High Court and Land Courts respectively.

### **Jurisdiction of the High Court;**

**9]** Section 119(1) of the Lesotho Constitution establishes the High Court and confers on it unlimited original jurisdiction to hear and determine any civil or criminal proceedings (see also **Section 2** of the **High Court Act NO. 5 of 1978**).

### **The Land Courts**

**10]** The Land Courts are creatures of the **Land Act No.8 of 2010**, section 73 thereof (as amended by **section 7** of the **Land (amendment) No. 16 of 2012**). Their jurisdiction is conferred and defined under the said Act.

Section 73 reads;

**73.** *The following Courts are established with jurisdiction, subject to the provisions of this part, to hear and determine all disputes, actions and proceedings concerning land;*

- a) The land Court; and*
- b) District Land Courts*

**74.** *The Land Court shall be a division of the High Court.*

**75.** *The subordinate Courts are District Land Courts for purposes of this Act.*

The rationale for creation of these courts is distinctly stated in the objects of the Act as; to achieve "*speedy disposal of land matters through creation of specialised Land Courts...*"

**11]** It becomes immediately clear from the above provisions that the Land Court(s) are specialised Courts designed to deal with ALL land disputes. **Motumi V Shale C of A (CIV) No. 32 of 2017.**

Sections 74 and 75 respectively simply defines their status by putting, the Land Court at an equivalent position as the High Court, and the District Land Courts the equivalent of a subordinate Courts. Unlike the High Court, the jurisdiction of Land Courts is confined or limited to Land Disputes.it should be highlighted that **(Ts'eliso Motebele V Mampho Matekase LC/APN/152/2014),**

**12]** It follows, in my view, therefore that, where the legislature establishes a specialist Court, the effect thereof is to ouster jurisdiction of the ordinary Courts in respect of all matters that fall within the spectrum of the specialist Court so created. my view is fortified by the remarks of **Botha JA** in the case of **Paper, Printing, Wood & Allied Workers' Union**



**& Pienaar NO 1993 (4) SA 621 (A) at 637 A-B**, which were adopted in the case of **Vice Chancellor NUL V Professor Lana C of A (CIV) No. 10 of 2002**

*'The existence of such specialist Courts points to a legislative policy which recognizes and gives effect to the desirability, in the interests of the administration of justice, of creating such structures to the exclusion of the ordinary Courts.'*

**13]** Although the quoted remarks were made in the context of exclusivity of Labour Court jurisdiction in labour-related disputes, I find the reasoning applicable in relation to the Land Courts too. An array of decided cases on the jurisdictional scope of the Land courts reflect that the status quo as regards the unlimited original Jurisdiction of the High Court in Land related Disputes has been altered. By way of illustration, my brother **Sakoane AJ** (as he then was) had occasion to deal with an issue of whether or a not a District Land Court is competent to adjudicate over a matter where an order for cancellation of a Lease is sought in **Tseliso Mokemane V Thlako Mokhorro LC/APN/30B/2013**, a remedy ordinarily falling within the province of the High Court. He succinctly affirmed the above position that the jurisdiction of other Courts in land matters is ousted (para 15). He stated further at paragraph 17 of the judgment that such courts are clothed with full jurisdiction to grant remedies sought. This means, in my view, that so long as a dispute is categorized as one relating or concerning Land, the District Land Courts have the capacity to preside over same, regardless of the remedy sought and despite the fact that prior to the enactment of the Land Act 2010 and the resultant birth of the Land Courts, the remedy so sought was only justiciable in the High court. An illustration of the remedies referred to herein, is a declaratory order. (See *Thamae v Moletsane*). Perhaps I should hasten to add that the jurisdiction of these Courts is concurrent in land Disputes( *Roma Valley, Moletsane V Thamae*) save in

matters to which specific forum(that is to say the Land Court or district Land Court) has been attached by the provisions of the Act aside the General jurisdictional provision(S 73). See in this regard, sections 10(5)18(3), 28, 59, 52(d) (to mention but a few).see also **Alice Mphutlane v Mosa Seoli& 5 others (LC/APN/18/2014).**

**14]** Having outlined the jurisdiction of these Courts, I now turn to nature of the applicant's claim

### **The nature of the applicant's claim**

The applicant's founding averments at paragraph 7 of the founding affidavit are relevant in the determination of whether or not the applicant's claim is a dispute concerning Land. He avers that;

*"The applicant is holder of rights in and to immovable property ...known as Roma filling station...and that the applicant holds the property through a registered certificate of title to occupy bearing number 9183 which was granted on 22nd February 1971".*

**15]** These averments undoubtedly speak to the foundation on which the applicant is suing. In other words he is suing the respondents by virtue of being a holder of a title deed to this property, hence he seeks an order interdicting the respondents from interfering with his ownership rights, seeks that they vacate the said land, remove their construction materials thereon and restore possession of the said land to the applicant. In my view the applicant is claiming possession and all other reliefs, by virtue of his alleged ownership.

In order to properly categorise the nature of the applicant's claim, some basic concepts of the law of property come into play. For purposes of the determination of this question, I will focus on ownership, entitlements of the owner and protection of ownership.

- 16]** Ownership of property entitles the owner (among other things) to;
- a) use of the thing(property),
  - b) the power to possess the thing and
  - c) the power to claim the thing from any unlawful possessor (ius vindicandi. see **Silberberg & schoeman's : the Law of property 3<sup>rd</sup> edition,p162**

Vindication is a remedy availed as a form of protection of ownership and is intended for recovery of possession. The underlying principle is that an owner cannot be deprived of his property against his will and where this happens, he is entitled to recover/vindicate it from the person who retains possession of it without his consent. (Silberberg p.273). It is inherent in the nature of ownership that possession of the thing should normally be with the owner.

**17]** Where an eviction order is sought (as is the case here) it was held that the claim is vindicatory in nature and ownership is an essential averment and has to be proved adequately (by way of title document) **Goudini Chrome (Pty) Ltd) V MCC Contracts (Pty) Ltd 1993(1) SA 77** and that the property is in the possession of the respondent at the commencement of the action. The applicant in the instant seeks to prove his title by production of a Title Deed.

In essence, the applicant is claiming that it is the rightful holder of rights or title to the disputed plot. The question of possession is only accessory to that of ownership. To put in in another way; the applicant is seeking protection of his ownership rights through an interdict and restoration of possession of the land by seeking a "vacation" order. The next question should then be; isn't this one of the types of disputes anticipated under the Land Act 2010? To answer this, the instructive remarks of Howie JA in

**Lephema V Total Lesotho (Pty) Ltd & Others C of A (CIV) 36/14**

elucidates the proper interpretation of section 73 of the Land Act 2010;

*"in regard to the jurisdiction issue the enquiry as to what the expressions 'relating to land' or 'concerning land' mean, must therefore focus on the provisions of the Act. It is clear, in my view, that the Act is concerned...with title to land, derogations from title and rights that override title. The dispute raised by the Lephema's application (i.e assertion of rights by sublease and cancellation and reversal of an invalid registration of a lease agreement in the Deeds Registry) for example, unquestionably relates to or concerns property but it is common cause that it is not a dispute "relating to" or "concerning land" within the meaning of the Act. Those expressions are of wide and general import but they must be interpreted in their context so that the dispute to which they refer are disputes involving claims to the title, claims relying on derogation from title or claims to rights overriding title"*

**18]** In casu; the application is about an interdict, ejectment and possession based on an allegation that the applicant is a holder of rights to the plot in question. The respondent's counsel are in my view, correct in their submission that the real dispute herein is on ownership of this piece of Land. This in my view, places it squarely within nature of disputes contemplated in section 73 as interpreted in the Lephema case. Applicant's counsel's argument that the claim would be defined as a land dispute if he had a sought a declaratory order to the effect that he is the owner, is, in my considered opinion, without merit. The jurisdiction of the High court is ousted by the creation of specialised Court and cannot in any way be extended to disputes falling within the purview of the Land Court simply because the parties are domicile within the jurisdiction of the High court and the value of property exceeds M 300.000.00.

**19]** Having made the finding as I did above, I do not deem necessary to even delve into the question whether or not the respondents' averments on the fact that the parties had been embroiled in litigation over the past years over this land, should be considered.

### **Conclusion**

**20]** For reasons set out above, I am of the view that the present matter is a claim concerning Land and therefore falls squarely within the exclusive jurisdiction of the Land Courts and that the High Court has no jurisdiction to hear the matter.

In the result, the following order is made;

The point of Law is upheld with costs

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**BANYANE P**  
**ACTING JUDGE**

For Applicant: Advocate Letsika

For 1<sup>st</sup> and 3<sup>rd</sup> respondents: Advocate Chonela

For 2<sup>nd</sup> respondent: Mr Mpaka

