IN THE LAND COURT OF LESOTHO

HELD AT MASERU	**LC/A/09/19**
In the matter between	CIV/DLC/BRA/24/17
PULENG TEKE	**APPELLANT**
AND	
PHUTHA LICHABA HOLDINGS (PTY) LTD	**1ST RESPONDENT**
KANANA COMMUNITY COUNCIL	**2ND RESPONDENT**
DIRECTOR GENERAL L.A.A	**3RD RESPONDENT**
COMMMISSIONER OF LANDS	**4TH RESPONDENT**
LAND ADMINISTRATION AUTHORITY	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

JUDGEMENT

Coram: Banyane AJ

Heard: 07/10/19

Delivered: 15/11/19

Summary

Appeal from the District Land Court – a decision on a special answer of lack of jurisdiction - whether the decision is final or interlocutory - whether the decision is appealable - Interpretation of Rule 88 of the District Land Court - the rule envisages simple interlocutory orders on procedural aspects raised during litigation or during trial - orders having a final effect, though

interlocutory in form fall outside the limitation under this Rule and therefore subject to immediate appeal

Jurisdiction of the District Land Court to entertain a claim where cancellation of a certificate of allocation (Form C) and an order that land be registered in favour of a party - whether granting such orders is tantamount to allocation of Land by the Court - the determinant factor of jurisdiction is the nature of the right a litigant seeks to assert - if it is about title to Land, the District Land Court is competent to grant the relief sought.

Annotations

Cited Cases

Lesotho

Likotsi Civic Association and 14 Others V Minister of Local Government and 4 others C of A (CIV) No. 42/2012.

Nkoe V Masupha C of A (CIV) No. 42 of 2016

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

Lephema V Total Lesotho (Pty) Ltd & Others C of A No.36/2014

Mokhali Shale V Mamphele Shale and Others C of A (CIV) No.35/2019

Mphalane & Another V Phori C of A (CIV) No. 19 of 1999

Leseteli Malefane V Roma Valley C of A (CIV) No. 8/2016

Moletsane V Thamae C of (CIV) No.23/17

Mafata and Another v Mokemane CIV/A/24/86

Mphutlane V Seoli & Others LC/APN/10/14

Masoabi V Mofelehetsi CIV/A/10/14

Chomane v Tankiso CIV/A/5/79

Mokemane V Mokhoro LC/APN/30B/13

South Africa

Barrows V Benning (67/11) [2012] ZASCA 10(2012)

Ewing McDonald & Co Ltd V M & M Products 1991(1) SA 252(AD)

Pretoria Garrison Institutes V Danish Variety Products (Pty) Limited (1948)4 SA 839

Metlika Trading LTD V Commissioner SARS 2005(3) SA 1(SCA),

Malhere V Britstown Municipality 1948(1) SA 676 at 680-681

Statutes

The Land Act 2010

District Land Court Rules 2012

Books

Herbstein & Van Winsen; The Civil Practice of the High Courts of South Africa, 5th Edition. Juta & Co, 2018

Introduction

[1] The main issues arising for determination in this appeal are whether an appeal lies against a decision of the District Land Court on a preliminary objection raised in terms of Rule 65 of the District Land Court Rules or whether such decisions are prohibited from immediate appeal in terms of Rule 88. The second issue being whether the District Land Court has jurisdiction to entertain a claim in which cancellation of a certificate of allocation (form C) is sought and to direct that a lease be issued in favour of a litigant.

Factual background

[2] The facts giving rise to the appeal are as follows;

The 1st respondent, who was the applicant in the court below sued the appellant in the Berea District Land Court over a certain agricultural site situated at Thuathe to which he holds a certificate of allocation(Form C) issued by the 2nd respondent herein on the 04th April 2016. It appears from the 1st respondent's originating application in the Court a quo that this certificate of allocation was preceded by an agreement of sale in relation to this piece of Land. The 1st respondent has lodged a lease application against which the appellant has raised an objection.

[3] It is further the 1st respondent' case in the Court a quo that the 2nd respondent herein wrote a letter on the 22nd April 2016, in terms of which he was directed to cease using the field because it allegedly belongs to the appellant and that the Form C was erroneously issued on the recommendation of chief Thebe Masupha. Later on the 18th July 2016 the 2nd respondent wrote a letter to LAA to warn it about the erroneous allocation certificate.

[4] The 1st respondent construe this to be revocation of its allocation which it says is unlawful, unprocedural and ought to be reviewed and set aside. It thus sought relief in the following terms;

a) Review of the decision of the 2nd respondent (herein) in revoking its allocation.
b) Order directing the 4th and 5th respondents to issue lease documents in the disputed plot, surveyed and identified as numbers 14292-063 and 14292-064, in its favour.

[5] The application was opposed by the appellant. Her case is essentially that the persons who purportedly concluded the sale agreement with the 1st respondent are not members of the Teke family, but are Children of a certain 'Mamakaieane Seithleko, who according to the appellant lived with her grandfather Teke Teke, though not lawfully married and they had no rights in the land in question and could not therefore validly enter into any transaction relating to this land. Her case is further that she inherited the Land from his father Moqebo Teke, who in turn inherited it from his father Teke Teke. She filed a counter-claim, alongside her answer.

[6] She essentially sought the following relief;

c) That the lease for the disputed plots be registered in her names
d) That the 1st respondent surrenders the Forms C issued for this land
e) That the form C confirming allocation in favour of 1st respondent be cancelled forthwith.
f) That the first respondent be interdicted from interfering in any manner with the Land in dispute
g) That the 1st respondent be ejected from the disputed land.

[7] In his answer to the Counter-claim, the 1st respondent's raised a special answer of lack of jurisdiction. The basis of the jurisdictional challenge is three pronged; namely; that;

a) The District Land Court has no power to order that a lease be registered in favour of the appellant in respect of the disputed land, as that is tantamount to allocating the said land to her, whereas land allocation powers vest in the allocating authorities.
b) The District Land Court has no power to order that the 1st respondent surrenders the form C in its favour over the Land in issue.

c) The District Land Court has no power to order that the form C confirming allocation in favour of the 1st respondent should be cancelled.

[8] After submissions were made on behalf of the parties the Court upheld the special answer and dismissed the counter-claim, hence this appeal.

Before this Court

[9] Now the appellant's contention before this Court is that: the learned Magistrate erred and or misdirected himself in the following respects;

1. In holding that the District Land Court has no jurisdiction to entertain the reliefs in the appellant's counter-claim. The court a quo should have held that the counter-claim raised a dispute relating to or concerning land as contemplated by the Land Act, of which District Land Court has jurisdiction to entertain; that the Court should have dismissed the special answer.
2. By dismissing the counter-application on grounds that the District Land Court lacks jurisdiction, without hearing viva voce evidence.
3. By including that the point of Law was a point of law properly so-called.
4. By dismissing the entire counter-application when the points raised in the special answer pertained to specific reliefs sought in the counter-application, not the entire relief(s)

Arguments and analysis

[10] my understanding of the grounds of appeal is that the appellant's complaint is that, the learned Magistrate erred in dismissing the counter claim because firstly; the counter-claim is about a dispute concerning land,

secondly that the magistrate erred in upholding the preliminary objection without hearing viva voce evidence and thirdly that the Magistrate erred in dismissing the whole counter-claim when the jurisdictional challenge was only directed at three prayers(c, d & e) and not at the other reliefs of ejectment and interdict.

[11] At the heart of these grounds, lies the question whether the District Land Court lacks jurisdiction to make an order cancelling a certificate of allocation (Form C) and to issue an order directing that the land be registered in favour of the appellant.

[12] Before I set out address this question, it is appropriate to first consider the issue whether a decision on a preliminary objection is appealable. This issue was raised in the submissions before this Court. I do so forthwith.

Appelability of a decision on preliminary objections

[13] Advocate Tsenoli argued on behalf of the 1st respondent that the decision on a preliminary objection is interlocutory and in terms of Rule 88(1) and (2) of the District Land Court rules, an appeal against an interlocutory order is not permissible. He contended that an appeal only lies against a final decision of the court, in this case, a decision to be made after the merits will have been dealt with. He cited the case of **Globe & Phoenix G.M Ltd V Rhodesian Corporation Ltd 1932(AD) 146** to support the contention that the decision on the objection is only incidental to the main application, in respect of which the appellant ought to have waited for its finalization before noting an appeal to this Court.

[14] He went further to argue, on the basis of the cases of **Mphalane & Another V Phori LAC (2000-2004)49** and **Reentseng Mahanetsa & Others V Bus Stop Holdings C of A (CIV) 40/18** that since the order was interlocutory, then leave of Court ought to have been sought before noting the appeal in question.

[15] Advocate Lebakeng for the appellant contended on the other hand that; while the finality or otherwise of a judgement is decisive in determining the appelability or otherwise of a decision, in the present case, the order dismissing the appellant's counter-claim is final hence appealable because the Court that gave it cannot change it. He relied on the case of **Zweli v Minister of Law and Other 1993(1) SA 523 at 563 B-D** in support of his contention.

[16] It is pertinent to reproduce, at this very juncture, the rule on the basis on which the propriety of this appeal is being challenged: Rule 88 of the District Land Court Rules.

Rule 88(1) reads

"The applicant or the respondent may, on payment of prescribed court fees and on conditions provided for under these Rules, appeal against <u>any Final Judgement</u> of the Court. (My underlining).

88(2*) no appeal shall lie from the orders made on any decision or order of any Court on interlocutory matters, such as a decision or order on adjournments, objections, the admissibility or inadmissibility of evidence, or permission to sue as a pauper, but any such decision or order may be raised as a ground of appeal when an appeal is lodged against a final decision*.

[17] For purposes of this case, this rule should be read with Rule 65, which permits the raising of objections on the listed grounds (including jurisdiction) and also Rule 66 which authorises the court to dismiss an application where the court is satisfied that the objection of lack of jurisdiction is well-founded. The question whether an immediate appeal against a decision on a preliminary objection is competent will therefore depend on whether or not this type of decision is envisaged under Rule 88, that is to say; whether a decision made in terms of Rule 66 is a purely interlocutory order within the meaning of Rule 88(2).

[18] My reading of rule 88(2) shows that the orders or decisions envisaged therein are those which the court grants during the course of trial and in giving directions with regard to some procedural questions. By way of illustration, the objections referred to under this rule, are in my view, those arising during the course of trial. These are envisaged under rule 79, which reads;

"*where any question put to a witness is objected to by any party or his representative, and the court allows the same question to be put, the question, the answer, the objection and the name of the person making it shall be recorded together with the decision of the Court thereon*.

[19] For the determination of this issue, is it therefore important to consider applicable principles in drawing a distinction between final and interlocutory orders.

[20] The rule to be applied in determining whether an order is purely interlocutory was laid down in the case of **Pretoria Garrison Institutes V Danish Variety Products(Pty) Ltd (1948)4 SA 839** at **870** where it was stated that;

A preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "*dispose of any issue or any portion of the issue in the main action or suit,* or unless it '*irreparably anticipates or precludes some of the relief which would be given at the hearing*'. See also **Metlika Trading Ltd V Commissioner SARS 2005(3) SA 1(SCA), Mafata and Another V Mokemane CIV/A/24/86**, **Mphalane C of A CIV No.19 of 1999.**

[21] It was stated in the Metlika case that; in determining whether an order is final, it is important to bear in mind that" *not merely the form of the order must be considered but also, and predominantly its effect*.

[22] Significantly, decisions on certain objections raised by way of a special plea (in our case special answer)which are interlocutory in form but have a final effect, are said to qualify for immediate appeal, that is to say, before a final decision is made on the merits of the application or action as the case maybe. These include a decision on a plea of lack of jurisdiction. **Herbstein 5th Edition, p1208**.

[23] In **Malhere V Britstown Municipality 1948(1) SA 676 at 680-681**. The following remarks from the case **Steyler N.O V Fitzgerald (1911, AD 295)** were adopted;

"*The order dismissing the plea was one of the greatest consequences; it settled a definite portion of the dispute and had a direct bearing upon the ultimate issue. It is difficult to see how such a decision could properly be called a simple interlocutory one*".

[24] Applying these principles in this instant case, it becomes clear, in my view, that a decision upholding a special answer, thereby barricading the appellant from ventilating her claim alongside the main application, has a final effect and therefore appealable. To put it in another way, the appellant's counter-claim was barred from being considered at the trial yet the appellant was not even informed of the appropriate Court, before which she may bring her claim. This is in direct contrast to the peremptory terms of Rule 66(3).

[25] In **Chomane v Tankiso CIV/A/5/79**, albeit the Court dealt with an order of absolution from the instance, it was said that in as much as the decision was interlocutory, it had the force of a definitive sentence because the particular suit in which it has been pronounced is ended, and a fresh suit is necessary to enable the plaintiff again to proceed against the same defendant.

[26] Rule 88 should therefore be interpreted as prohibiting an appeal against a simple interlocutory order but not orders which are final in effect. The impugned order is indeed interlocutory in form, because the main case has not been heard, however, in my view, it has a final and definitive effect and therefore falls outside the purview of prohibition or limitation under Rule 88(2). The framers of this rule did not intend, I opine, to include a decision on the preliminary objection of jurisdiction. The appeal is therefore properly before this Court.

Having confirmed the propriety of this appeal, I turn now to consider the issue whether the district Land Court has Jurisdiction to entertain the appellant's counter-claim and grant the impugned reliefs.

Jurisdiction of the District Land Court to entertain the reliefs sought in the counter-claim

[27] Advocate Tsenoli correctly submitted that, Jurisdiction is the power of a Court to adjudicate upon, determine and dispose of a matter. **Barrows V Benning (67/11) [2012] ZASCA 10(2012) (para 3), Ewing McDonald & Co Ltd V M & M Products 1991(1) SA 252(AD).**

The arguments advanced on the jurisdictional challenge follow;

[28] He argued that the District Land Court has no power to make an order that a lease should be registered in favour of the applicant in respect of the disputed Land because that would be tantamount to allocating the said land to the applicant whereas allocating powers vest in the land allocating bodies. He went further to say that the applicant has not even shown to have satisfied the requirements for lease issuance provided for in Section 18 of the Land Act 2010. He contended that the appellant has not even alleged to have been allocated the land nor that she has applied to the commissioner for issuance of a lease. In his opinion, the applicant is therefore essentially asking the court to allocate the Land to her. He relied on the case of **Matau Makhetha V Rex 1974-75 LLR 431** and **Makhutla & Another V Makhutla & Another 2000-2004 LAC 480** to submit that Courts do not allocate Land but can only confirm the correctness of allocation where the proper authorities have made an allocation.

[29] He submitted that the court cannot order that the lease be registered in the names of a person who has not been allocated the Land by the allocating authorities.

[30] Relying on Rule 8 of the District Land Court Rules 2012, he contended further that the District Land Court is the creature of the Land Act 2010,

and its powers are confined to subject matter disputes stipulated under Rule 8; that all those excluded under this Rule fall outside the province of the District Land Court and are therefore not justiciable before the District Land Court. He submitted therefore that the District Land Court does not have power to make an order that a Form C issued in favour of the respondent should be surrendered and cancelled. He went on to argue that, should the Court order such cancellation, this essentially amounts to revocation of allocation which is the sole prerogative of the Land allocation authorities in terms of section 14(1) of the Land Act 2010, after the said authorities would have followed the mandatory legal procedures, but not the court.

[31] Advocate Lebakeng in his counter argument says the court has jurisdiction to grant the prayers sought. Relying on section 73 of the Land Act as interpreted in **Lephema V Total Lesotho (Pty) Ltd and Others LAC 2013-2014**, he argued that Rule 8 cannot be interpreted to oust the jurisdiction of the District Land Court where a party seeks to challenge any decision by the Land allocating bodies; and that the rule read together with the empowering Legislation do not exclude the power of the District Land Court to grant the impugned prayers/ reliefs in the counter-claim. The case of **Leseteli Malefane V Roma Valley C of A (CIV) 8/16** was also cited in support.

[32] It was further argued that; with the advent of the Land Act 2010, the District Land Courts are clothed with the powers to determine any matter contemplated under the Act other than those which have been expressly excluded from their jurisdiction.

[33] The case of **Mokemane V Mokhoro LC/APN/30B/13** was also cited to buttress the point that the District Land Courts have been conferred with

full jurisdiction to hear and determine all land disputes and to grant remedies sought including even cancellation of a lease which prior to the enactment fell within the province of the High Court.

[34] He adopted the reasoning in Mokemane, to submit that; because the Court is competent to order cancellation of a lease, there is no reason why it cannot order cancellation of a Form C because both are title documents in Lesotho.

[35] He contended that section 14 of the Act is not applicable in determining the appellant's title on the disputed Land but section 15, which deals with inheritance to land, this being the basis of the appellant's claim.

[36] Before proceeding to my analysis of these arguments, I should perhaps also highlight arguments raised in relation to the other grounds of appeal.

Failure to hear oral evidence before making the impugned decision.

[37] On the question whether the learned Magistrate erred and misdirected himself by dismissing the counter-claim without hearing viva voce evidence, both counsel are also at loggerheads on the appropriateness of the procedure adopted in the Court below.

[38] Adv. Tsenoli argued that, Rule 66(1) should not be construed as mandatory on the leading of oral evidence even where documentary evidence is clear enough to enable the Court to make a decision. And that, if the court is satisfied that the objection is well-founded, it is entitled to dismiss the application. He submitted that this ground has no merit and is

insupportable in Law. Advocate Lebakeng, relying on the case of **Likotsi Civic Association and 14 Others V Minister of Local Government and 4 Others C of A (CIV) No.42/2012** argued that leading of evidence is mandatory before any order can be made in the Land Courts.

Dismissing the whole counter-claim when the complaint was not directed to all the reliefs

[39] In relation to the ground of appeal under this heading, Advocate Tsenoli similarly relied on rule 66 to argue that the court is empowered to dismiss the application if it is satisfied that it has no jurisdiction.

[40] Advocate Lebakeng argued that Magistrate erred by dismissing the appellant's counter-claim when the jurisdictional challenge was only directed at the three prayers already stated earlier.

I proceed to address the issues raised by these arguments.

[41] The Land Courts came into existence in terms of section 73(as amended) of the Land Act 2010. Being creatures of statute, the extent of their jurisdiction is subject to the limits prescribed by the said enactment. Their jurisdictional powers are provided for in section 73 and other sections as I will shortly demonstrate. In essence, the Land Courts are authorised to administer the Land Act, meaning, they entertain/deal with all disputes involving claims of title to land, derogations from title to land and claims to rights overriding title because the Land Act is concerned with acquisition of title to Land as shown in the preamble of the Act. (**Lephema V Total Lesotho Lephema V Total Lesotho (Pty) Ltd And Others C of A (CIV) No.36/2014**, **Mofelehetsi V Masoabi V Mofelehetsi CIV/A/10/14**, **Mphutlane V Seoli and Others LC/APN/18/2014.** Whenever the

jurisdictional challenge therefore arises, the provisions of the Act should take precedence.

[42] Section 73 is the general provision conferring jurisdiction. There are other provisions in the Land Act which expressly confer jurisdiction to the District Land Court. These are sections 10(5), 18(3), 20(2), 22 28, 37(9), 59, and 72. It will be observed from the close examination of Rule 8 that it is a replica of these identified sections. This was observed in **Mphutlane V Seoli & Others LC/APN/10/14, and Leseteli Malefane V Roma Valley C of A (CIV) No.8/2016.** It cannot therefore be proper to read its provisions in isolation from the Act, but should must be interpreted in accordance with enabling provisions in the Land Act (section 76 thereof) this was said in **Leseteli Malefane v Roma Valley (para 17). Rule 3(2)** provides that

"No provision or rule contained in these rules shall be interpreted or applied in such manner as to contradict the provisions of the Act".

[43] As regards other matters provided for under the Act, to which no forum has been specified, section 73 then becomes decisive that; so long as the dispute is about title to land, regardless of whether title is acquired by allocation, inheritance or other cognizable methods under the Act, such as donations, then it is justiciable before the Land Courts.

[44] The competence of the Land Court (District Land Court included) to hear and determine a given dispute cannot therefore depend on the nature of the relief sought, but on the nature of the dispute itself. In the case of **Moletsane v Thamae C of A (CIV) No.13/17, Mosito P** stated the position as follows;

Whether a court has jurisdiction (in the sense that is now relevant) to consider a particular claim, depends upon the nature of the rights that the party seeks to enforce. Whether the claim is good or bad in Law is immaterial to the jurisdictional inquiry. If a claim involves a dispute, whether a party is an allottee or not or whether the party may assert a land right or not, or where a party seeks to assert a right that arises out of the Land Act provisions, then the claim is justiciable in the Land Courts(district Land Court included), by virtue of concurrent jurisdiction. He significantly remarked that; the question whether or not such a party actually has the right that they seek to assert does not arise for purposes of jurisdictional challenge.

He went further to say; *"In my opinion therefore, the provisions of either of two sets of Court Rules cannot be interpreted so as to exclude the jurisdiction of either of the two courts which has been specifically conferred by the parent Act*. I entirely agree.

[45] The 1st respondent's argument both in this Court and the court below seems to be that the appellant cannot validly have the Land registered in her names because she is not an allottee nor has she filed a lease application, hence in his view, the appellant is seeking allocation of the Land by the Court. The Learned Magistrate acceded to this line of thinking. In the body of his judgement, he stated;

"…as much as this Court has an ocean of remedies it can grant to the aggrieved litigants that seeks Sales before Court, I strongly believe that if I were to grant this prayer, this court would be usurping the powers that are from the proper authority to register the Land".

[46] The argument as well the quoted passage reflect a misconstruction of the nature of the appellant's claim. From her pleadings, the appellant seeks

to assert her alleged right in the disputed Land, and she seeks invalidation of the title documents issued in favour of the 1st respondent, for reasons that; a) she inherited the Land and b) that the purposed agreement of sale, which gave birth to these certificates is invalid because those who purported to transfer the rights in this field had none themselves. The question whether or not she qualifies for registration of a lease in her names or entitled to the relief sought in terms of the quoted provisions of the Land Act, should be left for determination in the merits, and not for purposes of the jurisdictional inquiry. Her claim should not be construed to mean she is asking the Court to register a lease in her names but that the competent authority, should, in the event that the Court rules in her favour. The deciding factor to the inquiry was therefore whether her claim is about title to land. Clearly, in my view, the answer to this is in the affirmative, and the Court should have affirmed its jurisdiction.

[47] I am fortified in my view that the Land Courts (District Land Court included) are competent to grant an order seeking to invalidate certificates of allocation, by the remarks of Damaseb AJA in the case of **Mokhali Shale V Mamphele Shale and Others C of A (CIV) No.35/2019** where he stated at para 10 of the judgement;

From the pleaded facts there cannot be any denying that the gravemen of the appellant's case in the court below was the assertion of title to landed property. He challenged the 2nd respondent's allocation (community Council) to the 1st respondent and the consequential invalidation of the certificates of title over the same land. The dispute is over land and title thereto. It did not matter that the assertion of title is through inheritance. (My underlining)

[48] In that case, the appellant has approached the High Court seeking, inter alia, an order declaring him as an heir to the landed property, an order

declaring that certificates of allocation were unlawfully and improperly issued, invalid, null and void and of no force and effect and subsequently ordering council to cancel same.

[49] The learned Magistrate was indeed correct in relying on the authority of **Mokemane V Mokhoro LC/APN/30B/13** and asserting the jurisdiction of the District Land Court to order surrender and cancellation of a Form C. I do not therefore deem fit to pursue this point any further.

[50] He however erred, for the reasons stated above, in holding that the District Land Court has no jurisdiction to grant an order directing the LAA to issue a lease in favour of the appellant and dismissing the counterclaim.

[51] Having found that the District Land Court is competent to hear and determine the impugned reliefs, I do not deem necessary to further delve in the question whether he erred in dismissing the counterclaim when challenge was only directed and the three reliefs and on the question whether oral evidence was necessary before determining the jurisdictional challenge. Suffice is to say, the procedure in the District Land Court is inquisitorial and sui generis, and leading of evidence, particularly where there are disputes of facts, is peremptory. **Nkoe V Masupha C of A (CIV), Motumi v Shale C of A (CIV) No. 32 of 2017.**

[52] Another aspect that should be considered in this appeal is the appellant's request that the matter should be remitted to the district Land Court for hearing of merits before a different presiding officer, a Magistrate in Maseru. This is based on the submission that the learned Magistrate when dealing with the preliminary objection made some findings on the merits such as a finding that the 1st respondent was an innocent third party.

According to the appellant's counsel, this disqualifies the Magistrate from further hearing the matter.

[53] the Court of appeal dealt with a similar issue in **Likotsi Civic Association and 14 Others V Minister of Local Government and 4 Others C of A(CIV) no. 42/2012** (para 6)where it was held that an order of removal of the matter before the presiding judge would only be justified if the Judge made credibility findings or findings on the merits of the application or had expressed herself in such a way as to indicate that she might reasonably be thought to be in some way prejudiced against one or the other or more of the parties"

[54] Considering the relevant passage in the judgement of his Worship Monethi, he stated that;

"*now the difficulty of which this current court is faced with is that neither of all the papers of the applicant from top to bottom, have she said or alleged that that such a form C is void, hence I am inclined to order prayer (c) and (d) as the 1st respondent is an innocent 3rd party in this matter and whatever order I make will have impact on its status. The Court feels that the true battle is between the two giant elephants and the respondent is only the grass beneath"*.

[55] In my reading of this passage of the judgement, I cannot say; findings on the merits have been made. I say so because the statement that the 1st respondent is 'an innocent party' has no relevance to the issue that the Court is called upon to determine; namely; the issue of the competing claims of title to the disputed land. Regard being had to the nature of the dispute before Court, that is, either party's title to the disputed plot, the

bona fides or otherwise of the 1st respondent have no bearing because the respondent seeks to assert his right, not as a bona fide purchaser, but allottee to the Land. Even assuming that the "elephants" refer to the appellant and the persons who concluded the sale agreement with the 1st respondent, it cannot be said the fight is between them and the appellant when such persons are not parties in the proceedings in the Court a quo. I cannot therefore conclude that any decision on the merits has been made. The appellant's request for removal of the case before his worship Monethi is therefore refused, while the appeal itself should succeed.

Disposition

[56] For the above reasons, the following order is made;

a) the appeal is upheld, with costs
b) The decision of the Court a quo upholding the special answer and dismissing the counter-claim is set aside.
c) The matter is remitted to that court for hearing of the merits, both in the main application and the counter claim.

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P. BANYANE
(ACTING JUDGE)

For Appellant: Advocate P. Lebakeng

For 1st Respondent: Advocate P. Tsenoli

For 2nd-6th Respondents: No appearance