

IN THE LAND COURT OF LESOTHO

HELD AT MASERU

LC/APN/29/13

In the matter between

ELIZABETH KOTSOKOANE

APPLICANT

AND

LEHLOHONOLO MOLAPO

1ST RESPONDENT

LAND ADMINISTRATION AUTHORITY

2ND RESPONDENT

MAMOSI MOLAPO

3RD RESPONDENT

JUDGEMENT

Coram: Banyane AJ

Dates of Hearing: 18/06/19, 15/08/19, 17/08/19, 11/10/19, 12/11/19

Date of Judgement: 09/03/2020

Summary

Rei vindicatio claim against a bona fide possessor - Improvement lienholder having effected useful improvements on the plot thereby enhancing market value of the property - whether a lien holder is entitled to the market value of the property or the actual amount expended on the property - no evidence adduced on the actual expenditure - an order of absolution from the instance made but Lienholder entitled to retain possession until compensated.

ANNOTATIONS

Cited cases

Makotoko and Another v Lesotho Development and Construction (Pty) Ltd
C of A (CIV) 57/2013

Constituency Committee BNP Mafeteng and Others v ISSA LAC (2011-
2012)

Steyn v Lebona CIV/T/143/82.

William Pheiffer v Cornelius Van Wyk & Others (267/13) [2014] ZASCA
87.

Rhooode v De Cork (45/12) [2012] ZASCA 179

Immaculate Truck Repairs v Capital Acceptance Ltd case number
1153/2014 (Available in SAFLII).

McCarthy Retail v Short distance carriers 2001(3) SA 482(SCA)

Nortjie v Pool 1966(3) SA 96(A).

Books and articles

PJ Schwikkard and SE van der Merwe-principles of evidence; 4th edition,
2016

Konrad M Kritzinger the principles of the Law of Mortgage, pledge and lien
1999, Juta & Co

Silberberg and Schoeman's The Law of Property 3rd edition

Mostert et al: The Principles of the Law of property in South Africa, 4th Ed,
(2012).

TJ Scott: Lien, LAWSA, second edition. Vol.15, Part 2, Lexis Nexis, Durban
2008

Introduction

[1] The dispute between the parties is in relation to a certain developed site identified as **plot number 30082-093** situated at Likileng, Botha-Bothe urban Area. A lease for the plot was issued in 1993 in favour of the applicant's husband (now deceased). By virtue of the Land (amendment) Act of 1992, the applicant is the holder of rights and interests to this plot, a fact unchallenged by the 1st and 3rd respondents. The latter are spouses married in community of property. They have developed and/ or erected dwelling structures on this plot although they hold no title document to it. They lived on this plot for about a decade now.

[2] The applicant's claim before this Court is founded on *rei vindicatio*. She seeks relief couched in the following terms;

- a) Cancellation and nullification of lease or any document of title in respect of **Plot number 30082-093** passed in favour of the 1st respondent and declaring same to be unlawful
- b) Declaring the applicant as the only legitimate and lawful title holder of plot number 30082-093
- c) Ordering the 1st respondent to vacate plot number and to remove any structures unlawfully and consciously erected by him on this plot; or in the alternative, the 1st respondent to pay damages and or compensation and or loss of beneficial use of the property by the applicant in perpetuity (legitimate expectation) in the amount M 500 000 wherefrom, the applicant shall only be obliged to pass lawful title of the same to the 1st respondent
- d) Granting applicant costs of suit on attorney and client scale only in the event of opposition of this application
- e) Granting such further and/ or alternative relief

The counter-claim

[3] The application is opposed by the 1st respondent and 3rd respondents. Without claiming title to this plot, the respondents resist the applicant's claim on grounds that, as bona fide occupiers, they have a lien for improvements they effected on the property, which was vacant when they occupied it. A counter-claim has been filed in this regard. The respondents also resist the amount of damages sought and aver on the contrary that the applicant is entitled to no more than the unimproved land or its value.

The respondents seek judgement as follows;

- a) An order declaring that the 1st respondent is entitled to retain the developed residential site fully described as plot no. 30082-363 situated at Likileng in the Botha-Bothe urban area until duly compensated by the applicant in the sum 557, 400.00.(later amended to M 1 177,200) alternatively
- b) Payment of the sum 1 177,200.00 compensation for the improvements on the aforesaid plot
- c) Interest thereon at the rate of 18% percent from the estate of issue of summons to the date of payment
- d) Costs of suit
- e) Further and alternative relief

Common cause facts

[4] As indicated at the prelude of this judgement, it is not disputed that the applicant, on whose behalf, the son Mr. Kabi Kotsokoane testified, is a registered title-holder on the disputed plot. In 2010, five years of the respondents' occupation, Mr. Kotsokoane paid a visit to the site only to find a two-roomed house, and a seven roomed house on the plot. This was the first time the respondents knew that the lease had been registered in relation to this plot.

Issues

[5] The issues that arise for determination in this case are therefore whether the respondents have established a lien which entitles them to retain possession of the applicant's property until compensated for the improvements effected on the property. If the answer is in the affirmative, what amount of compensation is due?

The evidence

[6] For determination of these issues, it is necessary to outline in detail the facts that led to the respondents' development and occupation of the plot, most of which are uncontroverted. They are as follows;

6.1 The 1st and 3rd respondents entered into a sale agreement with one Lethusang Ramalitse in 2004 after he showed them this site, which according to them, was unfenced. When they asked for a title document, so the 1st respondent testified, Mr. Ramalitse told them his documents for lease application to the plot were misplaced. They approached the Lands Survey and Physical Planning Department (LSPP) in the district to verify that the plot belonged to Mr Ramalitse. One Motselisi, an officer in the employ of LSPP at the material time confirmed this. Since they wanted prove that the site now belonged to them, Motselisi advised that the lease application in favour of Ramalitse would be halted and substituted by their own lease application. They then concluded the agreement. After the purchase price was paid, they went back to LSPP. Together with the LSPP officials who were in company of a police officer, apparently attached in that office, they were taken to the plot where the dimensions of the plot were ascertained. Thereafter some forms were filled so that the plot may be transferred into their names. These were an application for consent (item 2 in the bundle of documents) and application for a lease. Subsequently, they fenced the plot in December 2004. The 1st respondent

persistently followed up on the status of his lease application. In January 2005, he was told the forms had not been sent to headquarters, Maseru for processing. He says in March 2005, the same status prevailed, so he was told and he even suggested to transmit the forms to headquarters but was told that it would be irregular because only LSPP officials have authority to do so. In April, he was told the forms had been sent.

6.2 He told the Court that he continually inquired telephonically about the status of his application and officers at Headquarters would refer him back to Motselisi in the District Office. He says at one point in the same year Motselisi threatened him saying he should stop nagging because lease applications 'take' a long time to process. He decided to refrain from inquiring. This was in August 2005. He said prior to the threat, he was advised to ahead and build his house if he so desired.

6.3 In October 2005, he started building a two roomed house and this was completed in December 2005. In April 2006, they took occupation of this house. Two years later, he desired to build a bigger house. The status *quo* regarding his lease application prevailed. He approached the LSPP department again and he was advised to apply for a building permit. He submitted his building plan as a requirement for building permit issuance. He then applied for a building permit. After its issuance, he build the seven roomed house in April 2007. It was completed in December 2007. In January 2008, they moved into the bigger house with his family.

6.4 Significantly, he told the Court that during all stages of construction of the fence, the two-roomed house and the big house, there never was any interference by anyone claiming any right to the plot, so his stay on the plot was peaceful until 2010 when he again visited the LSPP offices believing that at this time, the lease had been issued. A new officer Ms Papali Moloi was now in this office. He narrated his story to her but was told his file could not be found. In October of 2010, he received a call from the LSPP office. He was told one man by the name of Kotsokoane was claiming rights to this plot. A date was set up for a meeting. On the

appointed date Mr. Kotsokoane, the applicant's son, to the 1st respondent's utter dismay, had with him a lease to the site. The parties subsequently entered into negotiations because both were amenable to settlement. He told the Court that he offered an alternative site plus a monetary top-up. The applicant's son turned down the offer. He also offered compensation. They did not agree on the amount nor the amount sought by the applicant. Their disagreement culminated in the launching of this case.

6.5 He told the Court that he, throughout his occupancy of the plot prior to the surfacing of Mr. Kotsokoane, he believed the site was his and that; had he known of the applicant's title, he could not have purchased the Land since he had a plot at an area called Baroeng as far back as 2006 on which he could have built his home.

6.6 He stated that he is willing to compensate the applicant for the market value of the raw land, an amount of M 114, 000.00.

[7] Lethusang Ramalitse corroborated the respondent's story about existence of the sale agreement. As to his acquisition of the plot, he told the Court that during the year 2002, he worked for the National Security Services and stationed at Botha-Bothe. He says his boss, one 'Masekhobe acquired a site from LSPP. He accompanied his boss on a day appointed for the pointing of the site to her. During the pointing, he asked Motselisi as to whether there were any available sites on the area. Motselisi answered positively and pointed to the site, now in dispute. He was keen to have the site. He was asked to pay M 1500 for it. He did pay and was issued a receipt in the presence of one Maqhai, a police officer based at LSPP offices at the material time. Motselisi then caused him to fill some forms with which, he was told, he could be issued a lease document for this plot. He however never got the lease and was always told that lease issuance is a long-time process. He testified further that he was told by the said Motselisi that if he intends to build on the plot, he should approach her for advice as to the

correct procedures to follow. He then decided to sell the land to the 1st respondent and his wife in 2004 and this they did through the LSPP office. He similarly came to know Mr Kotsokoane in 2010 when he was called to LSPP offices.

[8] He told the Court that they discovered in this meeting that the said Motselisi had fraudulently sold Land to various people and caused them to fill the forms, some of which were similar to the ones he was made to fill.

[9] An officer from the Land Administration Authority, who worked for the LSPP serving the Botha Bothe District from 2008 until 2011 when she joined the LAA also took the stand. She confirmed that Mr. Kotsokoane approached her office in 2010 with a complaint that someone is in occupation of his Land. In the meeting held to inquire into the complaint, the 1st respondent produced a certain document PFL89, which the witness stated; was used in support of applications for traders licences; to serve as proof that an applicant of a licence had applied for a lease as well as a building permit. She told the Court that two forms PFL 81 and Form 11, were used as applications for transfer of rights from a lease-holder issued to respondents. According to this witness, these forms contained a false number, that is to say, a number purportedly a plot number of the disputed site contrary to the one depicted on the lease document held by Mr Kotsokoane.

9.1 Significantly, she told the Court that when she first came into office, she discovered that a number of people had been issued these documents bearing false numbers, which documents were never used as proof of land allocation. In her view, the officers involved in this scam apparently targeted vacant sites and sold them to unsuspecting members of the public.

9.2 She also confirmed that the applicant did call their offices several times to follow up his lease application. She said one Pheello, another officer

allegedly involved in the scam could not be located because at the time she (the witness) took over the office, the said Pheello was no longer working for the LSPP. She says during the LSPP era, leases would sometimes be issued 10 years after the lodging of an application.

9.3 It is against this backdrop that the 1st respondent's claim has to be determined.

Arguments

[10] The gravamen of the applicant's complaint can be summed up as follows;

10.1 Firstly that the respondents do not have title to the plot in question, nor the person from whom they 'acquired' it, and this means Ramalitse could not transfer a right he did not have.

10.2 Secondly that when Ramalitse was asked to pay M 1500 and not issued a title document, this ought to have aroused suspicion about the legality of the transaction

10.3 Thirdly that the respondents were defrauded by the LSPP officials and not the applicant, so he has a course of action in the Counter-claim against them.

[11] It was submitted on the basis of these contentions that the respondents are not bona fide possessors nor occupiers and that the applicant is not liable for the amount claimed in the counter-claim.

[12] Advocate Ratau argued on the other hand that the peculiar circumstances of this case do not render the issue of title decisive on the bona fides or otherwise of the respondents. He contended that the involvement of the LSPP officials in the whole process should be of

paramount importance because the respondents concluded the sale agreement after they sought confirmation/verification of Mr. Ramalitse's allegations about his pending lease application with the District Land administration body. Having obtained confirmation by Lawful authority in the district, they could not suspect or doubt they were not authorised to act as they did. They followed the legal processes of building permits after having been told how long leases take. He also urged the Court to take into account the fact that the applicant only came into picture 5 years after the respondents' occupation and at this time, both dwelling structures were complete. They were not, before then, aware of applicant's rights over the plot.

[13] He submitted that they were genuine and / or acted in good faith in their dealings vis a' vis this site and are therefore bona fide occupiers. He submitted therefore that, having developed the applicant's plot, the respondents are entitled to compensation and cannot be evicted until compensated. In other words, the respondents have a lien to enforce their claim of compensation. The cases of ***Constituency Committee BNP Mafeteng and Others v ISSA LAC (2011-2012), Lesotho Development and Construction (Pty) Ltd v Makotoko & Another LAC 2013-2014*** were cited in support of this proposition.

[14] As regards the amount of M 500.000 claimed as compensation by the applicant, he contended that the amount is not supported or substantiated by any evidence. He submitted that the only amount to which the applicant is entitled to is M 114.000.00 as the market value of the and without improvements on it.

The Law

It is imperative to investigate the nature and operation of enrichment liens for the determination of issues in this matter.

[15] A lien or right of retention is the right enjoyed by the possessor to retain physical control of another's property, whether movable or immovable, as security for payment of a claim for money or labour expended on that property. **P 62. Konrad M Kritzing; Principles of the Law of Mortgage, pledge and lien 1999, Juta & Co.** The underlying purpose is to secure repayment of money or labour that the lien holder has expended on the owner's property. A lien functions as a defence to the owner's *rei vindicatio* and entitles the lien holder to retain possession of the property until compensated for the expenditure incurred (***Mostert et al: The Principles of the Law of Property in South Africa, 4th Ed, 2012, p331***).

[16] Liens are classified according to the type of expenditure incurred by the lien holder in respect of another's property. For purposes of this judgement, I focus on enrichment liens (classified as salvage and improvement liens). These liens are based on the principle of unjustified enrichment. They are real security rights enforceable against the owner of property and his successors in title which arise by operation of Law from the fact that the retentor (lien holder) had put money or money's worth into the property of another (***Mostert et al p 330-331***).

[17] The existence or availability of a lien depends, firstly, on how the law classifies the possessor or occupier who made the improvements (whether one is a bona fide possessor/occupier, bona fide/mala fide occupier and,

secondly, on the kind of improvements (i.e. necessary, useful or luxurious (***TJ Scott; Liens, LAWSA vol. 15, part 2, p38-39***).

[18] Essential requirements for existence of a lien are; a) a person must have expended money or labour on property belonging to another, b) it must be alleged and proved that the person has possession of the property, c) and that the expenses incurred were necessary for the salvage of the property or were useful for the improvement of the property. ***William Pheiffer v Cornelius Van Wyk & Others (267/13) [2014] ZASCA 87***.

[19] In this matter the respondents rely on an improvement lien as bona fide possessors/occupiers. An improvement lien affords security for the recovery of useful expenses. An expenditure is said to be useful if it improves the land and the market value should be enhanced or increased by such an improvement. (***Silberberg and Schoeman's: the Law of property, 3rd ed. P152***). ***McCarthy retail v short distance carriers 2001(3) SA 482(SCA)***.

Analysis

[20] A valuation report tendered by the 1st respondent as the foundation of his claim reflects the improvements and or structures on the plot in question as follows; there is a two-roomed house with a garage (described in the report as an outbuilding) valued at M 120 000, a VIP toilet valued at M 7 200, the main house (seven-roomed) is valued at M936 000.00, and the vacant land without improvements is valued at M 114,000.00. The value of the land and the buildings according to valuation report was M 1 177.200.00 as at 25th June 2019, plus the insurance value of each one of the structures comes to the figure M 1 381 360.00.

[21] The Respondents' claim, as I see it, is limited to useful expenses because there is no evidence to show that any measures were taken for the preservation of property nor is there any evidence on luxurious expenses.

[22] Before I consider the question whether the respondents have a lien to enforce their claim for compensation, I first consider the question whether the respondents are bona fide possessors or bona fide occupiers.

[23] A bona fide possessor is a person who genuinely but mistakenly believes that he is the owner of the land. In other words, a person who possesses property of which he believes he is the owner. ***Steyn v Lebona CIV/T/143/82. Silberberg and Schoeman's The Law of Property 3rd ed. p149.*** An occupier is someone who does not have the *animus domini* (an intention to excise ownership) *or does not believe he is the owner.* A bona fide occupier is a person who believes he has a right to occupy the property ***McCarthy Retail Ltd v short distance carriers (supra).***

[24] The uncontroverted evidence before this Court is that the 1st respondent and his wife were victims of a scam orchestrated by Lands survey and physical planning (LSPP) officials. They were made to believe that what they filled were proper documents for lease application and that a lease would ultimately be issued. Upon numerous follow-ups with the department, they even applied and obtained a building permit at the instigation of the LSPP officials.

[25] The salient features of the 1st respondent's evidence, is that the construction of all structures was uninterrupted by anyone nor was the

respondent apprised of the existence of the leasehold over this plot. It was only in 2010 when Mr Kotsokoane surfaced indicating the plot was his parents' property. At this time, both structures were complete. Differently put, at the time respondents commenced and completed construction, the applicant had been absent from the property for at least five years, possibly more. Until completion of all structures, she never showed up to assert her rights.

25.1 In the circumstances, and given the extensive period of the applicant's absence, it was not unreasonable for the respondents who had peacefully improved and resided on the plot to believe that the property did belong to Mr Ramalitse at the time of conclusion of the sale agreement. This peaceful and or uninterrupted occupation coupled with the fact that the 1st respondent consulted the LSPP at all material times, applied and was issued with a building permit, the fact that he believed that he was in the process of acquiring title document, lead me to conclude on these facts that the 1st and 3rd respondents genuinely believed that they had rights to the plot and were just waiting for registration of those. They are, in my view, bona fide possessors. The fact that they did not have a title document does not in my opinion disqualify him from being bona fide possessors.

[26] Having decided that the respondents are bona fide possessors, I turn now to the second issue; are they entitled to a lien?

[27] On the strength of the authorities cited, an improvement lien entitles its holder, in this case the respondents as bona fide possessors, to retain possession of another's property until compensated for useful expenses. It is an undisputed fact that the land was vacant when the improvements were effected by the respondents. It appears to me that the improvements effected were useful as they have increased or enhanced the market value of the property as reflected in the valuation report.

I turn now to the amount of compensation awardable to the respondents.

Are the respondents entitled to the amounts claimed?

[28] The respondents' case is that they are entitled to the market value of the property as contained in the valuation report. This means they are claiming M1 177.200.00 minus the value of the land (M114 000.00). The question that arises at this stage is whether they are entitled to this amount.

[29] A bona fide possessor is entitled to compensation for the expenses in improving another person's property, that is; to recover both necessary and useful expenses (***Silberberg and Schoeman's Law of property, p 152***). As I stated earlier, the 1st respondent in his evidence, did not distinguish between the two categories of expenses. Such a distinction is important in determining the amount of compensation. I say this because in respect of necessary expenses, the bona fide possessor is entitled to full reimbursement because such were necessary for the preservation of the property while the measure of compensation due in so far as the claim for useful expenses is concerned is different. For the latter, the amount of compensation is limited to the amount by which the value of the property has been increased by the expenses or the actual amount of expenses incurred by the applicant whichever is the lesser amount. The Court has a wide discretion to either award an amount equal to the value by which the property has been enhanced or the actual expenditure incurred, whichever is lesser. ***Rhode v De cork (45/12) [2012] ZASCA 179, Immaculate Truck Repairs v Capital acceptance Ltd case number 1153/2014. Silberberg and Schoeman's p152***

[30] What this means is that an enquiry should be made into both the cost of improvement/actual expenditure and the value by which the property has been enhanced as a result. If the enhanced value is more than the cost

of improvements, the lien holder is only entitled to be recompensed for the costs incurred. But if the cost is more than the enhanced value, the owner is entitled only to the value. (**Nortjie v Pool 1966(3) SA 96(A) at 131 G.** In other words, where the market value amount is more than the actual useful expenses, the claimant/lienholder would be entitled to the lesser of the two amounts and this means the respondents would be entitled to the market value as depicted in the report only if such amount is less than the actual amount expended on the property. In **Retail Ltd v short distance carriers 2001(3) SA 482(SCA)** it was stated that;

"In Roman and Roman Dutch Law, the bona fide possessor excise a lien for the amount of his necessary and useful expenses or the increase in the market value brought about, which ever was the lesser"

[31] In this case, the respondents sought to rely solely on the valuation report. They did not establish or detail their own expense, that is, the actual expenses incurred as useful expenses. 1st respondent adduced no oral nor documentary evidence in the form of invoices for the amount incurred for the purchase of building material for instance. In other words there is insufficient evidence on the amount for which the lien is to serve as security.

Conclusion

[32] Having concluded that there is insufficient evidence on the amount for which the lien is to serve as security, the respondents cannot therefore succeed to obtain the order for payment of the money claimed in the counter-claim. The respondent's claim should therefore succeed in so far as they assert a lien as a defence against the applicant's *rei vindicatio*.

[33] This finding does not preclude a later successful claim by the respondents where acceptable and sufficient evidence regarding the useful expenses incurred by them is presented. In my view, a decree of absolution from the instance is an appropriate order under these circumstances.

At the close of the case, when both parties have had an opportunity to present whatever evidence they consider relevant, absolution from the instance is an appropriate order where, evidence adduced is insufficient for a finding to be made against the defendant (in this case applicant in the main). Such an order does not bar the plaintiff (respondent in the main) from reinstituting the action insofar as it has not prescribed, as opposed to a positive finding that no claim exists against the defendant. ***It is the appropriate order when after all the evidence the plaintiff has failed to discharge the normal burden of proof.*** (See **PJ Schwikkard and SE van der Merwe: Principles of Evidence; 4th Edition, 2016, Chapter 32 page 625-626**).

[34] The question to consider now is whether they should retain possession of the land in question pending institution of a claim for compensation. In exercising its discretion to order restoration of the property, a Court must apply fair and equitable considerations, taking into account factors such as, whether the owner would have incurred a similar type of useful expenses/ whether the owner would himself have made the improvement, the financial position of the owner; whether the owner intends to use the property personally or intends selling it; whether the improvement can be removed without damage (that is; feasibility of the removal of the improvement by the bona fide possessor). (***TJ Scott: liens p 39***). All these were however not placed before this Court for consideration. The primary consideration should therefore be that the first respondent and his family live on the property and they occupy same as bona fide possessors. This means their eviction and demolition of their home before compensation

would not just and equitable. However the applicant's real right in this property should also be protected.

[35] I will therefore strive to give an order that is aimed at balancing the competing interests of applicant's right to possession of her property and the respondents' right to be compensated for useful improvements.

[36] As regards the alternative claim of M 500.000.00 to the order of demolition sought, the applicant did not, as correctly submitted by the respondents' counsel adduce any evidence to justify or support an award of damages in this regard.

Costs

[37] In the light of the foregoing analysis, the applicant cannot succeed to obtain the eviction by virtue of the respondents' lien nor the alternative claim of damages. This means the only relief in the main application on which there is success, is the declarator (prayer b). The respondents cannot similarly obtain the relief for payment of the claimed amount for reasons earlier stated. There is therefore partial success for both parties. It is only fair that each party should bear their own costs.

Order

[38] In the result, the following orders are made;

- a) The applicant is declared as the only legitimate and lawful title holder of plot number 30082-093 situated at Likileng, Botha-Bothe.
- b) The 1st and 3rd respondents are entitled to retain possession of this plot until duly compensated by the applicant in the sum to be proved

by them in an enrichment action/claim for compensation to be instituted subsequent to these proceedings.

- c) This claim/action should be instituted within 1 month of this judgement.
- d) Each party to bear their own costs.

P. Banyane
Acting Judge

For Applicant: Advocate B. Sekatle

For Respondent: Advocate S. Ratau

