

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/799/18

In the Matter Between:-

MATOKELO NCHELA

PLAINTIFF

AND

MOSELE DIBAKGA

DEFENDANT

JUDGMENT

CORAM : MOKHESI J

DATE OF HEARING :13th AUGUST 2020

DATE OF JUDGMENT :15TH OCTOBER 2020

Summary:

UNJUSTIFIED ENRICHMENT: *The plaintiff had issued summons against the defendant claiming compensation for improvements made on the defendant' landed property- The plaintiff was a bona fide possessor of the property- Principles applicable considered and applied- Plaintiff accordingly awarded compensation.*

Annotations :

CASES:

Rubin v Botha 1911 AD 568

Fletcher and Fletcher v Bulawayo Waterworks CO. Ltd 1915 AD 636

Makotoko and Another v Lesotho Development and Construction (PTY) Ltd C of A (CIV) 57/2013 [2014] LSCA 28 (24th October 2014)

Rademeyer and Others v Rademeyer and Others 1967 (2) SA (C.P.D) 702

Barnett and Others v Rademan and Another, 1934 A.D. 203

MOKHESI J

[1] The plaintiff had issued summons against the defendant claiming compensation for the improvement made on site NO. 11302 – 081, which site belongs to the defendant. The plaintiff had, in a mistaken belief that the site belonged to her developed it by building four rented houses, installing water and electricity, and erected parameter fence around the site. The plaintiff is claiming an amount of M124,672.00. This matter started in the District Land Court for the District of Maseru as an ejectment proceeding against the plaintiff wherein the plaintiff counterclaimed for retention of the site pending compensation for the improvements made thereon. The court *a quo* granted the plaintiff a *lien* over the site until she was paid compensation for useful and necessary expenses she incurred in developing the site. This was in addition to finding that the plaintiff developed site in a *bona fide* but mistaken belief that it belonged to her. When the plaintiff developed the site it had not been developed at all. Given that the monetary claim exceeded civil jurisdiction of that court, the plaintiff issued summons in this court claiming relief alluded to above.

[2] The plaintiffs claim is based on the market value of the property after the development while on the other hand the defendant contends that the plaintiff is only entitled to the actual expenses she incurred in developing the property, and further that the rentals she has been collecting from the flats be deducted from

compensation. The plaintiff relied on the services of property valuers to determine the market value of the property. Mr. Refuoe Chaka of Home-Based Land and Property Consultants (PTY) Ltd who are real estate appraisers or valuers and property economists, testified for the plaintiff. He intimated that he determined the market value of the property by using a method of open market value on a comparison basis, which is basically the price the property would fetch when sold on the open market. He placed the value of the building at M94,720.00 and land at M29,952.00, together totaling M124,672.99.

[3] The defendant had led evidence of one witness, Mr. Leoma Matamane who is a qualified Quantity Surveyor, with a degree from the University of the Witwatersrand. He determined that estimated cost of erecting the building to be M56,272.68. This amount does not cater for water, electricity installations and perimeter fencing.

Issues for determination:

- (i) Whether the plaintiff is entitled to the market value of the property or the actual expenses she incurred for developing the property.
- (ii) Whether the rentals the plaintiff has been collecting since the year 2014 should be deducted from the compensation claimed.

[4] THE LAW:

Parties are on common ground that the plaintiff was a *bona fide* possessor of the site in question, and that when she possessed it was undeveloped. She then constructed four rental flats thereon, installed water and electricity, and erected parameter fence. In order to determine the amount of compensation due to the applicant for the improvements she made on the site, comparison has to be made between the market value of the whole property (ie the flats and the land) with the market value of the land without the flats (***Rubin v Botha 1911 AD 568 at 578***, per Lord de Villiers, (J)). However, this is not a hard and fast rule as the court is endowed with a discretion to award compensation for which equity and fairness of each case will cry out for.

[5] This rule was stated as follows, in ***Fletcher and Fletcher v Bulawayo Waterworks CO. Ltd 1915 AD 636 at 656*** where Solomon J.A, said:

*"And that brings me to a consideration of the question upon what basis the compensation be made. In the case of the **De Beers Consolidated Mines v London and South African Exploration Company** it was laid down that the bona fide possessor is entitled to be compensated for his improvements to the extent of the enhanced value of the land, and that is the principle upon which, in most of the reported cases, the amount has been assessed. From the case of **Meyer's Trustee v Malan (1911, T.P.D 559)** it will be used seen,*

however, that this is not a hard and fast rule to be applied indiscriminately in every case, but that all the circumstances must be considered by the court, which is to decide what is fair and equitable between the parties. The doctrine upon which the right to compensation is based is an equitable one, and it must not be applied in such a way as to produce inequitable results. Probably in the majority of cases it will be found that it is fair and equitable that the owner of the land should pay for the improvements to the extent to which the land has been enhanced in value, subject, of course, to this limitation that, inasmuch as the possessor is to be compensated for the expense to which he has been put, he can in no circumstances recover more than the amount of such expenses. At the same time it is easy to suggest cases in which the application of the rule would be most unfair to the owner of the land..."

[6] Civil Fruits: Whether they should be deducted from compensation.

Adv. Kao, for the defendant, expended much energy in trying to determine how much the plaintiff has earned so far in rentals, and even in argument he submitted that the rentals which the plaintiff has derived from the flats should be set off against the compensation to be paid. The position of the law is contrary to this submission, and it is that the fruits derived from improvements

made by a *bona fide* possessor “cannot be set off against a claim for compensation” in respect of the improvements which produced them (**Fletcher’s** case at 651) ;see also: **Makotoko and Another v Lesotho Development and Construction (PTY) Ltd C of A (CIV) 57/2013 [2014] LSCA 28 (24th October 2014) at para. 10**. The development of this rule was stated in **Rademeyer and Others v Rademeyer and Others 1967 (2) SA (C.P.D) 702** where Van Zyl J said:

“In Fletcher and Fletcher v Bulawayo Waterworks Co. Ltd, 1915 A.D 636, Innes, C.J., relying on Voet, 6.1.38, states at p. 651:

“The rule, where a claim for improvements is set up, is that the fruits derived from the property occupied must go against the expenditure incurred. “See further also Voet, 24.1.3 and 4.1.29 and 32; Raba v Ngoma, 1913 E.D.L. 469 at p. 474; Burns v Burns, 1937 W.L.D 67 at pp. 76, 77; Pucjowski v Johnston’s Executors, 1946 W.L.D. 1 at p. 5. The Roman law regarding the ownership of the fruits was, however, modified in two respects. In the first place the bona fide possessor acquired irrevocable ownership in all fruits gathered before lis contestatio..... The second modification absolves the bona fide possessor from having to deduct, from his claim for expenses, the fruits derived from the improvements made by

*him....” Rentals are fruits development (civil fruits) (**Barnett and Others v Rademan and Another, 1934 A.D. 203**).*

[7] In view of the above principles, the argument by Advocate Kao, for the defendant, falls by the wayside for lack of merit. The rentals which the plaintiff is collecting from the improved property, are fruits of the improvement, and therefore, cannot be set off against the compensation to be paid by the defendant.

[8] The plaintiff did not adduce evidence of the actual expenditure she incurred in developing the site, instead she relied on the enhanced market values of the site after the improvements, which placed the market value of the whole property (land and improvements) at M124,672.00. The value of the flats being M94,720, and land M29,952.00. On the one hand the defendant adduced an estimate of the expenses the plaintiff incurred in making the improvements, but this expense did not include fencing, installation of electricity and water, while these were covered in the enhanced value determination by the plaintiff's valuers. The defendant's estimate for erecting the building is M56,272.68. The problem with the plaintiff's claim is that she does not discount the value of the land from the amount of compensation. This is crucial because the value of land cannot be the improvement for purposes of this enquiry. She may have bought the land for a certain amount, but that cannot be claimed

from the defendant. The claim against the defendant is for improvements only.

[9] Applying the formula outlined in *Fletcher's* case, the value of the whole property is M94,720.00. This value was not disputed to be the correct value of the flats. This value juxtaposed with the defendant's estimate of M56,272.00 which does not account for parameter fencing, water and electricity installation associated expenses, to my mind represents a fair value of the improvement.

[10] In the result the following order is made:

a) That the defendant pays to the plaintiff an amount of M94,720.00 as compensation for the improvements made at plot NO. 11302 – 081

b) The plaintiff is awarded the costs of suit.

MOKHESI J

**FOR THE PLAINTIFF: ADV. LETSIE INSTRUCTED BY T.M.
MAIEANE & CO. ATTORNEYS**

**FOR THE DEFENDANT: ADV. E.M. KAO INSTRUCTED BY T.
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