

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/102/2020

In the matter between

'MAMMOPE SCOUT

APPLICANT

And

VITTICHALIL NARAYANAN NAIR

1ST RESPONDENT

DEEPA BHSKARAN NAIR

2ND RESPONDENT

TSOOANA SCOUT-MOCHABA

3RD RESPONDENT

LENKA REGINALD MALEFANE

4TH RESPONDENT

LAND ADMINISTRATION AUTHORITY

5TH RESPONDENT

Neutral Citation: 'Mammope Scout v Vittichalil Narayanan Nair & 4 Others
(CCA/102/2020) [2021] LSHC 37

JUDGEMENT

CORAM: BANYANE J

DATE OF HEARING: 18/03/2021

DATE OF JUDGEMENT: 26/03/2021

Summary

Sale of immovable property – followed by transfer of rights to purchaser – the seller allegedly having no intention to transfer her interest in the land - whether claim vindicatory thus justiciable in the Land Courts.

Annotations

Cases cited

1. Mafube Investment Holdings (Pty) Ltd v Mashamole Letoao & Others LC/APN/137/2014
2. Lephema v Total Lesotho & Others C of A (CIV) 36/2014
3. Mwangi v Masupha LC/APN/170/2014
4. Thabiso Makepe v Lebohang Thotanyane and Another CCA/0070/15
5. Lebohang Thotanyane and Another v Thabiso Makepe LC/APN/88/2015
6. Shale v Shale C of A (CIV) 35/2019
7. Moletsane v Thamae C of A (CIV) 23/2017

Statutes

1. The Land Act No.8 of 2010
2. The Land Regulations of 2011
3. High Court (Commercial Court) Rules 2011

Books

M. Mostert *et al*: The Principles of the Law of Property in South Africa (2010) (Oxford University Press. Southern Africa) (Pty) Ltd, Cape Town

BANYANE J

Introduction

[1] The dispute between the parties pertains to plot No.122282-294 situated at Maseru West, in the Maseru Urban Area. The applicant and her husband Mr Makara Scout (deceased) acquired rights over this plot in 2018. The couple subsequently concluded a sale agreement with the 1st and 2nd respondent in relation to this property. In May 2020, title over this plot was transferred to the 1st and 2nd respondents herein, a married couple. What forms the crux of the dispute before this Court is a document (special power of attorney) executed by them (applicant and her late husband) in terms of which they purportedly authorized advocate Malefane (4th respondent) to act on their behalf to facilitate transfer of the property into the 1st and 2nd respondents' names. The applicant's major complaint is that when they signed this document, they were not apprised of its contents and that they never intended to pass title before the full payment of the purchase price.

[2] It was as a result of this document that the property was transferred to the respondents in May 2020 and registered as such by the 5th respondent. The applicant contends that she only became aware that the property has been transferred into the respondents' names in June 2020 as a consequence of which she instituted these proceedings in September 2020, seeking reliefs couched as follows: -

1. Dispensing with the Rules on the normal modes and periods of service on the grounds of urgency.
2. Dispensing a Rule Nisi be issued returnable on the date to be determined by the Honourable Court, calling upon the Respondents to show cause (if any) why the following prayers shall not be granted in favour of the Applicant;
 - a) Interdicting and restraining the 1st and 2nd Respondents from making any developments or improvements on undeveloped

site registered under **Plot No.12282-294** situated at Maseru West, in the District of Maseru pending finalization of this Application.

- b) Interdicting and restraining the 1st and 2nd Respondents from entering into a Sale Agreement, Sub-Lease Agreement, Registration of Mortgage Bond or any other transaction in respect of a site registered on **Plot No.12282-291** situated at Maseru West, in the District of Maseru pending finalization of this Application.
- c) Interdicting and restraining the 3rd Respondent from making negotiations and agreements with anybody and / or interfering with any transaction in relation to a site registered on **Plot No.12282-294** situated at Maseru West in the District of Maseru.
- d) Ordering that the Applicant should not be evicted from a developed property on a site registered on **Plot No.12292-508** situated at Katilehong, Maseru Urban Area, belonging to Moeketsi Christopher Tsanana Macheli, pending finalization of this Application.
- e) Cancellation of a Sale Agreement between the Applicant and the 1st and 2nd Respondents for a sale and purchase of a site registered under **Plot No.12282-294** situated at Maseru West in the District of Maseru.
- f) Cancellation of Certificate of Consent to Transfer of rights and interests from the Applicant to the 1st and 2nd Respondents on a site registered on Plot No.12282-294 situated at Maseru West, in the District of Maseru.
- g) Cancellation of a Deed of Transfer transferring rights and interest from the Applicant to the 1st and 2nd Respondents made on the 28th May 2020 in respect of a sale registered under **Plot No. 12282-294** situated at Maseru West in the District of Maseru
- h) Ordering the 5th Respondent to re-instate to the Applicant her rights and interests on a site registered under **Plot No. 12282-294** situated at Maseru West in the District of Maseru.

- i) Ordering the Applicant to pay back to the 1st and 2nd Respondents an amount of **Eight Hundred Thousand Maloti Only (M800,000.00)** immediately upon sale of a site registered under **Plot No.12282-294** situated at Maseru West in the District of Maseru.

IN THE ALTERNATIVE

- j) Ordering the 1st and 2nd Respondents to pay to the Applicant, an amount of **Eight Hundred Thousand Maloti Only (M800,000.00)** being the balance outstanding of the purchase price of in full and final payment of a site registered on **Plot No.12282-294** situated at Maseru West in the District of Maseru, within **thirty (30) days of the Order**.
3. That prayer **1** operate as an absolute and prayers **2 (a), 2 (b), 2 (c)** and **2 (d)** operate with immediate effect an interim relief:
 4. Costs of suit on Attorney and Client Scale in the event of opposition.
 5. Further and / or alternative relief.

[3] The 1st and 2nd Respondents oppose the application principally on the ground that the property was transferred by consent of the applicant and her husband following conclusion of a sale agreement between them. Apart from this, they objected to the jurisdiction of this Court.

[4] Before addressing the interim reliefs sought, the parties were directed to first address the jurisdictional issue. Heads of argument were filed in this regard.

Submissions

[5] Mr Malefane for the respondents contended; firstly, that the dispute did not arise out of a commercial transaction and thus it is not a commercial dispute that falls for adjudication in the commercial Court. According to him, the deed of sale under scrutiny is not a commercial transaction because; a) it was not done in the course of commerce or trade and; b) No

profit was intended by either party ; c) the agreement was not concluded in furtherance of any of the party's business(s) or trade; d) the parties' agreement is a consumer contract and not a "business to business agreement".

5.1 He contends secondly: that all the issues raised by this application as well as the reliefs sought by the applicant relate to land and for this reason, the claim ought to be launched in the Land Courts. He cited the case of **Shale v Shale C of A (CIV)35/2019** and **Lephema v Total Lesotho & Others C of A (CIV) 36/2014** to submit that matters relating to land falls within the exclusive jurisdiction of the Land Courts.

[6] Mrs Lephatsa for the applicant counter argued that Land is a commercial asset and that the dispute is over a commercial transaction namely; a sale of Land. She contends that a party that challenges the validity of the contract of sale, can only do so before the Commercial Court, and where the contract is found to be invalid, every deed subsequent to the invalid sale shall fall away and should be cancelled. She relied on **Mafube Investment Holdings (Pty) Ltd v Mashamole Letoao & Others LC/APN/137/2014** in this regard, as well as Rule 10 of the High Court Rules (as amended) 2011 to submit that a sale agreement is a business contract enforceable by specific performance or cancellation against either party for breach.

6.1 She submits that the substantive prayer sought by the applicant is cancellation of the sale agreement between the parties and not cancellation of the deed of transfer as Mr Malefane contends.

Issue

[7] The only issue that arise for determination at this stage is whether this Court has jurisdiction to hear the matter.

Discussion

[8] Both the commercial Court and the Land Court are the specialized divisions of the High Court. The business of the former is outlined in the Commercial Court Rules of 2011 while the Jurisdiction of the Land Court is defined by the Land Act No.8 of 2010.

[9] The jurisdiction of these two Courts over matters where an agreement of sale in relation to land is involved has been considered in a number of cases. The following are some of those cases.

9.1 In **Lephema v Total Lesotho** (*supra*) the Court of appeal dealt, *inter alia*, with the question whether Total's counter-claim in terms of which it sought reliefs aimed at rectification of the deeds register by way of reversal of the cancellation of Maputsoe Properties' Lease with consequent restoration of the various relevant registrations, fell to be determined in the Land Court or the Commercial Court.

9.1.1 The Court at paragraph 26 of the judgement stated as follows;

Leaving aside the prayer just mentioned, the relief claimed by total is based on assertion of its rights as sublessee. In effect, it aims to remove the basis on which Lephema claims to be sublessor and to have MP's name restored as the lessee in the deeds register.

9.1.2 Further at para 27;

This analysis shows that total is not claiming title (it has no basis on which to do so). And it is not claiming a right which override title (it already has that right). Accordingly its claim does not "relate to land" or "concern land" within the meaning of the land Act. If its claim succeeds, title will be involved but only in so far as an invalid entry will be erased and a valid one be restored. It follows that the counter claim did not have to be brought in the Land Court.

9.1.3 At para 29;

There can be question that the counter- application concerns subject matter within the ambit of the business of the commercial court. Central to Total's claim is a sublease with MP which is, in the words of rule 10(1) of the commercial court rules(Government gazette 76 of 2 December 2011, supplement No.2) "a business contract" which has given rise to a relationship of a commercial or business nature and the counter-claim is connected to such a relationship".

[10] In **Mafube Investment Holdings** (*supra*), the applicant sought specific performance of a contract of sale, revival of consent, alternatively damages for breach of contract. The complaint was that the defendant was deliberately refusing to execute a deed of transfer.

10.1 The Court held that these reliefs do not involve title to land nor constitute claims relying on derogations from title nor was it a claim to rights overriding title; further that the cause of action was breach of contract and not enforcement of a claim of grant of title to land.

10.2 Importantly, the Court held that a sale agreement is a business contract containing the suspensive condition of consent acquisition from the commissioner of lands; and that it confers a personal contractual right on the buyer to claim transfer of rights from the seller by specific performance; or like any other contract, either party may seek cancellation for breach.

[11] **Mwangi v Masupha LC/APN/170/2014** followed **Mafube Investment Holdings** (*supra*). The applicant in this case (the seller) sought cancellation of the agreement of sale and the certificate of consent, payment of rentals collected by the buyer from the disputed plot and an order of ejectment. The complaint was that the buyer failed to pay stamp duty to enable registration of the deed of transfer, as a result, the balance

of the purchase price could not be paid by him while he continued to derive financial benefit from the plot.

11.1 At para 18, the Court held that;

an agreement involving the disposal of the seller's interest in land in favour of a buyer remains a business transaction. Any dispute regarding its enforceability by specific performance or cancellation for breach does not involve a claim of title to land as explained in the Lephema judgement. it is the type of dispute that falls within the remit of the high Court (commercial division) in terms of rule 5(1).

11.2 further at Para 19;

Since the prayers sought by the applicant revolve around the determination of breach of that contract and its cancellation, that is the main issue whose resolution must first be made by the competent court before the other reliefs can be granted. In that sense these other issues are subsidiary and remain ancillary and can only be considered after the clearance of the dispute on the status of the contract by the High Court (commercial division).

[12] Another decision which followed **Mafube Investments** (*supra*) is **Thabiso Makepe v Lebohang Thotanyane and Another CCA/0070/15**, where the buyer sought specific performance against the seller to take steps to transfer the plot. The Court held that where a party seeks specific performance, the claim falls within the jurisdiction of the Commercial Court.

[13] It will be observed that in **Mafube, Thabiso Makepe** and **Mwangi**, title had not passed to the buyer. This distinguishes these cases from the facts of the present matter. They however dispose of one aspect raised by Mr Malefane in argument that an agreement of sale between individuals does not qualify as a business contract. I should add that this argument

need not be interrogated any further because Mr Malefane neither addressed these authorities, nor comprehensively argue this point.

13.1 In **Lephema**, Total Lesotho was not claiming title to the land in question but restoration of its name (as the sub-lessee), in the Deeds Register. It is similarly distinguishable from the present matter.

13.1.1 The significance of this decision is that it provides guidance on the type of disputes to be adjudicated in the Land Court; that not every dispute relating to property is a dispute concerning Land within the meaning of the Act. Importantly that the expressions "relating to" or "concerning" Land are of wide and general import but they must be interpreted in the context so that the disputes to which they refer are disputes involving claims to title, claims relying on derogations from title or claims to rights overriding title.

13.2 Title is defined in the Land Regulations 2011 as follows;

"title means an allocation of land made under the Act, or where a lease is granted or issued under the Act, such lease, and in relation to the rights existing at the commencement of the Act, means an allocation made by proper authority or the transfer of an allocation consented to by proper authority".

13.3 In **Shale v Shale** (*supra*), the Court stated that the phrase "concerning land", under section 73 of the Land Act 2010 is not restrictive but expansive; that "concern" means relate to, be about, affect or involve.

[14] In another case between **Lebohang Thotanyane and Another v Thabiso Makepe LC/APN/88/2015**, the applicants sought a declarator in the Land Court to the effect that the continued occupation of the respondent was unlawful, ejectment and payment of damages.

14.1 The Court held that the dispute between the parties is over title and thus justiciable before the Land Court because the issue before it was whether a title-holder's claim can be defeated by the buyer's assertion of a personal contractual right derived from a sale agreement that has collapsed due to failure to fulfil the suspensive condition.

14.2 In **Moletsane v Thamae C of A (CIV)23/17**, it was held that the question whether the Land Courts have jurisdiction to consider a particular claim, depends on the nature of the rights that the party seeks to enforce.

[15] It is clear on these authorities that factors to be considered in determining the jurisdictional issue of the two courts where an agreement of sale has been concluded in relation to land include, inter alia, the nature of the right that a party seeks to enforce, i.e whether contractual or about title to Land and the issues raised by a given dispute.

[16] I turn now to the facts of this case in order to establish whether the present matter involves purely contractual rights or real right in property.

Applicant's factual averments

[17] It is the applicant's case that the transfer of the land was obtained through fraudulent means. She avers in this connection that her daughter, the 3rd respondent connived with the 1st and 2nd respondents to have the transfer effected without her knowledge or authority; that she deceitfully and manipulatively took her original lease and other documents and handed them to the respondents.(para 9.25 and 10.5 of the founding affidavit)

17.1 She avers that in May 2020, she received information that the 1st respondent was intending to transfer her site but he denied upon

confrontation. She says she subsequently filed her objection to the transfer with the 5th respondent, the LAA.

17.2 On the 05th June 2020, so she avers at para 12.3, she was shocked to discover that her husband and herself have apparently signed a power of attorney authorizing advocate Malefane to facilitate transfer to the 1st and 2nd respondents. She avers that they were coerced and deceived into signing this document. She says she did not read the document, so she did not know its contents. She adds that the 3rd respondent misrepresented to them what the content of the document was.

17.3 On the 08th June 2020 when she followed up on her objection, she discovered that the rights have already been transferred.

17.4 She avers further that they never intended to authorise Adv Malefane to act on their behalf because in terms of their agreement with the respondents, transfer would only be effected upon full and final payment of the purchase price by the respondents.

17.5 She avers that para 16.1 that the sale agreement was invalid and of no force because they were not *ad idem* when it was concluded because they did not agree on the purchase price of the subject matter.

[18] A closer examination of the applicant's claim reveals, in my opinion, that it is founded on *rei vindicatio*. She seeks re-registration of the property in her name and invalidation of the consent and deed of transfer. The objective of *rei vindicatio* is to restore physical control of the property to the owner. **Mostert et al: The Principles of the Law of Property; p218.**

[19] Her founding affidavit is divided into various sections. From paragraph 8 she outlines the background to her acquisition of the plot. In

the next paragraph, she recounts the several offers from different potential buyers and how the sale agreement with the respondents was concluded.

[20] The nub of her claim before Court is distillable from paragraphs 12.1. Her main complaint as I understand it is that they were deceived into signing the power of attorney authorising advocate Malefane to act on their behalf to facilitate the transfer of this plot; that they could not have signed such a document were they apprised of its contents because in terms of their contract, transfer would only be effected after full payment of the purchase price. It is on this basis that she contends that the disputed plot was transferred and registered in the names of the 1st and 2nd respondent by illegal means.

[21] To put it differently, she seeks to vindicate her rights/title in this land from the respondents.

[22] While it is true that the dispute between the parties arose from the contract concluded by the parties, the main issue as I see it is whether the applicant and her husband intended to transfer their rights in this property to the respondents and whether under the circumstances of this case, the respondents did not acquire title despite registration in their favour. In other words, the bone of contention is the passing of title from the lessee to another person. The core dispute or issue raised in this matter is in my view about derivative acquisition of land rights / title by the buyer.

[23] Disposal of interest in land by the lessee is governed by section 35 of the Land Act 2010 read with Land Regulations of 2011. Under section 83(1) of the Act, it is a criminal offence to fraudulently procure a lease or any instrument relating to land.

[24] For these reasons, I am of the view that this matter is justiciable in the Land Courts.

Order

[25] In the result the following order is made;

- a) The point *in limine* of lack of jurisdiction is upheld.
- b) And the application is dismissed with costs.

**P. BANYANE
JUDGE**

For Applicant: Mrs Lephatsa

For Respondents: Advocate Malefane