

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0005/2021

In the matter between:

**NTHOATENG KHITIONE
MAMAHALI MAKHOTLA
MASEIPONE THAMAE
PITSO MASILONYANE
MASENEKANE TŠIU
MOOKAMELI RAMAKAU
MATHAPELO RAMAKAU
TŠOTLEHO NTŠOEU**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT
5TH APPLICANT
6TH APPLICANT
7TH APPLICANT
8TH APPLICANT**

AND

**BOTANICAL OILS (PTY) LTD
COMMISSIONER OF LANDS AND
ADMINISTRATION AUTHORITY
REGISTRAR GENERAL DEEDS REGISTRY
LAW OFFICE
MOHLAKENG A05 COMMUNITY COUNCIL
MINISTRY OF LOCAL GOVERNMENT AND
CHIEFTAINSHIP AFFAIRS
ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT**

Neutral Citation: Nthoateng Khitione & Others v Botanical Oils (Pty) Ltd & Others [2022] LSHC 166 Comm. (18 AUGUST 2022)

CORAM: MOKHESI J
DATE HEARD: 01ST JUNE 2022
DELIVERED: 18TH AUGUST 2022

SUMMARY

LAW OF PROPERTY- *Non-compliance with section 24 of the Deeds Registry Act- Respondent taking occupation of the sub-leased property before consent sought and the sublease agreement being registered- Consequences thereof- Sublease agreements cancelled and declared null and void*

ANNOTATIONS:

STATUTES:

Deeds Registry Act of 1967

CASES:

Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) and other 2022 (1) SA 100 (SCA) (09 July 2021)

C & S Properties (Pty) Ltd v Khaketla and Others (C of A (CIV) 64/2011) [2012] LSCA 26 (27 April 2012)

De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and others 2004 (1) SA 406 (CC)

Heynes Mathew Ltd v Gibson N.O 1950 (1) SA 13 (CPD)

Molomo Filling Station and Another v Mendi Group (Pty) Ltd and Others C of A (CIV) NO. 83/2019 (dated 30 October 2020).

Willoughby's Consolidated Co. Ltd v Copthall Stores Ltd 1918 AD 1

Books:

Badenhorst et al **Silberberg and Schoeman's The Law of Property 5th Ed.**

JUDGMENT

INTRODUCTION

[1] The applicants had lodged an urgent application in terms of which they sought orders to the effect that the various sublease agreements they had concluded with the 1st respondent be cancelled and declared null and void.

[2] **The Parties and Background facts**

The applicants are owners of various and adjacent fields at Ha- Khitione, Ha-Mofoka in the District of Maseru. The 1st respondent is a company duly registered in terms of the laws of Lesotho whose main business preoccupation is to cultivate and produce medical cannabis. The 2nd respondent is the Commissioner of Land Administration Authority cited in her capacity as the officer and authority in terms of the Deeds Registry Act 1967 and Land Act 2010 whose mandate is to issue consent to register long term subleases agreements. The 3rd respondent is the Registrar General Deeds Registry office whose mandate is to register long term subleases in terms of the Deeds Registry Act 1967. The 4th respondent is the Mohlakeng Community Council. The 5th respondent is the Minister of Local Government and Chieftainship Affairs who is responsible for administration of 2nd and 4th respondents. The 6th is the Attorney General cited in his capacity as the legal representative of the Crown in all civil matters where government has a direct and substantial interest.

[3] Desirous of acquiring vast swathes of agricultural land, the 1st respondent, through its officers approached the applicants who own adjacent fields, as already stated. The 1st respondent was keen on engaging in a project of

cultivating, growing and producing cannabis and its products. Towards this purpose, it concluded sublease agreement with each of the applicants. The terms of each sublease agreement are the same for each applicant. The said sublease agreements are for a period of ten years and eleven months with an option of further renewal for a further period of ten years and eleven months. In terms of clause 3.4, the sublessee undertook to register the sublease agreements in terms of the Deeds Registry Act of 1967 (the Act), subject to the sublessors applying for and acquiring consent in terms of the Act. The sublease agreements were not registered, but that notwithstanding, the 1st respondent took occupation of the fields and commended its business operations as anticipated.

- [4] A dispute between the parties arose regarding compensation payable to the applicants by the 1st respondent. The applicants kept nudging the 1st respondent to renegotiate the terms of the agreement, to which attempts, the latter refused to accede, prompting the applicants to institute the current proceedings.
- [5] The applicants' case is that the sublease agreements are unlawful, unenforceable and void for the following reasons:

- (i) Their non-registration in terms of the Act.
- (ii) That:

“Before registration can even be effected by the 3rd Respondent, Ministerial consent to register the said sublease agreement must be

obtained from 2nd Respondent and any purported sublease that does not comply with the obtaining of the ministerial consent is void. The voidness of the sublease agreements “Khitone 1” becomes apparent because 1st Defendant failed to act and register the agreement but they are clear that 1st Respondent must obtain consent within three (3) months and they failed to do so.”

(iii) That:

“The Sublease agreements annexure “Khitone 1” are unenforceable because they contravene the Land Act, 2010 and in terms of clause 5.1 thereof, 1st Respondent is not entitled to use land if the agreement contravene the Land Act 2010. I wish to disclose that the Land Act has not been complied with in that the certificate of allocation of the Applicants clearly dictates that the land, subject matter herein, is designed for agricultural purposes only but he 1st Respondent is not using these fields for agricultural purposes solely but is using them in contravention of the terms of allocation...”

[6] This application is opposed. Mr Lebohang Ramakhula deposed to an answering affidavit on behalf of the 1st respondent and in it, raised three of the so-called points in *limine*, namely:

- (i) Notice of motion is fatally defective;
- (ii) Lack of urgency of the matter; and
- (iii) The requirements for an interim interdict not satisfied.

[7] On the merits the 1st respondent aver that it has not contravened the provisions of the Land Act, moreso when the applicants do not point to a

specific provision which they alleged was contravened. It avers that it has been issued with a valid licence for the cultivation, manufacturing, supply, hold, import and export and transit of cannabis and/or cannabis resin in terms of section 12 of the Drugs of Abuse Act, of 2008.

[8] On the question of contravention of the Act regarding failure to register the sublease agreements, the 1st respondent contends that the sublease agreements must be registered within three months, but that should only be after consent has been given. The 1st respondent aver that the Act places no obligation on it to seek consent before concluding an agreement of sublease. It contends that the obligation to register the sublease agreement arises once consent has been given, and for the reason, in the present matter no consent has been given, no obligation arises to register the sublease agreements.

[9] **Issues for determination:**

- (i) The so-called points in *limine* raised by the 1st respondent
- (ii) The merits of the application

[10] **Points in *limine***

All points in *limine* are without any merit, and much need not be said in that regard. As regards lack of urgency and interim interdict, the issues had passed their sell-by dates as the court had ruled when the matter was moved the first day, that the matter was not urgent. Equally the relief relating to interim interdict was not granted. The parties were instead directed to ensure that the matter is heard to finality at the earliest opportunity.

[11] **The merits**

It is the applicants' contention that the sublease agreements are unenforceable as they contravene the Land Act, 2010. This contention is without any substance. As the 1st respondent correctly pointed out, it has been issued with a licence for cultivation, manufacturing, supply, hold, import and transit of cannabis. In terms of the licence, the 1st respondent is not restricted to cultivation of cannabis but is also empowered to manufacture, supply, hold import and export it. Implicit in the activities, authorised by this licence, is that the 1st respondent is entitled to engage in a commercial and industrial cannabis enterprise.

[12] **Failure to comply with S.24 of the Deeds Registry Act, 1967**

It is the applicants' case that the 1st respondent contravened the provisions of section 24 of the Act by failing to register the sublease agreements and must have obtained appropriate consent within three months but failed to do so. They argue that the agreement is null and void and unenforceable. They cited in support of their contention the case of **Molomo Filling Station and Another v Mendi Group (Pty) Ltd and Others C of A (CIV) NO. 83/2019 (dated 30 October 2020)**.

[13] On the one hand the 1st respondent contends that case law and the Act, places no obligation on it to obtain consent before concluding the sublease agreement. The obligation to register only arises once consent has been given. And that in the present case the fact that consent has not been sought, there is no obligation on it to register the sublease agreement within three months as stipulated in the Act. It is apposite at this point to quote the provisions of section 24 of the Deeds Registry Act 1967.

[14] Section 24 provides that:

24. (1) Every agreement of lease or sub-lease of rights in or to immovable property which when entered into was for a period of not less than three years, or, for the natural life of the lessee, or any other person mentioned in the lease or sub-lease, or which is renewable from time to time for periods which together with the first period amount in all to not less than three years, shall be registered in the deeds registry.

(2) Such registration shall only be effected after the proper authority has consented in writing to the lessee occupying and using the land to which the lease refers, which consent shall not be unreasonably withheld.

(3) Every agreement of lease or sub-lease of rights in or to immovable property and to which the proper authority has consented in writing shall be lodged for registration in the deeds registry within three months of the granting of such consent.

(4) Every agreement of lease or sub-lease of rights in or to immovable property and to which the proper authority consented in writing prior to the commencement of this Act shall be lodged for registration in the deeds registry within three months of the date of commencement of this Act.

(5) Failure to lodge such lease or sub-lease for registration within the prescribed period or within such extended period or within such extended period as the court may allow, shall render the agreement of lease or sub-lease null and void and of no force and effect.

(6) Any agreement of lease or sub-lease of rights in or to immovable property executed, attested or registered contrary to the provisions of this section shall be null and void and of no force and effect.

- [15] The starting point should be the case of **Molomo Filling Station and Another v Mendi Group (Pty) Ltd and Others (above)**. In that case a sublessee to an unregistered sublease agreement had sought to enforce its terms. The Court of Appeal held that the sublease agreement was unenforceable for non-compliance with section 24 of the Deeds Registry Act 1967. Of importance is what was said by the court at paragraph 30:

[30] On what basis can the Mendi Group claim enforcement of the agreement? I do not think that the agreement is enforceable because of an agreement. A contract is an agreement between parties, entered into with the intention of creating binding obligations, to perform according to the terms agreed. In casu, the intention was to enter into a contract, which as the parties agreed was to be one for 12 years. For it to be so, the Act requires that it must first be registered in terms of section 24 (1) of the Act. This is distinct from an intention to enter into legal obligations for the purpose of concluding an enforceable contract consistent with the terms of the Act...In my view, the validity and enforceability of the agreement are coextensive.

- [16] The agreement of sublease involves both a contract to confer rights and registration in terms of section 24 in order to transfer those rights to the sublessee (**C & S Properties (Pty) Ltd v Khaketla and Others (C of A (CIV) 64/2011) [2012] LSCA 26 (27 April 2012) at para. 18**). What I understand the Court of Appeal to be saying in **Molomo** is that in terms of section 24 of the Act for a contract to confer rights to the Sublessee and for

it to be valid and enforceable, it must be registered in terms of section 24 of the Act. This is consistent with a trite approach which distinguishes between real rights and contractual rights. The unregistered sublease agreement is unenforceable, the only remedy available to the sublessee is to seek specific performance to have it registered in terms of the Act.

[17] This distinction was drawn in **Willoughby's Consolidated Co. Ltd v Copthall Stores Ltd 1918 AD 1 at 16** where the court said:

Now servitude [sublease], like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude [sublease] in the beneficiary, any more than a contract of sale of land passes the dominium to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude[sublease], which must be effected coram lege loci by an entry made in the register and endorsed upon the title deeds of the servient [subleased property].

[18] In **Heynes Mathew Ltd v Gibson N.O 1950 (1) SA 13 (CPD)** at 15, the court said:

...When once the lessee has been granted a lease of more than 10 years than certain legal qualities attach thereto. One of the legal qualities that attaches to it is that, being a lease in longum tempus, it requires to be registered to bind third parties. Registration really may be said to be equivalent to full delivery to the lessee of the rights granted to him by the lease. He is entitled therefore to whatever advantages flow from a lease of this description. One of the advantages is that upon due registration he is protected for the term of his lease against third

parties. This right flows from the lease, and it is a right which he is entitled to have registered in proper form, which means registered in Deeds Registry. I am of the opinion that the position is no different from that of a servitude in regard to which it is common cause that the holder of a servitude registered against the title deeds of the property....

- [19] What can be distilled from the above decisions is that inasmuch as the contract of sublease between the parties is binding, in order to transfer the rights which flow from the sublease to the sublessee, the formalities prescribed in section 24 of the Act must be followed. As part of the formalities for transference of the rights which flow from the sublease, consent of proper authority is required. The purpose of this consent as garnered from the provisions of section 24 (2) is to give the sublessee permission to occupy and use the land which is subject of the sublease agreement. Without consent from proper authority, the sublessee cannot have a right to occupy and use the subleased property. No legal title to the subleased property vests in the sublessee and an agreement between the parties by means of which a sublessee occupies and uses subleased property without consent of proper authority is invalid and ineffectual.
- [20] In the present matter the parties did exactly that. They concluded a sublease agreement and the 1st respondent took occupation and commenced operations without the sublease agreements being registered. It is difficult to understand the purpose which will be served by seeking consent when the 1st respondent and the applicants have arrogated to themselves the authority to permit usage and occupation, outside of the law. The power to authorise usage and occupation of subleased property vests in 2nd respondent.

[21] The 1st respondent contends that there is no express legislative requirement that consent must precede conclusion of a sublease agreement. The 1st respondent is relying on **(S Properties (Pty) Ltd v DR. ‘Mamphono Khaketla and Others (C of A (CIV) 63/2011)**. It further contends that the transaction in question was for a sublease of vacant pieces of land and not for “immovable property”. It argues that the Act distinguishes between ‘immovable property’ and “land”, and that section 24 refers to immovable property. I agree that there is no requirement that consent be sought before conclusion of a sublease agreement, however, as I see it, different consequences attach to taking occupation of subleased property without consent being given and property being registered in terms of the Act. It is apposite therefore to quote the interpretation section of the Act in relevant parts where it defines the impugned words:

immovable property” includes –

(a) any building including fixtures or improvements in or over Land and right of occupation and use thereof;

(b) a registered lease or sublease of any such building, fixtures and improvements aforesaid, which when entered into was for a period of not less than three years or for the natural life of the lessee or any other person mentioned in the lease or sub-lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period amount in all to not less than three years; or

(c) any right to minerals (including any right to mine for minerals and a lease or sub-lease of such right;”

“Land” means the land only and does not include any buildings or other improvements erected thereon;

[22] The exercise of trying to decipher whether the property in question is an immovable, involves interpreting the Act. Interpretation involves considering the language used in the provision, understood in the context in which it has been used and taking into account the purpose of the provision (**Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) and other 2022 (1) SA 100 (SCA) (09 July 2021) at para. 25**). In my considered view, the context is clear, section 24 deals with registration of leases and subleases in respect of immovable property and provides under subsections 2 and 3, that the transfer of rights flowing from leases or subleases shall only be effected after a proper authority will have consented to occupation and usage. The purpose of registration is to protect the sublessee against third parties. The 1st respondent’s interpretation that the words “immovable property” excludes “land” is flawed, and this is due to the use of the word “includes” as it appears in the interpretation section. When the word is used in a statute, the case of **De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and others 2004 (1) SA 406 (CC)** at para 18, provides guidance on how it to be understood:

The correct sense of “includes” in a statute must be ascertained from the context in which it is used. Debele provides useful guidelines for this determination. If the primary meaning of the term is well known and not in need of definition and items in the list introduced by “includes” go beyond that primary meaning, the purpose of that list is then usually taken to add to the primary meaning so that “includes” is

non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case “includes” is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning – if it is a word in ordinary, non-legal usage – fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred in Debele as (a quagmire of uncertainty in the application of the term.”

- [23] With the above principles in mind, I revert to the 1st respondent’s contention that the words “immovable property” excludes land. This contention is flawed as already stated. The primary legal meaning of the word “immovable property” is that it is “land and everything that is attached to land by natural or artificial means” (**Badenhorst et al Silberberg and Schoeman’s The Law of Property 5th Ed., at para 3.3.2.2.**). The items which are listed under the definition of the “immovable property” are merely meant to add to the primary meaning of the words, they are not exhaustive. Upon reading of the definition, I do not get a sense that the legislature intended the words to be exclusive of the primary legal meaning of the word. Section 24 thus apply to sublease over land as in the present matter, I do agree with the 1st respondent’s counsel that section 24 does not say that consent must precede registration. What the 1st respondent’s counsel seems to have lost sight of, is that in the present matter the parties to the impugned sublease agreement allowed the 1st respondent to occupy and use land without the requisite authority of the proper authority being granted. The agreements are null and void and of no force and effect in view of these

circumstances. With this conclusion it is unnecessary to deal with the applicants' second anchor of its case (i.e. misrepresentation by the 1st respondents' officials).

[24] In the result the following orders are made:

(a) The sublease agreements entered into between the applicants and the 1st respondent are cancelled and declared null and void.

(b) The 1st respondent is evicted from the fields belonging to the applicants situated at Ha-Khithione, Ha Mofoka in the district of Maseru and are further interdicted from using, occupying and transacting any business on the said fields permanently.

(c) The 1st respondent is given two months within which to vacate the applicants' fields.

(d) The applicants are awarded the costs of suit.

MOKHESI J

For the Applicants:

**Adv. L. D. Molapo instructed by C. T
Poopa Attorneys**

For the 1st Respondent:

**Adv. P. C Ploos Van Amstel instructed by
Webber Newdigate Attorneys**

For the 2nd to 6th Respondents:

No representation