

## IN THE LAND COURT OF LESOTHO

**Held at Maseru**

**LC/APN/149/2014**

In the matter between:

**TEBELLO KHOROMENG**

**APPLICANT**

**And**

**MOSIMOLI MANAMOLELA**

**1<sup>ST</sup> RESPONDENT**

**GOODTRADING SUPERMARKET (PTY) LTD**

**2<sup>ND</sup> RESPONDENT**

**LAND ADMINISTRATION AUTHORITY**

**3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENRAL**

**4<sup>TH</sup> RESPONDENT**

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### **JUDGMENT**

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Neutral Citation: *Tebello Khoromeng vs Mosimoli Manamolela and others*  
LSHC 120 Lan (2 June 2022)

**Coram** : His Honour Justice Keketso L. Moahloli

**Dates heard** : 8, 9, 18, 30 September & 27 October 2014; 17, 18,  
19 February, 9, 10 June, 20 October & 12 November  
2015; 9 February, 26 & 28 April, 13, 14, 15  
September, 9, 13 December 2016; 29 June 2017; 26 July  
2018

**Date delivered** : 2 June 2022

## **SUMMARY**

*Sale of land – Ministerial consent not required for parties to conclude a valid sale agreement, but such consent is a prerequisite for transfer of title – Where seller in bad faith and unreasonably fails to facilitate transfer of title to a buyer, the latter may be granted an order of specific performance directing the seller to do all what is necessary to facilitate transfer of title to the buyer.*

## **ANNOTATIONS**

### **Cases**

*Allison v Massel and another 1954 (4) SA 569.*

*Amardien v Registrar of Deeds and Others 2019 (2) BCLR (CC)*

*C & S Properties (Pty) Ltd v Dr Khaketla and Others C of A (CIV) No 63/2012*

*Chetty v ERF 311, South Crest 2020 (3) SA 181 (GJ)*

*Hassum v Naik 1952 (3) SA 331*

*Krauze v Van Wyk en Andere 1986 (1) SA 158*

*Mahomed v KPMG Harley & Morris and Others C of A (CIV) No 34/2013*

*Molapo v Molefe C of A (CIV) 11 of 2003*

*Mothobi v Sebotsa C of A (CIV) 3 of 2008*

*Sea Lake (Pty) v Chung Hwa Enterprise Co (Pty) Ltd and Another C of A  
(CIV) 19 of 2000*

*Swart v Vooslo 1965 (1) SA 100*

*Taelo Michael Kolisang v Thabiso Victor Mahase C of A (CIV) 55/2019*

*Taka v Pheko C of A (CIV) No 59/2015*

*Three Zeds (Pty) Ltd v Ranthocha and Others C of A (CIV) No 51/2018*

*Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 (1) SA 337 (CC)*

### **Statutes**

*Alienation of Land Act 68 of 1981*

*Deeds Registry Act 12 of 1967*

*Land Act 8 of 2010*

*Land Court Rules 2012*

### **Journal articles**

*Beale JH "Registration of Title to Land" 1893 Harvard Law Review 369-377*

### **Books**

*Badenhorst PJ, Pienaar JM and Mostert (eds) Silberberg and Schoeman's The Law of Property (Lexis Nexis Butterworths 2006)*

*Christie RH, The Law of Contract in South Africa 3<sup>rd</sup> ed (Butterworths 1996)*

*Gibson South Africa Mercantile and Company Law 6<sup>th</sup> Edition*

*Willie Law of Mortgage and Pledge in South Africa 2<sup>nd</sup> Edition*

## MOAHLOLI J

[1] This case is about a long, acrimonious and often bad-tempered battle over the acquisition and development of a prime business site in the town of Qacha's Nek.

### **Factual background**

[2] In 1990 Mojari Christopher Manamolela and Gabriel Kotzé concluded a sale agreement. Manamolela sold to Gabriel Kotzé a portion of site 130A Qacha's Nek. The site was sold upon the following conditions:

- a) *Purchase price of Eighteen Thousand Rands be paid to the seller on or before 15 March 1990.*
- b) *The purchasers shall take occupation of the property with immediate effect.*
- c) *Risk shall pass on date or registration of transfer of the property into the purchaser's name.*
- d) *The purchaser shall pay all costs of transfer including the costs of drawing this agreement and shall when called upon deposit such costs with Rogers & Morris.*
- e) *All rates and charges levied in respect of the said properties shall be paid by the purchaser as from the date of registration of transfer, portion of a year to be calculated proportionately.*
- f) *The properties are sold with all improvements, fixtures and fittings as they now stand, voetstoets, and the SELLER shall not be responsible for any defects, whether patent or latent.*

*g) The properties are further sold in accordance with the area disclosed in the description and annexure attached hereto.*

*h) It is hereby recorded that the seller has sold certain other properties of site 130 to other purchasers. The purchaser undertakes to attend at his own cost to the survey and subdivision of site 130 and 130A, subject to the condition that the seller cede his rights to claim the costs of survey and sub-division against various purchasers aforementioned, to the Purchasers.*

**[3]** The *Deed of Sale (Deed 1)* was signed by two witnesses and the purchaser and seller at Matatiele on the 6<sup>th</sup> March 1990. A deposit slip in the amount of eighteen thousand credited to Qhoalinyane Trading Store is attached. No further action was taken by the parties in respect of *Deed 1*. On the 9<sup>th</sup> September 1993 Plot 130 was registered in the names of Mojari Manamolela as Plot No 41581-096. The next day, 10<sup>th</sup> September 1993 mortgage bond was issued by Standard Lesotho Bank in respect of the registered property. In 2004 Mr Kotzé met his demise and was survived by his wife, Mrs Shirley Kotzé.

**[4]** In 2008 Mrs Shirley Kotzé sold site 130A (Plot No 41581-096) to one Tebello Khoromeng, applicant herein. Mrs Kotzé and Khomoreng signed a *Deed of Sale (Deed 2)*. The purchase price for the site was fifty thousand rands (R 50,000.00) which would be paid by the purchaser to the seller upon exchange of documents relating to the site. Parties agreed further that transfer of the site into the names of the purchaser shall take effect as soon as the purchase price was paid. The deed of sale was signed by the seller and the purchaser at Matatiele in the Republic of South Africa on the 22<sup>nd</sup> April 2008.

[5] Seemingly, transfer of title from Mrs Kotzé to Khoromeng in terms of *Deed 2* could not happen right away. Transfer of rights in land can only be effected if the parties obtained official consent and their agreement is registered with the authorities.<sup>1</sup> First, title ought to have been transferred to Kotzé after deed was concluded. Then Mrs Kotzé would pass the title to Khoromeng. Mrs Kotzé and Khoromeng aware of this shortcoming approached Mr Manamolela. At this point Mr Manamolela remained title holder. They, Kotzé, Khoromeng and Manamolela agreed as follows:

*(a) That Kotzé would pass rights and interests on the site number 130A or lease number 41581-096 purchased from Manamolela to Tebello Khoromeng.*

*(b) That as per agreement between Manamolela and Kotzé (Deed 1) Kotzé ought to have paid survey expenses which he had however not yet paid.*

*(c) Tebello Khoromeng “new buyer” accepts to pay ten thousand Maloti for such expenses and to receive title or transfer of the site into his names.*

[6] The agreement was concluded on the 17<sup>th</sup> June 2008 by Khoromeng and Manamolela in the presence of Lesaoana Chaka and Thabiso Manamolela. Tebello Khoromeng paid an amount of ten thousand Maloti (M10, 000.00) on the day for subdivision and survey expenses. Mrs Kotzé had also notified the Letloepe Community Council in Qacha’s Nek of her intent to have rights which would otherwise be transferred to her to have them

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<sup>1</sup> Deeds Registry Act 12 of 967 ; *Mahomed v KPMG Harley & Morris Joint Venture N.O (Liquidators Lesotho Bank) C of A (Civ) No 34/13*; Beale “Registration of Title to Land” 369.

transferred to Khoromeng in a letter dated 27<sup>th</sup> May 2008. However, the transfer of title into the names of Khoromeng was never effected.

- [7] Sometime in 2012 the mortgage was cancelled. Thereafter, *Manamolela* and *Goodtrading Supermarket* concluded sublease agreement over property that included a portion of 130A. In terms of the sublease agreement, *Mojari Manamolela* and *Mathabiso Manamolela* (sub lessors) agreed to let to *Good Trading Company (Pty) Ltd* (sublessee) for a period of twenty five years Plot No 41581-096 situated at Qacha's Nek Reserve. In 2014 the Commissioner of Lands consented to the Sublease agreement and the agreement was registered with LAA.
- [8] The boundaries of the portion of site 130A are depicted in the deed of sale and in an accompanying diagram. It is described as follows; *a portion bounded by the co-ordinates B,C,D & E of the annexure, the boundary CD being a straight line and 90 degrees to the boundary EC and running not closer than 3m to the stone roundavel, the boundary EG being a straight line and 90 degrees line EC, the boundary GJ parallel to the boundary line EC.*

### **Preliminary objections**

- [9] Rule 66 (1) of the Land Court Rules 2012 allows a party to make preliminary objections by way of a special answer on any of the grounds set out in Rule 66 (2). And the Court ought to deal with these objections whenever they are raised. Respondents raised several objections, inter alia, *locus standi* of the applicant to institute proceedings; non-joinder of interested parties and *lis pendens*. These objections were dismissed. The first objection (*locus standi*), on the ground that the correct test is whether Khoromeng has a direct and substantial interest in the lease right to site

No 41581-096 also known as site 130A. At this stage of the proceedings the issue is not whether the lease rights belonged to Khoromeng or Manamolela; as this will issueably be addressed during the hearing and arguments on the merits. At this juncture the court is only concerned with whether Khoromeng has a legal interest in the right which is the subject matter of the litigation. In *casu* Khoromeng, has demonstrated convincingly that he has a legal interest in the disputed or contested right of ownership of above site. “*Locus standi* means a party has sufficient interest to protect, not that he has an enforceable legal right”<sup>2</sup>

**[10]** In order for an objection in terms of rule 66 (2) (c)-*lis pendens* to succeed a litigant must establish that a suit between the same parties or concerning a like thing and founded upon the same cause of action is pending in some other court. Respondent instituted ejectment proceedings in the Qacha’s Nek Magistrate Court. Proceedings before this court concerns title, registration and transfer of title and cancellation of a sub-lease agreement. And on the question of non-joinder the test is prejudice. Whether non-joinder of any party would prejudice such a party. Here circumstances are such that it is unlikely that failure to join Shirley Kotze would be prejudicial to her in anyway, as an alleged ex-owner of the property.

### **Applicant’s case**

**[11]** Following a series of events as narrated in paragraphs 2 and 3 applicant and 1<sup>st</sup> respondent applied for subdivision on the 3<sup>rd</sup> July 2008 and M10.00 consent fee was paid. They filled in transfer forms and Manamolela undertook to process the lease and gave Khoromeng permission to start developing the site. The subdivision application was also lodged with the Land Administration Authority (LAA) and was

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<sup>2</sup> Kefumane Taka v Nthathi Pheko and Others C of A (CIV) 59/2015



finally approved and Form S.10 was issued in the names of Khoromeng on the 12<sup>th</sup> August 2014.

[12] Khoromeng took occupation and began to develop the site soon after applying for subdivision but before either an S.10 was issued and title transferred into his names. On the 5<sup>th</sup> September 2008 he had tenants occupying site 130A removed.<sup>3</sup> On 2<sup>nd</sup> October 2008 Manamolela commenced action in the Qacha's Nek Magistrate Court praying for among other reliefs the ejectment of Khoromeng from site held under lease number 41581-096 Qacha's Nek. He also claimed damages for loss of rent and a declaratory order that any agreement that purported to transfer ownership of plot No 130 be declared null and void.

[13] It is applicant's case that he has developed Plot No. 41581-096 to the value of sixty million maloti. Further that, respondent was aware and had consented to the said development. Therefore, he seeks the following reliefs:

- (a) *An order declaring the sub-lease agreement between 1<sup>st</sup> and 2<sup>nd</sup> respondent registered with the 3<sup>rd</sup> Respondent in respect of the applicant's site to be null and void.*
- (b) *An order for cancellation of the consent and Sub-lease agreement registered with 3<sup>rd</sup> respondent by the 1<sup>st</sup> respondent in favour of the 2<sup>nd</sup> respondent.*
- (c) *An order compelling the 1<sup>st</sup> respondent to seek and apply to the commissioner of Lands for its consent to the subdivision and the transfer of rights to the portion of site with lease number 41581-096 (otherwise known as 130A) in favour of and in the names of the*

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<sup>3</sup> See page 43 para 5 of the record.

*applicant in accordance with applicant's agreement with Mrs Kotzé.*

*(d) An order compelling the respondent to thereafter lodge with LAA an application and/ or deed of transfer of the portion of site bearing lease numbers 41581-096 (otherwise known as 130A) in favour of and in the names of the applicant.*

*(e) Costs of suit*

***ALTERNATIVELY***

*a) Payment of the disbursement of M 50 000.00 as amount paid as consideration for the site in issue.*

*b) Payment of an amount of M 60 000 000.00 (sixty million Maloti) for improvements made on the site.*

*c) Payment of M 10 000.00 as amount paid for surveying purposes and subdivision.*

*d) Costs of suit*

*e) Further and/ or alternative*

***Respondent's case***

[14] Mr Manamolela passed away on the 8<sup>th</sup> September 2015. On the 12<sup>th</sup> November 2015 Mosimoli Manamolela late Manamolela's daughter moved an application for substitution. The application for substitution was granted. She testified as 1<sup>st</sup> respondent during the oral hearing. The gist of the respondent's case is that he remains the lawful holder of the rights in Plot No 41581-096. In his answer he avers that rights had not been passed to Kotzé because full payment had not be made, no deed of

transfer was signed and parties had not sought and obtained ministerial consent. He challenges the authenticity of the deposit slip. It is respondent's case that failure to, absence of a signed deed of transfer and failure to seek and obtain ministerial consent before the deed was signed rendered any subsequent dealings or transactions on the site by Kotzé invalid. An original pay slip is attached to the papers. Perhaps in hindsight Ms Manamolela who substituted the original 1<sup>st</sup> respondent and testified in court that she could not deny that the payment was made or whether it had been returned to Kotzé.

[15] Respondent denies that there was agreement on the transfer or actual transfer of rights to Khoromeng. He states “*while the agreement was under discussion the applicant and 1<sup>st</sup> respondent did not agree on the measurements hence why the matter did not go any further than that. This stands as the reason perhaps why in paragraph 3.2 applicant talks about 2478 square metres more or less while Form S.10 he talks about 7351 square metres... Respondent concedes that applicant paid M10, 000.00 and 1<sup>st</sup> respondent is ready to pay it back as he had been asking applicant to take it back...*” On this line respondent continued to state that no subdivision was done and he knew nothing about the S.10 and that he had never applied for consent. He was aware of a consent application form attached to the papers purportedly signed by himself and disputes filing out and signing the same.

[16] The application is also opposed by the 2<sup>nd</sup> respondent, Goodtrading Supermarket. Goodtrading is the sub lessee under the sublease agreement registered on the 14<sup>th</sup> May 2014. Goodtrading contends that applicant has no *locus standi* to bring suit. The ownership of the site remained that of

1<sup>st</sup> respondent and contractually on Goodtrading by virtue of the Sublease agreement.

[17] Goodtrading contends that applicant has not made out a case for declaratory relief sought. It submits “... *In shape, substance and form, prayer (c) is a non-starter in the Land Court dispensation in lieu of an appropriate Ministerial consent. Besides a position of law that the lessee obviously cannot be compelled to obtain Ministerial consent after the conclusion of an invalid agreement. This is trite law is binding. This prayer is also weird*”. Goodtrading also avers that non-joinder of Mrs Kotzé was fatal to applicant’s case because the purported *Deed 2* was concluded by applicant and Kotzé. Goodtrading insists that *Deed 2* was improperly done because no ministerial consent had been obtained.

[18] Goodtrading then proceeded to react to issues or allegations that could issuably be reacted to by 1<sup>st</sup> respondent. He denies existence of deed *one-* a contract of sale it was not privy or party to. Among others, it denies the payment of M 10, 000.00 paid by applicant to 1<sup>st</sup> respondent, the dimension of the site issue and destruction of shacks on the site in issue. Goodtrading alleges that it paid ground rent owed between 1994/1995 and 2013/2014 and penalties in order to obtain consent for the sublease agreement.

### ***Pre-trial conference***

[19] Parties outlined the following at the pre-trial meeting as issues to be determined by the court:

1. *Whether the deed of sale between the Applicant and 1<sup>st</sup> respondent constitutes transfer of rights over Plot No: 41581-096.*

2. *Jurisdiction of this honourable court with regard to the case number CC: 2008 pending in Qacha's Nek (lis pendes).*
3. *Whether Kotzé as a non-citizen of Lesotho could hold title over plot in issue.*
4. *Whether the ministerial stamp (Ministry of Local Government) on the Building Permit and plan (annexure TK 9) were valid.*
5. *Whether the registered sub-lease agreement between 1<sup>st</sup> and 2<sup>nd</sup> respondents is valid in the circumstances.*
6. *Whether the deed of sale between Applicant and 1<sup>st</sup> Respondent was valid with regard to portion of Plot 41581-096.*
7. *Whether the mortgaged property could be sold.*

### ***Oral evidence***

[20] Evidence was led on behalf of the applicant and respondents. Khoromeng testified that he approached Manamolela and offered to buy from him a vacant site in Qacha's nek. He was told by Manamolela that he had already sold same to Kotzé. Khoromeng approached the Shirley and offered to buy from her for fifty thousand maloti (M 50,000.00) a site the size 2478 m<sup>2</sup>. He paid M 10, 000.00 for survey and M 10.00 as sub division fee. He applied for a build permit and one was granted. He was informed by the LAA that the lease was being processed. He was later told that ground rent was owed and a lease could not be issued. He learned that Manamolela entered into a sublease agreement with Goodtrading over property that included portion he had purchased.

[21] One Matela who worked for LAA as a Land surveyor testified on behalf of applicant. Matela stated under cross-examination that according to their

records Khoromeng is the owner of Plot No. 41581-096 but the lease holder is Mojari Manamolela. He also stated that it is possible to do subdivision without ministerial consent. He said they received the file on the 12<sup>th</sup> July 2012 and examination was completed on the 28<sup>th</sup> January 2013. In re-examination he stated that it was wrong for an s.10 to have been issued in the names of Tebello Khoromeng but he retained a discretion to recall irregularly issued s.10s.

[22] Second witness called by applicant was one Matela, regional manager of customer services LAA. He testified that an application for consent to subdivide was lodged on the 24<sup>th</sup> June 2008. According to record application for subdivision was processed. The transfer was not processed because the ground rent to the tune of M 17673.90. Under cross-examination he stated a mortgage had been issued in respect of the site on the 10<sup>th</sup> September 1993. In 2008 the site was still mortgaged. He said it would be possible to subdivide bonded property but transfer could not take place. He said he was not aware of any cancellation of the sale agreement.

[23] Third to be called was Shirley Kotzé. She testified that Gabriel in his lifetime lived in Lesotho and had a Lesotho passport and tendered it in. She testified that Kotzé bought a site from Khoromeng and paid the purchase price.

[24] Mosimoli Manamolela testified that her late father and applicant had a disagreement regarding the portion of site to be subdivided. This disagreement could not be resolved and her late father aborted the agreement. They later concluded a sub-lease agreement with Goodtrading but Goodtrading has been refused building permit by the authorities.

[25] Respondents also called Mr Lesaoana Chaka; a long-time friend of Manamolela. He testified that he was aware of the disagreement regarding the dimensions of the site to be surveyed and sub-divided. According to his testimony at one point he was asked by the late Manamolela to intercede between Mosimoli, Khoromeng and Senatsi (surveyor) and the surveyor was removed from the site never to return. Manamolela then wrote to the Land Survey and Physical Planning (LSSP) requesting the latter to stop the process.

[26] Manamolela's counsel, Advocate Lephuthing submitted that Lesotho Bank had a real right over the mortgage and until it was cancelled respondent would not be in a position to sell the property or transfer it. He argued that further sales purportedly made amounted to further burden and encumbrance of the mortgaged property in contravention of clause 20 of the mortgage bond. Clause 20 states that the mortgagor/s shall not pass any further bonds on the neither property nor further burden or encumber the mortgaged property in any way without written consent of the corporation." According to Advocate Lephuthing, the Magistrate had dismissed an application for absolution from the instance on the basis that the property belonged to Manamolela subject to a mortgage bond.

[27] On this line counsel went on to argue that matters were made worse for applicant because there was no Ministerial consent for and on behalf of the applicant and the registered ownership for plot no 41581-096 vested in 1<sup>st</sup> respondent subject to a lease agreement no 33266 registered on the 14<sup>th</sup> May 2014. He argued that there could have been no subdivision application before Ministerial consent was sought and obtained. He further argued that there was a fall-out between applicant and respondent

2008 as a result of which respondent cancelled his undertaking to facilitate the transfer. It is respondent's case that it was improper for applicant to have applied for an S.10 as one could only be applied for by owner of property. Further that applicant has no enforceable claim to the property because requisite documents required in terms of section 15(2) of the Deeds Registry Act had not been completed to effect transfer. Therefore, respondent submitted that applicant had no *locus standi* to institute this action.

[28] Respondents argued that the subdivision application could not be successful in light of section 15 (4) of the Deeds Registry Act 1967 and in light of the fact that the property had been encumbered in 2008 when Khoromeng purchased the property. They went on to argue that applicant constructed a building on the property which he had no title over.

[29] In the nutshell respondents' case is that the property was a subject matter of mortgage bond at the time of purported sales and that the property remains that of first respondent and contractually to Goodtrading Supermarket.

### ***Analysis***

[30] This case involves three transactions on a site whose title deed is held by Manamolela or his heirs. *Deed 1* is *inter partes* Kotzé and Manamolela. *Deed 2* is between Kotzé and Khoromeng. But somehow Manamolela has become such an integral part of *Deed 2* as shown above. The sub-lease agreement is between Khoromeng and Goodtrading Supermarket. However, this is not a typical double sale dispute as far as the two deeds of sale are concerned. *Deed 2* is born out of an agreement between Kotzé who concluded an agreement to sell her rights to Khoromeng in *Deed 2*.



The obstacle is that no transfer of title had been done in respect of *Deed 1*. Seemingly this would affect the transfer of title to Khoromeng in *Deed 2*. Is there a remedy?

**[31]** The gravamen of this case is the propriety of Manamolela's conduct in encumbering and sub-letting property over which he had voluntarily disposed of his rights and interests. Further, whether pending transfer of title to purchasers Manamolela could be permitted and validly enter into a sublease agreement over a portion of property he had already sold. And on the other hand applicant's claims over transfer and cancellation of the sub-lease agreement. The catalogue of events narrated above depict the dubious and clearly unethical conduct of the late Mojari Manamolela in dealing with this particular property. He sells a portion of site 130A in 1990 to the Kotzé the buyer. He fails to discharge his contractual obligation to transfer it to the buyer but instead has the property registered into his own names and encumbered. This encumbrance would run from 1993 to 2012. Basically, this rendered him incapable to convey title of the property to anyone during this period.

**[32]** It would be very remiss of this court to let this kind of conduct to go unchecked. This conduct violates of tenets of any contractual relationship – good faith and fairness in contractual relationship relating to land.<sup>4</sup> The role of the court is to determine whether vulnerable purchasers are deserving of the much needed protections and whether parties act in good faith. Manamolela exploited the buyers and the bank for his benefit. He continued to derive benefit from property that he had already alienated. Whether Mr Manamolela had a seller's remorse or whether his conduct was outrightly fraudulent is cause for concern. But he laboured under the

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<sup>4</sup> Wary Holdings Pty Ltd v Stalwo (Pty) Ltd 2009 (1) SA (CC)

false impression that since no ministerial consent was sought or obtained before the finalisation of the sale agreements and the fact that the property was mortgaged even after deed one, afforded him the necessary refuge.

**[33]** A buyer who has paid consideration for land, if land is registerable should be entitled to demand from seller transfer of the title.<sup>5</sup> Otherwise a deed between the parties would remain entirely inoperative in so far as the legal title is concerned.<sup>6</sup> Transfer or registration of deeds may not be withheld unreasonably or without good reason. *In Wary Holdings Pty Ltd v Stalwo (Pty) Ltd*<sup>7</sup> the court emphasised the need “for protection of vulnerable purchasers and imbuing good faith and fairness into contractual relationships relating to land”. This the Judge said when referring to the provisions of *the Alienation of Land Act*.<sup>8</sup> Similar protection must be enjoyed under common law.

**[34]** Transfer must be made by the holder of the real right or by a duly authorised agent.<sup>9</sup> This is a golden rule of property law under the maxim “no one can transfer more rights to another than he himself has (*nemo plus iuris transferre potest quam ipse habet*).<sup>10</sup> But where the seller does not have rights or title to transfer she or he must first acquire it for him or herself and then transfer it, or induce the owner to transfer the real right of ownership direct to the buyer.<sup>11</sup> No doubt Kotzé, Khoromeng and Manamolela exercised the second option. The three made an arrangement when they concluded a sale agreement at the start of Deed 2

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<sup>5</sup> See *Chetty v Erf 311, South Crest 2020 (3) SA 18 (GJ)*.

<sup>6</sup> Beale “Registration of Title to Land” 369-377.

<sup>7</sup> 2009 (1) SA 337 (CC).

<sup>8</sup> Act 68 of 1981.

<sup>9</sup> Badenhorst, Pienaar and Mostert in *Silberberg and Schoeman’s The Law of Property* 73.

<sup>10</sup> Badenhorst 73.

<sup>11</sup> Badenhorst 73.

to short-circuit the transfer process. Under this arrangement which all parties seemed to be comfortable with transfer would be directly from Manamolela to Khoromeng. There is nothing untoward about this arrangement that would otherwise invalidate the agreement for as long as all parties were privy and consented.

[35] Khoromeng has come to court seeking cancellation of the sublease agreement and a relief declaring the sublease agreement null and void. In addition he seeks specific performance, that is, an order compelling 1<sup>st</sup> respondent to transfer into his names title of the site. Further, he seeks an order compelling respondent to lodge with LAA a deed transfer.

[36] Manamolela's two defences as traversed in papers and led in oral evidence is that failure to obtain ministerial consent and the fact that the site was mortgaged at the time are fatal flaws to applicant's case. He argued that failure to obtain ministerial consent among others rendered Deed 1 null and void. Failure to obtain ministerial consent before a deed of sale was executed was previously held to render such deed null and void. In *Sea Lake (Pty) Ltd v Chung Hwa Trading Enterprises Co (Pty)* the Court of Appeal held that without prior consent of the Minister a lessee is not entitled to dispose of his interest and the transactions whereunder he purports to do so is invalid.<sup>12</sup> This decision was cited with approval by the Court of Appeal in *Mothobi v Sebotsa*. However, this position was reversed by the same court in *C&S Properties (Pty) Ltd v Khaketla*.<sup>13</sup> In *C & S Properties* the Court of Appeal held that section 35 (1) and 36 (5) of the Land Act did not require ministerial consent prior to the conclusion of a sale agreement. This was restated and endorsed in the later decision of

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<sup>12</sup> *Sea Lake (Pty) Ltd v Chung Hwa Trading Enterprises Co (Pty) Ltd and Another* LAC (2000-2004) 190

<sup>13</sup> LAC (2011 - 2012)

the court in *Three Zeds (Pty) Ltd v Ranchoba*,<sup>14</sup> which cited C&S Properties with approval holding that Ministerial consent is not required before parties can enter into deeds of sale or subleases and similar transactions. It follows therefore that respondents' point on ministerial consent falls away and cannot be sustained.

[37] A sale agreement confers personal contractual rights on the buyer to claim transfer of rights from seller unless the agreement is cancelled or declared void. The agreement was never cancelled or at least there is no evidence to the effect that it was cancelled. The fact that Manamolela claims to have unilaterally cancelled the sale agreement cannot stand. In any case the sale agreement between Kotzé and Khoromeng was not his to cancel. However, in 1993 and some three years after the conclusion of *Deed 1* Manamolela registered the land. Apparently, the registration was not done with the intention to transfer it to Kotzé, the buyer, but for his own selfish benefit. The registered title was bonded with Standard Bank. Respondents have raised this point as their defence and state that *Deed 2* could not be concluded in light of the fact that the subject matter of sale was bonded. It is clear that Kotzé or his wife did not know of this. But clearly this curtailed and undermined any process to have title transferred to Kotzé. In other words, Manamolela deliberately and maliciously rendered himself incapable to transfer title to either Kotzé or Khoromeng.

[38] But the mortgage bond has been cancelled. Therefore, Khoromeng has a right to claim transfer of rights. Since this claim concerns transfer of rights in land it can only be carried out if the parties have obtained consent (to transfer and not to sell) and applied for registration.<sup>15</sup> In *Mahomed v*

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<sup>14</sup> *Three Zeds (Pty) Ltd v Ranthoha and Others* C of A No. 51/2018.

<sup>15</sup> *Mahomed v KPMG* C of A (CIV) No 34/13.

*KPMG Harley and Morris Joint Venture*, appellant brought an application in the High Court for orders, inter alia-

- a) *Directing the first respondent, as the banks liquidators, to prepare and present the conveyancing documents necessary to effect transfer to appellant of all property rights to plot 469.*

[39] The Court of Appeal considered this to be an appropriate prayer for specific performance. This is similar to prayers (c) and (d) of applicant's prayers. Applicant seeks specific performance, namely that 1<sup>st</sup> respondent initiates the transfer process by signing the deed of transfer, subdivision and seeking consent.

[40] The rights to site were later transferred to Goodtrading. The transfer happened after both *Deed 1* and *Deed 2* have been concluded. In other words the sub-lease agreement came after rights in the land had been sold to Kotzé and later to Khoromeng. The principle *qui prior est tempor, portior est jure* would apply in this case.<sup>16</sup> It was applied by our Court of Appeal in *Mahomed v KPMG*; where it was held that the possessor of the earlier right is entitled to specific performance unless the other/later purchaser can show a balance of equities in his favour. Goodtrading has not shown this. It was also Shirley's evidence that they were not aware that the site was later encumbered and that Manamolela promised to furnish them with transfer documents but he never delivered.

[41] Respondents challenge applicant's *locus standi* to claim reliefs sought in the originating application. They argue that by virtue of section 15 of the Deeds Registry Act applicant lost the right to claim the reliefs sought.

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<sup>16</sup> Christie "The Law of contract in SA, 3<sup>RD</sup>Ed.

Respondents argue that both the subdivision and the registration of the title ought to have happened within three months.

[42] Section 15(2) of the Deeds Registration Act refers to person or body holding allocation certificate. It reads “save as is otherwise provided in the Land Act 1979 or any other law, every person or body holding a certificate issued by the proper authority authorising the occupation or use of land shall within three months of the date of issue of the certificate shall apply to the registrar for a registered certificate of title or use.” In terms of section 15(4) failure to lodge the certificate in terms of (2) within prescribed time period or the time allowed by the court the allocation certificate shall be rendered null and void.

[43] The Court of Appeal in *Sea Lake (Pty) v Chu Hwa Enterprises* held that failure to allege and prove existence of a certificate deprived a litigant of a right to claim a right to occupy land therefore failed to establish *locus standi*.<sup>17</sup> The decision was cited with approval in *Molapo v Molefe*<sup>18</sup>

*What the appellant should have applied for then is either a certificate of allocation issued by the proper authority authorising the occupation or use of the land or a certificate of title to occupy or use, known as a title deed but, as I read the papers, nowhere does he in fact allege that he was allocated the land in question nor does he show that he was granted a certificate to occupy or use. It is clear, as it seems to me, therefore, that his case must fail on this point alone.*

[44] It is under these circumstances that the question of the right to claim arises under the Act. Contrary to respondents’ argument section 15 refers to

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<sup>17</sup> *Sea Lake (Pty) v Chung Hwa Enterprise Co. (Pty) Ltd and Another LAC (2000-2004) 193 G*

<sup>18</sup> *Molapo v Molefe C of A (CIV) 11 of 2003*

initial or newly issued allocation certificates and not title or subdivision applications as conceived by respondents. Therefore, section 15 bears little relevance here and as a result cannot be used as a point of attachment on applicant standing to institute these proceedings.

[45] In the result, the application is granted with costs. In particular, the main reliefs sought in prayers (a), (b), (c), (d) and (e) in the originating application are hereby granted.

**KEKETSO L. MOAHLOLI**

**JUDGE**

**Appearances:**

For Applicant : Adv TA Lesaoana

For Respondents : Adv CJ Lephuthing