IN THE LAND COURT OF LESOTHO

HELD AT MASERU **CIV/APPEAL/0009/2022**

CIV/DLC/MSU/0036/2021

In the matter between

MAKHAPETLA MABOTE **APPELLANT**

AND

MASERU CITY COUNCIL **1ST RESPONDENT**

LAND ADMINISTRATION AUTHORITY **2ND RESPONDENT**

Neutral Citation: Makhapetla Mabote v Maseru City Council and Another [2024] LSHC Lan 235 (12th June 2024)

CORAM : BANYANE J

HEARD : 18/03/2024

DELIVERED : 12/06/2024

Summary

Appeal-against an order of the District Land Court dismissing the appellant's claim for lack of jurisdiction-appellant having approached the court seeking an order declaring him to have pre-emption rights over land-right not cognizable in the Land Law of Lesotho-thus there was no right to evoke the jurisdiction of the Court-appeal dismissed

ANNOTATIONS:

Legislation and subsidiary Legislation:

1. Land Act No 8 of 2010 (as amended)
2. District Land Court Rules 2012

CITED CASES

Lesotho:

1. Moletsane v Thamae C of A (Civ) 23/2017
2. Lephema v Total Lesotho C of A (Civ) 36/14
3. Mamohau Mwangi and another v Masupha and another LC/APN/170/14
4. Makoala v Makoala LAC (2009 – 2010) 40

South Africa:

1. Transvaal Property and Investment Co Ltd v Pretoria Municipality 1921 TPD 261
2. Adams stores (Pty) Ltd v Charleston Boards 1951 (2) SA 508 (N)
3. Licence Officer, Pretoria v Kliris 1980 (3) SA 674 (J)
4. Minister of Law and order (Bophuthatswana) v Maubane 1981 (3) SA 453 (A)
5. Makhanya v University of Zululand (218/2008) [2009] ZASCA 69 (29 May 2009)

JUDGMENT

BANYANE J

Introduction

[1] This appeal is against a decision of the District Land Court for the district of Maseru dated 07 April 2022 dismissing the appellant's claim for lack of jurisdiction. On 12 June 2024 I issued an order dismissing the appeal with costs. The reasons for this order follow.

The appellant's case in the court below

[2] The appellant as applicant sued the respondents in the Court *a quo* in relation to a certain piece of land situated at Motheo 2, in the Maseru Urban Area. The essence of the applicant's case is captured in paragraphs 5, 6, 7,8 and 9 of his originating application as follows.

[3] The appellant applied to the first respondent (MCC) for a piece of land measuring two thousand four hundred square meters (2400 sqm) at Motheo 2. He averred that his application succeeded. The MCC directed him to survey the site and

submit a map and coordinates of the site, for purposes of the evaluation and fixing the purchase price. Despite complying with the above, the MCC reneged from its decision to allocate him the site.

Relief sought

[4] Based on these allegations, he sought an order in the following terms:

a) That the applicant has a pre-emption right to purchase the site measuring two thousand four hundred square meters (2400 sqm) at Motheo 2 in the District of Maseru.

b) That the first respondent be ordered to provide the applicant with the price for the site measuring two thousand four hundred square meters (2400 sqm) at Motheo 2 in the District of Maseru.

c) That the first respondent is (sic) be ordered to afford the applicant the period of six months to pay for the said site.

d) In the alternative, the applicant should pay the applicant an amount of eighty thousand Maloti (M80 000.00) within six months of the order herein and the second respondent should provide the applicant with a lease title upon proof of payment to the first respondent.

The preliminary objection

[5] The first respondent opposed the matter and raised a preliminary objection of lack of jurisdiction on the following grounds. I quote:

> "1.3 The applicant is seeking orders of mandamus against the respondents in terms whereof they are to be ordered to allocate to the applicant the site in question and to register it in his names in circumstances where the Land Allocation Committee which is the repository of power in relation to allocation of land has not allocated the land to the applicant.
>
> 1.4 In the result, it is averred that this is not a matter concerning a dispute over land but a typical order of mandamus sought against a statutory body. Consequently, it does not fall within the jurisdiction of this honourable Court which is a creature of statute with no inherent powers and whose jurisdiction is circumscribed by the enabling Act and rules…"

Grounds of appeal

[6] The presiding Magistrate, without reasons, upheld the objection and dismissed the appellant's claim for lack of jurisdiction. The appellant appeals the judgment on a single ground that the learned Magistrate erred in finding that the District Land Court did not have jurisdiction over the cause of action when as a matter of law it has jurisdiction.

Submissions on appeal

[7] The appellant's counsel Advocate Molise relied heavily on **Moletsane v Thamae**[1] to submit that the District Land Court has jurisdiction to issue a declaratory order and that substantive merits of the case are irrelevant in determining the validity of the jurisdictional challenge.

[8] Advocate Phafane KC for the 1st respondent conversely contended that the appellant's claim is not a dispute contemplated in section 73 of the Land Act 2010 and as such does not fall within the jurisdiction of the District Land Court because it is not about title to land but is a claim concerning administrative procedures. For a proper interpretation of section 73, he referred the Court to **Lephema v Total Lesotho**.[2]

[9] In addition, the appellant sought mandamus, a remedy which is only tenable in the High Court because the District Land Court is a creature of statute with no inherent powers, but limited jurisdiction set out in the enabling Act and Rules made thereunder. In his view, the claim does not fall under any of the provisions of Rule 8 of the District Land Court Rules which define the subject-matter jurisdiction of the DLC.

[1] C of A(CIV) 23/2017

[2] Lephema v Total Lesotho [2014] LSCA 30

[10] He further relied on **Mamohau Mwangi and another v Masupha and another**[3] to submit that the insertion of the word "all" in section 73 of the Land Act as amended by Land (Amendment) Act No.16 of 2012, does not have the effect of unlimiting the jurisdiction of the Land Courts to hear every dispute involving land even where the dispute does not involve a claim of title.

The Law

[11] The term jurisdiction has many meanings. Jurisdiction is often defined as the power vested in a court by law to adjudicate upon, determine, and dispose of a matter.[4] The jurisdiction of a court depends on either the nature of the proceedings or the nature of the relief claimed or, in some cases on both, but does not depend on the substantive merits of the case or the defence relied upon by the defendant.[5]

[3] (LC/APN/170/14)

[4] Ewing v McDonald & Co Ltd v M & M Products Co 1991(1)SA 252(A) at 256G, see also Veneta Minerarai Spa v Carolina Collieries(Pty)Ltd 1987(4)SA 883(A_)at 886 D, Graff Reinet Municipality v Van Ryneve'dt's Pass Irrigation Board 1950(2)SA 420(A) at 424.

[5] Estate agents Board v Lek 1979(3)SA 1048(A), Gcaba v Minister of Safety and security 2010(1) SA 238(CC).Galo Africa Ltd and others v sting Music (Pty) Ltd and others 2010 (6)SA 239 (SCA) para 6.

[12] For purposes of deciding the validity of the preliminary point, the applicant's pleadings alone should be considered.[6] This means the disposal of a jurisdictional challenge entails no more than a factual inquiry, with reference to only the particulars of claim to establish the nature of the right that is being asserted in support of the claim.[7] Sometimes the right that is being asserted might be identified expressly. At other times, it might be discoverable by inference from the facts that are alleged and the relief that is being claimed.[8]

[13] **In Moletsane v Thamae[9]**, the Court of Appeal held that the disposal of a jurisdictional challenge in land disputes involves consideration of two main features of the claim, namely, whether the applicant brings a claim as an allottee or not. From this arises the second feature, whether the applicant asserts the right under the Land Act, 2010 or whether the right arises outside the Land Act. The Court said:

> "Whether a court has jurisdiction (in the sense that is now relevant) to consider a particular claim, depends upon the nature of rights that the party seeks to enforce. Whether the claim is good or bad in law is immaterial to jurisdictional inquiry.

[6] Makoala v Makoala LAC (2009 – 2010) 40
[7] Makhanya v University of Zululand (218/2008) [2009] ZASCA 69 (29 May 2009) para 31
[8] Makhanya v University of Zululand para 31
[9] supra

> But if a claim, as formulated by the party, is enforceable in a particular Court, the applicant is entitled to bring it before that court. Thus if a claim involves a dispute, the first is whether, as in this case, the party was an allotee or not. From that arises second feature, whether the party may assert a right or interest that arises outside the terms of the Land Act. I do not say whether, the party necessarily has the right that is asserted. I only say that he or she asserts that right or interest. That right or interest in each case may be either the right at common law to exact performance of a contract or a constitutional right etc."

Discussion

[14] With these principles in mind, I turn to the pleadings in the Court below to establish the nature of the right that is being asserted in support of the claim and accordingly decide whether the District Land Court is competent to hear and determine the dispute between the parties and issue the orders sought.

[15] The jurisdictional challenge is premised on the nature of proceedings (subject matter jurisdiction) as well as the relief sought. So, resolution of this issue involves consideration of mainly three factors, namely, the subject matter, the relief sought, and the right that is being asserted in support of the claim.

[16] The appellant's pleadings make it clear that he applied for allocation of the land in question. Before applying for allocation of this land, he sought guidance and advice from some officials at the Maseru City Council. He was advised to

conduct a survey, which he did. These averments are backed up by his annexures to the originating application. A letter dated 06 December 2019 addressed to the Land Allocating Committee shows that he applied for a grant of title of a piece of land in question situated at Motheo II. In paragraph 2 of the letter, he says:

> "I made investigations and sought guidance from some offices within the Maseru City Council where I was advised to get a map and coordinates to confirm that the land has not been allocated to anyone (hereto attached)."

[17] On 08 October 2020, the Director of Planning and Development wrote to the appellant stating that the Land Allocating Committee resolved not to allocate the land to him but that a publication advertising the land to members of the public in terms of the **Land Act 2010** will be made and he will have the option, like every Mosotho to apply for grant of title.

[18] On 22 November 2020, the Director again wrote to the appellant, apparently as a follow-up to their meeting on 16 October 2020 and in reaction to the appellant's letter dated 15 October 2020. According to the Director, she explained to the appellant that no allocation of the land had been made to him because the request was never presented or tabled before the Land Allocating Committee, an authority vested with the power to allocate Land in terms of the law. She continues:

> "I explained to you that what happened here is a mistake caused by some officers in the Maseru City Council because they have no authority to allocate land.

> Your request was submitted to the Land Allocating Authority which decided that the land should be publicized as required by the Land Act 2010 and you will have an opportunity to apply for grant of title like any other Mosotho who would be interested to apply for allocation of this piece of Land.

[19] This correspondence reveals, in my view, that the relevant official at MCC (Director, Planning) informed the appellant that he was ill-advised by officers of Council because land allocation follows certain prescribed procedural steps which the Council had resolved to follow. The documents elucidate that the appellant's claim is not based on the allocation of this land to him. It follows in my view that the applicant is not seeking to enforce any right as an allottee.

[20] The question is, which right is he seeking to assert? I answer this by reference to the first prayer in his originating application, from which the other reliefs flow. Under this relief, he sought a declarator that has a right of pre-emption to this land.

[21] Pre-emption rights within the contractual setting have been discussed in several decisions. I review only two of these to show the personal nature of such rights. In **Soleriou v Retco Pyntons(PTY)Ltd** 1985(2) SA 922 at 932D-G , the Court said the following about pre-emptive rights.

> "A right of first refusal is well known in our law. In the contract of sale, it is usually called a right of pre-emption. The grantor of such right cannot be compelled to sell the property concerned but if he does sell, he is obliged to give the grantee the preference of purchasing and

consequently is prevented from selling to a third person without giving the first refusal. (**Owsianick v African Consolidated Theaters(PTY) LTD 1967(3) 310 at 327B**). A pre-emption right involves a negative contract not to sell the property to a third person without giving the grantee the first refusal and the grantee has the correlative legal right which is enforceable by legal remedies."

21.1 In Owsianick v African Consolidated Theaters (PTY) LTD 1967(3) 310 at 327B, the Court said:

"I see no logical reason why the holder of a right of pre-emption should not enjoy the normal right of the victim of a breach of contractual obligation to claim specific performance of the obligation once the contingency giving rise to the obligation has eventuated".

[22] The next question is whether pre-emption rights are cognizable under the Land Act 2010. In other words, are these rights envisaged under the Land Act? The answer is to be found in section 26 of the **Land Act 2010**, a provision governing land allocation or the conferment of title to land situated in urban areas.

[23] Grant of title in an urban area is governed by Part V of the Land Act 2010. Section 26 under this part provides:

"26 (1) Where land is available for grant of title, the Minister shall, by notice in the gazette, publicize the fact.

(2) The notice referred to in sub-section (1) shall –

(a) State that the land is available for lease

(b) Contain a sufficient description of the land to enable its identification:

(C) Give particulars of the permitted land use, the ground rent or fee payable, where appropriate, and of the amount to be paid for the improvements, if any, made to the land; and

(d) Invite members of the public to lodge applications with the allocating authority by a specific date."

23.1 The above quoted provisions must be read with Part III of the Land Regulations, 2011. Regulation 6 outlines the procedure for allocation of land. I quote it in part.

"6(3) where land is available for allocation in an urban area, the allocating authority shall not exercise its power to allocate land unless publication in terms of section 26 has been made."

(5) An application for allocation of land in both rural and urban areas shall be to a Secretary of a Land allocating authority in a prescribed form.

(7) Land allocations shall be on a competitive and transparent basis.

(8) The Secretary of a land allocating authority shall notify the applicant in writing of a date, time and place of hearing of the application and the applicant shall be entitled to appear and make representation or submissions in support of his application for allocation of land.

(10) The decision of the allocating authority on any application shall be in writing setting forth adequately the grounds upon which it is given.

(11) Where a decision to allocate land has been made, the allocating authority shall issue a certificate of allocation on a prescribed form after payment of a prescribed fee or a premium where necessary.

[24] It is clear in these provisions that title to land is conferred by a process through which land available for grant of title is first advertised before any applications are received. The procedure is mandatory and must be observed by the relevant authority. It seems to me that the prime objective of this procedure is to allocate land on a transparent, competitive basis. Preemptive rights are therefore not cognizable or envisaged under the Act. Conversely the provisions unambiguously show that allocation of land is a transparent process and initiated by the allocating authority where land is available for grant of title.

Subject matter jurisdiction of the District Land Court

[25] The last issue to address is whether even though the right is not cognizable under the Land Act, whether the District Land Court is competent to adjudicate over the matter and grant the reliefs sought.

[26] The District Land Court is a creature of the Land Act 2010. It has no inherent jurisdiction. Its jurisdiction must be deduced from the four corners of the statute under which it is constituted. Several provisions in the Land Act set out the subject matter jurisdiction of this Court. By subject matter jurisdiction I mean the types of cases that a court is authorized to hear. These provisions are mirrored in rule 8 of the District Land Court Rules, 2012.[10]

[27] The appellant sought an order declaring him a holder of pre-emptive rights; consequently the MCC be ordered to fix the purchase price. Clearly, he sought mandamus as consequential relief to the declarator. Mandamus is a mandatory interdict against public authorities which compels an authority to perform a specific duty (e.g statutory duty) imposed on it or perform some act that remedies the effect of its unlawful administrative action already taken.[11]

[10] Mphutlane v Seoli LC/APN/2014 LSHC 98 (25 November 2014)

[11] Baxter, Administratie Law 687-690. see also Transvaal Property and Investment Co Ltd v Pretoria Municipality 1921 TPD 261 , Adams stores (Pty) Ltd v Charleston Board 1951 (2) SA 508 (N) Licence Officer, Pretoria v Kliris1980 (3) SA 674 (J) Minister of Law and order (Bophuthatswana) v Maubane 1981 (3) SA 453 (A), (Baxter 690).

[28] While it is true that land allocation is the statutory responsibility of the allocating authority and while a refusal to allocate may be liable to be set aside on recognized grounds for review of administrative acts, unallocated land belongs to Basotho nation and must be allocated in accordance with the prescribed procedures. In my view, unallocated land is not subject of a preemptive right. It follows that the appellant is essentially asking the court to order what the law prohibits.

[29] Based on my understanding of pre-emptive rights and the appellant's case as pleaded, it cannot be said he has a right to assert which evokes the jurisdiction of the court until such time that the land is advertised, the applicant applied, and the application decided.

Disposal

[30] For reasons set out above, I conclude that the alleged injury complained of is not within the Court's power to redress. In other words, the prayers sought are incompetent in our land law. Resultantly, the District Land Court has no jurisdiction over the subject matter because it has no power to grant what the law prohibits. The appeal must therefore fail.

Order

[31] As a result, the appeal is dismissed with costs.

P. BANYANE
JUDGE

For Appellant : Advocate Molise

For Respondent : Advocate Phafane KC