

**IN THE LAND COURT OF LESOTHO**

**HELD AT MASERU**

**LC/APN/0016/2023**

In the matter between

**MAKIBINYANE SANTOS MOHAPELOA**

**APPLICANT**

**AND**

**TENTENKIE LIMPHO MOHAPELOA**

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

**SEQOBELOA MOSHOESHOE**

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

**MALETSIE MAPHUNYE MOSHOESHOE**

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

**FIRST NATIONAL BANK OF LESOTHO**

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

**THE REGISTRAR OF DEEDS**

**5<sup>TH</sup> RESPONDENT**

**LAND ADMINISTRATION AUTHORITY**

**6<sup>TH</sup> RESPONDENT**

**Neutral Citation:** Makibinyane Santos Mohapeloa v Tentenkie Limpho Mohapeloa and 5 Others [2024] LSHC Lan 245 (25<sup>th</sup> October 2024)

**CORAM** : **BANYANE J**  
**HEARD** : **16/09/2024**  
**DELIVERED** : **25/10/2024**  
**REASONS GIVEN** : **04/12/2024**

### **Summary**

preliminary objection-on the ground of lack of jurisdiction- claim concerning disposal of the applicant's land by his sister-acting on the strength of a power of attorney-whether claim is about title to land or arises from a relationship of commercial or business nature-held that the claim is vindicatory in nature and thus falls within the purview of the Land Court. Objection dismissed.

### **ANNOTATIONS:**

#### **Statutes**

1. Land Act 2010

#### **Cited Cases**

1. Makoala v Makoala C of A (Civ) 04/09
2. Lephema v Total Lesotho C of A (Civ) 36/2014
3. Mwangi v Masupha LC/APN/170/2014

4. Moletsane v Thamae C of A (CIV) 23/2017
5. Mwangi v Masupha LC/APN/170/2014
6. Mokemane v Mokhorro & 4 Others LC/APN/30B/2013
7. Shale v Shale C of A (CIV)35/2019
8. Alice Mphutlane v Mosa Seoli LC/APN/18/2010
9. Leseteli Malefane v Roma Valley C of A (CIV) 8/2016

### **South Africa**

1. Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC)
2. Makhanya v University of Zululand ZASCA 69
3. Estate agents Board v Lek 1979 (3) SA 104 8 (A)
4. Galo Africa Ltd and others v sting Music (Pty) Ltd and others 2010 (6) SA 239 (SCA)
5. RMS Transport v Psicon Holdings (PTY) Ltd 1996 (2) SA 176

## **JUDGMENT**

**BANYANE J**

## **Introduction**

[1] The dispute between the parties pertains to transfer of rights in plot No. 13283- 10136 to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. This plot is a product of subdivision of plot No. 13283-205 inherited by the applicant from his parents.

## **Background facts**

[2] The applicant and 1<sup>st</sup> respondent are siblings and offspring of the late Mohapelo and Mamuseti Mohapelo. During their lifetime, the duo acquired immovable property identified as plot 13283 -205. It is situated at Maseru East, within the Maseru Urban area. After their demise, the applicant inherited this plot. This plot was later subdivided into four parts. The contentious plot No.13283 - 10136 is a product of this subdivision.

[3] The applicant lives in Denmark. On 06 March 2020 and 17 November 2021 respectively, he signed power of attorney authorizing his sister to conduct certain transactions in relation to plot 13283-205. The special power attorney signed on 06 March 2020 authorized the 1<sup>st</sup> respondent to sign all documents for transfer of rights in plot 13283-205 to the applicant.

**3.1** By the second power attorney signed on 17 November 2021, the applicant appointed the 1<sup>st</sup> respondent;

“with power of substitution to be my lawful representative and agent in my name, place and stead, to apply and secure certificate of consent to transfer and seek for a deed of transfer of rights I hold in plot number 13283 -10136 (situated at Maseru East) to be registered into the names of Maletsie Maphunye Moshoeshoe (ID Number 056104236520) and to do such other procedure necessary to expedite such transfer of rights....”

[4] Acting pursuant to this second power of attorney, the 1<sup>st</sup> respondent successfully obtained a certificate of consent on 07 February 2022. On 08 December 2022, a deed transferring rights in this property to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents was registered. The 3<sup>rd</sup> respondent is the 1<sup>st</sup> respondent’s daughter. She is married to the 2<sup>nd</sup> respondent in community of property. The couple obtained a loan from the bank, so a bond was registered against this property. These facts are common cause.

**Relief sought**

[5] The applicant challenges the transfer of his rights. He also seeks cancellation of this transfer as well as the mortgage bond.

## **The preliminary objection**

[6] The application is vigorously opposed by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents. In their joint answer, they raised a preliminary objection on grounds that the applicant's claim is not justiciable before the Land Court but the Commercial Division of the High Court; alternatively, before the District Land Court. The grounds for objection are captured as follows:

“The gist of the applicant's case as captured in paragraphs 8,9 and 16 of the originating application is clear that the applicant's cause of action is pure breach of a contract. He does not dispute the 1<sup>st</sup> respondent's authority to have transferred the plot in issue to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. His interest is purely in the proceeds of the alleged sale; therefore the applicant's claim does not involve title to land nor constitutes a claim relying on derogation from title nor is it a claim to rights overriding title. In the circumstances, the cause of action is breach of contract , not enforcement of a claim of grant of title to land. For these reasons the matter falls within the jurisdiction of the Commercial Court; alternatively it ought not have been instituted in this court without leave being sought and obtained.”

[7] Advocate Mabote cited several relevant authorities for determination of the jurisdictional issue.<sup>1</sup> She submitted that when a point *in limine* is raised, the issue for determination is whether the applicant's affidavit makes out a *prima facie* case. Consequently, the applicant's affidavit alone must be considered, and the averments contained therein should be considered as true for the purpose of deciding upon the validity of the preliminary point.

[7.1] At the heart of the applicant's case is that the 1<sup>st</sup> respondent acted contrary to their agreement by failing to remit the proceeds of the sale to him. Besides that, the applicant has not pleaded any other cause of action upon which he impugns the sale and subsequent deed of transfer, so the argument went.

[7.2] She developed this argument by citing **Lephema v Total Lesotho**<sup>2</sup> where the Court of Appeal said section 73 of the Land Court must be interpreted to confine the Land Courts' authority to claims or disputes about title, claims relying on derogations from title or claims to rights overriding title. She further argued that any dispute regarding enforceability or cancellation of an agreement involving the disposal of the seller's interest in land in favour of the

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<sup>1</sup> Makoala v Makoala C of A (Civ) 04/09, Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC) at 263) and other cases

<sup>2</sup> C of A(CIV) 36/2014

buyer is a business transaction and is not a claim about title. It therefore falls within the remit of the commercial division of the High Court. For this submission, she relied on **Mwangi v Masupha**.<sup>3</sup>

[8] Advocate Mariti argued on the other hand that the matter does not fall within the jurisdiction of the Commercial Court because there are no contractual obligations between the applicant and the respondents. Accordingly, the applicant is not asserting a contractual right, but his complaint is that rights in the disputed plot were transferred without his approval as the title holder. He cited **Moletsane v Thamae**<sup>4</sup> to submit that the question of whether the Land Courts (District Land Courts included) have jurisdiction to consider a particular claim, depends on the nature of the rights that the party seeks to enforce. In addition, the Land Courts and District Land Courts have concurrent jurisdiction, so the matter is properly before this Court.

### **The law on jurisdiction**

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<sup>3</sup> LC/APN/170/2014

<sup>4</sup> C of A(CIV) 23/17



[9] The term jurisdiction has many meanings. Jurisdiction is defined as the power vested in a court by law to adjudicate upon, determine, and dispose of a matter.<sup>5</sup> In **Makhanya v University of Zululand**<sup>6</sup> jurisdiction is described as the power of a court to consider and to either uphold or dismiss a claim.

[10] 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.<sup>7</sup>

[11] For purposes of deciding the validity of the preliminary point, the applicant's pleadings alone should be considered.<sup>8</sup> This means the disposal of a jurisdictional challenge entails no more than a factual inquiry, with reference to only the particulars of the claim to establish the nature of the right that is being asserted in support of

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<sup>5</sup> 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.

<sup>6</sup> ZASCA 69 at para 52

<sup>7</sup> 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.

<sup>8</sup> Makoala v Makoala C of A (Civ) 04/2009

the claim.<sup>9</sup> 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.<sup>10</sup>

[12] In **Moletsane v Thamae**<sup>11</sup> the Court of Appeal held that the disposal of a jurisdictional challenge in land-related 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. I quote:

“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.

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 allottee 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.”

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<sup>9</sup> Makhanya v University of Zululand para 31

<sup>10</sup> Makhanya v University of Zululand para 31

<sup>11</sup> C of A (CIV)2 3/2017

[13] With these principles in mind, I examine the pleadings to establish the nature of the right that is being asserted in support of the claim, the nature of the action and the reliefs sought in order determine whether the claim falls within the Commercial Court or the District Land Court.

### **The applicant's case as pleaded**

[14] The applicant's case as pleaded in his originating application may be summarized as follows. A while ago, his two sisters, including 1<sup>st</sup> respondent, advised him about changes in the law relating to size ceilings for residential plots. According to the report, the maximum area of a residential plot (in square meters) must be 1000 square meters. Since plot 13283 -205 exceeded this limit, he permitted the 1<sup>st</sup> respondent to cause survey of this plot to be compliant with the statutory limits. He signed power of attorney authorizing his sister to do the necessary in this regard. The site was then sub-divided into four parts. At all material times, his sister, the 1<sup>st</sup> respondent, kept the leases as caretaker of this property.

[14.1] Around the year 2021, his sister, the 1<sup>st</sup> respondent, informed him that she fell into hard times financially and needed his assistance. She sought permission to sell the contentious site. He acceded to the request and granted the 1<sup>st</sup> respondent with a special power of attorney permitting her to find a buyer and effect transfer. The year 2022 came

to pass without any update about the intended sale. Around June 2023, he requested the 1<sup>st</sup> respondent to hand over the four leases to him. She gave him only three of these but became belligerent about the lease for the disputed site.

**[14.2]** He was shocked to the marrow when he was rudely informed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the lease is with their lawyers. He conducted his investigation with the relevant authorities about the lease. It was in the course of this investigation that he discovered that the plot was sold to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent on 03 May 2022 for M200,000.00 and subsequently transferred to them on 09 December 2022.

**[14.3]** In paragraphs 15 to 20 the applicant asserts that his sister, instead of selling the land and transmitting the proceeds to him, connived or colluded with her daughter by exchanging the purchase price to his exclusion and prejudice. In addition, the property was encumbered as security for the bank loan without his knowledge. For these reasons, he seeks payment of M200,000.00 as the fair market value of the land, failing which, cancellation of the sale and transfer as well as the mortgage bond.

**[14.4]** I must indicate that, without amending his originating application, the applicant wrote to the respondents' legal representative indicating his intention to abandon the relief for payment of M 200,000,00(market value). Without rectification of the originating application, I consider the averments as they are.

## **Jurisdiction of the Commercial Court**

[15] Jurisdiction of the Commercial Court is set out in Rule 129 of High Court Civil Litigation Rules 2024 as follows.

129(1) The business of the Commercial Court shall comprise of all matters arising out of or connected with any relationship of a commercial or business nature in the private or public sectors whether contractual or not

(2) The business of the court shall include, but not limited to

a)...

b)...

c)agency and partnership

....

[16] The question to be answered is whether the dispute arises out of a relationship of a commercial or business nature?

[17] A careful examination of the applicant's claim as pleaded show that the applicant authorized the 1<sup>st</sup> respondent to sell the disputed land although the second power of attorney itself makes no mention of a sale but transfer of rights to the 3<sup>rd</sup> respondent. According to the averments in the originating application, the 1<sup>st</sup> respondent sought financial

assistance from her brother, so the sale of the plot was intended to solve or address her financial troubles. To my mind, the dispute arises from a family arrangement or agreement made between siblings for financial assistance. It cannot, in my view, be described as a claim arising out of a relationship of a business or commercial nature.

[18] Conversely, two main features emerging from the originating application are that the applicant brings the claim as the title holder (lease holder). The second feature is that the applicant asserts ownership rights. In my view, the nature of his claim is therefore not personal, neither is the relief claimed.

[19] Various remedies protect ownership. They are classified into real remedies, delictual remedies and unjustified enrichment remedies. Each applies depending on the circumstances and facts of each case.<sup>12</sup>

[20] Real remedies among others restore physical control of the property to the owner. *Rei vindication* is classified under real remedies. It is available to the owner to reclaim his property from anyone in physical possession or control of the property.<sup>13</sup>

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<sup>12</sup> Mostert et al: The principles of the Law of Property in South Africa (2012) p 213

<sup>13</sup> Mostert (supra) p 227

[20.1] Delictual remedies are relevant when the owner has suffered financial loss either because the property itself has been alienated, damaged, or destroyed. These remedies provide for payment of compensation. Action *ad exhibendum* is an example of delictual remedies. It is instituted by the owner against a person who deliberately and wrongfully disposed of the property. As the property cannot be claimed because it has been disposed of, its market value at the time of disposal is claimed instead.<sup>14</sup>

[20.2] Unjustified enrichment remedies provide payment of compensation for unjustified enrichment. This occurs when someone other than the owner is unjustifiably enriched at the expense of the owner.<sup>15</sup>

[21] The applicant's pleadings show that his claim is in effect for an order restoring possession of his property as an alternative relief for compensation for its market value. The question of whether his claim is good or bad in law, or whether the claim has prospects of succeeding are irrelevant in the jurisdictional inquiry.

### **Exclusivity and concurrence of the jurisdiction of the Land Court and District Land Courts**

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<sup>14</sup> RMS Transport v Psicon Holdings (PTY) Ltd 1996 (2) SA 176 at 181182

<sup>15</sup> supra 215-216

[22] The next question to be answered is whether the matter falls within the jurisdiction of the District Land Court or is properly instituted before this Court.

[23] Section 73 of the *Land Act 2010 (as amended by Land Amendment Act 2012)* establishes the Land Court and District Land Courts with jurisdiction *to hear and determine all disputes, actions and proceedings concerning land.*<sup>16</sup> Being creatures of statute, the Land Courts can only exercise powers conferred by the constitutive Act. The parameters of the jurisdiction of the two Courts contemplated by section 73 of the Land Act have been stated and restated by this Court and the Court of Appeal in numerous cases.<sup>16</sup>

[24] It is to be noted that section 73 is the general provision specifying the purpose for which these Courts have been established. This is not the only provision to which we refer when considering the scope of Jurisdiction of these Courts. Under various sections, the Land Act specifies the court for a particular claim. These are *section 18 (3), 20 (2), 22, 36(3) and (4) and 72 of the Act. 28, 52 and 59; section 10 (5) and (c); and (c).*<sup>17</sup>

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<sup>16</sup> see *Lephema v Total Lesotho & Others C of A (CIV)36/2014, Mwangi v Masupha LC/APN/170/2014, Mokemane v Mokhorro & 4 Others LC/APN/30B/2013, Shale v Shale C of A (CIV)35/2019*, to mention but a few.

<sup>17</sup> *Alice Mphutlane v Mosa Seoli LC/APN/18/2010.*



[25] Regarding other matters to which forum is not specified in the Act, guidance should be sought from the body of case law available. These cases discuss the jurisdictional competence of these courts over various matters, including cancellation of a lease, granting of declaratory orders, claims of title based on inheritance etc.<sup>18</sup>

[26] In **Malineo Moletsane v Thamae**<sup>19</sup> The Court of Appeal said:

“Section 73 of the Land Act 2010 provides that the Land Court and District Land Court are established with jurisdiction, subject to the provisions of Part XII of the Act” to hear and determine disputes, actions and proceedings concerning Land. In 2012, this section was amended by the Land (Amendment) Act 2012 by inserting the words “all” between “determine” and “disputes”. Thus, as matters now stand, both Courts have jurisdiction to hear and determine all disputes, actions and proceedings concerning land. Their jurisdiction is concurrent when it comes to hearing and determining all disputes, actions and proceedings concerning land. The subordinate legislation has to be interpreted consistently with the present Act.

If there are two Courts which the right or interest might be brought, that should not evoke surprise because that is the nature of concurrent jurisdiction. In my opinion therefore, the provisions of either of the two sets of rules cannot be interpreted to exclude the jurisdiction of either of the two Courts which has been specifically confirmed by the parent Act.

In the result, a party who has a claim that is capable of being considered by either of the two Courts, must necessarily choose in which Court to pursue the claim and once having made that election, will not be able to bring the same claim before the other Court in its original jurisdiction.”<sup>20</sup>

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<sup>18</sup> See *Mokemane v Mokhorro (supra)*, *Shale v Shale (supra)*, *Thamae v Moletsane C of A (CIV)23/2017*, *Leseteli Malefane v Roma Valley and others C of A (CIV) 8/2016*

<sup>19</sup> *supra*

<sup>20</sup> See also *Mwangi v Masupha (supra)*.

[27] Considering that the applicant claims M 200 000.00 as the market value of the property, no argument was made on whether there is a monetary ceiling attached to the jurisdiction of the District Land Court. In the circumstances, it is not necessary to make a finding in this regard, so I leave the question open for future consideration. Resultantly, the respondents failed to establish the jurisdiction of the District Land Court to hear this claim, which if established, would necessitate an application for leave to institute the claim before this Court.

**Order**

[28] For reasons set out in this judgement, the preliminary objection is dismissed with no order of costs.

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**P. BANYANE**  
**JUDGE**

For Applicant : Advocate Mariti

For Respondents : Advocate Mabote