

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0108/2021

In the matter between:

‘MANTOA RAMAKOALA

APPLICANT

AND

‘MAKHETHANG MONTŠO

1ST RESPONDENT

LAND ADMINISTRATION AUTHORITY

2ND RESPONDENT

Neutral Citation: `Mantoa Ramakoala v Makhethang Montšo & Another [2023]
LSHC 141 Comm. (14 SEPTEMBER 2023)

CORAM: MOKHESI J

HEARD: 23 MAY 2023

DELIVERED: 14 SEPTEMBER 2023

SUMMARY

Civil Practice: *Dispute of facts arising from the papers in circumstances where they were clearly foreseeable- Application dismissed on account that when the applicant lodged the application dispute of facts were foreseeable.*

ANNOTATIONS

Cases:

Legislation

High Court Rules

Lesotho

Makoala v Makoala LAC (2009 – 2010) 40)

South Africa

Room Hire Co. (Pty) Limited v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155

(T)

Mamadi and Another v Premier Limpopo Province and Others 2023 (6) BCLR 733

(CC)

JUDGMENT

[1] **Introduction**

In this application the applicant is seeking cancellation of the agreement which was entered into between the deceased whose estate she inherited and the 1st respondent. The reliefs she is seeking are couched as follows:

“1. That a rule nisi be issued returnable on the date and time to be determined by the honourable court calling upon the respondents to show cause (if any) why;

(a) The 1st and 2nd Respondents shall not be interdicted and/or restrained from disposing off and/or transferring the rights and interests of the 1st Respondent on a residential site bearing lease number 14301 – 049 to any third party pending finalization of this application.

(b) The 1st Respondent shall not be interdicted and/or restrained from developing and or erecting any structures, either temporary or permanent structures on the site in question pending finalization of this application.

(c) Cancellation of a contract of sale of a residential site in question, concluded on the 5th March 2017 between the 1st Respondent and the late ‘Mampholle Mpholle.

(d) The 1st Respondent shall not be ordered and or directed to pay a sum of Ninety Four Thousand Maloti (M94,000.00) as purchase price of the site in question.

(e) The 1st Respondent shall not be ordered and/or directed to transfer her rights and interest in the site under lease number 14301 – 049 to the Applicant.

(f) Costs of suit in the event of opposition.”

[2] **Background Facts**

This application is opposed. On 5 March 2017, the late Mrs ‘Mampholle Mpholle who was the applicant’s sister concluded an agreement with the 1st respondent in terms of which the late ‘Mampholle was to build a two-roomed house for the 1st respondent. In return Mrs ‘Mampholle was to be given one of the subdivided portions on the site registered as Plot No. 14301 – 049 which belong to the 1st respondent. Mrs ‘Mampholle built and completed the two-roomed house. However, in January 2021 she passed away before the rights in the plot which was to be given to her could be transferred. The reason for failure to transfer the rights in the plot to her before her death was as a result of the disagreement with the 1st respondent regarding fulfilment of terms of the agreement by her as the 1st respondent claimed there was no ceiling and electricity installed. The applicant disputes that this was part of the agreement. Consequent to her death, the Mpholle family appointed the applicant as the heir to the deceased’s rights and interest in said site.

[3] The applicant is suing in that capacity. Mediation route was followed to have the parties' dispute resolved. One such mediation was held by Chief Tšele Tsiane of Lithabaneng before whom it was agreed by both parties that a valuer of the two-roomed house be engaged to aid a fair compensation of the applicant by 1st respondent. As it turned out each party engaged their own property valuer at different times. The applicant engaged a valuer who physically inspected the building on 6 September 2021 and produced a report on the 13 September 2021. In the report (by Net Props (Pty) Ltd) the building is valued at M93,824.00. On the one hand the 1st respondent engaged her own valuer (Arthock Property Services (Pty) Ltd) who physically inspected the building on 12 August 2021 and valued it M29,000.00. When the parties could not accept each other's valuation report, the applicant approached the court seeking the reliefs outlined in the Notice of Motion.

[4] **Parties' Respective Cases**

It is the applicant's case that the written agreement between her late sister and the 1st respondent did not include a clause which stipulated that ceiling and electricity be fitted and installed, respectively in the completed house. She argues that the 1st respondent is in breach of the agreement by not delivering the site as agreed.

[5] **Respondent's case**

The respondent's case is that the applicant cannot inherit the rights and interests of the late 'Mampholle Mpholle as she is survived by her daughter. The 1st respondent further refutes the claimed value of the house. The 1st respondent in addition has raised a number of the so-called points in *limine*, namely, (i) Non-compliance with Rule 8(22) of the High Court Rules; (ii) Abuse of court process; (iii) Dispute of fact; (iv) Lack of *locus standi*; (v) Misjoinder; (iv) Lack of cause of action.

[6] **Issues for determination**

- (i) Points in *limine* raised
- (ii) The merits

[7] I have looked at the points in *limine* raised, at least as the courts have always said, a material dispute of fact is not a point to be raised in *limine* (**Makoala v Makoala LAC (2009 – 2010) 40**). The 1st respondent attacks the applicant's *locus standi* on the score that she could not inherit Mrs Mpholle's property because her daughter is still alive. There is no merit in this contention, because even if Mrs Mpholle's daughter is still alive the nomination of the applicant as the heir in relation to the plot in issue is not

challenged by the alleged daughter. The rest of the points are without any merit.

[8] **The Merits**

When one reads through the pleadings it becomes evident that there is a genuine and a material dispute of fact regarding the value of the house the subject matter of this litigation. Even on the version of the applicant, after the parties had appeared before the village for mediation, and a recommendation made that they engage the services of an independent valuer, the 1st respondent rejected the findings of such a valuer. The 1st respondent even engaged her own valuer who came up with a different valuation. During argument, Adv. Mainoane, who appeared for the applicant was directed to this material dispute however, she was insistent that there is no dispute of fact in this matter, and therefore no application for referral to *viva voce* evidence of these two experts (property valuers) was made.

[9] In the circumstances, Rule 8(14) of the High Court Rules comes into play:

It provides that:

“If in the opinion of the court the application cannot be decided on affidavit the court may dismiss the application or make such order as to

it seems appropriate with a view of ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear to the examined and cross-examined as a witness, or it may order that the matter be converted into a trial with appropriate directions as to pleadings or definition of issues, or otherwise as the court may deem fit.”

- [10] In terms of this subrule the court is given a discretion whether to dismiss or refer the matter to oral evidence or trial. Where, as in this case, when the applicant lodged the application the material dispute was foreseeable that it will arise, the court will be inclined to dismiss the application (see **Room Hire Co. (Pty) Limited v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155 (T)** at p.p 1162 and 1168). The reason for dismissing the application on the score that a dispute of fact was foreseeable was bluntly stated in the case of **Mamadi and Another v Premier Limpopo Province and Others 2023 (6) BCLR 733 (CC) (6 July 2022)** at para. 42:

“The purpose of the court’s discretion under this rule to dismiss an application is to discourage a litigant from using motion proceedings when the court will not be able to decide the dispute on the papers. This is a waste of scarce judicial resources and prejudicial to the respondent. An applicant should not be able to use motion proceedings when the worst outcome is confined to a referral to oral evidence or

trial. Rule 6 (5)(g) thus vests a power in courts, where motion proceedings have been inappropriately used in this way, to penalise a litigant through dismissal without rendering a final decision. In short, therefore, a dismissal in terms of rule 6(5)(g) serves to punish litigants for the improper use of motion proceedings.”

[11] Rule 6(5)(g) of the South African Uniform Rules of which is being referred to in the above decision is the equivalent of Rule 8 (14), now in issue. In the present matter when the applicant lodged the present proceedings, she was fully aware that the issue of the value of the house would be hotly contested, as it has always been the case even before the mediators. The applicant was fully aware that the 1st respondent would reject its valuer’s determination as she did before. It is, therefore, baffling why the applicant chose motion proceedings to resolve this impasse.

[12] In the exercise of my discretion, therefore, this application is dismissed with costs.

MOKHESI J

**For the Applicant: Adv. Mainoane-Marabe instructed by MMB MIGHT
Attorneys**

**For the Respondents: Adv. Nqhae instructed by K.M Thabane & Co.
Attorneys**