C. of A. (CIV) NO. 1 of 1980

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

TLHOLEHO MAHAMO Appellant

v.

MOLIKENG MAHAMO Respondent

HELD AT MASERU

CORAM:

TEBBUTT, J.A.
SCHUTZ, J.A.
VAN WINSEN, J.A.

J U D G M E N T

TEBBUTT, J.A.

This application for leave to appeal to this Court from a judgment of the High Court was refused with costs, the Court stating that it would file its reasons for doing so later. These are the reasons.

This matter involves a dispute between two brothers over a field. In the Manamela Local Court (to which I shall refer as the Local Court) the present appellant was sued by the present respondent the latter alleging that appellant had ploughed a field which had been allocated to him and he also claimed from the appellant the crop harvested by appellant following his ploughing of the field. The Local Court found the field to be the respondent's and also awarded the crop to him, with costs. This Judgment was taken on appeal to the Hololo Central Court which upheld the judgment of the Local Court. The judgment of the Central Court in turn was taken on appeal to the Judicial Commissioner who reversed the finding of the Local Court and the Central Court. That

2/ judgment .....

judgment again was brought on appeal to the High Court where Isaacs A.J. decided that the Judicial Commissioner was wrong and he restored the judgment of the Local Court.

Appellant now applies in terms of Section 17 of the Court of Appeal Act No. 10 of 1978 to appeal against the judgment of Isaacs A.J.

Before dealing with that application it is necessary to refer to the form of applicant's application.

Section 17 of the Court of Appeal Act provides that -

> "Any person aggrieved by any judgment of the High Court in its civil appellate jurisdiction may appeal to the Court (the Court of Appeal) with the leave of the Court or upon the certificate of the Judge who heard the appeal on any ground of appeal which involves a question of law but not on a question of fact".

No certificate was granted by Isaacs A.J. and accordingly it was necessary for the appellant to obtain the leave of this Court to appeal to it. The Court of Appeal Rules 1980 which were made in terms of Section 22 of the Court of Appeal Act provide in Rule 2(7) that where an application for leave to appeal in a civil matter is necessary in terms of Section 17 of the Act, the provisions of Rule 2(1) to (6) inclusive, which apply to criminal appeals, shall <u>mutatis mutandis</u> apply. Rule 2(1) provides that where an application for leave to appeal is necessary a criminal matter -

> ".....such application shall be made by way of notice of motion supported by affidavits".

In the present instance the appellant has timeously filed a notice of motion but this is not supported by any affidavit or affidavits as required by the Rule. Appellant has therefore breached the Rule. Rule 8(2) gives the Court of Appeal the discretion to condone any breach of the Rules "on the application of the appellant" but goes on to provide that such application shall be by notice of motion delivered to the respondent and to the Registrar not less than seven days before the date of hearing. No such application for condonation has been made by appellant.

3/ Respondent .....

Respondent has not taken the point either that the Rule has been breached or that the Court should not condone such breach. It was however contended in his heads of argument that appellant has not elaborated upon the grounds of appeal set out in the notice of motion as to why he has reasonable prospects of success and that accordingly the application for leave to appeal is not a proper one. Despite this, however, the Court decided to allow the appellant to proceed with his application for leave to appeal and to condone his breach of the Rule in question. The breach is somewhat technical in nature. While it is true that an affidavit should support the notice of motion, the respondent cannot, I feel, be prejudiced by its absence nor by the fact that appellant has not stated on oath that he believes or has been advised that he has reasonable prospects of success on appeal. However, albeit that the breach is a technical one, it must not be assumed that the Court will necessarily condone a similar breach in the future and applicants for leave to appeal should be warned to observe the Rules in future.

I turn then to the application for leave to appeal itself.

In order to appreciate the grounds on which it is based it is necessary to refer briefly to the facts.

The field in question belonged to the father of the disputants, one Mokoko, who died in 1970 and it appears that the junior wife of the father lived on the land until her death in 1974. Following her death a dispute arose as to who the land belonged resulting in a case in the Local Court in which the present respondent was the plaintiff and the present appellant one of the defendants. The present appellant averred that he had been allocated or "confirmed in the field" by his father before his death and that thereafter he, the appellant, had always ploughed the land. That case is referred to in the record of the various proceedings as CC 212/75. In the judgment of the President of the Local Court in that case he stated that the dispute involved land which was "vested in the chieftainship for the people" and was not inheritable. This , of course is in accordance with Section 3 of the Land Act No. 20 of 1973. The father could award the land to whomsoever he chose but such award required the blessing or confirmation of the chief. The Local Court found that there

was no evidence to show that the father had ever consulted the chief of Maloseng or of Qalo, who were apparently the chiefs involved, or that he had made his award before either of the chiefs for their blessing. After the death of the father and of the junior wife without male issue from their union surviving them, the land reverted to the chieftainship for re-allocation and the Local Court held that the chief concerned was free to allocate the land as he saw fit. The present appellant did not appeal against that judgment.

That judgment formed one of the exhibits (Exhibit "C") in the proceedings between the two present disputants in the Local Court which has now eventually reached this Court.

Following upon the judgment the present respondent made an application for allocation of the field to him and in due course the field was duly allocated to him in accordance with the provisions of the Land Act. A certificate evidencing such allocation (Form "C") was handed in as an exhibit before the Local Court.

The Local Court found that the field had been properly allocated to the present respondent and that "the senior chief to the chief of Maloseng, Chief Hlasoa, raised no objection hence the allocation by the chief of Maloseng ... . is correct". On this basis the Local Court decided that the field belonged to the present respondent and also awarded him the crop of kaffir-corn on it.

One of his grounds of appeal to the Central Court from the decision of the Local Court by the present appellant reads as follows :

> "The President denied me the opportunity to call further evidence which he had promised he would allow me to lead at the close of my other evidence.
>
> (a) This is a letter by the office of the chief of Qalo chief Hlasoa dated 13.7.76 warning chieftainess 'Malelosa to withhold the allocation of the field until she had received a decision by the family and instructing her further to wait for that decision.

(b) Copy of judgment in CIV/A/6-/73 which quotes evidence by chieftainess 'Malelosa where she says she knows my father's request that I be confirmed on this field and other and the blessing by chief Hlasoa who is senior to her. It was then that chieftainess 'Malelosa completed this blessing through Mosolleki Kilase and Manamolela Motjanyela in 1954".

This ground of appeal, together with the other grounds raised, was considered by the Central Court and is referred to in its judgment dismissing the appeal from the Lower Court. It is not necessary to set out the full text of that judgment here; suffice to say that it was raised by appellant and considered by the Central Court.

As set out above the appellant thereafter lodged a further appeal to the Judicial Commissioner against the decision of the Central Court. He did not in that appeal again raise the ground of appeal I have just mentioned.

What he did raise before the Judicial Commissioner was a point he had taken in the Local Court that he had not been informed, as he submitted he should have been in terms of the Land Act, that he was to be deprived of the field when the allocation to the present respondent was made and that the allocation was accordingly invalid.

Section 13(1) of the Land Act provides :

"A Chief acting after consultation with the Development Committee established for the area of jurisdiction of that Chief shall, before revoking or derogating from any allocation or grant or terminating or restricting any interest or right in or over land, give at least thirty days written notice to the person affected thereby of his intention to do so."

Section 13(2) provides :

"The notice shall set out clearly the grounds upon which such allocation or grant is to be revoked or derogated from or the interest or right is to be terminated or restricted."

The Judicial Commissioner held that appellant should have been given notice in terms of the provisions of Section 13, his finding reading as follows :

> "The Central Court felt that the land was never appellant's and that there was no need to serve him with a notice of termination of his rights on the land. My assessor and I however feel that he should have been with such a notice....."

The Judicial Commissioner accordingly upheld the appeal from the Central Court and altered the judgment of the Local Court to one of absolution from the instance. He granted leave to appeal to the High Court on this one point only, viz.

> "on the question whether it was necessary to serve notice of termination of the interests of respondent to the land or not".

Isaacs A.J. in the High Court held that following the judgment in case CC 212/75, against which no appeal was noted and which therefore became res judicata, appellant by remaining on the land was in effect a trespasser, it having been held in that case that he had no right to the field. He accordingly concluded that the Judicial Commissioner was incorrect in holding that appellant was entitled to a notice in terms of Section 13 of the Land Act, that no such notice was necessary prior to the allocation of the field to the present respondent, and that such allocation was accordingly valid and lawful. The order of the Local Court was therefore restored.

Appellant's present grounds of appeal upon which he basis his application for leave to appeal are the following:

> "1. (a) That in his judgment the learned judge a quo overlooked the fact that the appellant had complained consistently that the President of Manamela Local Court refused to accept a judgment of the High Court CIV/A/6/73 which stated inter alia that the appellant was allocated during the lifetime of Mokoko, the field the subject matter of CIV/A/10/79.
>
> (b) That the judgment in CIV/A/6/73 being a judgment of a superior court clearly could not be superseded by the judgment CC 212/75 of a subordinate Court and of a later date.

(c) That the act of the President of the Local Court of refusing the tendering of CIV/A/6/73 was an irregularity and prejudicial to the rights of the appellant.

(d) That the testimony of Chieftainess 'Malelosa and Chief Hlasoa in the CIV/A/6/73 that they made the allocation to the appellant during the lifetime of MOKOKO was accepted by the High Court as credible evidence.

2. (a) That the fact that the Appellant who was respondent in CIV/A/10/79 did not appeal against the judgment in CC 212/75 was irrelevant to the proceedings as Appellant already possessed the judgment of a superior court stating his rights.

(b) That in any event the subject matter of CC 212/75 was not a question of the allocation of land but a question of proprietary rights other than land.

3. That in view of the judgment in CIV/A/6/73 which stated that the appellant was allocated the land in question, the Respondent could not be validly allocated the same land unless there was a lawful derogation against appellant.

4. That the learned judge a quo was wrong in law when he concluded that the appellant was a trespasser, as appellant's rights exceeded those of a bona fide possessor or a bona fide occupier in view of the allocation confirmed by the judgment CIV/A/6/73 against which no appeal was ever lodged."

The present application really involves an application for the matter to be sent back to the Local Court to admit fresh evidence and Mr. Kolisang, who appeared for the appellant conceded that unless he could persuade this Court that the matter should be sent back to have the evidence referred to in the judgment in Civil Appeal No.6 of 1973, his application had to fail.

It is clear that a court of appeal will only grant such an application in exceptional circumstances and the applicant must show that he did not have and could not have secured the evidence at the trial stage or could not have got the evidence if he had used reasonable diligence. Also the evidence must be such that if adduced it would be practically conclusive of the matter (see Herbstein and van Winsen: Civil Practice of the Superior Courts in South Africa, 2nd Edition p.653).

In the present case it is quite clear that the evidence that he was allocated the field, if correct, was at all times available to appellant and he could at any time have adduced it before the trial court. One would have thought that if the appellant's rights to the field had been finally determined by the High Court in 1973, he would have relied heavily on such judgment and would at the very least, have said in his own testimony before the Local Court that the field had been allocated to him by the appropriate chief and that this fact had been accepted as correct. Moreover he was specifically alerted to the need to adduce such evidence in the Local Court by the High Court. As I have set out above, the Local Court in its judgment in CC 212/75 specifically stated that there was no evidence that the father had consulted either the chief of Maloseng, who at that time appears to have been chieftainess 'Malelosa, or the chief of Qalo, who was chief Hlasoa. As I have also set out, that judgment was handed in to the Local Court as an exhibit by the present respondent. One would have expected the appellant in the light thereof, if Chieftainess 'Malelosa and Chief Hlasoa had made an allocation of the field to him during Mokoko's lifetime, to have referred to that in his own evidence. Indeed the fact that he should have given such evidence must have been appreciated by appellant for in his cross-examination of respondent in the Local Court he asked appellant about the judgment in question, the following appearing on the record of respondent's evidence:

> "I do not object to the judgment of the High Court of Lesotho which cannot be reversed by this Court."

Respondent, however, was at pains to make it clear that that judgment concerned a dispute between a certain Chief Kopano and the appellant and that it related to a field other than the one concerned in the present dispute. Appellant's evidence in reply to this is, to put it at its highest, equivocal.

Appellant protests that the President of the Local Court refused to allow him to put in the judgment of the High Court in Civil Appeal No.6 of 1973. Apart from the fact that nowhere on the record does this appear to have occured and that, as I have pointed out, reference was made to it in the cross-examination of the respondent by appellant, the fact referred to in that judgment upon which appellant now seeks to rely, and that he wants to introduce as fresh

evidence, is an alleged allocation to him by Chief Hlasoa. Appellant in fact called Chief Hlasoa in the Local Court trial to testify as to an allocation by him of a field to appellant. The Chief was completely uncertain as to what field he had so allocated but conceded that -

> "I am giving evidence on the field which was disputed by Kopano and (appellant)".

It would seem therefore that the field referred to in the judgment in Civil Appeal No.6 of 1973 was not that involved in the present dispute or, at least, that there is uncertainty as to whether it is the same field and that therefore even if the evidence were now to be admitted, it would not be conclusive of the matter.

In any event, as I have shown, the judgment and the evidence referred to in that judgment were in fact canvassed before the trial Court.

Appellant also had more than ample opportunities of asking that the matter be remitted to the Local Court in all the appeal proceedings he has brought so far. He could have done so when he specifically raised the matter before the Central Court and he could have done so before the Judicial Commissioner and the High Court. He has failed to avail himself of these opportunities. His application to do so now cannot be countenanced.

All appellant's grounds upon which he seeks leave to appeal involve our acceding to his application to lead the so-called fresh evidence in the Local Court. Appellant has not shown any of the factors that would entitle a court to accede to such application and accordingly it must be refused.

It follows that appellant's application for leave to appeal must be refused, with costs and the Court, as I have stated, so ordered.

Signed: P.H. Tebbutt
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P.H. TEBBUTT
Judge of Appeal

I agree Signed : W.P. Schutz
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W.P SCHUTZ
Judge of Appeal

I agree Signed: L. De V. Van Winsen
.....
L. DE V. VAN WINSEN
Judge of Appeal

Delivered this 13th day of January, 1981 at MASERU

For Appellant : Mr. Kolisang
For Respondent : Mr. Sello.