C. of A. (CIV) NO. 5 of 1980

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

MATLOLA RAMATEKOA Appellant

v

SELEBALO RAMATEKOA Respondent

HELD AT MASERU

CORAM:

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

J U D G M E N T

SCHUTZ, J.A.

This is an application for leave to appeal from the learned Chief Justice's decision upholding an appeal from the Judicial Commissioner. At the outset it must be mentioned that there has been a non-compliance with Court of Appeal Rules 2(1) and (7) in that the application is not supported by an affidavit. The Court is in the circumstances prepared to condone this non-compliance, but as pointed out in the later case of the present session, Mahamo v. Mahamo, compliance with the rules will be required in future.

I have rarely, if ever, seen such protracted litigation and with such fluctuating fortunes as the record reveals. As the parties, who are half-brothers, have been alternatively plaintiffs and defendants, appellants and respondents on several occasions, I shall refer to the applicant for leave to appeal as Matlola and to the respondent as Selebalo.

The parties' father Sebolai Ramatekoa was a headman. Selebalo was born of Sebolai's first wife, and after her death Matlola was born of his second wife. Sebolai died in 1946 and Selebalo succeeded him as headman and was his heir. Included in the inheritance was the land which is the subject of this dispute. In 1948 Selebalo went to work in the Union, and he continued to

/work

work there until he retired to Lesotho in 1970. One Kahlolo took over the headmanship in his absence. Matlola also spent various periods working in South Africa. The essential dispute between the parties is that Matlola avers that at some time in the nineteen sixties Selebalo allocated to him the land in question, whereas Selebalo denies this averment. There was litigation relevant to this land even prior to the present case.

In 1969 one Masulubanye Rantsoti sued Selebalo in the Tsikoane Local Court (CC 390/68), the dispute being described as "Part of plaintiff's (Masulubanye's) site which defendant (Selebalo) has given away". Masulubanye gave evidence that the site had been allocated to one "Matlela" who was already using it. The claim was dismissed on the ground that Selebalo had been wrongly brought to court, as he had no control over the site. The significance of these proceedings is that Selebalo must have known of Matlola's occupation of the site as early as 9th January 1969, and must have been aware of at least a suggestion of an allocation to him.

Then in 1973 Selebalo sued Matlola in the Tsikoane Local Court (CC 130/73) for appropriating the site. The claim was dismissed inter alia on the grounds that there was insufficient evidence, and that "the question of land concerns the chiefs".

In 1974 Matlola sued Selebalo in the Tsikoane Local Court (CC 114/74) calling upon Selebalo to remove his kraal, cattle and fence from the site. The claim succeeded, the court relying upon CC 130/73 as being in Matlola's favour, and as not having rebutted by Selebalo. Selebalo then appealed to the Tsifalimali Central Court (CC 170/74). The appeal succeeded, the court holding that Matlola had produced no evidence other than judgment CC 130/73, that this judgment did not decide that the land was his, and that the court in that case had left the issue undecided and referred it to the chiefs. Matlola was given leave to institute new proceedings when he had enough evidence from his chief. Not surprisingly he let matters lie.

With three separate hearings already behind the parties (and with another five to go), the present proceedings were launched in 1975 before the Tsikoane Local Court. This time Selebalo was the plaintiff. He claimed that Matlola should be ordered to evacuate the site. Selebalo relied upon his rights to the property by virtue of inheritance and Matlola upon the "gift"

/to him,

to him, as confirmed before chief Mohale, the chief of Linotsing. The court ruled, rightly in my view, that the onus of proof rested on Matlola. Matlola gave evidence that Selebalo had summoned him from the gold mines in South Africa and had taken him before chief Mohale to confirm him on the site. No documentary evidence was obtained. He was not taken before Kahlolo (then "acting" as headman in Selebalo's place) "because it belonged to our family. You (Selebalo) were just giving me a share in our family inheritance". He said that his buildings on the site had already stood for 15 years. Then Matlola called Mahloko Ramatekoa, a paternal uncle of the parties. He deposed that Selebalo came back from South Africa and told him of Matlola whom Selebalo wanted to move out of an old site of his after his house had collapsed and join Nkhono Mampo Sebeta's family. He was thankful of the kind offer to Matlola. Subsequently, and after Matlola had built a rondavel on the site, Selebalo asked Matlola to fence the site. He said that Matlola had been using the site for more than 10 years. At a later time when Selebalo had come back to Lesotho to retire the witness asked Selebalo whether the site could be given to Masulubanye (plaintiff in CC 390/68) but Selebalo refused on the ground that the site had already been allocated to Matlola. He also was of the view that "you were not allocating land as such, you were giving to him houses which belonged to your family and had become yours through inheritance". He conceded that Selebalo had not invited all family members when he made the allocation. The second witness called by Matlola was chief Mohale. He said that in the nineteen sixties Selebalo allocated as a building site the site, which had previously belonged to the family, to Matlola. Matlola then erected houses on the site. Before he was given the site Matlola had been living at his parents' home. Further, he said "You came before me with defendant (Matlola) to inform me of this gift, as I was your chief". That concluded Matlola's case.

Selebalo stated that the site was his through inheritance, and that on it were two rondavels, two kraals, a stable, and an office for his administrative work. Matlola had his own home, he said, which his mother Mamatlola had been given by Sebolai during his lifetime (the uncle had conceded this allocation in his evidence). In addition, said Selebalo, in 1968 Matlola had been allocated a site for building and a field at Malifariki by the land allocation committee under the chairmanship of Kahlolo. He claimed that he found that Matlola had built a rondavel on the site when he came to Lesotho in 1970

/I have

I have difficulty with this statement in the light of what I have already said about the action brought by Masulubanye in 1969. This was one of the points relied on by the Local Court. He queried this work on several occasions until he went to court in CC 130/73. He said that he did not know why chief Mohale said that the field was Matlola's, and he denied coming from South Africa with Matlola in order to give him the field. The only witness called by Selebalo was his wife Mantholi. She said that although she was living in South Africa at the relevant time, she as the elder wife of Selebalo would have known if her home had been given away. The disputes, she said, started only in 1970 when Selebalo retired. She made this concession in cross-examination :"I know that you came to Lesotho with (Selebalo) at one time. You came together in a car". Matlola's case was that the "gift" had been made when both brothers were on leave from South Africa.

On this evidence the Local Court dismissed Selebalo's claim, saying that it was convinced that Matlola had a right to the site. Apart from the point about Selebalo having knowledge of Matlola's occupation at least by 1969, the Court said, "Defendant(Matlola) through Mahloko Ramatekoa and chief Mohale Mokokoane has shown this Court that he was given this site by plaintiff as part of his share in the family inheritance". By this is clearly meant that the Local Court accepted the evidence of Matlola's two witnesses. A probability that weighed with the court was that if Matlola had appropriated the site unlawfully he could not have built three houses at various times without anyone preventing him.

Selebalo then appealed to the Tsifalimali Central Court. Matlola did not appear although he had been given notice of the appeal date. He subsequently claimed that he was in hospital in the Republic and had tried to obtain a postponement. This clearly is correct as advocate Mofolo wrote asking for a postponement, which was refused on the ground that lawyers are not acceptable in Central Courts. At any rate, the appeal went by default. The Central Court allowed the appeal and ruled that the site should remain the sole property of Selebalo. In reply to the Court Selebalo said that "We have not been before our family members on this matter". The significance of this statement will be dealt with later. Selebalo told the Court by way of argument, that the uncle had reason to tell lies, as there had been previous litigation about the estate which the uncle had lost. Chief Mohale, he said, always backed Matlola. In holding that Matlola had not discharged

/the

the onus resting on him the Central Court relied firstly on the fact that the family did not know anything as they were not consulted. The President proceeded, "the family should have full knowledge of the transaction in order to facilitate evidence in case of future litigation.... there must be evidence by the family". To this it might be pointed out that there was some family evidence, that given by the uncle. Secondly, the Central Court said that Matlola should have explained the reasons which induced Selebalo to allot the site in the light of the fact that Matlola's family already had a site (that allocated to his mother by Sebolai) especially as Selebalo had children of his own. The crucial part of the judgment, to my mind, is that leading to the conclusion that the evidence of the uncle and of chief Mohale was "rigged" and was false. The reasons for this conclusion are as follows. The Court refers to Selebalo's claim, unsupported by evidence, or indeed by any cross-examination of these witnesses that both were slandering him and that the uncle was acting at the instigation of the chief who, so it was claimed, was disputing Selebalo's rights(presumably as headman). The Court found that the evidence of the uncle contradicted that of Matlola. The reason for this conclusion is not clear to me, unless it relates to the period during which Matlola had been in occupation. The conflict on this score, if there is one, hardly seems to me to be material. Then the Court expresses surprise that that uncle should not have made public an event as important as the allocation. Next it refers to the fact that chief Mohale was told but Kahlolo was not. Matlola's answer had been that as the matter had been one of inheritance only concerning only the family there was no need to inform him. The Court commented that it was "anomalous that the chief directly responsible was overlooked and the chief above him consulted". The final ground for rejecting the evidence on Matlola's side was a query as to why chief Mohale did not cause the allocation to be processed along proper administrative lines.

Matlola then appealed to the Judicial Commissioner. In his grounds of appeal he dealt with the question of informing Kahlolo as follows : "It was not my business to inform Kahlolo who was acting at Lenyakoane for Selebalo. It rested with chief Selebalo to inform him just as he informed chief Mohale". In argument this point was further developed by the submission that there was no need for Selebalo to inform the local chief as he himself was the local chief. Selebalo's legal representative argued that this was not a case of dealing with an inheritance (this argument was not

/proceeded with

proceeded with in this Court), but that if it was section 14 of Part I of the Laws of Lerotholi should apply. In the result the Judicial Commissioner allowed the appeal and restored the Local Court's order in favour of Matlola. Essentially two reasons were given. The first was that the trial court had believed Matlola and that strong reasons are needed to disturb such a finding. The second was that, so the Judicial Commissioner held, the probabilities favoured Matlola's version. The first probability relied on was Selebalo's wife's evidence that the two brothers had once gone home together. The second was the unlikelihood of Matlola's having built three houses at different times without disturbance if he was not entitled to do so.

Upon leave being granted by the Judicial Commissioner Selebalo then appealed to the High Court. The appeal was heard by the learned Chief Justice. His remarks about the merits are all obiter dicta. There was a "smell of truth" in the attacks on Matlola's two witnesses. Then, the Chief Justice opined, there was unlikelihood in Selebalo's having made the gift, particularly if Matlola and his mother between them already had two sites. Matlola's position as regards the site allocated to his mother was protected by s.13(3) of Part I of the Laws of Lerotholi. What, the learned Chief Justice asked, made Selebalo change his mind after so many years? And why did Matlola not obtain a "Form C" after its introduction in 1965? The learned Chief Justice also queried whether the evidence established an irrevocable gift or only an indulgence to a younger brother.

The ground of decision in the High Court was, however, based on s.14(4) of Part I of the Laws of Lerotholi. Dissatisfaction was expressed at all the lower courts not having applied "one of the most elementary principles of the Laws of Lerotholi". There had been no family meeting to arbitrate. The learned Chief Justice held that the convening of a family council is "usually a condition precedent to lodging an action" and placed reliance for this proposition on Poulter Family Law and Litigation in Basotho Society 223 et seq. In the result the appeal was allowed with costs and a family council was ordered to be convened. It was further ordered that in the event of no agreement emerging the matter was to go before the Subordinate Court of a First Class magistrate as a way to finality, and as the presidents of the Local and Central Courts were already too familiar with the dispute and might have strong feelings about it.

The first question is whether this reference at this stage

/to a

to a family council was correct. Section 14(4) of Part I of the Laws of Lerotholi reads :

> "Any dispute amongst the deceased's family over property or property rights shall be referred (for arbitration) to the brothers of the deceased and other persons whose right it is under Sesotho law and custom to be consulted. If no agreement is arrived at by such persons, or if either party wishes to contest their decision, the dispute shall be taken to the appropriate court by the dissatisfied person".

The right to contest the findings of a family council makes it clear, in my view, that this is a provision for mediation rather than arbitration (whatever word the "Law" uses).

The status of Part I of the Laws of Lerotholi is somewhat unusual. Its origin is described in Duncan Sotho Laws and Customs xiii - xiv and Poulter (op cit) 4 - 6. By contrast with Parts II and III it has no legislative backing.

> "Nevertheless it is helpful, though not conclusive, on any question as to the existence or extent of any customary practice amongst the Basotho people ..... (It) is no sense written law. Its provisions though reduced to print, do not emanate from any lawgiver".

per Lansdown J in Bereng Griffith v. 'Mantsebo Seeiso Griffith (1926-53) H.C.T.L.R. 50 at 58.

The question arises whether s.14(4) contains a jurisdictional provision laying down that the court of mediation of the family and elders is the first tribunal to which a customary inheritance dispute must be referred, or, put another way, whether mediation is a mandatory condition precedent to reference to the courts.

In seeking an answer to this question it is important to remember that courts have jurisdiction conferred on them by law. The local courts and the central courts are created by s.3 of the Basuto Courts Proclamation 23 of 1958. By virtue of s.24(a) of that Proclamation these courts must administer Sesuto law and custom prevailing in Lesotho so far as it is not repugnant to justice or morality or inconsistent with the provisions of any law in force and the provisions of the Proclamation. Section 47 of the Proclamation provides :

> "Nothing in this Proclamation contained shall be deemed to abrogate or apply to the custom whereby civil disputes may be settled out of Court by discussion and arbitration by the relatives of the parties or by other persons acting in a private and personal capacity".

/These

These courts having jurisdiction one would expect a clear provision ousting jurisdiction before concluding that jurisdiction had been ousted. Section 47 of the Proclamation just quoted, although recognizing the custom, contains no such provision, and that in the very place where one might have been expected to find it. The words "may be settled" rather suggest a contrary conclusion.

As to s.14(4) of the Laws of Lerotholi, it is not drawn in terms of ouster of jurisdiction, in the sense that it does not say that no claim may be taken to court before mediation has occurred. In fact it is expressed as a positive injunction to convene a family council, and it is in that context that the ordinarily mandatory word "shall" is used. The use of that word does not, incidentally, always establish that a provision is peremptory and not merely directory : Maharaj v. Rampersad 1964(4) S.A. 638(A.D.) at 643 H - 644 B. Thus I do not consider that a sufficiently clear ouster of jurisdiction is to be found in s.14(4). This conclusion is contrary to what is stated in Duncan (op. cit.) to the effect that, "It has been held many times that such disputes may not go to court unless such arbitration has been tried and found to have failed". Two decisions of the Judicial Commissioner are relied upon. Poulter (op. cit.) 223, relying on these and other later decisions of the Judicial Commissioner is less emphatic, stating that it is usual to remit if there has been no family council.

To my mind it is in the best interests of justice that the conclusion that the holding of a family council should not have to be regarded as an invariable pre-condition to the institution of action is reached. One could conceive of situations where a family meeting would be pointless, for instance where the family has already clearly expressed its view, and one of the parties is determined to challenge that view. However, nothing that I have said should be taken to detract from the existence of the custom and the desirability of its application in the ordinary run of cases. It is for the local courts to give effect to the custom, and they should usually insist on its observance. Raising the matter only at the appeal stage leads to a waste of time and money.

Proceeding then on the basis that mediation was not an absolute pre-condition to litigation I address myself to the question whether the learned Chief Justice's application of the custom in the third appeal, mero motu we are told by counsel(but

/see. above

see above as to the proceedings in the Judicial Commissioner's Court), should be upheld. I do not think that it should. One of the most important functions of the courts is to achieve finality in disputes. Here one has the extraordinary spectacle of essentially the same dispute coming before the ninth court. If there is a remittal to a family council there is the prospect of another four proceedings. Another factor that weighs with me is that the parties went through four courts without either raising the point (but again see above as to Selebalo's attitude in the third court, that of the Judicial Commissioner). Now Selebalo seeks to support the Chief Justice's intervention. He is the one who started the litigation without convening a family council. It seems to me unfair to allow him to succeed in his contention in the face of opposition from Matlola who is desirous of having the matter decided on the record. A further consideration that weighs with me is that it is most unlikely, in the light of the protracted litigation, that a family council will serve any useful purpose. Indeed it emerged during argument that one of Selebalo's objects is to try and elicit further evidence at the council and re-present his case more cogently, that is to have two bites at a cherry. As to that object, he has had his chance, and this litigation must now be stopped.

For these reasons I would set aside the learned Chief Justice's order. That means that this Court will have to decide the case on the record.

The Local Court, which saw and heard the witnesses, decided in favour of Matlola. Mr. Maqutu, appearing for Matlola, relies on the principles numbered (3) to (9) in R. v. Dhlumayo 1948(2) S.A. 677(A.D.). Mr. Mda, appearing for Selebalo, relies on the principle numbered (10), contending that the Local Court overlooked certain probabilities and that this amounts to a misdirection which sets this Court at large. I shall now examine these alleged improbabilities.

The first is failure to give publicity to the allocation within the family. As to whether there was in fact no publicity at all, there is the contrary evidence of the uncle. However, as the onus rested on Matlola one might have expected him to call more family members, and I think that this is a point against him. It was also submitted that at least Selebalo's own son and heir should have been told. As he had an interest in common with Selebalo I would have thought that it was for Selebalo to call him to say that he was not told.

/The second

The second is the failure to tell Kahlolo the "acting" chief subordinate to Mohale. The exact status of Kahlolo is by no means clear. Mr. Maqutu has pointed out that Selebalo was gazetted as a chief in 1968 which tends to suggest that he had not given up the reins of chieftainship entirely. The suggestion is that having told the principal chief, and even accepting that the principal chief had to tell the subordinate chief, there was no need to do so in this case as Selebalo himself was the true chief. I find this alleged improbability inconclusive.

The third is the fact that Matlola was already entitled to other property so that it was unlikely that Selebalo would give him more to the prejudice of himself and his heirs. The difficulty I have with this submission is that Selebalo did not prove, as he could have, what property he had at his disposal, which affects the weight of the probability and the existence of the probablity itself.

The fourth was based on Selebalo's evidence that the site included his administrative office, which he would hardly have given away. But against this is the evidence of the uncle, who was believed, that the administrative office falls outside the enclosure. Also outside, he said, was the family graveyard.

The fifth was that there was no formal act following the allocation. This is a point, but it is by no means decisive, and I think that there is substance in the contention that this was not a question of allocation of land as such, but a division of the inheritance by the heir, which was the heir's own affair.

Against these probabilities, such as are in my view shown to be probabilities, there are countervailing probabilities. The strongest,and it is a strong one, is that Matlola occupied the site and built three houses on it over a period of many years without Selebalo doing anything about it or even, as I understand him, even knowing about it. Connected with this is the point already made earlier about Selebalo's having gained the requisite knowledge already in January 1969 and not only in mid 1970 as he said. I have the strong suspicion that he was not being frank about his knowledge. A much lesser probability relates to his wife's concession about the two brothers going home together on holiday.

In the result I find no balance of probability in Selebalo's favour. The findings on credibility then come into play. The trial Court believed Matlola's witnesses and no good

reason has been advanced, nor can I see any, for disagreeing with that conclusion.

I am thus of the view that Matlola has discharged the onus, and that the finding of the Local Court should be restored.

So this case must end in the final Court of Lesotho. I look at the proceedings with some unhappiness as they have proceeded like a long rally between equally matched opponents in a tennis match through many courts. Although it is not my function to reform the statute law of Lesotho, I would suggest that there is much to be said for a more precise formulation of customary law, and the method of its application, having regard to its status and to what must be done and what is merely wise prescription; and for the prevention of a lengthy series of appeals, as now allowed, which spell only confusion, defeated expectations, delay and costs. It is a vital principle that litigation should have an end. This litigation demonstrates that, if allowed, it can go on almost forever.

The order that I propose is that leave to appeal be granted and that the appeal should be upheld with costs, including any costs in all the intervening courts, and that the order of the Local Court dismissing Selebalo's claim be restored.

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

I agree Signed: P.H. Tebbutt
.....
P.H. TEBBUTT
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. Maqutu
For Respondent: Mr. Mda