IN THE LESOTHO COURT OF APPEAL

HELD AT MASERU — C of A (CIV) NO. 6 of 1980

in the matter between

LESOTHO CHOMANE — APPELLANT

and

BABELI TANKISO — RESPONDENT

CORAM : MAISELS J.P., GOLDIN J.A., STEYN A.J.A.

STEYN A.J.A.

This appeal is, hopefully, the last in a series of litigation which commenced in the Magistrate's Court in Maseru in April 1976. In the summons, Appellant (referred to herein as Plaintiff) claims an order:

"(a) Ejecting Defendant from the aforesaid portion of Plaintiff's site.

(b) Directing Plaintiff to pay R600-00 damages.

(c) Directing Defendant to pay costs."

Plaintiff's claims were based upon the following factual averments in the summons:

"(a) Plaintiff is the owner of the right to occupy certain unnumbered residential site together with the buildings and other improvements situated thereon.

(b) Since the end of 1974, Defendant is in unlawful occupation of a portion of Plaintiff's site.

(c) As a result of the Defendant's wrongful and unlawful acts, Plaintiff has been unable to kraal his cattle in the said kraal.

(d) Plaintiff has suffered damages in the sum of R600-00."

Defendant denied that he was in occupation of 'any portion of a site' belonging to Plaintiff. He went on to admit that 'he dismantled a kraal built by Plaintiff, but says that this kraal was built' by Plaintiff on Defendant's site from stones quarried from Defendant's site, save some 7 poles which are the property of the P[illegible]'

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In paragraph 4(c) of the plea, Defendant alleges that 'he dismantled the said kraal because it constituted a nuisance to him'.

After a lengthy hearing which commenced of August 2, 1977 and ended on the 2nd of March 1978, the Resident Magistrate's Court entered a judgment in the following terms :

'Absolution from instance.'

Against this judgment Plaintiff appealed to the High Court. His appeal was not only dismissed, but the Court went on to amend the order of the Resident Magistrate to read:

'Judgment for the Defendant with costs.'

It is against this decision in the High Court which Plaintiff seeks leave to appeal. Having regard to the complex and difficult nature of this case, we have no doubt that such leave should be granted and I proceed to deal with the matter as if it were properly before us by way of appeal.

It became common cause between Counsel at the hearing of the Appeal that the issues to be decided by us were the following :

(a) Was there an allocation of land - in or about 1952 - to Plaintiff, sanctioned by Chief Seqobela Letlatsa, Chief of Qoaling and which would have entitled him to the undisturbed right of occupation immune from termination by Defendant? (This was of course prior to the enactment of the Land Act 17 of 1979).

(b) If not, was there a land loan by Defendant to Plaintiff, and if so, was such land loan duly terminated by Defendant?

(c) Did Plaintiff prove with sufficient certainty the dimensions of the land in question in order to permit of the Court making an effective order?

(d) Did Plaintiff prove the quantum of his damages?

As to (a) and (b) above. An examination of the evidence reveals the following :

(a) There was a quarrel between Defendant's father (Tankiso) and Plaintiff. Their father Chomane took them before the Chief. After this meeting Plaintiff was authorised to build a kraal and in fact did so. Record p. 31 (9 - 14), 32 (20 - 25). (Defendant's own evidence) p. 38 (4 - 19) (Defendant's mother).

(b) Chomane came to the Chief, reported the quarrel between Defendant's father and Plaintiff about the kraal that they had built together. The Chief detailed messengers to allocate Plaintiff a site for building his own kraal. (Chief Letlatsa at p. 24 (15 - 20), Plaintiff p. 3 (13 - 16). The witness Kobile in fact accompanied Chomane to witness the allocation which he pointed out and allocated after a second group of messengers had visited the site. (See also the witness Moleoa (p. 22).

(c) Plaintiff built a kraal and occupied the site so allocated from about 1952 until 1974 when Defendant demolished the kraal without reference to any authority, tribal or otherwise. He admits doing so in the following circumstances deposed to by him:

'Q - But you pulled down the kraal and ploughed land when you felt like (it)?

A - Yes.

Q - The very kraal which was built with permission of your father and grandfather?

A - Yes, but on loan.

Q - Is this the procedure of doing things in your village - i.e. to do just what one believes is just to do?

A - Yes.

Q - Is it not correct to go to Courts?

A - To do what is not necessary?'

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In my view the evidence discloses that Plaintiff was in fact allocated the land on terms and in circumstances which entitled him to hold it against Defendant. However, even on the basis that it was a land loan, there is no evidence that Defendant ever sought to terminate it in an appropriate manner. In fact the evidence indicates that he acted as of right and demolished the kraal and erected a fence without reference to any authority. This, it is common cause, he was not entitled to do either at common or customary law without, at least, terminating the loan by notice and giving Plaintiff an opportunity to remove his property.

I accordingly find that Plaintiff was entitled to the right to occupy the property which constituted his kraal as at the date Defendant demolished it and that the latter's conduct in doing so was unlawful.

(c) Did Plaintiff prove with sufficient certainty the dimensions of the land in question in order to permit of the Court making and effective order?

The issues raised under this heading are complex. Clearly in a society in which survey and registration of agricultural land is comparatively unknown, one cannot exact the same standards of accuracy as in a society in which these developments are well known and long established.

Nevertheless, the Court cannot make orders which are incapable of effective implementation. An examination of the Plan (Annexure 'B' to the Further Particulars) and the evidence led before the Court of first instance, leaves me uncertain that any order we may make would be capable of enforcement.

Neither should we on the submission of Plaintiff and the authorities cited to us by both Counsel as to the Customary Law applicable, order the Chief to determine the boundaries of the disputed land. (See Duncan, Sotho Laws and Customs pp. 59, 88, 89 and 91 and see Mpuleng Senkoto v. Moketa Mautsoa (J.C. 139/1971.)

It must be borne in mind that Plaintiff has not applied for relief of the kind outlined in the judgment just cited, but for an ejectment order. To obtain this relief he must establish boundaries with sufficient certainty - although not with anything like absolute certainty - to enable the Court to make an implementable order. This he has failed to do. The judgment of absolution from the instance on claim (a) of the summons was accordingly correctly made by the Court of first instance.

It is clear from the above that the understandable desire on the part of the learned Judge in the High Court to bring finality to this matter by giving judgment in favour of the Defendant was not justified by the evidence. The appeal against this order of the High Court must be upheld.

(d) Did Plaintiff prove the quantum of his damages?

It is clear in the light of the findings recorded under (a) above, that Plaintiff would be entitled to damages due to Defendant's unlawful conduct. This constituted an invasion of Plaintiff's rights of occupation under the agreement arrived at between Defendant's father and himself duly sanctioned by the Chief. However, the Court of first instance found that the damages claimed were not supported 'by any evidence'.

A careful reading of the evidence convinces me that this finding was not justified. In view of the fact that Plaintiff elected to prove his damages by claiming the costs involved in the building of the kraal, it is difficult to conceive of his producing receipts or other documentary proof of the amounts spent. Whilst Plaintiff's evidence in this regard is hardly exact and in certain respects even vague, he did in cross-examination detail the amounts expended and the losses sustained by him. In fact much of his case on damages was established in cross-examination. It is clear that Plaintiff spent R150 on stones and that he paid R40 on labour to bring the stone there and R60 on digging deep holes to embed the stones. Transport of stones from the old kraal, cost him R100 and he paid R100 (R40 + R60) for building the kraal. In addition to that, he alleged that he spent R200 to buy paraffin because he lost his privilege of collecting 'free'

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cow dung from the kraal.

This evidence was - except in respect of the claim for the loss sustained in respect of the cow dung - not challenged by the Defendant in any way and in my opinion there is no basis on which his testimony can be rejected as being too vague or for it not to be accorded proper weight. Having studied the evidence and analysed it, I conclude that Plaintiff has proved that he has sustained damages as follows :

R150 being R100 for 8 pieces of long stone.
R40 being two pieces at R20 per piece.
R10 for one piece.
TOTAL R150

Labour : R40 for bringing the stone there.
R60 for digging holes to embed the stone.
Transport of stone from the old kraal : R100.
Cost of the building of the kraal : R100.
TOTAL R300

I believe, however, that his claim for the loss of the cow dung is too vague for the Court to be able to find what he in fact should receive for damages in this respect.

I accordingly conclude that the Court of first instance as well as the High Court failed to give proper weight to the evidence in regard to the damages sustained by Plaintiff; that he proved his damages on the balance of probability and that he should have been awarded R450 as damages.

The litigation between Plaintiff and Defendant is a continuation of a dispute that originated between Plaintiff and Defendant's father nearly 30 years ago. I believe that the time has arrived to call an end to it. Should this judgment and the award of damages not succeed in doing so, the parties in my view would be well advised to have recourse to the procedure outlined in the Senkoto judgment JC139/1971 in which the Judicial Commissioner recorded the following :

'The judgment of the Local Court is reinstated, but courts cannot give an order to chiefs, and where the

Local Court's judgment purports to give an order to the chieftainship, this court merely makes a request to the Principal Chief of Makhoakhoa to be delineated in terms of the Local Court judgment.'

In the result it is ordered as follows :

(1) The appeal against the judgment of the High Court giving judgment for Defendant succeeds. The judgment of absolution from the instance on the claim for eviction decreed by the court of first instance is reinstated.

(2) The appeal against the decision to refuse to award damages succeeds and the judgment is altered to read : "in respect of claim (b) :

Judgment for Plaintiff as and for damages in the sum of R450 with costs."

(3) Plaintiff is entitled to his costs in the Resident Magistrate's Court, in the High Court and in this Court and it is ordered accordingly.

Steyn A J A

Maisels: President. I agree

Maisels J P

Goldin J A, I agree

Goldin J A

DELIVERED THIS DAY OF MAY 1982.