

CIV/A/5/81

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

TSEKELO LITSEBE

Appellant

V

'MAKHOLU LITSEBE

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 10th day of September, 1982.

The two parties to the dispute were not present on the day of the trial, each for a different reason. However, they each had a spokesman. For the plaintiff it was Mr. Phillip Molantoa and for the Defendant it was Mr. Malebanye Litsebe.

The dispute centres around two fields at Nkokomohi.

The defendant is alleged to have ploughed one of plaintiff's two fields without the latter's consent. He further drove away Ntiki's span when preparing to plough for the plaintiff. It is alleged, further that the plaintiff inherited these fields from her parents as she "was never married. She is still at home." It is also alleged that when plaintiff's mother died, plaintiff was "allocated the fields by chieftainess 'Mamphu who had the right at that time round 1960." One of the fields plaintiff disputed with Mamóorosana and plaintiff is alleged to have won the case in all the courts. Defendant had been living in the village for three (3) years without a complaint against the plaintiff and suddenly he surprises

/everybody

everybody. The plaintiff, it is alleged, "has never been deprived of these fields according to law governing land now." It is finally alleged that defendant has no "rights in the Litsebe family, who died having no son."

Under cross-examination it was stated that the two fields were granted to the plaintiff by chieftainess 'Mamphu as a "confirmation of the inheritance." When questioned by the court it was revealed that chief Koenaesele Masupha is in charge of the two fields. He has not said anything about the matter or given a decision.

Spirit Lekhopa, an old man of about 68 years says that the two fields belonged to the father of the plaintiff, chief Litsebe who had three families. Plaintiff's mother was allocated the two fields by 'Mampeneka Ralebilu Ntjane. The witness says he was deputy to chief Mpitl Mothebesoane. He did not know who gave the defendant the right to plough those fields. He alleges that plaintiff was never married. She was illegitimate. As far as he knew plaintiff has always used the fields and that the defendant was a recent arrival.

In cross-examination he stated, inter alia, that defendant had not been sued by a chief but the owner of the **fields**; that the chief once informed the defendant that he had ploughed a field belonging to another person, but no decision had been made on that issue, that Litsebe's children are dependant on Lekhola; that after plaintiff's mother Lekhola and others "confirmed that the fields belonged to Makholu (plaintiff); that plaintiff is not married to Sankatana Tsekelo, does not represent Litsebe" to his knowledge.

That was the plaintiff's case.

The defendant, through his spokesman Mr. Malebanye says :

/that he

that he has not taken the fields himself but rather that they have been "given to him by Mothebesoane Litsebe" at a general meeting of the family that he should live on the lands which belonged to his father and support all the orphans of chief Koenaesele K. Masupha and he accepted the family's request. He was given rights over the fields. The matter was referred to chieftainess Matholoana Masupha per letter. She accepted it and encouraged the principal chief 'Mamathe. It was not true that the plaintiff was unmarried. She was married to Sankatana Moorosana Masupha. She ngalaed to her maiden home and stayed there until her mother died. She lived with Litsebe's children but was never allocated any fields. At this stage exhibit "B" was handed into court as part of the evidence at the trial. This was a document which was addressed to chief Mpiti Mothebesoane to the effect that Litsebe's family, at a meeting of the family held on 20th January 1974 and in the presence of some twenty (20) members, agreed to the transfer of rights of ownership from Nko Litsebe to Tsekelo Malebanye (Defendant), that the latter should succeed the former as those whose duty it was to revive the family had failed to do so.

Exhibit 'C' is a letter confirming that the defendant succeeds the late chief Litsebe and that he is allotted special earmarks. Exhibit "D" is a letter to chieftainess 'Mamathe before whom chief Koenaesele Masupha placed "their son Tsekelo Litsebe to come and revive chief Litsebe's family." Exhibit "H" is a letter addressed to the chief of Mamathe introducing before him a new "headman Tsekelo Daver Litsebe" and that he had succeeded the "late Litsebe, you will guide him according to the right channels like others."

The witness further stated that plaintiff knew when defendant was allocated the disputed fields.

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Under cross-examination the witness stated that apart from the documents already handed into court as evidence he had no other evidence. The fields were allocated to the defendant by chief Koenaesele Masupha. Before then the fields were ploughed by the plaintiff.

Mpiti Mathe Qesoane. He appointed the defendant to be heir to the late chief. Mafa Litsebe is the late chief's son. Maja's son who was born in the Republic of South Africa refused to succeed his father as chief and so did his brother, Sekhohola, who comes after him also refused and went to live in another village. A family meeting was therefore called and confirmed defendant as the chief to succeed the late chief Litsebe as Sekhohola and the other son, in the presence of the family, at the family meeting, refused to become chiefs. Thus in 1974 defendant was presented to chief Koenaesele Masupha who was represented by Phillip Moloantoa who "accepted that the defendant has succeeded to Maja's rights including his fields and wrote a letter to chieftainess 'Matholoana who affirmed that "Tsekelo has succeeded to these rights." The principal chief as well as the District Administrator did not refuse but accepted the request.

Under cross-examination the witness stated that . the two fields have always belonged to the late chief Mafa and were ploughed by the plaintiff before the defendant was given a right to use them. Plaintiff had been authorised by the witness what to do while she still stayed with the family. Plaintiff used these fields for about ten (10) years. When plaintiff had a dispute over the same fields with 'Mamoorosane the witness was her spokesman. The rights of the defendant's inheritance from the late Litsebe were confirmed by Phillip Moloantoa (cross-examiner). Even the rights to the fields was confirmed by him personally. The cross-examiner had

sent Seboko Selai as his representative to confirm the defendant's rights in the fields. The defendant was given a form "C" for the fields. The fields belonged to Litsebe's family and not to Makholu's family Litsebe had four fields. Two which are not in dispute are ploughed by the defendant. The witness denied that the other two fields belonged to plaintiff. It was the cross-examiner who encouraged chief Koenaesele's office to present the defendant before chieftainess 'Matholoana. The witness reiterated that he was the chief of Mothebesoane's village. He allocated land even though he was not gazetted.

Elia Mokhejane, a middle aged man, informed the court that : the fields in issue belonged to the late chief Litsebe: They never belonged to Makholu. Mafa succeeded Litsebe and at Mafa's death they were given to his wife Mamoorosane Litsebe. After her death the lands were given to the defendant. He inherited them as rights of Litsebe.

He is the chairman of chief Litsebe. According to him, plaintiff is married. He did not know why she was sent to her maiden home. She was not given the right to live off the land.

Under cross-examination he states :

The fields were given to the defendant by the chief and defendant's family, the chief who did so was Mpiti Mothebesoane. Although the chief responsible for the allocation of fields is Koenaesele, chief Mpiti Mothebesoane is only a headman. The fields were used by chieftainess 'Mamphu and on her death, by Malibeo who used them after the death of her husband, chief Litsebe. Maja used the fields after the death of Malibeo. Then Mamoorosane used the fields. Makholu, being illegitimated, depended on the fields. She spent a long time in her family

/She still

She still dependant on the fields.

Chief Mohale Masupha states that :

Plaintiff is the legal wife of Sankatana. She is the daughter-in-law to Mamoorosana.

He knows that bohali was paid. The head at Masupha's in Moorosane's family is Sankatana. On the death of Sankatana he gave plaintiff her husband's mourning cloth but she did not wear it however when the children of Sankatana cut their hair the plaintiff was present.

Under cross-examination he states :

The witness is related to Sankatana. The mother of Sankatana is the second wife of his wife. The eldest son of Sankatana's family is Molomo. Eight (8) cattle were paid for plaintiff's bohali. Plaintiff was now living in her maiden home. She went there in order to give birth to Kholu. She has three children. All children are married. All bohali cattle for these girls was paid to Sankatana. Sankatana was supporting plaintiff at her home.

He had no knowledge concerning the disputed fields.

The witness then positively says that plaintiff wore Sankatana's mourning cloth, but has no knowledge as to whether she has even put it off.

Libeo Molefi simply states that it is true that her sister, the plaintiff, is married at Moorosane's family. She has no rights in Litsebe's family. She finds it surprising that she claims the fields from her father, the defendant, who has succeeded to his father

/She knows

She knows when chief Sankatana died. Plaintiff wore his mourning cloth.

Under cross-examination she states :

She knows the two fields being disputed. After Malibeo died the fields were under the control of chief Mpiti. She is on good terms with plaintiff. She did not know when it was when plaintiff disputed the fields with Mamoorosane. She knows plaintiff to be married. She saw eight (8) head of cattle paid for plaintiff's bohali. Plaintiff did wear Sankatana's mourning cloth.

The judgment of the president of the Local Court is a little confused.—The defendant's defence is referred to as the plaintiff's point of view. It is the plaintiff's evidence that she was never married but defendant's evidence is that the plaintiff was married to Sankatana and that eight bohali cattle were paid. The president has reversed the order. Then the president introduces a totally unknown name and refers to that person (Makhanya Litsebe) as the defendant. Well, in this present matter the defendant is Tsekelo Litsebe. This totally unknown defendant is, according to the president's judgment, supposed to have given evidence. But according to the record of the case there is no such evidence and there was no complaint when the appeal was heard that the record was faulty. I am therefore bound by four corners of the record since the matter before me is an appeal.

The plaintiff is found according to the Local court president's judgment, to have supported her case by attaching the "decision of the Judicial Commissioner" where the same fields were disputed between Mamoorosana Masupha and the plaintiff and apparently absolution from the instance was then granted. All that is reflected is the names of the

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parties and the result of the appeal why the court came to that decision the president in present proceedings did not know. All he could say about the result of that appeal was that the dispute had not come to an end. Nobody had won. So the inclusion of that extract served no legal purpose whatsoever except, perhaps, to confuse the issues before him and appear as though the plaintiff had in fact won the dispute as the cross-examination tended to show.

The learned president came to several conclusions

1. "That the dispute is about fields which cannot be inherited by anybody in this country but one can have rights over them if he has been given them by the chief and the family members." (My underlining).

The first portion is quite correct and in accordance with the law. (See the recent decision in Tsepo Molapo v. Lebotsa & Another, CIV/APN/38/80 dated 13th August, 1982).

However, the ultimate decision is made by the chief of the area or his representative. In this matter the greater part of the defence evidence was devoted solely to establishing this very same principle which the learned president says ought to have been established. Through uncontradicted evidence the defendant was able to establish how he came to believe that he had rightly been allocated the fields and everything which rightly belonged to the late chief Litsebe. The chief of the area, through his representative, allocated the same fields which had been allocated to the late chief Litsebe. He was given a form "C". This fact has not been denied. The family of the late chief had met and agreed that the defendant would come into the family of Litsebe and revive it because those whose responsibility it was to do so have, before the family congregation, refused and elected to live away from their

home. On the other hand, the plaintiff told a cold lie, through her representative, and said she inherited the fields (disputed) from her parents as she "was never married." She also claims that on her mother's death the fields were allocated to her by chieftainess 'Mamphu. But there was no evidence of this which she called. It was said that one of the fields being disputed she had previously disputed with 'Mamoorosana and "won the case in all the courts." This is not quite true at least of the Judicial Commissioner's Court. On this first conclusion of the president's judgment, the defendant passes the test laid down by the learned president himself.

The learned president says that it is not clear that the plaintiff was married. Defendant called evidence which clearly established that plaintiff was married to Sankatana Masupha. To have required more would have been tantamount to placing the onus on the defendant or if the onus was on him to discharge it beyond reasonable doubt and not on a balance of probabilities. Whichever way, he more than discharged the onus on him as required in civil procedure.

The fact that the plaintiff may have been allowed to use the fields while his mother was still alive and shortly thereafter while the family was still persuading the rightful heirs to take their places, did not create rights for her by efflux of time. She is disqualified according to custom particularly because she is married to the Masupha family and according to custom she has no rights in the affairs of Litsebe's family. If she was allotted the fields in her own right and proved that to be so and also proved that she had been emancipated as a minor her argument would be understandable. But all the evidence in the present case point to the fact that she purported to acquire the fields after the

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death of her natural parents as inheritance.

According to the evidence on record the plaintiff has failed hopelessly to discharge the onus on her but the defendant presented a corroborated evidence which had a ring of truth in it.

In my view the proper judgment ought to have been in favour of the defendant.

The matter went to Motjoka Central Court and the defendant's appeal was dismissed in the following words :

"I cannot find where the respondent's (plaintiff) right to use the fields was lessened according to the law governing allocation of land."

In my view that issue did not arise because there was no proof that there had been proper allocation. At first, plaintiff said she had inherited the fields from her parents. That could not be true as it is contrary to the customary law. She is a woman, whether illegitimate or not. By being illegitimate she does not become an exception to the law. As stated by Duncan in his book : SOTHO LAWS & CUSTOMS, 1960 Ed. p. 11 "An illegitimate child cannot be an heir in Sotho customary law." However, it has been established beyond doubt that she is married and belongs to the Masupha family and could therefore not inherit anything in the family of Litsebe. The witnesses for the defendant speak of inheritance. What they mean is that defendant had stepped into the shoes of the late chief Litsebe. He could not have inherited anything as he was from "outside" so to speak. However, there was evidence that the proper allocation had been made in his case in connection with these fields.

The appeal, in my view, ought to have been successful.

There was a further appeal to the Judicial Commissioner's Court. The judgment of that court was very brief :

"I have said we cannot really say the respondent (plaintiff) was confirmed on this land but she was definitely in control of the land or lands and she was left in control by the judgment of the Judicial Commissioner while it may be that the respondent is married to the Masupha's and has no rights in the Litsebe's family. This Court agrees with the Central Court that any decision or intention to remove the lands from the respondent should be brought by compliance with the compliance with the provisions of the Land Act 1973."

It was therefore ordered that the lands should remain with respondent (plaintiff) until they are properly taken away from her in accordance with the provisions of section 13 of Land Act No. 20 of 1973.

Firstly the learned Commissioner concedes that it has not been proved that plaintiff had been confirmed by any chief. But I am of the view he overlooked to say that the defendant had successfully proved to have been so. Secondly, it is not quite clear to me whether the word "control" is used instead of "possession." I believe the learned Commissioner wished to use the word "possession." The control of the fields was in the hands of the chief through his representative in the village. The earlier judgment of the Judicial Commissioner (Exh.A) did not put the plaintiff in control of the lands or fields but put her in possession of them. It must be made clear that the Land Act applicable in this case is not the present one but the one which was in force at the time.

Compliance of the relevant provisions of the land mentioned in the learned Commissioner's judgment is not necessary because the defendant had not been allocated these fields in accordance with the procedure laid down in the same law. The person who had been allocated those fields was the late chief Litsebe.

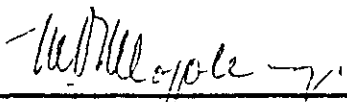
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Those who used the lands after him merely did so with the consent of the family and the chief or his representative in the village and this would only continue when a successor to the late chief was found and the necessary presentations were made to the senior chief. These had been done (Annexures speak for themselves). Then the fields were specifically allocated to the successor to late chief Litsebe precisely because in customary law, they are not inheritable. Plaintiff tendered not such a strong evidence as the defendant.

Before I conclude I wish to point out that there is a provision in the Laws of Lerotholi akin to the pretrial conference Rule in civil trials. This is Part 1 :14(4) which simply states that any dispute amongst the deceased's family over property shall be referred for arbitration to the brothers of the deceased and other persons whose right it is under Basotho law and custom to be consulted. This provision is of considerable importance and it does not seem to me that it was applied in this case. It must not be shouted down. There must be evidence in the future that it was complied with or at least an attempt to do so. It should not be ignored all together.

The answer posed by the Judicial Commissioner when granting the appeal certificate is answered in the affirmative.

In my view the defendant ought to have had judgment entered in his favour at the Local Court. He ought to have won the appeals at the Central and Judicial Commissioner's Courts. It is so ordered. He is awarded costs in all the courts.



J U D G E.

For the Appellant Mr. Masoabi

For the Respondent : In person.