CIV/APN/145/82

IN THE HIGH COURT OF LESOTHO

In the Application of :

SOLOMON M. MORAHANYE Applicant

v

MALIAPENG MAHLOMOLA Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 16th day of June, 1983

This is an application for leave to appeal to the High Court from the Judgment of the Judicial Commissioner who refused leave to appeal.

An account of events is necessary :

In April 1980 the plaintiff Solomon Morahanye sued the defendant Maliapeng Mahlomola and Malebina Motelle(the defendant's mother) for cutting trees from a plantation which plaintiff Solomon alleged he inherited from his forebear Harries. It seems to be agreed that one of defendant Maliapeng's forebears (probably but not necessarily her grandfather Jane or Johny Ntsoeu), did plant those trees. The trees are poplar trees(and not fruit trees) planted originally at any rate, on common chieftainship virgin land near dongas or rivulets, so as not to interfere with arable land. The tree plantation did not form part of Ntsoeu's residential site, though probably not far away from it. In so far as anyone can make sense of the evidence and arguments of the present litigants the dispute has been more or less a continuous one since the nineteen twenties with some half a dozen Judgments produced between persons or parties whose names I sometimes found difficult to relate to the actual litigants.

Be that as it may I have to try to fathom what may have happened over a span of time covering some fifty to sixty years. For this purpose it is essential to go into the legal history of

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the chieftainship, allegiance, land allocation and deprivation, including tree plantations for timber, either individually planted, or planted (or existing) for the benefit of the community, inheritance and removers.

It would seem that the forebear (or one of the forebears) of the plaintiff, a person called Harries was the village head of an area known as Ha Harries. As will be explained later it is not necessary to consider whether he was a chief by heredity, or by a new placing. The defendant's forebears (the Ntsoeu's) were in all probability ordinary subjects but at that time in the same area there was another headman more senior than the Harrieses, one Mokokoana Jonathan who himself was yet under a superior chief. It is not known who of these two superior chiefs or their ascedants permitted the defendant's forebears to plant the trees. The defendant's forebears who planted the trees appear to have owed allegiance to Mokokoana Jonathan, not to the plaintiff's forebear Harries. Mokokoana was subordinate to Chief Jonathan (probably Jonathan Mathealira) of Tsikoane in Leribe District who backed Harries as can be seen from the decision of the Court of the Paramount Chief in Matsieng in 1941 marked Exhibit B.

In those days there was no such thing as gazettment of chiefs sub-chiefs or headmen. There were of course Principal Chiefs of the Territory, other sub-chiefs and headmen of areas not precisely demarcated but placed with the consent of the Principal Chief or the Paramount Chief, (now His Majesty the King). The Principal Chiefs had their sons and these were placed by their fathers over areas of lesser chiefs and headmen(each of whom had his adherents) who quarrelled constantly amongst themselves for power and dominance. The headmen carried on the disputes through their subjects and this is, by and large, how the disputes were manifested in the chiefs courts, the final arbiter being the Court of Paramount Chief. I say the final arbiter because I do not see a single case reported between 1926 and 1953 by the learned Editor of the first volume of H.C.T.L.R. (1926-1953) nor in a volume prepared earlier entitled "Decisions and Review and Appeal cases with Court of the Resident Commissioner of Basutoland etc.." published in 1936,on a dispute remotely resenbling the appeal before me.

On what basis the Paramount Chief's Court resolved the issue is difficult to tell but it will be surprising if that

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Court countermanded the Order of a Principal or Senior Chief, in favour of a lesser chief, even if it be his own son. It is clear from the decision (Exhibit A) that in 1935 Chief Mokokoana Jonathan sent one Lengoato to challenge Harries, and not for the first time, because Mokokoana tried it before, through one Jane Ntsoeu the defendant's grandfather who (or whose forebears) planted or may have the trees. Mokokoana was fined (for contempt) by the Paramount Chief's "Court" three heads of cattle and Lengoato was ordered to get off and he disappeared from the scene. After this decision the homestead of Jane Ntsoeu's, one of the challengers to Harries, was razed (between 1935 and 1941) presumably because Ntsoeu attempted to, yet again, use the trees without recognising Harries as headman. The destruction of huts of a person ordered to be expelled by a chief was common in the old days but was forbidden in 1946 by s.8 Part I Laws of Lerotholi which provides for the necessity of a court order. (See Duncan Sotho Laws and Customs pp 66-67 and 113-114). Since 1967 revocation or derogation from a grant in land has been subject to legislation (The Land(Procedure) Act 1967 and its successors). Ntsoeu sued Harries and the decision (Exhibit B) by the Paramount Chief's Court was that he (Jane Ntsoeu) having refused to recognise Harries as his headman and having been already ordered to remove (he did in fact physically remove to headman Nyakane's) no longer had any right in Harries' domain where the trees were situate. Needless to say the claim of Jane Ntsoeu to the trees continued. I doubt if Harries ever enjoyed uninterrupted control over the plantation: the battle was simply postponed to another day and another generation, sometimes between different parties, contested before a multiplicity of tribunals.

It errupted in 1964, 1966, 1969 and 1973. It is said that in 1964 the defendant's forebear (her father Mahlomola Ntsoeu) obtained a Judgment awarding him the plantation against one Chanke Qaba - and in 1969 yet another Court ordered the defendant's forebear (her father Mahlomola) to lay his hands off the trees. He did not do so and was prosecuted and convicted for contempt. We do not have copies of these Judgments but they are referred to in the appeal of the defendant's father (Mahlomola Ntsoeu) against his conviction for contempt which conviction was quashed in November 1973. I cannot make head or tail of the Judgment of 1966, except to say that it does not seem as if it was an appeal from the 1964 Judgment in which defendant's forebear appears to have been successful. As I see it Chief Albert

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Mokokoana (who may have succeeded his father) tried to wrest the trees from the defendant's father Mahlomola Ntsoeu(Albert who gave evidence in the Court a quo denied this) who withdrew his claim on the ground that his mother Mamahlomola not himself, should have sued Albert Mokokoana.

The trial Court, the Local Court of Tsikoane, under the presidency of C.S. Lekena, Esq., thought that the trees belonged to the person (or his descendants) who planted them. This was the ratio decidendi as far as I can make out. He gave judgment in favour of the descendants of Jane Ntsoeu, i.e. the defendant Maliapeng. According to the authorities trees privately planted on virgin land could be inherited by the heir of the planter, but this was naturally subject to the heir continued residence and allegiance to the chief (Duncan, supra pp 95-97, Part I s.7(7) Laws of Lerotholi; Poulter Family Law and Litigation in Basotho Society p. 248). Sheddick in his studies writes in "Land Tenure in Basutoland" HMSO C.R.S. 13 1954 at 126 that

> "It is clear that titles to trees confer no corresponding titles to the ground on which they stand and that the ultimate public nature of land ownership overrides all other titles to land and to such structures or properties that are located upon it. There is thus no private ownership of trees in the fullest sense of the term in Basutoland, though people may be permitted to enjoy rights to trees for the period of their residence in the area associated with the trees."

I had occasion to discuss Sheddick's views with the late Mapetla CJ in 1974 (after a Judgment concerning a private tree planatation which to all intents and purposes had been abandoned by the heir and later fenced by the Government in its campaign against erosion) and he did not quite agree with Scheddick's comment when he wrote at the same page

> "Sooner or later, however, the chief will appropriate the trees (i.e. those planted by others) partly to demonstrate that the land on which the trees stand is public land and partly to ensure that the family holding the private trees does not continue in possession long enough for the private right in land to become confused with the private right to trees."

The learned late Chief Justice thought private tree plantations stood on the same footing as residential sites (in terms of Part I s.7(7) Laws of Lerotholi) and chiefs powers were very limited.

In an appeal by the plaintiff to the Central Court, under

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the presidency of L.S. Noosi Esq, the Court thought that the defendant's forebears, the Ntsoeus, having been deprived of the trees by the Paramount Chief's Court Judgment and having removed to another headman's jurisdiction, the right to the trees were lost, and the plaintiff (the descendant of Harries) was entitled to them. The Court relied on Maile v Sekhonyana 1963-1966 HCTLR p.67. The Paramount Chief's Court made no finding whether the trees were to be the personal property of the plaintiff or as representative of his subjects, i.e. that he administered the right to use the timber from the trees for the benefit of his community (those who recognise him as headman) but the Court could not in my view have declared him as heir. The trees just fell to be administered by him.

In an appeal by the defendant to the Judicial Commissioner the latter thought that the Central Court was wrong to find for the plaintiff, not necessarily because the defendant's forebears planted the trees though they seem to have done so but on the grounds that the judgment of 1941 by the Paramount Chief's Court (he ignored the 1935 decision by the same court it seems because Ntsoeu was not cited as defendant) was (a) not in accordance with the law as it stood in 1941 and (b) the decision in Maile v Sekhonyana (supra) relied on by the Central Court was a case involving a gazetted headman recognised by the administration whilst the plaintiff (and his predecessors) never were, i.e. were not gazetted and were no more than 'phalas' or village heads (under chief Mokokoana who was gazetted) and held his position only by the licence of the gazetted headman under whose jurisdiction he falls and his gazetted superior. Leihlo v Lenono CIV/A/6/76 dated 27th August 1976 was cited as authority for this proposition. The Judicial Commissioner argued that Ha Harries is not a gazetted area and no Harries was gazetted as a chief or headman, that when the defendants forebear was expelled from Ha Harries and went to live at Nyakane's, the latter was another ungazetted headman, from which it followed that the Ntsoeus (and their descendants) have not lost right to the trees that they have planted.

If Harries in the 1920's was merely a 'phala' and not a headman, either by hereditory rights or by lawful placing, as was the only way to become one in those days though I must include influence or strength of character or muscle, it would be very unlikely for him to have succeeded in depriving Jane Ntsoeu of

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his trees and destroying his homestead and forcing him to move albeit only a short distance away. The Judgments of 1935 and 1941 do not touch upon the actual position of Harries in this respect. What they do is to show that Harries won the day because still a higher chief, viz, the chief of Tsikoane of Leribe district and probably also the Principal Chief of Leribe were on his side who must have placed him over that area, against the wishes of Mokokoana Jonathan. Mokokoana Jonathan's area had been gazetted by High Commissioner's Notice No. 171 of 1939 issued under powers conferred on the Commissioner by the Native Administration Proclamation 1938 (No. 61 of 1938). The learned Judicial Commissioner reasoned that since neither Harries or Nyakane were gazetted in 1939 or indeed subsequently, the deprivation or removal of the Ntsoeu's in 1941 did not have any legal effect from inception so to speak and the defendant was thus entitled to the trees.

It should be noted, however, that very few chiefs or headmen whether placed or hereditory realised the implications of gazettment until the decision of the High Court in 1950 in Molapo v Molapo 1926-1953 HCTLR p. 210, that held that Courts jurisdiction to adjudicate on chieftainship disputes had been ousted by the Notice made under the Proclamation. (See Duncan Sotho Laws and Customs p 49 et seq). From May 1950 until March 1960 Molapo v Molapo supra remained supreme.

Molapo v Molapo has however been somewhat modified by Legislation. The Basutoland (Constitution) Order in Council 1959 ss 70-82(Vol I Laws of Lesotho p.60 et seq) gave the High Court (s.79) power to review the proceedings of the College of Chiefs which body was entrusted to adjudicate on all matters relating to the chieftainship and to recommend to the Paramount Chief, later Motlotlehi, still later His Majesty the King, who would and sometimes would not, approve the appointment. The Basutoland Order 1965 - known as the pre-Independence Constitution (Vol X Laws of Lesotho p.7 et seq) and the Independence Order and Constitution of 1966 (published separately) preserved the powers of the College of Chiefs by s.11 of the 1965 Order and by s.15 of the 1966 Order. The College of Chiefs continued with their task until the Chieftainship Act 1968. The Lesotho Gazettes between 1961 and 1968 are full of "Final Decisions" the most notable being Government Notice 22 of 1964 in Gazette 3413 of 11th February 1964. The last one I was able to trace was Government Notice 89 of 1968

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in the Gazette of 2nd August 1968 a week after the Chieftainship Act 1968 came into force.

The 1968 Chieftainship Act changed all this. The gazettment is now made by the King acting on the advice of the Minister of Interior. The legal position has been summarised in Lebona v The Minister of Interior & another CIV/APN/371 of 1977 dated 3rd April 1978. A village head of an ungazetted area has no right to be declared a chief, sub chief, or headman. The case of Jonathan v Mathealira CIV/T/20/77 dated 22nd September 1977 is a case in point. The applicant Jonathan sought a declaration that he was an "ungazetted chief" simply, it was said, to keep getting his stipend from the Government. He had served under a senior chief (and his father before him) for some thirty years but the application had no chance of success.

This was the legal position when the plaintiff sued in 1980. In 1980 he had no locus standi. He did not "inherit" the trees; they were not his to inherit. What he did "inherit" was the position of a customary or traditional village head of an area in which the trees are situate. He was never recognised by law, but he operates within the larger area of gazetted chiefs (the Mokokoana's) so recognised who change by shere evolution of time, once favouring one village head and at other times favouring another village head the situation being confounded by the administrative authorities, who keep using these traditional village heads or 'phalas' for tax collections and other duties but do not legally recognise their areas through gazettment.

I do not say this is a good or bad thing but what I do say is that the solution to these problems cannot be resolved by the Courts as the law stands at present. The plaintiff cannot disguise his hopeless situation by forming his cause of action under the law of "inheritance" as if the trees were his forebears private property.

The trial Court should therefore have dismissed the plaintiff's claim and declined jurisdiction. The Central Court should have done the same.

Leave to appeal is granted, but on the merits, the appeal by the plaintiff must be dismissed though not quite for the same reasons given by the Judicial Commissioner. In particular, I am not prepared to go as far as saying that the Paramount Chief's

Court acted unlawfully in 1941 because the legal effect of the High Commissioner's Notice of 1939 and subsequent notices became apparent only in 1950. The legislation which followed in 1959 and 1968 gave the Court jurisdiction to entertain only certain disputes and possibly a power of review, but this was not one of such cases.

I have refrained from referring to the parties as appellant and respondent and kept them as plaintiff and defendant for simplicity, convenience, and to avoid confusion since this is in fact the third appeal.

The defendant did not appear in the appeal though she was served. She will get no costs in this Court but is entitled to her costs in all the Courts below.

Will the Registrar please see to it that the defendant gets copy of this Judgment.

CHIEF JUSTICE
16th June, 1983

For Applicant : Adv. Monapathi
For Respondent: No Appearance