

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

FRANSISCA MAMATSELISO MASEELA

Appellant

v

ENEAMOTLATSIMASEELA

Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S.
Cotran on the 28th day of June, 1983

This is an appeal from the decision of the Land Tribunal (Rooney J. sitting with Prof. McClain and Principal Chief L. Majara as assessors) which sustained the objection of Enea Motlatsi Maseela to the grant of a lease over a residential site known as 120 Stadium Area Maseru Reserve applied for by the applicant Fransisca Maseela in terms of s.29 of the Land Act 1979 (Act No.17 of 1979 Gazette No. 41 of 14th December 1979) which came into operation on the 16th June 1980 (G.N. 71 of 1980 published in Gazette No.17 of 23rd May 1980).

The facts, such as they are, can be found in "notes" made by the Chairman and in the Tribunal's decision of the 18th February 1982.

It was common cause that in 1972 the objector Enea donated the above plot of land to his son, since deceased, and set up in motion the necessary steps to transfer the title deeds of the property, issued by the Deeds Registry in his name, to his son Seokho.

Prior to the Land Act 1973 (Act 20 of 1973 which came into force on 15th March 1974) the formalities for transfer of land in urban areas were governed by the Deeds Registry Act 1967 which

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came into force on the 15th May 1967 and the Land(Procedure)Act 1967 which came into force on the 16th June 1967. The form used was Form B, a composite form, found in the Land (Procedure) Act 1967 to which must be attached a letter of consent from the transferor. Before the transfer formalities were completed the objector's son died.

The objector's son Seokho (who was the second son) had a wife and three daughters and they had been living in a house (or one of the houses) on the plot which the objector donated to his son. In fact the objector himself lived there as well.

It was also common cause that after the death of his son the objector substituted the name of his deceased son(the original donee) with the name of the applicant who is his son's wife and therefore daughter-in-law. It was also agreed that the paper formalities were actually completed in her name whether by the endorsement of the original forms to the son or by the completion of new forms we do not really know. We do not know the exact date when this was done.

It must be assumed surely that the objector Enea (and donor) got his title deeds to the site under s.15(3) of the Deeds Registry Act 1967 which had then enjoined an allottee of land to proceed to obtain a registered certificate of title.

When the formal papers were completed in respect of the applicant and daughter-in-law as the new donee she too was enjoined by the Deeds Registry Act to comply with either s.15(2) if the land was undeveloped or s.16(3) if the land was developed i.e. became "immovable property" within the definition of that term in s.2. The sections provide that lodging of the papers for registration shall be made within three months of the date of the certificate by the authority consenting to the transfer. The Registrar had power to extend this period vide s.15(4) in case of undeveloped land and so did the High Court, failing which the certificate was null and void and the land reverted to the "Basotho Nation" and the Registrar had also power to extend the time for the transfer of developed land (immovable property) under s.16(5) failing compliance with which the deed or agreement is null and void "unless otherwise ordered by the Court". This

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latter text is somewhat different from the text of s.15(4) and is clearly intended to give the High Court power to prevent the time limits imposed by law, or as extended by the Registrar, from being abused once development had taken place.

The original consent certificate of the authority was somehow lost or mislaid. The applicant had not lodged the papers with the Registrar of Deeds either in terms of s.15(4) or s.16(5) nor had she invoked the assistance of the High Court to intervene.

In 1974 as I said a new Land Act came into force. This repealed the Land(Procedure) Act 1967. An applicant for a transfer of land had to fill a new form under s.15(1)(b). It is Form D, which was similar to the old Form B in the Land (Procedure) Act 1967. The applicant had however still to comply with the provisions relating to the Deeds Registry Act 1967 which were left intact by s.15(2)(b) of the Land Act 1973.

Nothing however seemed to have happened but the relationship between the objector and the applicant deteriorated and he changed his mind. We do not know when this occurred exactly, but it manifested itself around March 1980. The reasons can be discerned from the record. In short the deceased Seokho had no sons and his widow the applicant wanted to subdivide the plot to sell it but the objector now claims he did not consult his "heir". She succeeded in procuring from the authority Form D which approved the transfer of the site from the objector to her on 13th June 1980. It is not clear whether the consent of the authority was based on the old papers of 1972 or on fresh papers.

On the 16th June 1980, the Land Act 1979, an Act of far reaching consequences became operative and the applicant, in terms of s.29, then applied to the Commissioner of Land for the grant of a lease over the developed plot on the strength of the Form D of the 1973 Act. The objector lodged an adverse claim before the Land Tribunal presumably in terms of s.33(2) of the Act of 1979 against the grant of a lease to the applicant.

The Tribunal became seised of the dispute in terms of s.23 and upheld the objection on the ground that the applicant,

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both in 1972 (under the old papers - Form B of the Land(Procedure) Act 1967) and the new papers (Form D of the Land Act 1973) had been unable to "perfect" her title because she failed to comply with s.15(2) of the Deeds Registry Act 1967 as amended by the Land Act 1979 and was therefore "unable to comply with s.29(1) of the Land Act 1979".

The Tribunal added that its decision did not preclude the applicant from applying to the "Registrar of Deeds or the High Court" for extension of the period within which she must lodge with the Registrar "Form D" granted to her on the 13th June 1980, and that "it remains an open question as to whether the right of occupation and use conferred upon the objector by his title deed have now reverted back to the Basotho Nation". It must be pointed out at once (with all respect to the Land Tribunal) that prior to the 16th June 1980 (for reasons I have already alluded to in this Judgment) the section applicable to the situation was section 16(3) not s.15(2) of the Deeds Registry Act 1967, since the site qualified as "immovable property".

There was no evidence or even a suggestion that Form D, which was issued to the applicant only three days before the Land Act 1979 came into operation was obtained furtively or through chicanery with an eye on the provisions of the new Act or the commencement notice of the Act both of which had been previously published in the gazette. The result that follows is, as it must, be based on that assumption.

The Tribunal (again with respect) apart from a bald statement that the applicant was unable to comply with s.29(1) did not attempt to rationalise the reasons for its decision.

The applicant appealed. The arguments are centred around and involve consideration of ss 28, 29, 75(2)(a), 81 and 82 of the Act. I will quote the relevant provisions :

Section 28:

"(1) Titles to land in urban areas, other than land predominantly used for agricultural purposes, lawfully held by any person on the date of commencement of this act shall be deemed to be converted into leases"

(2)

(3)

/Section 29

Section 29 :

- "(1) Whenever a person to whom section 28(1) applies is desirous of granting or creating any interest in the land held by him or whenever section 30 or 31 applies to that person, he shall produce with his application:
 - (a)
 - (b)
 - (c) any one of the following documents -
 - (i)
 - (ii)
 - (iii) the original(or a certified copy thereof if the original is lost) of a valid certificate of allotment of land or any document(including a certified copy of a Chief's register kept under the Land Act 1973) evidencing any allocation lawfully made;
 - (iv)
 - (v)
 - (vi) any other official document evidencing that the applicant is in lawful occupation of the land."

Section 75 :

- "(1) The Commissioner shall keep comprehensive records of all land to which this Part applies.
- (2) The Commissioner shall cause to be prepared -
 - (a) all leases and licences;
 - (b)
 - (c)
 - (d)
 - (e)
- (3) All documents prepared by the Commissioner under subsection (2) shall, unless otherwise prescribed, be executed by him.
- (4) The Commissioner shall cause all documents referred to in paragraphs (a) to (e) of subsection (2) and requiring registration to be registered.
- (5)
- (6)
- (7) "

Section 81 :

"Notwithstanding any other law the Registrar shall not register any title granted under this Act except upon the application of the Commissioner".

Section 82 :

"Where at the commencement of this Act any land or part thereof has, whether by error or otherwise, been the subject of two or more allocations, the allottee who has used the land and made improvements thereon shall hold title to the land in preference to any allottee who left the land unused and undeveloped".

The various durations of leases, depending on the nature of the land, is found in s.39.

The Tribunal says that applicant/appellant should have complied with the provisions of the Deeds Registry Act 1967 either in 1972, which was possible, or on the 13th June 1980, which was possible, but not feasible or mandatory, for she still had, but for the date of commencement, almost three months grace. Since the 16th June 1980 only the Commissioner of Land can prepare leases in accordance with s.75(2)(a) 75(3), 75(4) and the Registrar of Deeds was deprived of powers to do so except on the application of the Commissioner by virtue of the provisions of s.81.

With respect to Mr. Monapathi s.82 is not applicable here. The site in question was not subject to two or more allocations. The section, I think, is intended to lay a definitive guideline to Courts of law to resolve the rampant abuse of the land allocating authority, be it in an urban or rural area, mostly the latter, when the Courts had been confronted with two or three or even four allocations (Form C) to two three or four persons, as the case may be, emanating from the same land allocating authority. The message of the draftsman here is clear, viz, that there may well be many chits of paper, but it is the chit of the person who has actually used and improved the land that must in the final analysis prevail. Even without such criterion the High Court has been adopting this approach any way.

What the Tribunal failed to appreciate is that the word

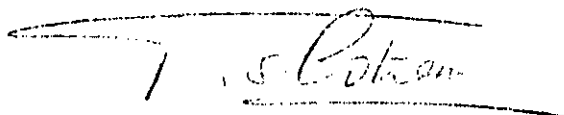
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"title" appearing in section 28, has, apart from the meanings allotted to the concept in s.29, a statutory defined meaning in s.2 which provide, inter alia, that rights in land existing at the commencement of the Act include an "allocation made by the proper authority or the transfer of an allocation consented to by the proper authority" from which it follows that Form D held by the applicant/appellant constituted an automatic right to her being granted a lease adverse to the title deed holder. None of the provisions of s.29 derogate from this title for one has only to look at s.29(1)(c)(iii) and (vi), reproduced supra.

The only issue that the Tribunal was seised of was whether or not the objection to the grant of the lease can be upheld. For reasons which I have endeavoured to give, it cannot be upheld. Obiter notions about the site reverting to the "Basotho Nation" or the validity of the donation either by customary law or civil law are irrelevant both below and here. The Basotho Nation is not involved. The onus for invalidating the lease is a matter outside the Tribunal's functions and indeed this they did recognise, but reversed the onus. This the Tribunal cannot do. It is a function of the High Court in its normal original jurisdiction and it is up to the objector to approach it if he thinks the lease could be annulled on grounds that have nothing to do with the Land Act 1979.

The appeal is allowed and the Tribunal's decision set aside.

The objector/respondent will bear the costs here and before the Tribunal a quo.



CHIEF JUSTICE
28th June 1983

For Appellant : Adv. Monapathi

For Respondent: Mr. Masoabi