CIV/A/25/83

IN THE HIGH COURT OF LESOTHO

In the matter of

SEOTSA LETIMA Appellant

v

MAOTO-A-LIPERE LETIMA Respondent

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice J.L. Kheola on the 31st day of December, 1984.

This is an appeal against the judgment of the Judicial Commissioner delivered on the 22nd July, 1983. The appellant had sued the respondent at Semenanyana Local Court for fifteen bags of mealies or R150-00 as compensation for wrongfully reaping and using appellant's maize from his land. The appellant was successful. The respondent appealed to Thaba-Tseka Central Court. The appeal was dismissed. He appealed to the Judicial Commissioner's Court and he was successful. The appellant is now appealing to this Court under a certificate by the Judicial Commissioner granting the appeal on the ground of a question of law raised by the appellant, namely :

> "The power and privileges of members of Parliament in terms of Regulation 14 of 1965, Part I, Section 5 thereof: Laws of Lesotho Vol. X p. 526:
>
> > "Whether the provisions of the section prohibit service or execution of process only within the precincts of Parliament or it includes even when a member of the Assembly is served with process whilst at his home."

Before I come to the question of law served for the decision of this Court, I shall deal with the facts of this case which appear to be very simple and undisputed. During the 1978/79 season, the appellant ploughed a certain land and sowed maize. He did not only do the hoeing but also took every case for the maize crop till it was ready for

2/ harvest. .....

It is common cause that it was at this stage that the respondent reaped the maize and took it to his house claiming that the land belonged to his mother who was living in the Republic of South Africa. At the trial, the appellant merely said the land was his property but called no witness to prove allocation. The respondent also called no witness to substantiate his claim that the land belonged to his mother and that it was lawfully allocated to her.

In his judgment, the President of Semenanyana Local Court held that "it is clear before this Court that the dispute is over fifteen bags of mealies or R150-00 if converted to money and that the dispute as expounded is not over the land. It is evident that one may dispute what one sowed on a particular land even though this land may no longer belong to one but that the land had been ploughed under certain conditions with the owner, hence one has the right to dispute the produce of such land." The judgment of the Central Court President dismissed the appeal on the ground that the respondent had failed to rebut the evidence of the appellant. He also held that the respondent had failed to prove his defence that the land was allocated to his mother.

The learned Judicial Commissioner categorically disagreed with the judgments of the lower courts on the ground that "one cannot sow crops on the land which is not his, or which the owner has not given him the right to plough and sow". Relying on the case of Karata Chere and 2 Others v. Ruben Matlali, CIV/A/2/75 (unreported), the learned Judicial Commissioner held that the trial court misdirected itself by saying the land was not in dispute and that the dispute was only on the crops. He said "the real point is who is the owner of the land". By dismissing the appeal the learned Judicial Commissioner has, in fact, awarded the fifteen bags of maize to the respondent. Now the question one may ask is what evidence was there to justify the award to the respondent. The respondent merely said the land belonged to his mother but called not a single witness to

3/ substantiate his .....

substatiate his claim after several postponements to enable him to call his witnesses. There was abundant evidence that the appellant had sowed the maize on the land and that he also said the land was his property. He called his wife who testified that the land was hers and that the respondent reaped her maize.

Mr. Khauoe, counsel for the appellant before this Court, argued that the learned Judicial Commissioner had misapplied the rules embodied in the case of Chere v. Matlali, supra, in that, in that case there had been judgments and decisions before the dispute which ended in the appeal in the High Court of which one decision determined the ownership of the land. In the present case, so he submits, there has been no decision or judgment by either a court of law or an administrative tribunal which determined the ownership of the land in dispute. In Chere v. Matlali, Cotran, A.C.J. (as he then was) said at page three of the judgment,

> "I am afraid I have little sympathy with the reasoning of the Judicial Commissioner. It is in fact, a negation of the elimination of Paballo rule and an invitation to anarchy. The real point is who is the owner of the land, and this has been decided in 1959, by the admistrative decision referred to earlier. Certainly if a person bona fide sows another person's land he may be allowed to reap and keep the crop, but I see no bona fide in Matlali's action at all. He had no claim of right. He has been flouting administrative and Courts' decisions with impunity."

I agree with Mr. Khauoe that the facts in Chere's case can be distinguished from the facts of the present case. We are here dealing with a case in which the respondent produced no copy of judgment of any tribunal which awarded the land to him. He has no proof of lawful allocation. On what basis should he be allowed to reap where he has not sown? On the other hand the appellant attempted to prove that he was a bona fide occupier of the land by showing that he had been using the land. A copy of judgment in C.R. 44/79 shows that as soon as the respondent ploughed the land he was criminally charged although he was acquitted. But that criminal charge tends to show that he (respondent) had not

4/ been using the ....

been using the land before. I think the learned Judicial Commissioner overlooked very important points in Chere's case, supra. The first point is that a person can sow on a land because he is the owner of such land. The second point is that he may sow on the land because his a bona fide occupier of such land. The judgements of the local and central courts appear to have been based on the second point that the appellant was a bona fide occupier, Unfortunately there was very little evidence to support this view except that there was some evidence that the appellant had been using the land. It was, however, not clear for how long he had been using it without disturbance from the respondent.

Mr. Khauoe has rightly submitted that if this Honourable Court is to hold the same view as the learned Judicial Commissioner on ownership of the land and regard being had to the fact that neither the appellant nor the respondent had established his claim of right on the said land, the only just and correct judgment would be one of absolution from the instance. I agree. Where the plaintiff's evidence is not rejected but is insufficient to discharge onus of proof the proper judgment is absolution (Oliver's Transport v. Divisional Council, Worcester, 1950(4) S.A. 537(C)). In the present case the learned Judicial Commissioner ought to have found that the appellant as well as the respondent had produced insufficient evidence to discharge the onus of proof on ownership of the land and ordered absolution from the instance. The appellant's evidence that he is a bona fide occupier was also insufficient to discharge the onus of proof.

For the reasons stated above, I have come to the conclusion that the appeal must succeed; the judgment of the Judicial Commissioner is set aside and stubstituted with the order of absolution from the instance. There is no order as to costs.

With regard to the question of law reserved by the learned Judicial Commissioner for the decision of this Court I think the answer is that the prohibition applies only to the process served within the precincts of Partliament.

5/ Section 5 of the .....

Section 5 of the Parliament of Basutoland (Powers and Privileges) Regulations No. 14 of 1965 reads as follows:

> "No process issued by a court in exercising its jurisdiction shall be served or executed within the precincts of Parliament while either House of Parliament is sitting or through the President of the Senate, or officer of the Senate, or through the Speaker, or officer of the Assembly, as the case may be".
>
> (My underlining)

There can be no doubt that if a member of Parliament goes to his home while either House of Parliament is still sitting, service of court process upon him at his home is proper service. The privilege can be enjoyed by a member of Parliament only when he is within the precincts of Parliament while either House of Parliament is sitting. (Mohale v. The Minister of Interior CIV/APN/208/80, unreported).

J.L. KHEOLA
ACTING JUDGE.

31st December, 1984.

For Appellant : Mr. Khauoe
For Respondent : - -