C. of A. (CIV) No. 11 of 1983

IN THE LESOTHO COURT OF APPEAL

In the Application of :

MAMPOI LETSOELA	1st Applicant
RALIPOLI LETSOELA	2nd Applicant

and

PAULOSI LETSOELA	Respondent

HELD AT MASERU

Coram:

MAISELS, P
VAN WINSEN, J.A.
SCHREINER, A.J.A.

J U D G M E N T

Van Winsen, J.A.

Applicants apply in terms of Section 17 of the Appeal Court Act 1978 for leave to appeal against the judgment of the Magistrate, Mr. G. Sennane, in the Subordinate Court for the District of Berea granting in respondent's favour the following prayers, with costs, viz.:

(1) a declaration that a certain plantation situate at Khomokhoana river in the area of his headmanship belongs to him (respondent)

(2) an interdict restraining applicants from cutting and removing any trees from the said plantation

(3) damages in the sum of M1,000.00

An appeal to the High Court against the judgment failed.

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The salient facts in the dispute are succinctly set out in the trial Magistrate's judgment and do not require full restatement. Suffice to say that the dispute between the parties related to a single plantation which respondent (to whom I shall refer in the judgment as plaintiff) testified had been planted with trees by his late mother and which he had inherited from her after the death of his father in 1945.

Applicants (to whom I shall refer in the judgment as defendants) made the case that plaintiff's late mother had never been allocated the plantation in dispute by her husband, Chief Potfol Letsoela. First defendant claimed that the planatation belonged to her. In this claim she was supported by the evidence of second defendant and by that of the witness Mamoifo Letsoela.

There are a number of other factual disputes between the parties. The first of these relate to the question of whether plaintiff, as he testifies, was in complete control of the disputed plantation from 1948 to 1971 during which time he claims to have sold or made gifts of trees from the plantation to different people without let or hindrance from defendants who never during that period questioned his right to act as he did. Defendants claim, on the contrary, that the control which plaintiff exercised over the plantation was as agent for first defendant. Subsequently the latter withdrew the authority because she claimed it was being abused by plaintiff who, she said, exploited the plantation in his own interests.

While it is common cause that a large number of trees in the

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disputed area were cut down in 1971, the circumstances under which this took place and the participants in the cutting are in dispute as well as the question on whether the plantation in which the cutting took place is in fact the area claimed by plaintiff. The quantum of damages claimed for the cutting down is also in issue.

In the penultimate paragraph of the judgment the trial Magistrate remarked as follows:

> "I have seen all the witnesses in this case and was able to study their demeanour at the time they were giving their evidence. On a balance of probabilities I was able to form the opinion that the evidence given by the witnesses in favour of the plaintiff was much stronger than that given in favour of the defendants".

In a statement made by him in terms of Rule 3(1) of Order No. XXIX the Magistrate dealt in greater detail with specific witnesses called by plaintiff and the credence to be attached to their evidence. They apparently impressed him as being truthful witnesses and he comments favourably on their demeanour.

It is apparent from this brief summary of the issues that they constitute disputes as to facts, the resolution of which turn principally upon the credibility of the witnesses as assessed by the trial Court and on the probabilities of the case.

Section 17 of the Court of Appeal Act 1978 provides that:

> "Any person aggrieved by any judgment of the High Court in its civil appellate jurisdiction may appeal to this Court (i.e. the Court of Appeal) with the leave of the Court ..... on any ground of appeal which involves a question of law but not a question of fact".

It is not in dispute that the effect of this section is to limit appeal in the circumstances of the present matter in issues to

law only. It is clear that all the issues outlined above are issues of fact. Mr. Maqutu, who appears for the applicant, contended that the ground of appeal on which he proposed to base his appeal, if he is accorded leave by this Court to proceed, is that no reasonable Court could, on the evidence before the trial Court have come to the conclusion which it did and that this constitutes an issue of law and not of fact. This contention has the support of such cases as Commissioner for Inland Revenue v Paul 1956(3) SA 335(A) at p.340 and Goodrich v Commissioner for Inland Revnue 1959(3) SA 523(A) at p.527.

The application for leave to appeal can only succeed if this Court were satisfied that the applicant has a reasonable chance of persuading a Court of Appeal that no reasonable Court could have come to the conclusion arrived at by the trial Court. In my view there is no reasonable chance of applicant being able to persuade a Court of Appeal to that effect. The decision of the trial Court rested upon its findings on the credibility of the various witnesses and upon a consideration of the relevant probabilities.

No ground has been made out for the contention that no reasonable Court could have accepted the evidence of the witnesses called on behalf of the plaintiff in respect of the various contested issues set out earlier in this judgment or that no reasonable Court could have been swayed by the probabilities in coming to the conclusion arrived at by the trial Court. The presiding Magistrate followed the recognized methods in determining the credibility of the witnesses. He had ample opportunity, thanks to Mr. Maqutu's extended cross-examination

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of plaintiff's witnesses, to observe their demeanour in the witness-box and to draw conclusions as to their credibility. Of course, there were contradictions between the evidence of some of plaintiff's witnesses and in some cases these witnesses contradicted themselves but the trial Magistrate was not unaware of this fact. Nor did he overlook the necessity of exercising caution when weighing the evidence of members of the plaintiff's family. It is inherent in a case of this nature that close family ties could exist between witnesses testifying on behalf of the respective parties but the trial Court correctly concluded that such ties did not per se deprive the witnesses' evidence of credence.

The probabilities were correctly accepted as playing a part in the decision of the case. The undisturbed control which plaintiff for many long years exercised over the plantation in question and the unlikelihood that first defendant would, had it been her ground, have permitted the plantation to be ravished by the cutting down of over 7,000 trees during a rampage by a large number of people invited to assist in this work over a period of three days, are probabilities which strongly support the findings of the trial Court. If there could before this raid have been any doubt about the geographical position or other identity features related to this land - there was in any event adequate evidence on these issues - it was clearly set at rest by the raid on the plantation and the circumstances attendant thereon.

In the light of the above considerations I have no doubt that applicant's chances of persuading an Appeal Court that the trial Court

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acted in a way in which no Court could reasonably have done are so slender as to be practically non-existent.

Leave to appeal must accordingly be and is refused with costs.

L. DE V. VAN WINSEN
Judge of Appeal

I agree

I.A. MAISELS
President

I agree

W.H.R. SCHREINER
Acting Judge of Appeal

Delivered on this 27th day of April 1984 at MASERU.

For Applicants : Mr. Matsau

For Respondent : Mr. Maqutu