

IN THE HIGH COURT OF LESOTHO

In the matter of .

THAPELO MATSOSO

Applicant

V

MOLATO PHATLA

Respondent

J U D G M E N T

Delivered by the Hon. Acting Judge Mr. J.L. Kheola
on the 9th day of April, 1984.

This is an application in terms of Section 28(3) of Central and Local Courts Proclamation No. 62 of 1938 for leave to appeal against judgment of the Judicial Commissioner of the 1st April, 1980 under case number J.C. 278/79. The Judicial Commissioner has issued a certificate in which he held that this was not a fit case for appeal to the High Court and leave to appeal was not granted.

The onus is on the Applicant to show that he has prospects of success in the Appeal. The matter was argued before me on the 28th March, 1984.

Mr. Monaphathi appeared for the Applicant while Mr. Phakoana appeared for the Respondent. Before I consider their submissions I wish to give a short history of the dispute over the land in question.

On the 13th September, 1968 the Applicant sued the

/Respondent

Respondent in Mapoteng Local Court under case number CC 165/68. The president of that Court held that it did not appear as if there had been any allocation made by the chief to the parties and the case was remitted to the chief to make his decision. The chief of the area invited the parties to appear before him on the 20th September, 1968. The Applicant did not appear before the chief on that day but went to the land and ploughed it at night on the 20th September, 1968. He was charged with "ploughing a land without negotiating with the chief." He was found guilty and sentenced to two months' imprisonment conditionally suspended. He had pleaded guilty to the charge.

The Applicant again sued the Respondent at Mapoteng Local Court under case number CC 83/69 which ended case number CC 83/69 which ended at the Judicial Commissioner's Court as case number J.C. 213/69. The case was sent back to Mapoteng Local Court because the Court President had not conducted an inspection in loco in order to ascertain the identity of the land in dispute.

The case started de novo under case number CC 73/73. It went as far as Motjoka Central Court under case number CC 70/73, and it was again sent back to Mapoteng Local Court because the Applicant had not attended the inspection in loco.

On the 5th March, 1974 the case again started and went as far as the Judicial Commissioner's Court. For some reason which is not clear from the papers the Judicial Commissioner ordered that "the case be remitted to Motjoka

/Central

Central Court for retrial. The appellant to be the plaintiff and the Respondent to be the Defendant. The land to remain with Respondent as it was before 6th May, 1969 up to this stage each party to bear its own costs."

This order was complied with and the case started at Motjoka Central Court under case number CC 37/79 and judgment was entered in favour of the present Respondent. The appeal was lodged to the Judicial Commissioner's Court under case number J.C. 278/79 in the learned Judicial Commissioner came to the conclusion that the parties had not been good in their cross-examination and that the trial Court had believed the Respondent's side. He concluded that he could not say that the lower Court had misdirected itself and dismissed the appeal with costs. It is against this judgment that the Applicant seeks leave to appeal.

At the trial the Applicant gave evidence that this land is situated at the reeds at a place called Lehlakeng. It originally belonged to Matsoso who is the paternal grandfather of the Applicant. After his (Applicant's) marriage the senior daughter-in-law of Matsoso, one 'Mamochatso, convened a meeting of members of Matsoso family and informed them that she had decided to allocate this land to the Applicant. Members of the family agreed to the gift. The matter was taken to Headman Sekheche and finally to chief Tabola who approved what Mamochatso had done and he (as chief of the area) allocated the land to the Applicant.

/The Applicant

The Applicant says that Mosala who is the eldest son of 'Mamochatso, was present when his mother made the gift but he never objected. Pheta was also present but he never made any objection.

Ratebane Mafoso (PW.1) was a bugle in the village at the relevant time. He says that after the family had decided that the land should be given to the plaintiff he was asked to take plaintiff and Mosala to chief Tabola who approved what the family had done and instructed one Moji to go and allocate the land to the plaintiff. A portion of the land was given to Mosala.

The evidence of the plaintiff is confirmed by Phetela Nomo (PW.2), Mafenekha Makoaba (PW.3) and Lekunutu Makopotsa (PW.4) who testified that they were present at the family meeting at which 'Mamochatso gave the plaintiff the land in dispute.

The Applicant handed in as exhibits a number of extracts from the previous proceedings when the case was being sent back to start de novo. He did this because some of the witnesses, Mosala Matsoso and Sekheche Matsoso, are late. The extracts were marked Exh.A, B, C, D, E and F. He also intended to show some contradictions in their evidence.

In terms of section 20 of the Central and Local Courts Proclamation No. 62 of 1938 the Respondent authorized one Thamahane Phahla to represent him at the trial. The Central Court President approved that representation and Thamahane

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gave evidence to the effect that the land in question was allocated to his younger brother Pheta by chief Nkutu. He says that it was during Kalzer's War (First World War) when the land was allocated to Pheta. It was then a fallow land and Pheta had to remove some stones and some other things in order to cultivate the land. After the death of Pheta and his wives their orphans were taken to chieftainess 'Mathebe so that provision could be made for them during their minority. Chief Mitchell was then acting on behalf of chieftainess 'Mathebe allowed the guardian to use the late Pheta's lands to bring up the orphans. The arrangement worked smoothly until September 1968 when the plaintiff ploughed this land at night. He says that the Defendant does not claim this land for himself but as guardian of Pheta's orphans.

Chief Mitchell Tabola Peete (D.W.1) testified that he came to know that the land in dispute belongs to Pheta when Molato had taken Pheta's orphans to chieftainess 'Mathebe in order that they could be allowed to use the land until they reached the age of majority. Chieftainess 'Mathebe accepted this and instructed one Libenyane Maluke (D.W.2) to go and inspect the lands in question. He says that after he had succeeded chieftainess 'Mathebe as chief of the area there was a dispute between the Applicant and Molato Phahla. His decision awarded the land to Molato Pheta. He does not know when Pheta was allocated this land.

Libenyane Maluke (D.W.2) confirmed that chieftainess 'Mathebe ordered that the orphans of Pheta should be brought

up on those lands and that when they reached the age of majority they should be brought to him for confirmation on those lands. He does not know when the land was allocated to Pheta but he only saw when Pheta was using the land.

Moeketsi Setjeo (D.W.3) says that he assisted Pheta when they removed stones from the fallow land before it was ploughed.

Mr. Monaphathi has submitted that the evidence of Thamahane Phahla amounts to giving evidence by representation because the Defendant did not give evidence. Section 10 of Basuto Courts (Practice and Procedure) Rules - Government No. 21 of 1961 provides that no person whatsoever shall appear and act for any witness. I have carefully read the evidence of Thamahane Phahla and found nothing to suggest that he was giving evidence on behalf of the Defendant. The facts he deposed to were within his personal knowledge. I do not think that the mere fact that the Defendant has not given evidence makes the proceedings a nullity because in some cases the plaintiff or Defendant may have no personal knowledge such as where his property has been stolen in his absence. In such cases he conducts his case just like a prosecutor in a Criminal case. He calls witnesses who saw when the Defendant stole his property and leads them. In the present case there is evidence that the Defendant is the guardian of his brother's orphans and that the land was originally allocated to his brother, Pheta.

The Applicant is basing his claim on a donation made
/to him

to him by one 'Mamochatso Matsoso who is the senior daughter-in-law of Matsoso. He has called a number of witnesses who have confirmed his story but all his witnesses have not stated the time when the Applicant was allocated this land. In my view, time is of essence in this dispute because it seems that the dispute started in September 1968 under case number CC 165/68 when the Court President of Mapoteng Local Court ruled that it appeared that there had been no proper allocation made by the chief to any of the parties. He referred the matter back to the chief to make his decision. The Applicant did not go to the chief but ploughed the land at night without the chief's authority. He was charged and convicted. If prior to September, 1968 the land was being used by the Applicant and that he had been in undisturbed possession of the land the onus is on him to prove these points. He has led no evidence at all to show what the position was prior to 1968. We do not know when it was that chief Tabola allocated this land to him.

On the other hand the Respondent has led evidence that the land was allocated to Pheta during Kaizer's War (First World War). His evidence and that of his witnesses is that when he went to the chief to introduce the orphans of Pheta he was not claiming the land for himself but was seeking some provision for the minor orphans. Mr. Monaphathi has contended that because the Defendant has not given the ages of the orphans this claim is fraudulent because the so called orphans may have long reached age of majority. There is evidence in the papers that the orphans were minors

/when

when they were introduced to the chief of the area. If it is the plaintiff's case that they were not minors the onus is on him to prove that they were not. None of his witnesses ever refuted the allegation that Pheta's children were minors when he and his wife died.

The evidence of chief Mitchell Tabola Peete is challenged on the ground that it is hearsay because he says he does not know when the land was allocated to Pheta, nor was he chief of the area at the time the allocation is alleged to have been made. I disagree. Chief Mitchell made it quite clear that he did not know anything about the allocation of this land to Pheta but only came to know about it when Molato came to the chief and introduced the orphans in terms of section 7(5) (a) of the Laws of Leretholi.

The evidence of Libenyane Maluke (D.W.2) is also challenged on the same ground that he does not know when the allocation was done. I agree but he has stated that Pheta had been using the land before his death.

Mr. Phakoana submitted that the evidence of the Applicant and his witnesses merely shows allocation of a land that had already been ploughed. The evidence of the Respondent shows some originality in that he says stones were removed from the land and certain herbs and plants had to be cleared to prepare for the ploughing of the land. That the land was fallow land when it was allocated to Pheta is confirmed by Moeketsi Setjoe (D.W.3) who testified that he was invited by Pheta to go and help him in clearing the land before it

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was ploughed. This evidence shows that Pheta was the first person to be allocated the land in dispute.

The judgment of the trial Court has been criticized on the ground that too much reliance was made on the evidence of chief Mitchell Tabola Peete. The Court President concluded his judgment by saying, "After the Court has weighed the evidence of both parties, it has come to the conclusion that the evidence includes that of chief Mitchell T. N. Peete who is the litigants' chief whom the Court regards as having the best information as to whom this land lawfully belongs." I do not think that the evidence of chief Mitchell was very material as to the allocation to Pheta of this land. He only came to know that the land belonged to Pheta when Pheta's orphans were brought to chieftainness 'Mathebe. I do not see how the trial Court would have heavily relied on the evidence of chief Mitchell because he did not know anything about the allocation.

For the reasons I have stated above I do not think that it can be said that the trial Court misdirected itself where it believed the Defendant's story and dismissed the plaintiff's case. The onus was on the plaintiff to prove on a balance of probabilities that the land was allocated to him. In my view he failed to discharge the onus.

The application for leave to appeal against the judgment of the Judicial Commissioner in case number J.C.

J.C. 278/79 is refused. Costs are awarded to the Respondent.

J. H. K. K. K.
ACTING JUDGE.

9th April, 1984.

For the Applicant : Mr. Monaphathi

For the Respondent: Mr. Phakoana