

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

KAIZER MAJORO

Appellant

v.

KOMANE SEBAPO

Respondent

J U D G M E N T

Delivered by the Hon. Acting Chief Justice Mr. Justice
M.P. Mofokeng on the 30th April, 1980

This is an appeal from the Judicial Commissioner's Court in which the respondent sued the appellant that the latter had unlawfully ploughed land lawfully allocated to him. In this judgment the respondent and the appellant shall, for convenience, be referred to simply as the plaintiff and the defendant, respectively.

The pleadings, as usual, were brief and to the point. The plaintiff alleged that the defendant was ploughing his land which had been lawfully allocated to him (i.e. the plaintiff). He had ploughed the said land but the defendant had planted it by force. The defendant denied that he ploughed plaintiff's land. He averred that the land in question had belonged to his parents, i.e. Tokonye Mosala and his wife 'Makepolana to whom he was given and whom he came to regard as such.

Following the simple principle of 'he who asserts must prove' the president ruled that the onus lay on the plaintiff. (See Timothy Macheli & Another v Litanini Sesiu, CIV/A/4/76

(unreported) at p. 4).

The plaintiff gave evidence and briefly stated that the land in question was lawfully allocated to him by the Chief of Mapoteng assisted by his "Advisory Committee". He further stated that the same land had previously belonged to an owner who was childless and had since died. Before he applied and was allocated the land, it had reverted to the chieftainship. He then handed into Court, as evidence, a document styled Form "C" which he alleged gave him title to the said land. It was marked "A".

When asked questions by the defendant he stated that the owner of the land had no child and that the land was ploughed by 'Makepolana Mosala and not by defendant. He said that the defendant had ploughed that land by force because it did not belong to him. When questioned by the Court he said he had applied for this land to the Chief as it was available. He stated that 'Makepolana Mosala died in 1975. Finally he said he did not know how she was related to the defendant.

Mokhalo Motsopa stated that he assumed administrative duties at Mapoteng in August 1976. During his third month in office (that would be either October or November, depending on how he computed his time) the defendant produced a document styled Form "A" which one fills when one applies for a field. This form indicated that he had applied for a field at "Koete Mapoteng". The application was placed before the Advisory Committee. He had found this Committee in existence when he assumed duties. The Committee turned down the defendant's application. He says that he then advised the defendant to come along with his Chief who would explain how he, the defendant, lived. There was no response. He then wrote
/direct to.....

direct to principal chief enquiring whether the defendant had any right to apply for land. This was on the 7th October 1976. There was no reply. He then, together with his Committee went to the principal chief to discuss "land which included this particular one". He continued: "The Chief did not give us an answer and we returned home and proceeded with the duty of allocating lands. Before I could allocated this (these?) lands, I issued an official letter to the defendant to give him opportunity to raise an objection but he took no action and after 30 days the Committee advised me to allocate the lands as there was no objection." (My underlining). Such a letter does not form part of the evidence as it was never produced.

When questioned by the defendant, this witness stated that the defendant came to him on numerous occasions carrying Form "A". He said he placed his date-stamp on it and informed him to desist from ploughing the land he had applied for. He had informed defendant's principal chief but the latter did not reply. He also called on him without success. When there was no reply from the principal chief both when he had informed him that the defendant had applied for a field and when he went to him but he said nothing about that particular field, he "allocated the land because I have no objection". When his authority was challenged that he had not been gazetted as the chief of Mapoteng he simply answered: "You have not (the) right to demand proof of my gazettelement". The witness conceded that the principal chief did call on him and inquired concerning the fields of Tokonye i.e. 'Makepolana's husband. On being asked by the Court, he stated that the defendant was no relation of Tokonye and that

/defendant was.....

defendant was ploughing the land which was not his. He also stated that the Advisory Committee in Mapoteng was made up of two different committees.

Sechaba Mosala merely stated that after the death of 'Makepolana her lands reverted to the Principal Chief. He further mentioned that 'Makepolana was helped by defendant who was her nephew. Finally, the defendant had not been appointed by the Mosala family to inherit 'Makepolana's estate. When questioned by the court he stated that he had heard that 'Makepolana's land had been allocated to the plaintiff. Beside his own fields, the defendant also used to plough 'Makepolans's fields.

Laurenti Mabusela briefly stated that the land in dispute belonged to the plaintiff because it had been allocated to him "after it had been established that it belonged to the late 'Makepolane Mosala". He said that the land was allocated during 1977 and that it had reverted to the chief in 1976. He was a member of the Advisory Committee.

Tooane Foso says he was a caretaker of the area and was responsible to the Chief of Mapoteng. He remembered that the Advisory Committee discussed with him the fields in dispute.

That was briefly the plaintiff's case.

The defendant gave evidence. He briefly stated that he lived by ploughing the land in question with his parents. He gave a brief history of when and by whom it was allocated to his father. His father died and in 1966 his mother died. In accordance with the customary law, he was introduced to the principal chief. He alleged that he was accepted as the successor to all property. He alleges this was done in writing.

/Thereafter.....

Thereafter he filled in a Form "A" which was "presented before the Chief of Mapoteng as the field was in his area". When he wanted to notify the Advisory Committee, the Chief told him that he would write to his Chief and would also notify him. He further said that his committee was very busy. Defendant waited in vain for the letter to his chief. He was then called by the principal chief at Bela-Bela who wanted to know the number of fields 'Makepolane had. He said the defendant would have to surrender some of the lands he had specified. In his own words: "I selected the field at "koete (one in dispute) and I surrendered the other two for allocation to those who did not have fields and he thanked me". He says he followed the correct procedure because, as he puts it, "one should be confirmed by the chief after one has made a formal application for his parents' fields". He further states that the chief of Mapoteng says that even when he personally went to the principal chief he did not get a reply because, as he says, the principal chief knew that "he had allocated me the land as requested". He says he and his chief were never called to the fields. He had subpoenaed the principal chief but the latter died before he could testify.

On being questioned by the plaintiff he stated that he was related to the Mosala "because I was awarded the Mosalas during the lifetime of our predecessors". He was their nephew. He stated that the principal chief has authority to allocate land in Mapoteng through his representative". He had no Form "C". When questioned by the court he stated that he was allocated land by the principal chief and not the chief of Mapoteng. When he completed Form "A" he had not been allocated the land.

Morena Sebili.....

Morena Sebili was officially acting in the administrative office of the late chief Makhabane. He had personal knowledge of the dispute before court. He was invited by the late Chief Makhabane together with the latter's representative at Mapoteng - Mokhali - to discuss the question of the land in dispute. However, Motsopa arrived the following day and "the chief reminded him that he had instructed him that the field belonging to late 'Makepolana should be allocated to Kaizer Majoro" (i.e. defendant). The final decision was to rest with the principal chief. Motsopa did not comply with the request of the principal chief as expressed in exhibit 'E' & 'F'. The witness stated that Motsopa had "no authority to allocate land" at Mapoteng. This, he said, was clearly borne by exhibit "G" in which the principal chief acknowledges a letter in which Motsopa had requested to allocate sites on the field of...the late 'Masebueng Peete". The witness finally stated that where the principal chief was gazetted "he used to write a letter for allocation of land in that area".

When questioned by the court he stated inter alia that the principal chief's committee at Mapoteng worked hand in hand with his representative but the final decision was made by the principal chief. He was present when the late principal chief allocated the land to the defendant. Although plaintiff is purported to have been allocated the land by Motsopa on 16th February 1977 the correspondence between the principal chief and Motsopa started on 2nd December, 1977. The principal chief had warned Motsopa to come and prepare a Form "C" for the defendant. This was done "because Mokhali has no authority to allocate land without the decision of the chief" (i.e. principal chief) "the forms are sent to Bela-Bela

/for completion.....

for completion by the chief."

That was briefly the defendant's case.

By way of a prelude, Mr. Maqutu submitted that the appeal was ~~not~~ properly before this court because the Judicial Commissioner's certificate did not comply with Section 28(3) (b) of the Central and Local Courts Proclamation 62 of 1938 in that he did not certify that it was a fit and proper case for ~~an~~ ^{appeal} In support of this submission I was referred to two rulings made by my brother Rooney J. in the civil appeal cases Tsoloane Mohale v M. Sekake, (CIV/A/13/78) and Mothea v Mothea (CIV/APN/33/81) respectively in which he ordered that the matters were to be referred to the Judicial Commissioner to "consider the grant of a certificate in terms of Section 28 of the Central and Local Courts Proclamation 62 of 1938 as soon as possible". There are no reasons given why such orders were made. In the present case I am perfectly satisfied that the Judicial Commissioner has satisfied the requirements of the above-mentioned section. It is not so much the wording as the substance of what is contained in the certificate for leave to appeal which matters.

The issue to be decided by the trial court was, in my view, a simple one. The court of First instance had to decide as to whom the land in dispute had been lawfully allocated. The onus was on the plaintiff to satisfy the court that his allocation had been a lawful one. It is true that he produced a document called Form "C". The possession of such a document is prima facie evidence that the land has been allocated to the person named therein but it is not per se conclusive proof that the allocation was effected in accordance with the law. However when that document or its source is challenged, the person who bears the onus has to discharge that onus. In this

/particular.....

particular case the author of the Form "C" gave evidence and was challenged to show that he had the authority to do what he purportedly did. Instead of the plaintiff proving that Motsopa had the authority to allocate the land to him, he did not do so, but just glossed over such a vital question. If Motsopa did not have the authority to allocate land then the Form "C" he issued was surely invalid. The challenge by the defendant that Motsopa had no authority to allocate land is supported by his witness Morena Sebili whose evidence was not challenged at all by the plaintiff.

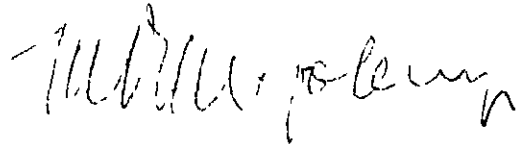
The approach adopted by Motsopa and his Committee was very peculiar indeed. If it is correct that they were solely responsible for the allocation of land in their area, then they must have known that the land formerly belonging to the late 'Makepolana Mosala had not been allocated to the defendant. Indeed, as shown earlier, the defendant's application had been turned down. However, they then engage in a lot of correspondence with the principal chief about the same land. They adopt a procedure which can only be followed where an individual had previously been lawfully allocated land and now has to be deprived of the same piece of land. This is a concession on the part of Motsopa that defendant had previously been lawfully allocated the land in dispute. Unfortunately, since Motsopa has not been shown to have possessed the authority to allocate land, he cannot deprive anybody of the right he enjoys by virtue of lawful occupation.

At the conclusion of all the evidence, and the onus being of the plaintiff and with the wrong assessment of the facts, the trial court ought to have entered judgment for the defendant (See Lesotho Chomane v Mabeli Tankiso, CIV/A/5/78 (unreported) at p. 7), I therefore come to the conclusion that the

/finding of....

finding of all the lower courts were in error when it was held that Mokhali Motsopa had the authority to allocate land in his own right. The trial court ought to have held to the contrary and so should the Central and Judicial Commissioner's Courts. It is accordingly ordered that the trial courts' judgment be altered to read "Plaintiff has failed to prove his case and it is hereby dismissed with costs".

The appeal is hereby upheld and it is ordered that the respondent pay the costs in all the courts.



ACTING CHIEF JUSTICE.

For Appellant . Mr. K. Sello

For Respondant : Mr. C. Maqutu.