CIV/A/7/85

IN THE HIGH COURT OF LESOTHO

In the Appeal of

SEETSA TSOTAKO Appellant

v.

MATSAISA MATABOLA Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice J L. Kheola
on the 6th day of May, 1986

The respondent (plaintiff in the court below) sued the present appellant in the magistrate's court for the district of Maseru and sought an order ejecting the appellant from an unnumbered site situated at Ha Thamae, in the Maseru district. The court below entered judgment for the respondent with costs It is against that judgment that the appellant is now appealing to this court

The litigation between the parties in respect of this unnumbered site at Ha Thamae started in 1975 when the present respondent sued the appellant at Maseru Local Court The respondent obtained a judgment in his favour against which the appellant appealed to Matsieng Central Court. The appeal was allowed and the matter was "returned to be dealt with by the chief of these litigants so as to allocate this site lawfully and to any of them who had applied for it." The central court president completely misunderstood the proceedings of the court of first instance.

/He was . .

He was under the impression that the site in question was allocated to the litigants by Polumo who was the owner of the arable land where the site is situated. The correct position is that Polumo gave back his land to the chief for re-allocation to the litigants and other people. It is well known that behind the scenes Polumo sold pieces of his land to these people and then asked the chief to re-allocate these pieces of land.

Although the judgment of the central court president had missed the issue the appellant and the respondent accepted it. They apparently appeared before their chief, Chief Moshoeshoe Seoli who gave evidence in the court below that he re-allocated the site to the appellant (see page 24 of the record). On the other hand the respondent denies that the chief made any decision in accordance with the judgment of the central court (see page 2 of the record). She says that the reason why she brought her case to the courts of law for the second time was that the chief failed to take any action.

The respondent testified that the site was allocated to her by chief Moshe Matsoso in 1974. She handed in a Form C dated the 8th April, 1974 as proof that the site was allocated to her (Exhibit A) According to the Form C the area of the site is 100 feet x 87 feet. Immediately after the site was allocated to him/her she fixed the poles around it with the intention of fencing it. After three days she found that the poles had been removed, and found people who were digging a foundation for a house They told her that they were employed by the appellant. She reported the matter to her chief The chief summoned the appellant to appear before him but the latter failed to comply with the chief's order until she finally decided to take the matter to Maseru Local Court. She denied that the chief re-allocated the site to the appellant.

Mkize Ntia was a member of Chief Moshe Matsoso's land allocation committee. The other members were Khabanyane, Thaabe and Seabata. He confirms that the site in question was lawfully allocated to the respondent and that the appellant was allocated a different site at a different place

Daniel Thaabe Letsie told the court below that the people who had applied for sites on Pulumo's land included the appellant and the respondent in this case He was present when the respondent was allocated her site but he was not present when the appellant was allocated a site on Pulumo's land. The site in question was allocated to the respondent by Chief Moshe Matsoso and he was the secretary of chief Moshe Matsoso's land allocation committee. He produced a sketch plan which confirmed his story that at Pulumo's land no person was allocated a site larger than 100 x 87 feet. I have checked the sketch plan, it shows nine (9) sites which measure 100 x 87 feet and several other sites which are smaller than the first nine sites. This witness was not cross-examined and this means that his evidence was accepted as true.

The appellant's version was that he was allocated the site in question on the 25th March, 1973 and handed in as exhibit a Form C date stamped the 8th June, 1978. The measurements of his site are 200 feet x 100 feet. The appellant actually handed in two different Form Cs, i.e. Exhibit "E" and the other one in Exhibit "H". Exhibit "E" has two date stamps, the first date stamp is that of chief Moshe Matsoso and it is dated the 23rd February, 1973. The second one is that of Chief Moshoeshoe Seoli dated the 8th June, 1978. The second Form C (Exhibit H) bears the name of Chief Moshoeshoe Seoli dated the 8th June, 1978. The appellant told the court that following the judgment of Matsieng Central Court he and the respondent appeared before Chief Moshoeshoe Seoli and that the chief allocated the site to him as it had been done in 1973.

/Chief....

Chief Moshoeshoe Seoli succeeded chief Moshe Matsoso in 1978. The latter had retired because of ill-health. Immediately after he had assumed administrative power at Ha Thamae, the dispute of the appellant and the respondent over the land in question was brought to his attention. After a thorough investigation he allocated the site to the appellant. He says that a long time after his decision the respondent appealed against his decision. He f wrote a letter (Exhibit "C") addressed to the senior chief and explained the dispute between the litigants. That letter reads as follows

"Morena Seqobeia T. Letlatsa,

I pass to you Matsaisa Matabola and Seeisa Tsotako before you their claim is about a site. Tsotako had built on Matsaisa Matabola's site.

This case comes from Judicial Courts and, I hope you will learn from the copies of judgments.

Your Servant,
Moshoeshoe T Seoli "

Following that letter he never heard from the litigants.

The last witness called by the appellant was one Mara Pulumo Sehlabo who claims to be the wife of the late Pulumo. Her evidence was to the effect that the site which is now the subject matter of this dispute was allocated to the appellant. She was present when the allocation was made because she was an interested party in that the land belonged to her husband and she wanted to make sure that the portions of land allocated to her children were not re-allocated to other people. As far as she knew the respondent was allocated a different site and that up to now the site has not been developed.

I propose to deal with the question of whether or not a plea of res judicata was sustainable in this case If the plea of res judicata

/succeeds....

succeeds there will be no need to go into the merits. One of the essential elements of res judicata is that the judgment upon which the party is relying must have been a final judgment. In the South African Law of Evidence, 2nd edition by Hoffmann, at page 240 the learned author states the law as follows

> "The judgment of any court, including a foreign court, can found a plea of res judicata provided that the court had jurisdiction in the matter and the judgment is a final one. For this purpose a judgment is final if it has determined the substantive rights of the parties, even though it may be liable to reversal on appeal or rescission for fraud, mistake or any other reasons. Until it has actually been reversed or rescinded it remains binding".

I have earlier in this judgment stated that the judgment of Matsieng Central Court was completely wrong because the president was labouring under the wrong impression that the site in question was allocated by Pulumo and not by the chief who has the right to do so. He paid very little attention to the Form C which was properly signed by the chief and date stamped. Be that as it may it is clear that even a wrong judgment can found a plea of res judicata as long as it has not been set aside in the proper manner. The court a quo was neither reviewing nor hearing an appeal against the Matsieng Central Court judgment. What it had to decide was whether or not that judgment was a final one which determined the substantive rights of the parties. I think the substative rights of the parties concerns the lawful allocation of the site to any of them. The central court judgment did not specifically state who between the two parties had been lawfully allocated the site. However, a proper reading of the judgment as a whole, gives one the impression that it purported to tell the parties that none of them had been lawfully allocated the site. The parties accepted this decision and took the matter back to their chief. It seems to me that they clearly understood that the chief would have to say to whom between the litigants he had allocated the site. It is clear from all

documentary evidence that the chief found that the site had originally been allocated to the respondent, however, the chief found that the appellant had already built a big house on the site and a suggestion was made that he (respondent) should be allocated another site (see Exhibit B, Exhibit C and Exhibit A) If I am correct that the Central Court judgment was to the effect that both parties had not been properly allocated the site in question, then it determined the substantive rights of the parties

Another possible meaning of the central court judgment is that it was absolution from the instance. It seems to me that the central court president was of the opinion that the respondent had failed to discharge the ordinary burden of proof in that the chief, who is the lawful authority to allocate land had not given evidence. Because of this uncertainty about the meaning of the judgment I have decided to refuse a plea of res judicata and to go into the merits of the case.

The respondent handed in as an exhibit a Form C dated the 8th April, 1974 She called two people who were members of Chief Moshe Matsoso's land allocation committee at the time she was allocated the site. Mkize Ntia and Daniel Thaabe Letsie testified that the site in question was allocated to the respondent And that the Form C (Exhibit A) was written and signed by Chief Moshe Matsoso after the site had been lawfully allocated to the respondent.

The appellant produced two Form C's i e. Exhibit E which has two date stamps and the other in Exhibit H. He explained that when the litigation started in 1975 his Form C (apparently Ex. E) had been taken by the officials of the Ministry of Interior because there was an inquiry going on concerning corruption in allocation of land at Ha Thamae The court below was not satisfied with this explanation and wanted to know why he did not get a copy of his Form C if at all it was in the custody of the Ministry of the Interior His explanation

/that

that he did not have the chance because the date on which the case was to be heard was too near sounded so hollow that the court below properly rejected it. If what he is saying were true he would have asked for a postponement because the Form C was the only piece of evidence he had as he alleges that he did not know the whereabouts of the members of the land allocation committee who allocated the site to him. The court below came to the conclusion that Exhibit E was not yet in existence in 1975 when the parties appeared before Maseru Local Court. In other words it held that Exhibit E was a false document which was made in 1978 and then back dated the 25th March, 1973 I entirely agree with this finding.

The reason why I agree that Exhibit E is a false document is that in his own evidence the appellant says that the site was allocated to him in 1973 but the Form C (Exhibit E) was only stamp dated on the 8th June, 1978. It is most improbable that Chief Moshe Matsoso could issue a Form C in 1973 and fail to stamp date it and the appellant also fail to draw his attention to this serious omission. The truth of the matter is that in 1975 Exhibit E was not in existence, it was filled by Chief Moshoeshoe Seoli on the 8th June, 1978 when he issued the Form C in Exhibit H. The Land Act of 1973 only came into force or the date of its commencement is the 1st March, 1974. Form C appears in the schedule to this Act, such a form could not have been used by chief Moshe Matsoso in 1973 because it was not there The heading of Exhibit E reads

"Sehokelo
(Molao oa Mobu 1973)
FORM C
TEMANA ea 15 (1) (a)."

This clearly shows that the appellant and Chief Moshoeshoe Seoli prepared Exhibit E on the 8th June, 1978 and then back dated it in order to

/give....

give the impression that the site was allocated to the appellant long before it was allocated to the respondent. This Form C that they used has betrayed them. Their evidence that it was issued on the 25th March, 1973 is false. The Form C that was used prior to the 1973 Act differs from Exhibit E (see Exhibit A). The appellant failed to produce a Form C in 1975 when this case started at Maseru Local Court not because it was at the Ministry of Interior but because it was not there at all. The signature in Exhibit E clearly differs from the signature in Exhibit A. Although I am not a handwriting expert the difference between the two signatures is so obvious that even a layman can see it. It is most probable that Chief Moshe Matsoso's signature was forged in Exhibit E. In June, 1978 when Exhibit E was made Chief Moshe Matsoso had retired and his place had been taken by Chief Moshoeshoe who undoubtedly had access to the date stamp of his predecessor.

I have stated earlier in this judgment that all documentary evidence in this case proves conclusively that the site in question was originally allocated to the respondent. The chief was not expected to re-allocate the site but merely to say to whom he had allocated the site. During his investigations he found that the site was allocated to the respondent but merely re-allocated the site to the appellant because he had unlawfully built a big house on the respondent's site. I do not agree with the attitude or opinion of the chief that because of the big house the respondent must lose a site that was lawfully allocated to him. It must be borne in mind that before the appellant started building his big house the respondent had already fixed poles around his site. The appellant took out those poles and threw them away. He defied the chief's order requiring him to appear before him in order to settle their dispute. He continued to build his big house and ignored the chief's order. As he was well aware of the dispute and defiantly went ahead with the building I do not think that the courts of law should take into account that he has a big house there.

/ If Chief...

If Chief Moshoeshoe Seoli purported to make a fresh allocation to the appellant on the 8th June, 1978 then such allocation was null and void because it was contrary to section 6 of the Land Act of 1973 in that he did not allocate the site after consultation with the Development Committee (the Land Allocation Committee) (See section 11 (7) of the Land Act, 1973). The chief clearly stated that "when I worked the matter between defendant and plaintiff P W 2 was not present". P.W.3 also stated that he was not present when the site was allocated to the appellant.

It was submitted that even if the Court found that an allocation was made to the respondent execution would be impossible because the site which was pointed at the inspection in loco is more than double the site claimed by the respondent I was referred to the case of Lesotho Chomane v. Babeli Tankiso, C. of A. (CIV) No.6 of 1980 (unreported) I do not agree with the submission that the instant case is on all fours with Lesotho Chomane's case. In the present case the respondent pointed out her site. What should be done is that the sheriff or messenger of the court should measure an area of 100 feet by 87 feet on the site that was pointed out as the one in dispute. There is evidence that the appellant's big house is on the extreme end of the site and this will make it easy for the sheriff to measure respondent's site on the piece of land away from the respondent's house.

For the reasons stated above the appeal is dismissed with costs to the respondent.

T.L. KHEOLA
J U D G E .

6th May, 1986.

For Appellant - Mr. Maqutu

For Respondent - Mr. Matsau.