IN THE HIGH COURT OF LESOTHO

In the Appeal of:-

'MALEHLOHONOLO LETOALA Appellant

vs

R E X

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola on the 14th day of April, 1988.

The appellant was convicted of contravening section 87 (1) of the Land Act No.17 of 1979 by the Resident Magistrate of Leribe. The charge is that upon or about the 25th day of August, 1986 and at or near Maputsoe Urban Area in the district of Leribe, the accused (now appellant) did unlawfully and intentionally occupy land without proper authority. She pleaded not guilty but was found guilty as charged and sentenced to pay a fine of M200-00 or 3 months' imprisonment of which M150-00 or 2 months imprisonment was suspended for 3 years on some conditions.

The appeal is against conviction only and is based on the following grounds:

"1. The judgment is against the weight of evidence and is not supported thereby.

2. The order on the accused made by PW1 in or about 1980/81 that she should stop ploughing the land was wrongful and unlawful. The accused was therefore entitled to resume occupation of her ploughing field.

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3. As the Commissioner of Lands failed to give the accused three months written notice of termination of her licence to occupy the land in question in terms of Section 38(1) and 43 of the Land Act 1979, such purported termination was null and void ab initio and of no legal force and effect.

4. The accused's occupation of the land in dispute was in the exercise of a bona fide claim of right and did not constitute a criminal offence."

The facts of this case are not in dispute and may be summarised as follows:-

1. Maputsoe area in which the land in question is situated was declared an urban area on the 16th June, 1980;

2. Prior to such declaration the appellant had used the land for over ten years for agricultural purposes;

3. In terms of section 28 (2) of the Land Act 1979 when Maputsoe was declared an urban area, the land which was used predominantly for agricultural purposes lawfully held by any person at the date of commencement of the Land Act was deemed to be held under a licence;

4. It is common cause that the area where the land in question is situated was never declared a selected development area in terms of section 44 or section 45 of the Land Act 1979;

5. In 1980 or 1981 the Chief of Maputsoe (P.W.1) and the Principal Chief of Tsikoane held a series of public meetings at which they informed the people who had lands used for agricultural purposes within Maputsoe urban area that they should stop using such lands because the area had been declared a selected development area;

6. The appellant stopped using her land believing that her rights to the land had been lawfully terminated;

7. In 1986 she re-occupied her land after she found out that her rights to the land had not been lawfully terminated;

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8. She put poles around the land apparently intending to erect a fence right round the land and to give portions of the land to her children.

The Prosecution case is based on the false premise that the reason for termination of the appellant's right to occupy the land in question was that the area where the land is situated was declared a selected development area. In terms of sections 44 and 45 of the Land Act once an area has been declared a selected development area all titles to land in that area are automatically extinguished. In an attempt to prove that the area was declared a selected development area the Prosecution handed in Legal Notice No. 103 of 1985 which is supplement No.5 to Gazette No.57 of 18th October, 1985 (Exhibit "B"). The Legal Notice refers to specific plots and the Prosecution has conceded that the appellant's land is not included amongst those plots.

If the appellant's land does not fall within the area declared as a selected development area her licence could be terminated by the Commissioner in terms of section 43 of the Land Act which reads as follows:

> "A licence may be terminated by the Commissioner serving upon the licence at least three months' notice of termination."

It is common cause that the Commissioner never served upon the appellant a notice of termination. It follows that her licence has never been lawfully terminated and that her re-occupation of her land after several years cannot amount to occupying land without proper authority. The order of the Chief of Maputsoe and the Principal Chief of Tsikoane that the people who had lands in that area should stop using them when Maputsoe was declared an urban area was unlawfully and was due to misinterpretation of the law as to the effect of such declaration.

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I am aware that section 43 of the Land Act was repealed by Order No.27 of 1986 dated the 6th August, 1987 with retrospective effect to the 20th January, 1986. The Order cannot apply to the appellant's case because the unlawful termination of her licence took place in 1980 or 1981. Even if the Order were applied to the present case the termination of the allocation was still unlawful because in terms of section 13 of the Land Act before revocation could take place the allotee would have had to be given thirty (30) days' written notice setting out the grounds of such revocation. The appellant was not given such notice.

The court a quo came to the conclusion that because the provisions of section 43 were not mandatory the termination of the licence could be done by any other person and that after such termination the Commissioner was not barred "from continuing with whatever intentions he wanted to carry on the soil nor was it incumbent upon him to start the process all afresh serving notice". I disagree with this conclusion. It is correct that the provisions of section 43 are not mandatory buy section 43 is the only provision in the Land Act which describes how and by whom a licence may be terminated. If the legislator had intended that anybody could terminate a licence it would have said so.

Section 14 of the Interpretation Act No.19 of 1977 provides that in an enactment passed or made after commencement of this Act, "shall" shall be construed as imperative and "may" as permissive and empowering. It seems to me that the "may" in section 43 of the Land Act 1979 empowers the Commissioner to terminate a licence and according to the Land Act he is the only person who has that power. The permission to terminate a licence is given to the Commissioner only and no other person has been given that power. The conclusion by the

court a quo that anybody can do the termination of a licence is a wrong interpretation of section 43.

The court a quo held that because the land had not been used or ploughed for several years, the Commissioner had the right to advertise it in terms of section 21 inviting people who claimed that they have title to the land to lodge their claims before the Land Tribunal in terms of section 23. I think here again the court a quo has missed the point. The appellant's licence was never lawfully terminated and was still effective when the Commissioner purported to advertise what he wrongly regarded as a piece of land available for grant of title in terms of section 21. The land in question was never available and his advertisement was unlawful.

The Commissioner knew that Maputsoe had been declared an urban area and he also knew that before he started surveying the area he had to terminate the licences of the people who used the land for agricultural purposes. Despite this knowledge he wrongfully and unlawfully started surveying the land in question and even advertised that such land was available for grant of title. His actions are a nullity and a cause of confusion in that area. Surely, the Commissioner keeps records and cannot just see arable lands which have not been used for some time and take for granted that they are available for grant of new title. In any case sight should not be lost of the fact that we are dealing with a criminal charge.

The appellant is alleged to have unlawfully occupied land without proper authority. The Prosecution had to prove beyond a reasonable doubt that the appellant's licence authorising her to occupy the land in question had been lawfully terminated. There was no such proof.

The appellant stopped using her land because her chief made her believe that the law compelled her to vacate it. Immediately after she realised that she had been unlawfully robbed of her land she re-occupied it.

Much has been made of the fact that when re-occupying the land the appellant intended to use it for residential purposes and not for agricultural purpose as required to do so under section 38 of the Land Act 1979. I am most surprised that at the hearing of this appeal on the 28th March, 1988 both the Crown Counsel and the Defence Counsel were still unaware that section 38 was repealed on the 6th march, 1987 by Order No.27 of 1986 with retrospective effect to the 20th January, 1986. The effect of that repeal is that on the 25th August, 1986 when the appellant re-occupied her land section 38 was no longer in force.

Mr. Qhomane, Counsel for the Crown, submitted that section 38 defines the rights of the licencee and that it is couched in imperative terms. He submitted further that if a licencee contravenes provisions of section 38 that would tantamount to unlawful occupation. I do not propose to make any decision on this submission because the section had already been repealed when the alleged offence took place. Even if the submission can be taken as correct the appellant's licence could not be automatically extinguished. The Commissioner still had to terminate the appellant's licence in terms of section 43, and then if the appellant remained in occupation after such termination, she could be prosecuted under section 87 (1) of the Land Act.

The appellant is still occupying the land in question under a valid licence or allocation which has not been terminated under section 43 or revoked under section 13.

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In the result the appeal is upheld. The fine and the appeal fee must be refunded to the appellant.

J.L. KHEOLA
JUDGE.

14th April, 1988.

For the Appellant - Dr. Tsotsi
For the Crown - Mr. Qhomane.