CIV/APN/67/89

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOTSEKI MATHEOLANE — Applicant

and

THE MANAGER OF SOFIA SCHOOL — 1st Respondent
THE TOWN CLERK BUTHA-BUTHE — 2nd Respondent
ATTORNEY-GENERAL — 3rd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 30th day of June, 1989

On the 22nd March, 1989 the applicant obtained a court order couched in the following terms:

"1. That the above Application be, and it is heard as an urgent application and the forms and service provided for in the Rules of Court are dispensed with

2. That a Rule Nisi be, and it is hereby issued calling upon the Respondents to appear and show cause on the 31st day of March, 1989 why an order in the following terms should not be granted;

(a) Interdicting the first Respondent from locking up the gate to the fence enclosing the premises occupied by the applicant in the Butha Buthe urban area and from interfering (directly or indirectly) with applicant's occupation of the said premises in any other way.

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(b) declaring that the site occupied by the applicant which has been fenced in by the first Respondent was lawfully allocated to the applicant and that the Respondents have no right or authority to eject him summarily therefrom

(c) declaring that the site in question does not fall within a lawfully declared selected development area;

(d) alternatively to (c) above declaring that applicant is entitled to substitute rights in accordance with the provisions of Section 46 (1) of the Land Act 1979;

(e) ordering the first and second Respondent jointly and severally to pay the applicant's costs on the scale between attorney and client (alternatively making such other order as to costs as the above Honourable Court may deem appropriate);

(f) granting such further or alternative relief as may be necessary or appropriate to protect the applicant's rights;

3. That prayer (a) above shall operate immediately as an interim order pending the finalisation of this application."

According to a Form C (Annexure "A" to applicant's founding affidavit) the applicant was allocated the land in question on the 14th March, 1980 by the Chief of Ha Mopeli. The document has the date-stamp of the chief of Ha Mopeli. It is signed by one Mamahe Chenene. It is the respondents' contention that the Form "C" in question is a forged document on the ground that the signature in it is not that of Mamahe Chenene. It is also alleged that Mamahe Chenene was not the Chief of Ha Mopeli.

These two issues cannot be resolved on the affidavits before me. The said Mamahe Chenene is now late and under such

circumstances proof of his signature would require expert evidence or evidence of people who worked with him during his lifetime. It is not enough just to allege that it is not the signature of the late 'Mamahe Chenene. As far as his position of Chief of Ha Mopeli is concerned, again we need evidence to rebut the fact that on the face of that document he appears to have been the chief of Ha Mopeli. The mere fact that we have not found a Notice in the Government Gazettes that he was the chief of Ha Mopeli is not conclusive evidence that he was not such a chief. See Mofoka v. Lehanela C. of A (CIV) 6 of 1988.

The Form "C" in question is said to be a copy and not the original because the word "Kopi" is written on the face of it. I was shown the original and I have no doubt that it is an original and not a copy of the original copy. It is not clear to me why the author marked it "Kopi". In any case even if it is a copy that is the only copy of the Form "C" allegedly to have given to the applicant when he was allocated the site.

It is common cause that by Legal Notice No.14 of 1980 which appears in Government Gazette No.29 dated the 22nd August, 1980, the area where the site in question is located was declared an urban area.

On the 7th November, 1986 the area where this site is situated was declared a selected development area in Legal Notice No. 123 of 1986 in Government Gazette No.55.

On the 11th May, 1988 the first respondent obtained a lease under The Land Act 1979 for the area which included the site allegedly allocated to the applicant.

On the 18th March, 1989 the applicant went to his school and upon his return home after sunset he found that the gate of the fence erected by the first respondent around the alleged school site including his residential site was locked. Previously the gate had always been left open and he and his family could go in and out without any obstruction.

The first respondent admits that the applicant was locked out of the premises on the 18th March, 1989. But he says that it was not done deliberately. He has annexed an affidavit of one Tebelo Samo who was employed by the first respondent to erect a fence around the school premises. After he had finished fencing, the gate leading into the school was always left open to enable the applicant to come in and out as he wished. The situation changed on the 18th March, 1989 because on the 16th March, 1989 property belonging to him (Tebelo) and Rapitso & Son Construction was stolen.

On Saturday the 18th March, 1989 he was instructed to lock the gate and he was given a spare key to give to the applicant. Unfortunately he forgot to give it to him. He deposes that on the 19th March, 1989 he went to the house of the applicant to go and hand over the spare key to him and to apologize for not giving him the key on the previous day. He was told that he had just left for the bus stop. He found the applicant at the bus stop and

apologized to him. He further told him that the gate had been locked for security reasons because there had been theft of property at the building site. The applicant refused to accept the key on the ground that he was going to see his attorney and that he did well to lock him out. The gate has never been locked again since the 18th March, 1989.

In his replying affidavit the applicant denies that Tebelo Samo went to his house on the following day and asks why he could not have left the key at his house instead of going to the bus stop with it. He also denies that the said Tebelo Samo found him at the bus stop and apologized. He admits that when he returned to his home on the 20th March, 1989 he found that the gate had been left open and it has never been closed since then. He says that Tebelo Samo could not have found him at the bus stop because he never went there. He used a special bus with his students and never went to the bus stop.

Whether Tebelo Samo did in fact go to the applicant's home on the following day and subsequently went to the bus stop and offered the key to him, are matters which cannot be decided on affidavits. Viva voce evidence has to be heard but the applicant never made such an application. The Court has the power to order that oral evidence must be led where there is a dispute of fact capable of being speedily resolved. Rule 8 (14) of the High Court Rules 1980 reads as follows:

> "If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or may make such order as to it seems appropriate with a view to ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear to be examined and cross-examined as a witness, or it may order that the matter be converted into a trial with appropriate directions as to pleadings or definition of issues or otherwise as the court may deem fit."

I do not propose to hear oral evidence or to order that the matter be converted into a trial because I am of the opinion that the applicant hurriedly and unnecessarily came to Court before he had found out why the gate had been locked. He went to the home of the first respondent on the evening of the 18th March, 1989 and was told that the first respondent had gone to Maseru. On the following morning he came to Maseru and made no attempt to call at the home of the first respondent before he (applicant) came to Maseru. When he returned to Butha Buthe on the 20th March, 1989 he found that the gate had been left open and it has never been closed since then. Even on the 20th March when he found that the gate had been opened he made no attempt to find out what had happened. He decided to go ahead with this application.

In paragraph 12 of his founding affidavit the applicant alleges that he verily believes that the first respondent deliberately and maliciously locked the gate presumably in order to exert pressure on him to abandon his site. He has failed to establish on a balance of probabilities that the first respondent had that intention. According to Tebelo Samo the failure to give him the spare

key was not intentional. There is a serious allegation that the applicant refused to accept the spare key on the following day and said that he was going to see his attorney and that Tebelo Samo had done well to lock him out. He was informed that the gate had been left open.

On the 20th March, 1989 when the applicant found that the gate had been left open he did not stop his attorney from lodging this application a day later. It seems to me that the applicant wants to get a final interdict against the respondents. In order to get a final order (interdict) he must prove three things namely:

(a) a clear right;

(b) injury actually committed or reasonably apprehended; and

(c) the absence of similar protection by any other ordinary remedy. See Setlogelo v. Setlogelo, 1914 A.D. 221 at p. 227.

I shall assume that the applicant was allocated this piece of land on the 14th March, 1980. On the 22nd August, 1980 the area where the site is situated was declared an urban area. In terms of section 15 (2) of the Deeds Registry Act 1967 the applicant was under an obligation to apply for a registered certificate of title to occupy or use land within three (3) months of the issue of the certificate (Form C). In the present case the applicant ought to have applied for the said certificate from the Registrar of Deeds within three (3) months after the area was declared an urban area.

Subsection (4) of section 15 provides that failure to lodge the Form C with the Registrar in terms of subsection (2) shall render the Form C null and void and of no force and effect and the rights of occupation and use shall revert back to the owner of the land, being the Basotho nation.

If my interpretation of section 15 is correct regarding the occupation of land by people who were allocated such land before the land was declared an urban area, then the applicant's right to occupy the land was extinguished three months after the declaration.

Section 44 of the Land Act 1979 provides:

> "Where it appears to the Minister in the public interest so to do for purposes of selected development, the Minister may by notice in the Gazette declare any area of land to be a selected development area and, thereupon all titles to land within the area shall be extinguished but substitute rights may be granted as provided under this Part."

Section 46 (1) and (2) read as follows:

> "(1) Subject to subsection (2) and to section 47, where the selected development area consists wholly or partly of land used for purposes other than agriculture, lessees and allottees of such land shall be entitled to be offered in exchange by the Minister leases within the selected development area, for the same purposes as those for which they previously held the land, of the same plot with or without amendment of the original boundaries thereof, if this is consistent with the development scheme, or of any other plot.
>
> (2) Where the development scheme is such as not to permit the grant of a lease for the purpose of which the lessee or allottee formerly held the land, the lessee or allottee shall have the option of either accepting a plot for any one of the purposes of the development scheme or of claiming compensation for being deprived of his lease or allocation."

I am of the opinion that the applicant's title to occuply that piece of land was extinguished immediately after the area was declared a selected development area. His entitlement was that prescribed by section 46. The Honourable Minister of Interior is under an obligation to offer the lessees and allottees, in exchange of their plots, leases within that development area or they may claim compensation.

I have no doubt in my mind that in terms of section 44 the applicant's title to the land in question was extinguished on the 7th November, 1986 when the area was declared a selected development area. He must have vacated the land immediately or after a reasonable time. However, he defied the declaration to such an extent that as late as 1988 he started building his house on that site. The applicant is definitely in unlawful occupation of the land in question and has to be dealt with in terms of section 87 of the Land Act 1979. There is no provision in the Land Act or the Deeds Registry Act that after a person's title to land has been extinguished he or she is entitled to remain in occupation till he or she has been given another site or compensation.

I should not be understood to mean that the first respondent was entitled to lock the gate and by so doing force the applicant to vacate the site. I mean that by recourse to law the first respondent may have the applicant ejected from the property because he is in unlawful occupation of the land.

Dr. Tsotsi, applicant's attorney, submitted that the applicant claims right of retention on the ground that he is a bona fide occupier of the land because he has a Form C. A bona fide occupier is a person who occupies land under the bona fide, but mistaken, belief that he has a lease of the land. See Principles of South African Law, fifth edition by Wille at page 191. I do not think that the applicant can be regarded as a bona fide occupier because he knew that his right or title to occupy the land had been extinguished by law. He knew that that piece of paper, Form C, had been rendered null and void by law. I am of the opinion that he is a made fide occupier who is not entitled to retention of the property nor is he entitled to compensation of the improvements he has made.

The declaratory orders the applicant is seeking cannot be granted on the ground that even if the site was lawfully allocated to him his title to the site was extinguished by law. This Court cannot authorise or prolong his unlawful occupation of land in defience of a lawful declaration by a proper authority. In addition to that the applicant has failed to prove that the locking of the gate was malicious and was with the intention of locking him out of the premises. There is evidence by Tebelo Samo that he locked it and forgot to give the spare key to the applicant. As I have already said there is a dispute of fact as to what happened on the following day. I am unable to decide that dispute on affidavits. Where there is such a dispute of fact this Court has a discretion to dismiss the application if the applicant foresaw or ought to have foreseen that such a dispute would arise. The applicant knew very well that his occupation of the site was being challenged but he decided to institute application proceedings instead of an action.

The interim orders granted on the 22nd March, 1989 and on the 12th May, 1989 are discharged with costs.

S/L. KHEOLA
JUDGE

30th June, 1989.

Dr. Tsotsi for the Applicant
Mr. Maqutu for the first Respondent
Mr. Mohapi for the first and second Respondents.