CIV/T/29/82

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MAKHETHANG JOSEPHINE LERATA — Plaintiff

and

MICHAEL LERATA — 1st Defendant
BERNADETTA TLALI — 2nd Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 2nd day of February, 1990.

On the 23rd February, 1987 the plaintiff obtained a final decree of divorce on terms set out in a Deed of Settlement. One of the terms was that the issue of sites numbers 10994 and 10995 both situated at Motimposo in the district of Maseru would be an issue between the plaintiff and the second defendant who was joined on the 8th September, 1986. These two sites were declared as forming part of the joint estate on the 10th March, 1982 when the summons was amended accordingly.

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It is common cause that the first and second defendants had been living as man and wife for some time before the institution of these proceedings in January, 1982. During their cohabitation the second defendant assumed by mistake the surname of the first defendant. On the 5th June, 1981 she changed her surname to her maiden surname of Tlali by a publication in Government Gazette No. 20 dated the 5th June, 1981.

In her plea the second defendant avers that the business site registered under number 10994 on the 15th July, 1975 was acquired by herself as a result of purchase of improvements thereon from Chief Seeiso Makotoko for an amount of M250. The residential site registered under number 10995 on the 15th July, 1975 was allocated to her by the Land Allocation Committee of Motimposo.

The two sites cannot form part of the joint estate of the plaintiff and the first defendant because the latter did not participate in any manner in their acquisition. She denies that the two sites were registered with the intention to exclude plaintiff from occupation nor to exclude the said site from the joint estate.

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The plaintiff testified that she first knew the second defendant in 1967 when she worked for her as a domestic helper. She (second defendant) looked after her children and stayed with them at Motimposo while she (plaintiff) stayed at the matrimonial home at Makotoko's. She and her husband owned buses and the second defendant later worked as a bus conductor. The plaintiff says that the joint estate consisted of four sites - a residential site at Makotoko's, a business site at Sefikeng, a business site at Motimposo and a residential site at Motimposo. The dispute between the parties is over the two sites at Motimposo.

She testified that she and the first defendant applied for the two sites in the normal way. She saw the Form Cs for the two sites in 1972 and noticed that they were issued in the name of the first defendant in whose possession the Form Cs remained all the time. When she became aware that the sites were no longer regarded as forming part of the joint estate she went to the Law Office and inspected the files of the two sites. She discovered that the first defendant donated the two sites to the second defendant on the 11th April, 1975. In fact the first defendant wrote two letters on the same day donating each site to the second defendant. They read as follows:

"P.O. Box 233,
MASERU, LESOTHO
11 APRIL, 1975.

Dear Chief,

I hereby certify that I voluntarily and willingly gave Manthuseng Lerata my site at Motimposo measuring 37x41x46x36 yds.

I request that the Form "C" for the site be changed into her name, and this letter be passed to the Law Office as evidence for this arrangement.

Your obedient servant,

Signed! MICHAEL LERATA

A date stamp of the Chief
of Motimposo and Ha Tsiu

This site is already developed.
Signed: M. LERATA

c.c. Registrar
Law Office
MASERU."

They form part of Exhibits "B" and "C" .

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In cross-examination the plaintiff stated that the business site was virgin land when they acquired it. The residential site had a small hut built of mud and belonged to Chief Makotoko Seeiso. The first defendant did not buy the site but Chief Makotoko Seeiso divided the site into two equal parts. He gave them half of the site on condition that the first defendant built a house for him on the other half. The first defendant never built a house for him and up to now that half of the site remains undeveloped. She alleges that she never bought any site which already had improvements. The Form Cs were signed by the wife of Chief Leloko because at the relevant time she was acting for her husband who was serving a sentence of two years' imprisonment.

The evidence of N. Pii who is the Registrar of Deeds at the Law Office was merely to hand in the title deeds of the two sites registered under numbers 10994 and 10995. They were marked Exhibit "B" and "C" respectively. The original copies were released to her after the Court examined them and certified copies were [illegible] as exhibits. She testified that it is possible that the Law Office required proof from the second defendant's wife that she was entitled to register the sites in her own name. She testified that the two letters appearing in Exhibits "B" and "C" are not evidence of transfer of immovable property from one person to another and that there are special papers for transfer.

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The second defendant testified that while she was working for the first defendant she lived with him as man and wife and used his surname as hers. She acquired the business site in 1971 when she met Chief Seeiso Makotoko. He allowed her to build a house on the site. When he died his wife Chieftainess 'Mathakane approached her and wanted to know how she had come to occupy the site. They entered into a written agreement of sale and she paid an amount of M250 - for the site and the building: She handed in as an exhibit a contract of sale dated the 26th June, 1974 - Exhibit "D". After agreement Chief Leloko Theko issued a Form C in her name.

The residential site was allocated to her in 1974 and a Form C was issued in her name and not that of the first defendant In 1975 when she decided to register the two sites at the Law Office, she was told that the Form Cs for both sites had to be renewed before registration could be effected. She also told them that she had a husband and they demanded a letter from him authorising her to register the sites in her name. This demand led to the writing by the first defendant of the two letters appearing as parts of Exhibits "B" and "C". She vehemently denied that the first defendant ever had any Form Cs for the two sites. They can never form part of the plaintiff's and first defendant's joint estate. The first defendant never participated in any manner in the acquisition of the two sites and she (2nd defendant) never owned them jointly with him.

The evidence of Chief Leloko Theko is to the effect that the business site was bought by the second defendant from Chieftainess Mathakane Seeiso and that he stamped the contract of sale with his official date-stamp. He subsequently issued a Form C in favour of the second defendant. The residential site was allocated to the second defendant by him. He issued a Form C in her name. He referred to Exhibit "F" which is photostat copy of a page of the register in which the names of people to whom land was allocated were recorded together with other particulars. Item 4 from the top is an entry showing that on the 20th August, 1971 land measuring 37x41x46x86 yards was allocated to the second defendant. He also identified his signature. He never allocated the two sites in question to the first defendant.

An officer from the Maseru City Council, 'Mabaeti Tjotsane (D.W.6) produced the orginal register from which Exhibit "F" was copied. The two copies tallied with each other. She confirmed that the register was not a very accurate document because many sites did not appear in it. Some Form Cs from Thamae's were seized by the authorities from their owners because of the corruption in the allocation of land that was going on. Some Form Cs were eventually given back to their owners but others got lost.

Butana Mafatle (D.W.3) was employed by the second defendant to build a house and some outbuildings at her residential site at Motimposo. She paid him. First defendant never paid him because he had no contract with him.

Thabo Mapetla (D.W.4) was the secretary of the Principal Chief's Appellate Land Committee. The plaintiff brought a claim against the second defendant concerning the two sites in question. Her claim was dismissed because she failed to join the first defendant (See Exhibit "E").

Moketo Moketo (D.W.5) was a member of Chief Leloko Theko's Land Allocation Committee. He confirmed that the residential site was allocated to the second defendant by them, and that a Form C was issued in her name.

Mr. Moorosi, counsel for the plaintiff submitted that the plaintiff has proved her case. She saw the two Form Cs which were in the possession of the first defendant all the time. The letters written by the first defendant confirm that the Form Cs were there. He further submitted that the entries in the register are not in order of dates and this shows that it was likely that omissions could be made. Finally he submitted that the donation made by the first defendant to the second defendant was to the prejudice of the joint estate.

On the other hand Mr. Monaphathi, attorney for the second defendant, submitted that allocation cannot be assumed but must be proved. There was no proof that the two sites were allocated to the first defendant. He submitted that even if the Court came to the conclusion that they were donated to the second defendant by the first defendant that donation cannot be revoked because it was not done in comtemplation of divorce. He referred to the case of Matjeloane v. Matjeloane 1977 L.L.R. 5.

I agree with Mr. Moorosi that Chief Leloko's register is not a very reliable record because the entries were not made at the time of allocation or immediately thereafter. They were sometimes made several months after the allocation. As proof of its unreliability is the fact that there is no entry concerning the business site allegedly allocated to the second defendant after she bought if from Chieftainess Mathakane Seeiso.

The plaintiff's case almost entirely depends on the letters written by the first defendant donating the sites to the second defendant. He alleges that his Form Cs should be changed into her name. The letters state clearly that there were some Form Cs in his own name. Be that as it may I am convinced that the residential site was allocated to the second defendant because her name appears in the register. I am again convinced that the business site was sold to her by Chieftainess 'Mathakane Seeiso Makotoko because there is a written agreement to that effect. This agreement was confirmed by Chief Leloko Theko by stamping it with his official date-stamp on the 28th June, 1974.

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The agreement was not challenged by the plaintiff in any way because she was not aware of it before she instituted her action; and I see no reason why I cannot accept it as a true document proving a valid contract between the second defendant and Chieftainess 'Mathakane. There is no doubt that the first defendant was very clever from the very beginning when he started living with the second defendant as man and wife. He apparently connived with Chief Leloko that every land allocation must be to the second defendant and not to him. He may have done this maliciously so as to ill-treat the plaintiff or under the wrong impression that the second defendant was his second wife under Sesotho law. However, if he regarded her as his second wife there was no need for him to have the sites registered in her name.

In his evidence the first defendant denied that the two sites were ever allocated to him. He wrote the letters in Exhibits "B" and "C" because the second defendant was using his surname and the people at the Law Office thought she was his lawful wife.

I have come to the conclusion that at the time the second defendant went to the Law Office to have her two sites registered in her name she had her own form Cs for them. I am supported in this finding by the evidence that her name appeared in the register of chief of the area in question and that means that a Form C was issued in her name. Again there is a contract of sale for the other site and that sale was followed by the issue of another Form C according to the evidence of Chief Leloko Theko.

The second defendant and the first defendant have explained the circumstances under which the two letters were written. The Law Office demanded such letters in terms of section 14 (3) of the Deeds Registry Act No.12 of 1967 which reads:

> "Subject to the provisions of sub-section (6) hereof, immovable property, bonds or other rights shall not be transferred or ceded to or registered in the name of, a woman married in community of property,save where such property, bonds or other rights are by law or by a condition of a bequest or donation excluded from the community."

The first defendant apparently drafted the letters following closely the wording of the above sub-section in order to help the woman he loved. It was all a lie; he did not have any two sites to donate to the second defendant. There were no Form Cs in his name. If he did not tell a lie the Law Office would have refused to register them in terms of section 14 (6) of the Deeds Registry Act 1967 which reads:

> "Notwithstanding the provisions set out in the preceding sub-sections (1) to (5), the registrar shall refuse except under an order of court to attest, execute or register all deeds and documents in respect of immovable property in favour of a married woman whose rights are governed by Basuto law and custom where such registration would be in conflict with Basuto law and custom."

The second defendant's Form Cs which were issued in 1971 and 1974 respectively, had to be renewed in terms of section 15 (2) of the Deeds Registry Act 1967.

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I have come to the conclusion that the plaintiff has failed to prove allocation of the two sites to her former husband and the second defendant has proved her defence on a balance of probabilities.

In the result the action is dismissed with costs.

J.L. KHEOLA
JUDGE

2nd February, 1990.

For Plaintiff - Mr. Moorosi
For 2nd Defendant - Mr. Monaphathi.

CIV/APN/221/88

IN THE HIGH COURT OF LESOTHO

In the matter between:

SAMUEL NTSEKHE	Applicant
and	
PITSO MORUNYANA	1st Respondent
CHIEF LOBIANE MASUPHA	2nd Respondent
CHIEF DAVID MASUPHA	3rd Respondent
DISTRICT SECRETARY OF BEREA	4th Respondent
ATTORNEY GENERAL	5th Respondent
NAPO MAPESHOANE	6th Respondent
PIET KATA	7th Respondent
PHALATSA PHALATSA	8th Respondent
MPHOSI SECWECWANA	9th Respondent
MALIEHE MALIEHE	10th Respondent
PAUL AUJANE	11th Respondent
NYOKOLE SEKOATI	12th Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 10th day of January, 1990.

This is an application for an order:

"(a) Restraining Third and Fourth Respondent from permitting Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Respondent from remaining in and using the arable lands situated at the Plateau of Mampete in the Ntsekhe area of Malimong which has been confirmed as being part of the Ntsekhe area by His Majesty in terms of the Ad-hoc boundary committee recommendation as falling under Applicant's jurisdiction of chieftainship.

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(b) Restraining First, Second, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Respondents from using the arable lands in the plateau of Mampete which in terms of His Majesty's decision has been confirmed to be in the Ntsekhe area of Malimong.

(c) Directing Respondents to pay costs".

In his founding affidavit the applicant has deposed that there has been a dispute between him and the chieftainship of Ha Mapeshoane of which the second respondent is the gazetted chief. He avers that the sixth respondent, Napo Mapeshoane, interfered with a portion of his territory at 'Mampete plateau claiming to be acting on behalf of his chief. He allocated his (applicant's) subjects' arable lands to the seventh, eighth, ninth, tenth, eleventh and twelveth, respondents in around 1966. The respondents (7th to 12th) simply seized the lands in question and ploughed them.

The matter was taken to the administrative authorities and to Motjoka Central Court. Chief Leshoboro Masopha who is the second respondent's predecessor submitted to the Central Court that the area in question belongs to him (applicant) and that he (Chief Leshoboro) had been brought to the area as the senior chief's son and knew nothing about the dispute.

If I may be allowed to digress to point out that the judgment of the Central Court is Annexure "A" to the founding affidavit and that according to that judgment Chief Leshoboro Masopha said that

the area in question belonged to both the present applicant and the sixth respondent. The Central Court dismissed the applicant's action.

The applicant avers that further inquiry into the matter with the administrative authorities revealed that the best solution was that there should be an ascertainment of the boundary. He brought his matter before the ad hoc boundary committee where it was found that the second respondent was the proper man to deal with as the sixth respondent was only a subject. (The decision of the ad hoc boundary committee is Annexure "B" to the founding affidavit).

It is common cause that the ad hoc boundary committee had been duly appointed by the Minister of Interior in terms of the Chieftainship Act, 1968. It found in favour of the applicant and in terms of section 5 of the Chieftainship Act, 1968 the Minister of Interior accepted the recommendation of the ad hoc boundary dispute committee and submitted it to His Majesty for approval. His Majesty approved the recommendation. (See Annexure "C" to the founding affidavit).

The recommendation of the ad hoc boundary committe entitles only Sefako Sefako amongst the people of the second respondent to remain in occupation of his arable land.

In April, 1987 after the recommendation of the ad hoc boundary committee was approved by His Majesty and read to the litigants, the applicant wrote a letter to the second respondent

advising him to tell his subjects tovacate the arable lands which they unlawfully seized from his subjects. In reply to this letter the first respondent, apparently acting on behalf of the second respondent said that the decision of the ad hoc boundary committee was not specific on the question of arable lands and refused to tell his subjects to vacate the arable lands in question (See Annexure "D" to the founding affidavit).

After this there was chaos because applicant's subjects planted some crops on the lands in question and subjects of the second respondent ploughed them under and planted their own crops. As a result of this the applicant appealed to the third and fourth respondents. The third respondent convened a public meeting at which all the respondents were invited and were formally informed of the decision of the ad hoc boundary committee which was approved by His Majesty.

In his opposing affidavit the sixth respondent avers that the applicant ought to have appealed against the judgment of Motjoka Central Court. He avers that he has been advised that the ad hoc boundary committee had no power to decide on its own as to who the parties to the enquiry should be. It had to carry out its task in accordance with its terms of reference.

He alleges that according to Annexure "A" the third respondent had taken a decision on the boundary. In all fairness he should not have been a member of the ad hoc boundary committee. The decision clearly indicates that there was interploughing in

relation to the area in question. Applicant may have the right to administer fields in his area of jurisdiction as determined by t the committee in accordance with the accepted practice of interploughing. He alleges that the committee had no power to make a decision in respect of people who were allocated the land as this fell outside its terms of reference. Natural justice demands that they ought to have been heard before an adverse decision was taken against them.

He futher avers that at the public meeting convened on the 13th January, 1988 the third and fourth respondents instructed the subjects of the first and second respondents not to cause any problems. However, it was agreed that despite the decision of the committee on the boundary the practice of interploughing was still recognized. The respondents were never instructed to stop using the lands in question.

The first respondent avers that the practice of interploughing still obtains in his area of jurisdiction.

The second respondent admits that there was a boundary dispute between himself and the applicant and that the recommendations made by the ad hoc boundary committee have been approved by His Majesty the King. He is also of the opinion that the recommendations of the committee did not affect the practice of interploughing in that area.

The averments of the rest of the respondents - except the third, fourth and fifth respondents who have filed no opposing affidavits - are that they were allocated the arable lands in question by their respective chiefs and that the practice of interploughing has not been abolished in their area.

The first question to be decided by this Court is whether or not according to Annexure "A" the third respondent had made a decision on the boundary and therefore ought not to have been appointed as a member of the ad hoc boundary committee. I do not find any statement in Annexure "A" that the third respondent or his predecessor ever made a final determination on the boundary between the applicant and the second or first or sixth respondents. It seems that in his evidence or outline of his case in the Central Court the applicant said that at one time the dispute was taken to the Principal Chief who was then Chieftainess 'Mamathe. The applicant said that Chieftainess 'Mamathe issued an order that the said area should not be used until the case was finalised. There was no compliance with that order and the said area was used.

In his evidence or outline of the his case in the Central Court Chief Leshoboro Masopha who is the second respondent's predecessor said that he did not know that the Principal Chief ever issued an order that this area should not be used. He further stated that they had recently been before the Principal Chief and that no decision was made, yet it was incumbent upon the Principal Chief so to do.

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