IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

SELLOANE PUTSOANE — Appellant

and

MOTLATSI LEKATSU — Respondent

HELD AT MASERU

Coram:

Mahomed P.
Ackermann J.A.
Browde J.A.

J U D G M E N T

Ackermann, J.A.

Appellant's husband, one James Mcrapeli Putsoane, brought an application by way of Notice of Motion in the High Court for an order ejecting respondent from a certain unnumbered site at Thoteng Ha Scout, Roma, in the district of Maseru. During the course of the proceedings the aforesaid James Mcrapeli Putsoane died and appellant duly substituted in his place. Molai, J. dismissed the application and the present appeal is brought against such dismissal.

It is common cause that the two sites to which reference is made in the papers were formerly allotted to certain Leronti Matobo and that one of these sites ("the original site") was duly and properly allocated to appellant's husband ("JM Putsoane") by virtue of a so-called Form "C" dated 9th March 1974. In the founding affidavit it is stated that the original site is shown "as plot number 012 in the Lesotho Cadastral Plan No. 18333 hereunto annexed". A copy of the Lesotho Cadastral Plan No. 18333 ("plan 18333") is annexed to the founding affidavit and on it a rectangular site numbered "012" is indicated. There is no dispute about the original site.

The dispute in this case concerns a site ("the adjacent site") which is adjacent to the original site and which JM Putsoane alleges "was subsequently allotted to me in 1979 ..... by Chief Maama Mafefoane Maama. I hold a Form 'C' dated 15th August, 1985 in respect hereof which is hereunto annexed and marked 'C'." I shall refer to this annexure "C" as "the 1985 Form 'C'".

It is common cause that in about July, 1985 the respondent deposited building materials on the adjacent site and subsequently built a house on the adjacent site in which he and his family are living. Respondent alleges that the adjacent site was given to him by Leronti Matobo to whom he had paid money for the site. Respondent further alleges that Matobo "later colluded with the applicant" to deny him the use and occupation of the adjacent site.

The issue before the High Court was whether the appellant (through JM Putsoane) had a stronger title to the occupation of the adjacent site than respondent.

In paragraph 7 of the founding affidavit deposed to by JM Putsoane the following is stated:

> "The Chief of Roma, Chief Maama Maama arbitrated sometime in 1985 in an earlier dispute in respect of the same site herein under reference in my favour. A fair translation of an agreement concluded between myself and Leronti Matobo, former allotee of the said site and attested to by Chief Maama Maama, the chief of Roma is hereunto annexed and marked 'D'."

The deponent does not aver that respondent was a party to the above alleged agreement, which respondent alleges "is another fraud designed to deprive me of the site ..... ." This alleged agreement is dated 15th August, 1985 (the translation incorrectly reflects the date as 27th August, 1987) and purports to be between Matobo as "site allotter" and J.M. Putsoane as "site allottee". Reference is made in this "agreement" to a decision and a letter of the Commissioner of Lands in Maseru, but applicant did not include such letter in his papers and there is no further reference in the papers to the "decision" of the commissioner. The "agreement" states that it is on the basis of paragraph (2) of that letter that the matter is referred to the Chief of Roma for his intervention. The concluding paragraph of the "agreement" reads as follows:

> "The Chief advised that as he knew that I have another site at that area I should give the disputed site to Mr. James M. Putsoane and Mr. Motlatsi Lekatsu another site as a replacement to the site in question. The Chief blessed the idea because it was fair and peaceful."

Immediately below this paragraph the name of Leronti Matobo appears and below that the following sentence:

> "I agree and approve the decision above because it is in order."

Immediately below this the signature of "Maama M. Maama" appears above the typed title "Chief of Roma" . Immediately below this the Chief's date stamp is appended whereof only the year 1985 is legible.

On the papers and in the High Court the appellant based her title to the adjacent site squarely and exclusively on the following two causes:

(a) an allotment by virtue of the 1985 Form "C";
(b) by virtue of the "agreement" with Matobo referred to above.

The Land Act 1979, in consequence of section 1 thereof, came into operation on the 16th June, 1980 by virtue of Government Notice No.71 of 1980 published in the Government Gazette of 23rd May, 1980. Part III of the Land Act 1979, embodying sections 19 to 33, applies to land in an urban area. The Roma area (in which the adjacent site is situated) was declared an urban area by Legal Notice No.14 of 1980 dated 22nd August, 1980.

In terms of the provisons of section 24 of the Land Act 1979 the power to grant title to land within an urban area is exercised by an Urban Land Committee consisting of:

"(a) the Principal Chief having jurisdiction, as chairman;

(b) the Commissioner or his authorised representative;

(c) the District Administrator, or where a Town Clerk has been appointed, the Town Clerk for the relevant urban area, who shall be the secretary of the committee;

(d) three other persons appointed by the Minister."

While it is averred in the founding affidavit that the adjacent site was alloted to J.M. Putsoane in 1979 the claim is clearly based on the 1985 Form "C".

For the grant of title to land in an urban area after 16th June 1980 to be valid, it must have been granted by an Urban Land Committee as provided for in section 24 of the said Act. Section 27 (1) moreover provides that when a decision to grant title to land under Part III of the Act has been taken, the secretary of the Urban Land Committee shall forward to the Commissioner a certificate to that effect in Form "C3" in the Third Schedule and shall at the same time issue a copy of the certificate to the applicant.

The 1985 Form "C" did not purport to be a grant of land in an urban area in terms of Part III of the said Act. In fact it clearly purports to be a grant in terms of Part II of the Act. Annexure "C" to the founding affidavit (which is the 1985 Form "C" relied upon by the appellant) is in fact Form "C2" of the Third Schedule and is so headed and stated to be issued in terms of section 17 (1) of the Act and not in terms of section 27 (1) of the Act. Molai, J. therefore rightly held that the 1985 Form "C" did not evidence a valid grant of land in an urban area and consequently not a valid grant of the adjacent site to J.M. Putsoane.

Likewise the "agreement" with Matobo could not, by itself, consitute a valid grant of the adjacent area.

Accordingly, on the papers before him, Molai, J. was quite correct in finding that appellant had not proved a valid grant of the adjacent site to J.M. Putsoane and in dismissing the application with costs.

At the hearing of the appeal, however, Mr. Sello on behalf of the appellant sought leave to file two further affidavits on the merits, one attested by a certain Joyce Masemene and the other by Chief Maama Mafefoane Maama. The notice of application, which was filed on the 15th July, 1991, is headed "NOTICE OF APPLICATION FOR LEAVE TO PRODUCE A DOCUMENT" and states that the application is being brought in terms of section 12 (a) of the Court of Appeal Act 1978 read with "Rule 10 (c) of the Rules."

The heading of the notice of application is misleading. The substance of the application was to introduce new evidence. The reference to section 12 (a) of the Court of Appeal Act is misplaced. This section is in part II of the Act which deals with criminal appeals. The reference to "Rule 10 (c) of the Rules" can only be a reference to rule 10 (1) (c) of the Court of Appeal Rules. Rule 10 of the High Court Rules deals with joinder of parties and causes of action. Rule 10 (1) (c) of the Court of Appeal Rules provides as follows:

> "Subject to the provisions of sections 10, 11 and 12 of the Court of Appeal Act No. 10 of 1978 the Court shall have the following powers
>
> (a) .....
>
> (b) .....
>
> (c) it may order evidence of any witness to be heard whether or not such witness gave evidence at the trial."

The reference in this paragraph to "trial", and the reference in the sub-rule to sections 10, 11 and 12 of the Court of Appeal Act (which deals with criminal trials) indicates that Rule 10 (1) (c) probably relates to criminal matters.

Even on the assumption that Rule 10 (1) (c) can apply to opposed applications, an applicant for relief thereunder will have to make out a proper case for setting aside a judgment in order to re-open a case and adduce fresh evidence by way of affidavit. Reference must be made to the common law in order to determine when a court of appeal could properly exercise such a discretion. The grounds upon

which such a discretion will be exercised are narrow.

In Shein v. Excess Insurance Co. Ltd 1912 AD 418, Innes ACJ, said the following at p. 429:

> "It would be undesirable to endeavour to frame an exhaustive definition of the special grounds on which the Court ought to accede to the application of a litigant desirous of leading further evidence upon appeal. But neither the circumstance that the matter at issue is of great importance to the applicant nor the circumstance that he finds himself able materially to strengthen the case he made in the trial Court or materially to weaken of his opponent would in themselves be such special grounds."

In Shedden and Another v. Patrick and Others 22LT 631 at 634 Lord Chelmsford formulated the English rule as follows:

> "It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence, which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial."

This passage has been quoted with approval in Deintje v. Gratus and Gratus 1929 AD 1 at 6 and in Staatspresident en in Ander v. Lefuo 1990 (2) SA 679 (A) at 691 (1).

In Colman v. Dumbar 1933 AD 141 the applicable principles were fully formulated at p. 161 - 163 and have been consistently approved since by the South African Courts. (See Lefuo's case supra at 691 J). These principels may be summarised as follows:

1. It is essential that there be finailty to a trial and a litigant will only in exceptional cricumstances be allowed to adduce further evidence.

2. The party making the application must show that he could not have adduced the evidence at the appropriate stage if he had used reasonable diligence.

3. The evidence must be material and weighty and must be such that if adduced would be practically conclusive.

4. Conditions must not have changed to such an extent that the opposite party will be prejudiced by the fresh evidence.

The deponent to one of the new affidavits, Joyce Masemene, is an acting Lands Officer in the Department of Lands,Surveys and Physical Planning of the Lesotho Government. In August 1985 J.M. Putsoane lodged an application with the above department for the issue to him of a lease in terms of the Land Act 1979 in respect of, inter alia, the adjacent site. J.M. Putsoane was advised to produce evidence from his chief of the allocation of the adjacent site. He endeavoured to comply with this request and produced the 1985 Form "C". It was brought to his attention that the Roma area had since been declared an urban area and that, consequently, the chief was no longer the competent land allocating authority in the area. He

was thereupon advised by the department that if he could obtain an affidavit from his chief deposing to the fact that the chief had, prior to the change of status of the Roma area, lawfully allocated to him the adjacent site the department would be able to issue him with a lease in respect of the original and adjacent site. "In due course" the deponent states, J.M. Putsoane presented an affidavit from Chief Maama which is annexed to the deponent's affidavit. Chief Maama's affidavit was attested to on the 23rd August, 1985 but it is not clear when exactly J.M. Putsoane lodged it with the department in question. From Joyce Masemene's affidavit it was certainly lodged before court proceedings were instituted. She is referring presumably to the proceedings in the Local Court which were instituted on the 20th February 1987. On the probabilities it was probably done sooner. Whatever the precise date was, there can be no doubt whatsoever that J.M. Putsoane had been warned of his problems in establishing his title in respect of the adjacent site and had in his possession Chief Maama's affidavit, before he deposed to his own supporting affidavit in the present matter on the 27th July 1987. No attempt has been made to place an explanation on oath before us as to why the evidence, which appellant now seeks to adduce, was not included in the founding papers. It is not as if the new affidavits tendered provide this answer. On the contrary. As outlined above they indicate that J.M. Putsoane was well aware of all the evidence now sought to be tendered before he launched the application. Having been warned of the inadequacy of the 1985 Form "C" it would have been easy to

obtain all the evidence that the appellant now wishes to place before court. There is not even a prima facie indication that the failure to bring forward the "new evidence" in the founding papers was not owing to remissness on the part of J.M. Putsoane and that he could not have obtained this evidence if he had used reasonable diligence. See Colman v. Dumbar, supra.

On this ground alone the appellant is not entitled to the relief she seeks. There is another reason in my view, why the relief sought ought not to be granted. The new evidence seeks to introduce a new cause of action, i.e. a grant in respect of the adjacent site made some time prior to 16th June 1980, and purporting to be evidenced in an affidavit by Chief Marema deposed to on the 23rd August 1985. In consequence of the view I take of the matter I expressly refrain from expressing any opinion as to the validity of this cause of action or its chances of success, in the event of the appellant deciding to pursue it. I also consider it appropriate to point out that at the time this application was launched the applicant J.M. Putsoane was well aware of the fact that his claim was disputed on the facts. He therefore launched motion proceedings at his peril. The present appellant is moreover aware of the fact that one of the defences raised to her claim is collusion and fraud.

For all these reasons the judgment in the court a quo must be sustained.

The appeal is acccrdingly dismissed with costs.

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L.W.H. ACKERMANN
Judge cf Appeal

I agree .....

I. MAHOMED
President of Ccurt of Appeal

I agree .....

J. BROWDE
Judge cf Appeal.

Delivered at Maseru this 26th day of July, 1991.