

CIV\APN\184\84

IN THE HIGH COURT OF LESOTHO

In the matter between :

PHAKISO SELLO

Applicant

and

BEN MANYOKOLE

Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 1st day of September, 1995

This is an application in which the present Applicant seeks to eject the Respondent from a certain site at Lekhaloaneng, Maseru Urban Area in the Maseru District by virtue of a Court Order in certain application CIV/APN/314/91.

I have agonized over the existence of the pending proceedings in CIV\APN\239\89 in which judgment has been reserved since 1992. That is, as to what effect the judgment herein have on the parties or their rights in the light of the pending judgment. In the end I reasoned that I would not venture into the unknown. It weighed against me that the existence of a pending judgment should be a reason to delaying my decision in the proceedings in which there was tension and there had been

violence between the parties. I inclined towards making a final resolution one way or the other.

I have never seen a judgment which adequately addresses every aspect of a dispute unless it was intended to be an academic disquisition. What I consider to be the two most important aspects of the dispute are the following. Firstly this present application relies on a default judgment of the former Chief Justice Mr. Justice Peter Brendan Cullinan of this Court in CIV\APN\314\91 of the 28th October 1991. This judgment had been entered in default of appearance of the Respondent therein one Mokhele Mokhele (now deceased). The present Applicant was the Applicant therein.

The second aspect is this one which makes this application even more easier to handle. It is that this Court had on 1st May 1995 ordered that there be a *viva voce* evidence on the question whether the site over which the Applicant had had an order from ejection was the same site that the present Respondent claims as his. The question had to do with the identity of the site. This was within the context of the averment by the Respondent that the Applicant's site was adjacent to his and that the Applicant was therefore wrongly claiming the site as that from which the old Mokhele was ejected by Court Order as aforesaid. This was the Respondent's case.

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As a result of this question of the identity of the site this Court went for an inspection-in-loco. The result was amply recorded to the satisfaction of the Counsel for Applicant Mr. Tsotsi and the Counsel for Respondent Mr. Kali. It was reduced to minutes that were adopted as part of the proceedings.

It appears that this compound, the big area of land at Lekhaloaneng had originally belonged to the late Mokhele. He made several subdivisions of this land with the result that a greater portion has been identified to belong to the Applicant. This included one portion originally said to belong to his former wife Mampe and one Rosa. The deceased Mokhele has retained a portion for himself which is on the extreme south east of the compound. On the west of Mokhele's portion there exists two smaller portions. One is the north which is the subject matter of the pending judgment in the said CIV\APN\239\89. The matter is before the former Chief Justice. Therein the present Applicant claims against one Sehlabaka and if I recall well the late Mokhele was also one of the Respondents. Its importance is that it refers to another portion of the site which is said to have been donated by the late Mokhele. Another probability is that this claim in the pending dispute involves two portions as one. Another portion is the portion now in dispute which I describe as being on the south west of Mokhele's and south of Sehlabaka.

On the surface there are things that are very worrisome. One is the question as to how both the Applicant and the Respondent got in possession of the respective portions. That is their entitlement in law to their portion of the lands. I say their portions for the reason that the attitude of the Respondent has been that what are being disputed are two different pieces of land not one. I might as well now record my conclusion that I found the land dispute to be one and the same piece of land as the Applicant has contended. It was this land which the Respondent presently occupies and on which he erected a building the description of which I have recorded in the minutes of the inspection-in-loco. The question, then, of the identity of the land has been answered in the way I have concluded. This is a result of the inspection.

I now go back to the worrisome aspects as to the alleged entitlement of the parties to the land. The Applicant is in possession of a Form C dated the 8th April 1980. The "original" appears to be an outright allocation. The same Form C bears a later endorsement which shows that there was an extension of 131S x 146E x 131N x 146W. The "original" Form C was signed by Letlatsa T. Letlatsa, while the extension has an endorsed date stamp impression of Chief of Qoaling and Phomolong and is dated the 9th February 1983. The nature of this Form C worries me. There was an explanation that the original document was exhibited

in those proceedings that are pending before the former Chief Justice. The Applicant told the Court that he took his Form C and a letter of introduction from his Chief to the Town Clerk for onward transmission to the Commissioner of Lands, where a formal document of title would be issued. I do not want to dispute this by way of canvassing it further. I admit that there is sufficient evidence to show that such steps were taken.

On the other hand I have looked at what the Respondent calls his entitlement to the land. There is a memorandum of agreement "of the site" between Mokhele Mokhele and Ben Manyokole (Respondent). That Mokhele Mokhele allocates a portion of his site to the son of his daughter Ben Manyokole, at Qoaling Ha Letlatsa. The measurements are stated. The contents state that after the agreement Ben Manyokole is enabled to proceed with improvements on his portion of the land until he wishes to find a lease for himself. It is signed by both donor and donee and is witnessed by one Sefali. The date of the agreement is the 23rd December 1987 and has been endorsed by Chief Mapetla with a rubber date stamp impression of the Chief of Qoaling and Phomolong.

This donation contained in the memorandum was introduced by the Chief to the Town Clerk by means of letters which were exhibited. In those letters it was proposed that the matter

would end up being placed before the Commissioner of Lands who would issue out a final document of title. I have no way of disputing this. There is no way of concluding otherwise. But what worries me is that this would not be a valid allocation if an application has not been made before a Chief or allocating authority, who would receive an application, grant title and issue out a final document as evidence of the procedures of affirmation of title to an applicant. To that extent the Respondent's title seems to be even shakier than the Applicant's worrisome Form C which I have commented about. Indeed there has been evidence that I accept that a letter was issued directed to the office of the Town Clerk towards processing of proper papers by the Commissioner of Lands. This was the evidence of Mr. Ramalefane a former clerk at the office of the Town Clerk.

The history of this dispute is a long one. It is a long one in the sense that this Applicant was involved in Matala Local Court that the same site against Thabo Sehlabaka (see CC307\88). There was another dispute and against the late Mokhele, Thabiso Sehlabaka and the Land Allocating Committee of Qoaling (see CIV\APN\239\89). There was, lastly, the application against Mokhele Mokhele in the High Court of Lesotho (see CIV\APN\314\91). In all these proceedings including the one before Matala Local Court in which the late Mokhele and Chief Mapetla were witnesses, there is no reference to this Respondent

as having been one of the occupiers of the portion of this land and Mokhele having donated a piece of the land to the Respondent. Incidentally Chief Mapetla was not called before this Court by and for the Respondent or at all. Chief Mapetla has been here at Court on several occasions when this case was being heard. Even over the restricted compass of the identification of the land Chief Mapetla would have been useful to this Court.

This question of allocation of land to the Respondent is a vexing problem. It is a question that would be answered by the late Mokhele had he not died. Dead men do not answer cases. Incidentally the late Mokhele who was an old and sickly man died about three weeks ago. I have in my discretion admitted his affidavit in the proceedings, on the application of Mr. Kali for the Respondent. He found his support in the South African cases of Flange Engineering Col (Pty) Ltd vs Elands Steel Mills (Pty) Ltd 1963(2) SA 303 and New Zealand Insurance Co. Ltd vs Du Toit 1965(4) SA 136. The affidavit of the late Mokhele is most unhelpful. This is so when viewed against the fact that when the disputes were waged in the Courts even as late as 1988 in (Matala Local Court) no mention was made that the Respondent was allocated a portion of the land. I say late in 1988 merely to emphasise that it is alleged that at that time the donation was already made. The other aspect is that besides other allocation this Applicant occupies one portion allegedly previously occupied

by one Rosa Tlali while the other was occupied by one Mampe who stayed with the Applicant as man and wife. "When Mampe deserted the Applicant, he continued to occupy the said site." (see paragraph 3). At paragraph 5 of the affidavit Mokhele said :

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I wish to aver that the Applicant approached me about Rosa Tlali's site that he be allocated that particular site. I then agreed that he would have the aforesaid site meaning in extent 100 x 100 but before I would recommend the allocation to the Chief, the Applicant showed his certificate of allocation which was signed by Letlatsa T. Letlatsa. I aver further that the applicant has no right or interest in or over the site in dispute.

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I have no knowledge of the Form C the Applicant is referring to in 1980 the allocation of land became vested in Maseru Urban Area Committee of which the Town Clerk is a member and no Form C could have been lawfully issued by the Chief of Qoaling."

The affidavit of the late Mokhele is a Gordian knot of that could only be cut by him. The affidavit of the late Mokhele is again most unhelpful when viewed against the fact that Exhibit H is a letter signed by the late Mokhele in which he says "I Mokhele I give Phakiso the site near his site. The person whom I had given the site has been defeated". This could also mean that the person has given up occupation or not performed. The question is : Which site is this? Is it not the one formerly occupied by Mampe? Is it the one allocated to one Rosa Tlali? As can already be observed the affidavit raises the same questions, which this Court thought were relevant, without (the affidavit) answering them. The unhelpful attitude of the late Mokhele Mokhele had been in full view with regard to the proceedings and the Court Order in CIV\APN\314\91.

One of the incidents or results of the Court Order in CIV\APN\314\91 was that the present Respondent came into the picture. He undertook to pay the taxed costs of the application thus acknowledging that he knew of the existence of the Court Order. He knew that the Court Order sought to eject Mokhele Mokhele from the very site that the Respondent was later seen raising a two roomed grey brick flat roofed building on. This Court was handed a set of photographs (Exh.D) which showed the various stages of the building starting from when the Applicant objected and came to the Court, until the building was almost

complete (the shell) but yet un-roofed. Despite the existence of the Court Order this Applicant, who was said to be the agent of Mokhele, continued to build on the site. That is why the Applicant says in paragraph 5 of his founding affidavit :

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Despite service upon Mokhele Mokhele and in fact as a result of the Order I was assaulted by the present respondent who lodged a case against me for assault on him. I refer the above Honourable Court to the proceedings in CR 944\91 he continued to build and upon completion of the building, the present respondent is in unlawful occupation of my site. I annex hereto a copy of the Order of Court in CIV\APN\314\91, and the return of service thereof."

So that the cause of the present proceedings is this Respondent having been seen building on the portion which the Applicant claims as his. This is not denied by the Respondent. The Respondent got to an extent (under cross examination) where he could not avoid having to accept that he was aware of the Court Order against the late Mokhele. It was a Court process or a bundle of documents over which the Applicant and the Respondent quarrelled. Having met somewhere the Applicant taxed the

Respondent about the Court papers. Briefly stated they argued about the papers and this ended in the assault or a fight being presumably the one referred to in paragraph 5 of the Applicant's affidavit.

It was in the proceedings before the magistrate's court where the Respondent is recorded as having said at page 15 of the proceedings (referring to the Applicant) :

" He came to me after I waited. I wasn't from the vehicle. He asked me whether I had received a summons from her lawyer instructing me to stop building where I was building. Such letter was at my grandfather's. So I told him that he should tell his lawyer that he should be the one to explain the contents of the letter. There is my grandfather's site at Lekhaloaneng where I am building a house. There is dispute over the site where I am building and the accused is the one disputing the site." (my underlining)

The proceedings would therefore support the view that the site on which the Respondent was building was the disputed site and it belonged to his grandfather.

It is also in those proceedings before the magistrate where the Respondent revealed that he is an heir of the relative of the late Mokhele and that as a result he is entitled to the site. At page 27 of the record the Respondent is recorded as having said:

"Q. You said accd fights interfere with you and its because the site is Mokhele's. But the site is not yours but Mokhele's. What I am saying is that the site is my grandfather's through my father and therefore mine."

This suggestion contradicts the other explanation which attributes his title to the site as being a result of an outright donation. Now he says it is an inheritance. This is a question of credibility. This did exercise my mind. But it is not one of the things that has mainly persuaded me in the order that I have made. But one cannot avoid suspecting that thing such as this indicate that some kind of games are being played. One of them could be that the late Mokhele was giving out and forgetting on the one hand and giving out and regretting on the other hand and then waiting for fate to take charge. But then the question that still remains is : Why Mokhele has not all along or disclosed the allocation to his grandson (the Respondent).

This Order in CIV\APN\314\91 was not appealed against (for arguments sake) nor did the Respondent intervene in the proceedings themselves. He may not have known about the proceedings then. But why did Mokhele not inform him? Nor did the late Mokhele apply for rescission of the Order. He may not have had good reasons for taking such steps. The main question in the circumstances would then be : Is this Court entitled to set aside, review or go behind the Order of the former Chief Justice when no one applied for opening up of the matter? This Court is unable to do so. It remains a valid order of this Court.

I may be repeating what I have said in the preceding paragraphs. This I have straight away pointed out to the Counsels during their argument in this matter. It was that I was worried that the title over the land purportedly granted to either parties were not clear. But what is important is that there is an Order of this Court which is now a valid judgment of this Court which sought to eject Mokhele. I am satisfied that the present Respondent got into the shoes of Mokhele in an irregular manner. He may have been an heir or he may have been a donee. But I do not see that this can stand in the way of a judgment of this Court in CIV\APN\314\91 which I said remains in effect.

The conduct of the Respondent is such that it could be characterized as contemptuous or *mala fide*. This dispute or criminal case before the magistrate shows clearly that there was a Court Order or proceedings of this Court which this Respondent knew about. He despised the Court Order. Despite the Court Order he proceeded on with building operations. This was unreasonable conduct in the circumstances. It is not in the powers of this Court to review the proceedings of the Court or other judgment, except in special circumstances spelled out in the rules of Court. I find that in CIV\APN\314\91 is binding against the present Respondent. Literally he made a contempt against it. He has not been *bona fide*.

I make the order that the Respondent shall vacate this site. I also make an order that he must pay the costs of this proceedings. The Respondent paid the costs of suit for the late Mokhele. He was in cahoots with him. It could be because they were related. It could be that the Applicant stood to benefit somewhat. What weighs against this is the existence of this Court Order. I cannot look behind the Court Order. If I were the judge who made the Court Order I would have looked behind the Form C of the Applicant and the endorsement.

This Order in CIV/APN/314/91 could have been given during the motion Court during unopposed matters. No judge can be

expected to scrutinize all these things. Even even if he does it cannot be as close as he would do in contested matters where challenges are thoroughly made to the different aspects of the claims and the defences. If this matter, even if unopposed, was the damages for instance the Court would have been bound to consider minimum proof and other matters such as the chequered character of the Applicant's Form C. The judge would have said that the Form C was shady because after 1979 the allocating authority was different. The Chief who made the endorsement had no authority to do so. Having been no application for rescission this Order therefore stands against the present Respondent.


T. MONAPATHI
JUDGE

1st September, 1995

For the Applicant : B. Tsotsi

For the Respondent : R. Kali