

CIV/A/31/92

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOTSOARI MOTSOARI

APPELLANT

and

MOHLAOLI MAHOMO

RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice G.N. Mofolo,  
Acting Judge, on the 15th day of September, 1995.

This is a case which commenced in 'Mamabaena Local Court where the plaintiff Mohlaoli Mahomo sued the defendant Motsoari Motsoari for ploughing his land.

The Local Court found for the defendant and ordered the plaintiff to vacate the land. Plaintiff had appealed to Ramokoatsi Central Court and the Court had upheld the appeal. From the judgment of Ramokoatsi Central Court the appellant who was defendant at "Mamaebana's Local Court had appealed to the Judicial Commissioner's Court and the appeal had been dismissed.

It was against the judgment of the Judicial Commissioner that the defendant at 'Mamaebana Local Court had appealed to this court.

According to the Record of Proceedings which are properly paginated, it is said that reasons for appeal are on pages 34 - 35 but the last page is 33 being the last page of the Judicial Commissioner's judgment. I do not, however, find this omission to be of any import considering that the appeal was in any event argued before the Judicial Commissioner and have in the meantime availed myself of the missing reasons for appeal.

For the sake of convenience, I will refer to the appellant before this court as the defendant and the respondent as the plaintiff.

The plaintiff had sued the defendant at 'Mamaebana Local Court claiming the land already referred to on the ground that he had been allocated the land by the chief and the allocating committee in 1972. The plaintiff had annexed a Form C which was signed purportedly by two chiefs namely: Ts'otleho Motlomelo and S.J. Moholobela. Morena-oa-Sehloho (Principal Chief) Sebaka (Ward Chief) and Ramotse (Headman) had been cancelled leaving Morena (Chief) and yet the date stamp was that of 'Morena oa Matelile.' (Chief of Matelile)

In his judgment the President of 'Mamaebana Local Court referred to the anomaly of the two signatures on plaintiff's Form C but except saying that it was surprising there were two signatures left the matter open. It appears that the trial

court found for the defendant on the ground that 'this land was not lawfully removed from Mots'oari's family by the time it was awarded to Plaintiff '.

On the other hand, Ramokoatsi Central Court appears to have been influenced in its decision to reverse the trial court's finding by the fact that 'it is clear that Respondent ploughed the remaining portion by force.' I am at a loss where the presiding officer got 'by force' from for in the proceedings before the Local Court there was no reference to use of force at all nor did the President of that court refer to force at all.

If the use of force came from addresses by the plaintiff and defendant before the Central Court the court was wrong to take such addresses as evidence on which a court could base its decision.

For reasons that are not clear to this court, the Judicial Commissioner confirmed the finding of the Central Court to the extend, as it said, 'that it found the allocation to be lawful.'

Now, in this context the lawfulness referred to appears to be the Form C which was issued in favour of the plaintiff by two chiefs namely: Ts'otleho Motlomelo and S.J. Moholobela. Before 'Mamaebana Local Court the defendant had asked questions to which the plaintiff had replied to as follows on page 3 of the Record of Proceedings:

"14. Chief Motseki allocated me the land being chief of Motiatii."

"17. Chief Motseki has the right to allocate the land."

"18. Chief Motseki was not yet gazetted when he allocated land to me."

"19. The ungazetted chiefs have right of allocating land."

"20. Chief Motseki allocated me the land lawfully though he was not yet gazetted."

then on p.5 appears the following answers:

"1. Plaintiff was allocated this land by Chief Ts'otleho Motlomelo chief of Maholong."

"2. Ts'otleho took the land from Chief Motseki and allocated it to Plaintiff."

I do not understand what is meant by Ts'otleho took the land from chief Motseki and allocated it to the plaintiff for neither Ts'otleho nor Motseki had the authority, in law, to allocate land. If this is what the Judicial Commissioner meant by

'The allocation to respondent of the land as done is lawful',

the learned Judicial Commissioner was terribly mistaken for only gazetted chief have the right, in consultation with their land committees, to allot land. As to what chief Moholobela's signature wanted on plaintiff's Form C is difficult to say as neither the plaintiff nor his witnesses say chief Moholobela was the allocating authority then.

As I have said, it appears that according to Exh. "A" (Form C) both Ts'otleho Motlomelo and S.J. Moholobela signed the Form C and as to designations Morena oa Sehloho (Principal Chief),

Sebaka (Ward Chief) and Ramotse (Headman) seem erased leaving Morena (Chief) apparently as an indication that Ts'otleho Motlomelo was the allocating authority - something which ties up with the evidence that plaintiff was allocated the land by chief Ts'otleho Motlomelo as shown supra at p.4.

In his evidence the plaintiff told the trial court that although Motseki was not gazetted it's him who allocated him the land. It was plaintiff's witness Moiapela Ntebele who told the Local Court that it was Ts'otleho Motlomelo who allocated the land to the plaintiff. Quite apart from this conflict in the plaintiff's evidence, no two chiefs can jointly and validly allocate land in the same area for authority is conferred upon an administrative organ to exercise its powers within a given geographical area or in a specific place.

According to the Form C (Exh "A") chief S.J. Moholobela is chief of Matelile and I am made to understand that his is the Principal Chieftainship Ward of Matelile so that in my view his signature on the Form C referred to is superfluous and may have been used to cover Ts'otleho Motlomelo's inability in law to allocate land.

It has been said if an organ 'exercises its powers outside the geographical area or in a place which does not qualify in

terms of the empowering statute, the organ will have exceeded its powers and the act will be invalid.' see Mutardzie v. Schrader, 1966(4) S.A. 678 (SWA). It has also been held that:

'An administrative organ on whom a certain status has not been conferred within a particular area has no authority to issue binding decrees within that area.' - see S. v. Peter, 1976(2) S.A. 513(C); Cape Divisional Council v. Parker, 1981(3) S.A. 817(C).

I find that when S.J. Moholobela signed Exh "A" (Form C) he had exceeded his powers and that when Ts'otleho Motlomelo also signed Exh "A" (Form C) he had no authority to do so and consequently that their act was invalid and of no legal force or effect.

It was defendant's case that the land claimed is his by virtue of having been allocated the same by Motsoari's family and in support produced Exh "B" which gave the defendant Toronyane Mots'oari's rights and evidence showed some of the rights to be inherited by the defendant included the land in dispute. The question now arises whether an heir can validly inherit arable lands. Mr. Sello for the defendant conceded that was not the law and as I agree with him it would be worthless to pursue this aspect of the case.

At the hearing of this appeal Mr. Sello had made certain submissions amongst which was the fact that although the law is

to the effect that on the death of a head of the family land automatically reverts to the chieftainship for re-allocation such an act could not be said to be valid and was to be looked upon as technical in that in reality the chief could not ignore interests of dependents in re-allocating the land so that, strictly, land ran in families with the qualification that there had to be in any event lawful allocation which the defendant did not have. He further submitted that a widow may not dispose of land without consultation with the family the more so because given the economic structure of the country land is a resource which cannot be disposed of without considering interests of dependants.

Mr. Sello concluded his argument by saying although defendant did not have a valid title, he was nevertheless entitled historically and customarily to be given such title to the land.

Mr. Khasipe in reply wondered how the appeal came on the roll of cases for hearing for after all it had lapsed as the set down was irregular and not according to the Rules of Court and cited Rule 52 of the High Court. He went on to say the set down was not according to the Rules of the Subordinate Court either and as far as he was concerned a Subordinate Court in law included the Judicial Commissioner's Court. As to the proposition that a Subordinate Court includes a Judicial

Commissioner's Court. Mr. Khasipe had no authority to support the contention and as in any event this court was not called upon to decide this issue this argument was not pursued.

Mr. Khasipe's implications of Rule 52 of the High Court rules is so important, though, that this cannot be left undecided.

I have had the occasion to lay my hands on defendant's appeal to the Judicial Commissioner's Court. The appeal was received by the Judicial Commissioner's Court on 11th October, 1990 and the Judicial Commissioner issued a certificate on the 21st November, 1991 though he signed the certificate on 2nd December, 1991.

Paragraph 3 of the Certificate reads:

Applicant is required to have served upon the Respondent a copy of his written grounds of appeal and a copy of set-down for the next session of the High Court.

and paragraphs 4 and 5 respectively read:

Applicant has also to lodge with the Clerk of this court at Maseru a notice of set-down addressed to the Registrar of the High Court.

and

All rules have to be complied with timeously failing which an application for condonation of late lodgement of the appeal should be submitted to the High Court through the Registrar.



According to the Judicial Commissioner's Certificate and hence the rules therein contained, appellant should have simultaneously as he served a copy of grounds of appeal served a copy of set down on the High Court in its ensuing session. In addition, appellant was to have lodged with the Clerk of the Judicial Commissioner's Court a notice of set-down addressed to the Registrar of the High Court. These requirements are in terms of the decision in Letsie Mots'oene v. Setsumi Molapo H.C.T.L.R. 1926 - 1953 and were to have been complied with within a period of 30 days from the date of issuance of certificate of the Judicial Commissioner. As far as this court is concerned, these rules appear peremptory.

From a perusal of the record, it appears that the appellant never complied with the provisions of the certificate as issued by the Judicial Commissioner for the only time the matter was set down was in February, 1993 and contrary to the requirements of provision 4 of the Judicial Commissioner's Certificate. According to the decision in Letsie Mots'oene v. Setsumi Molapo already referred to, '30 days are allowed to run from the date of issue of this certificate' so that when the appellant set down the matter on 17 February, 1993 he was out of time and the appeal had lapsed requiring the applicant to file. according to provision five (5) of the certificate, 'condonation of the late lodgment of the appeal' although, in my view, this should read condonation of the late filing of the Notice of set-down and the reinstatement of the appeal.

Before me when this appeal was argued, there was neither condonation of the late lodgment of the appeal nor condonation of the late filing of the Notice of Set-down. It appears to me Mr. Sello for the appellant was satisfied that once he had lodged an appeal necessary rules had been complied with. I don't think so. It will be seen that in retrospect, this is exactly what Mr. Khasipe for the respondent queried and in my view he was on the right track for specifically referring to Rule 52 of the High Court Rules which he said was not complied with despite the fact that sub-rule 5(b) reads:

'subject to the provisions of paragraph (a) herein, the provisions of this Rule shall mutatis mutandis apply to appeals from the court of the Judicial Commissioner.'

In the course of this argument, Mr. Khasipe made several concessions giving the impression that he had abandoned his main thrust of this appeal being out of time. Even if he did not do so, I do not think that this court is denied its inherent discretion to condone breaches of the rules in appropriate cases. It will be seen that in this particular case an appeal was lodged timeously but had to go through the labyrinths and maze of corridors of procedure where an appeal duly lodged expired.

Tindall J. in his landmark judgment concerning the procedure under review remarked:

'The noting of an appeal is a simple step, and there is no reason whatever why a party who wishes to note an appeal should not be compelled to note that appeal within a certain

time. When it comes to the prosecution of the appeal, that is a more elaborate procedure in regard to which delay may be expected to occur, and one can understand the legislature giving the court power to give a dispensation where the appeal has not been prosecuted within a certain period; but there is not the same reason for giving a dispensation where the appellant has failed to take such a simple step as the noting of this appeal within twenty-one days.' see Jackson v. Smith, 1928 T.P.D. 587.

I reinstated this appeal and on argument before me after careful consideration of the evidence in this case the view of this court is that the land in dispute belongs to neither the plaintiff nor the defendant; accordingly, the appeal is upheld and judgments of "Mamaebana Local Court, the Central Court and Judicial Commissioner's Court are set aside with costs to the defendant.

The judgment of this court is that the land in dispute will revert to the Chieftainship for fresh re-allocation.

Notwithstanding Mr. Sello's submissions as to costs in this court, having regard to the circumstances of this appeal in this court, I do not think it would be proper to award costs either way. Accordingly there will be no order as to costs in this court.

G. M. MOPOLO

Acting Judge

13th September, 1995

For Appellant: Mr. Sello

For Respondent: Mr. Khasipe