

IN THE LESOTHO COURT OF APPEAL

In the matter between:

THABO ORIEL MOHAPI

APPELLANT

AND

MATHEWS MONNE
MOSHE MONNE
MOKHELE TS'IU
RAMOSAKENG TS'IU
MATHIBELA SEIPOBI

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT

HELD AT:

MASERU

CORAM:

STEYN, J.A.
BROWDE, J.A.
LEON, J.A.

STEYN, J.A.

On the 14th of September, 1992 Appellant applied *ex parte* for the following relief:

*1. That a Rule Nisi issue returnable on a date and

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time to be determined by the above Honourable Court calling upon the Respondent herein to show cause, if any, why:

(a) The Applicant shall not be declared the sole owner of Plot No. 13283-404 situated at Stadium Maseru Urban Area.

(b) The Respondents and all other persons acting for or on behalf of the Monne family shall not be interdicted and restrained from entering the above said plot No. 13283-404 and / or claiming ownership thereof, or in any other way molesting the Applicant and harassing him in connection with his ownership and occupation thereof, pending the final end and determination of this application.

(c) The Respondents shall not be ordered to pay the costs of this application on an attorney / client scale."

The application was granted and a rule in the

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above terms was issued returnable on the 19th of October, 1992. However the granting of a final order was opposed by the Second Respondent on grounds to which I will refer anon. Shortly after the opposing affidavit was filed on the 4th of November 1992 and on the 11th of November a Notice of Motion headed "Counter/Claim" (*sic*) was issued out of the High Court. In this counter application - as the Judge *a quo* referred to it - Second Respondent (to whom I hereinafter refer as Respondent) claimed in essence a cancellation of the lease upon which Applicant relied for the relief claimed in its notice of motion on grounds to which I will refer below. This application was opposed by the Applicant and replying, supporting and answering affidavits were filed by and on behalf of the Appellant.

Several attempts were made to set the matter down for hearing. Finally on the 2nd of September 1993 and in circumstances unexplained on the papers the following order was made by the then Chief Justice:

- "1. Matters continue as trial, affidavits to stand as pleading and parties may call any witnesses they wish.

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2. There shall be discovery of documents.
3. Registrar of Deeds is joined as 6th Respondent whilst Commissioner of Lands is joined as 7th Respondent."

Notice of an application to advance a point *in limine* to the following effect was served on Respondent on the 13th of December, 1993; i.e.

- "1. The Respondents have failed to show that they have *locus standi in judicio* to contest the Applicant's claim to be the sole owner of the land in question and that they are entitled to apply for cancellation of his lease to the said land.
2. The Respondents have no valid defence to the main Application and no cause of action in the Counter-claim."

The matter was heard on the 19th of April, 1994. It would appear as if both parties and the Court ignored the

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fact that the matter had been referred to trial and the matter was - so it would appear - set down and dealt with by both parties on the papers as they stood. Comprehensive heads of argument were filed by both sides, Appellant for its part strenuously challenging 2nd Respondent *locus standi*.

On the second date (19/04/94) the Court made the following order:

- "1. The rule prayed for by the applicant in the main application is dismissed with costs.
2. The transfer of the land contrary to the provisions of the land act is declared a nullity."

On the 9th of May 1994 reasons for judgment were furnished by the Judge who presided at the hearing (Lehohla J.) to which I will refer herein below.

It is against the orders referred to above that Appellant appeals to this Court.

The facts alleged by the Appellant and on which his claim for relief is based are the following:

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The late Lefa Mary Mohapi to whom Appellant alleges he was married according to Sesotho Law and custom, was previously married by civil rites to one Khampepe. This civil marriage, it is common cause, was dissolved by divorce. Appellant alleges that in 1955 he married the said Mohapi by customary rites and that they lived together as man and wife until she passed away and was buried on the 29th August, 1992. There was no issue of the marriage.

The property in dispute is Plot No. 13283-404 Stadium Maseru Urban area and is held by Appellant under a 90 year lease issued to him by the Commissioner of Lands on the 6th of May 1988 but commencing in operation on the 16th of June, 1980. The value of the lease exceeds M10,000.

The circumstances under which Appellant acquired the right to the lease are the following. He alleges it was allocated to him by the District Commissioner, Maseru in or about 1964. By agreement with Mary (his now deceased "wife") he registered title to the plot in her name "to protect it from claims being made to it by my estranged first wife". When they subsequently realised that

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Appellant's first wife was not pursuing any claims and because Mary was very ill they decided "that the plot should be transferred back to me in order to secure it for my children by my first wife, the eldest of whom was brought up by Mary".

Mary in fact wrote a letter to the Commissioner of Lands on the 11th of December 1982 which reads as follows:

MARY LEFA MOHAPI

P.O. Box 2447,

MASERU 102.

11th December, 1982.

Commissioner of Lands,
lands & Survey Department,
MASERU.

Dear Sir,

re: APPLICATION FOR LEASE:

I hereby apply for lease in terms of Section 28 (1) read with Section 29 of the LAND ACT 1979. I am the owner of residential site no. 1 situate in the MASERU URBAN AREA.

I enclose herewith a certificate of Title Deed No. 8381 issued by the Registrar of Deeds on the 9th September, 1969. I also enclose a map of the boundaries of Site No. 1 in terms of Section 29 (1) (b) of 1979 Land Act.

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I also request that the said lease be in favour of my husband THABO MOHAPI to whom we are married according to Sesotho Law & Custom.

The reason for this request is that I want the said lease to pass by inheritance to my present family.

Yours faithfully,

(Sgd) Mary Lefa Monne
MARY LEFA MOHAPI (Nee Mary Lefa Monne)

It was in response to this letter that on the 6th of May 1988 the Commissioner of Lands executed a lease in favour of the Appellant - annexure "A" to the founding affidavit.

Respondents' challenge to the validity of Appellant's claim is the following:

He alleges that the lease was issued to Appellant "fraudulently or by mistake as a result of a misleading letter". (This is a reference to the letter cited above). Respondents then place in issue the fact as to whether Appellant and Mary were in fact married as alleged, and that they "misled the Commissioner of Lands, who sought no proof, that they were man and wife". The basis of this allegation is an averment that "if deponent

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was married by customary rites ... the respondents herein would know as they constitute Monne family to whom *lobola* and other customary law marriage requirements would be met".

The only averment Respondent makes justifying any rights to the land in question is the following. He alleges the response to Appellant's averment that Respondent is interfering with his right to occupy the land in question that - "This is correct, the reason is that the plots belonged to our subject in her own right and having died we have the duty to attend to her estate according to custom".

That both these allegations lack particularity and are essentially bald, unsubstantiated averments is self-evident.

In response to these allegations and the counter claim, Appellant very specifically challenges Respondents' *locus standi* and their rights not only to seek to impugn the validity of the lease but also to have been involved in the negotiations concerning the conclusion of a marriage contract between the parties

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(Appellant and Mary). He says that:

"Her late mother Mrs. Mamphesa Monne agreed to the marriage between Mary Lefa and me and she said it was not necessary for me to seek the permission of the Monnes for the marriage and to pay any *bohali* to the Monnes because they had not refunded the *bohali* paid to them by her divorced husband, and that the Khampepe's could not claim *bohali* from me because it was Khampepe's fault that led to the dissolution of their marriage.

The late Mary Lefa and I lived together as man and wife at the home of her said late mother at Sea Point Maseru for 4 years and none of the Monnes ever queried the fact that we were married according to Sesotho custom or ever asked for payment of *lobola*."

These averments are repeated in the opposition to the counter-claim and Appellant affirms moreover that "on the contrary all of them (the Monnes) accepted us as man and wife".

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Certain other affidavits were filed in substantiation of these averments. I will refer to some of these herein below.

I should in conclusion record that the narrow legal basis on which Respondents purport to challenge the validity of the lease was "a title deed in the name of Mary Lefa Monne would not result in (the lease's concerned) without transfer deed". (I assume that this was an allegation to substantiate a contention that Appellant could not have acquired title to the lease because of a non-compliance with the provisions of Section 16 of the *Deeds Registry Act*.)

The Court *a quo* in its judgment discharging the *rule nisi* and granting the "counter application" found that because *lobola* had not been paid and as a matter of law the parties were not married in accordance with Sesotho law and custom. Handing over of part or all agreed "*bohali*" cattle for the marriage is according to the Judge *a quo* an essential for the existence of Basotho customary marriage and is "totally lacking". He proceeds to find that the "affairs of the late Mary seemed to have been dogged by secrecy which rendered them all suspect".

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and "...in her (Mary's) eagerness to pass that property to the Applicant (Appellant) the late Mary faulted (sic) by hastily and fraudulently trying to cut corners".

The Court also finds that the Appellant "has concealed from the Court how he came to acquire title to the said plots". The Judge goes on to say,

"It is significant that, thanks to the diligence of the respondents especially Moshe Monne, the applicant was not the original allottee of the above plots. The original allottee was the late Mary who having died unmarried to the applicant and having borne no children to her previous husband and to the man with whom she lived before her death, by law left her assets to be dealt with by her maiden family i.e. the Monne family as she was their ward."

It seems to me that the Court *a quo* erred at least in the following important respects:

1. As I have pointed out above that in his response to the Respondents' opposition and the filing of their Counterclaim, Appellant alleges that the land in question was allocated to him by the District Commissioner, Maseru in or about 1964 and that he - sometime later and for

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the reasons indicated above registered title in Mary's name.

There was no response to this averment by the Respondents. They did not seek to challenge this averment as they would have been entitled to do - especially in view of the fact that they initiated a counter-application. The finding therefore that Appellant "concealed" from the Court how he came to acquire the plots is a serious factual misdirection. So too is the finding that "applicant was not the original allottee of the above plots". There was uncontested evidence under oath that he was an allottee by virtue of an allocation by the District Commissioner in 1964 and that Mary derived her title from him.

It is true that in his original application Appellant relied simply on the existence of the current lease as a basis for his claim. But this he was perfectly

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entitled to do. Until Respondents filed their opposing affidavits he was not to know on what grounds other than that they challenged the validity of his marriage, they contested his right to the land. He was therefore entitled in his response to Respondent's opposition and the counterclaim to detail the history of how he obtained title, which I repeat, has not been challenged.

Not only would Respondents have been entitled to challenge the fact that he was indeed the original allottee, but they could have availed themselves of the opportunity to cross-examine Appellant on this issue or to lead evidence pursuant to the Court order referring the matter to trial. They did none of these things. In these circumstances the finding of the Court on this issue is in clear conflict with unchallenged evidence.

2. The finding concerning the validity of the

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marriage, whilst it appears to have some legal basis in customary law, in other respects flies in the face of uncontested evidence. I find it difficult to agree with the summary rejection of Appellant's evidence that Mary's late mother consented to the marriage and waived the right to *lobola* in the circumstances alleged by him. This averment is also confirmed by one Makhotso Mphahama (born Monne) a relative of the Respondents. Indeed she specifically avers that this marriage was approved by Mary's mother "and generally by the Monne family". Moreover, it was common cause that she had been married by civil rites, divorced, and no longer subject to the customary law constraints alleged by Respondents.

Once again Respondents have not denied these allegations. They were, as indicated above, entitled to do so, either on affidavit or *viva voce*. They were content to abide by the bald allegations

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referred to above.

Once again the findings of the Court *a quo* appear to fly in the face of evidence which has not been contested by Respondents, who were entitled to do so both in reply to the opposition to their counterclaim or pursuant to the Court order referring the matter to trial. Instead they elected to have the issues decided on the papers as they stood.

3. Even more startling, however, is the failure of the Judge *a quo* to deal with the challenge to Respondents' *locus standi in judicio*. This challenge was not only raised in *limine*; it was raised by Appellant in his opposition to the counterclaim. The said Mphahama very specifically articulates the challenge thus:

"The second Respondent is the genealogical head

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of the Moshe family but not of Mofo's house. Mofo had a son called Matsepe who got married and had children. He is late but his eldest son Ts'iu Monne, still lives and resides at Sea Point Maseru. In my opinion he of all the Monnes, would have a better claim than the second Respondent to manage and inherit the estate of the late Mary Lefa Mohapi (born Monne)*.

Moreover in his heads of argument dated as long back as the 2nd September, 1993, Appellants advanced the following contentions in paras. 6 and 7:

- *6. The only reason given by the Respondents for invading the Applicant's rights to exclusive possession of his land is that "...the plots belonged to our subject in her own right and (she) having died we have the duty to attend to her estate according to custom". Apart from the fact that custom does not permit such a high-handed manner of asserting one's rights, the Respondents have failed to show that

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they in fact have such right.

7. Even if Lefa Mary Mohapi was not married to the Applicant, which is denied, the Applicants have not shown that

(a) she was not entitled to dispose of her property during her lifetime.

(b) that they are her heirs or that they are acting on behalf of her heir(s).

I have been unable to find any attempt by the Court to deal with these averments. Once again, there was ample opportunity for Respondents to reinforce their alleged rights to the land by way of further evidence - either *viva voce* or by way of affidavit. They failed to do so. Nor did they challenge Appellant's evidence in this regard. On this ground alone Respondents should in my view have been non-suited both in their opposition to Applicant's claim for relief and in

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respect of their counterclaim.

4. Finally the finding that Appellant's wife "hastily and fraudulently" tried "to cut corners" is a totally unsupportable finding. There is ample evidence, some of which I have cited above, that not only did Appellant and Mary live together continuously for 37 years (4 years of which with Mary's mother), but that they were generally regarded as man and wife. To say that in these circumstances Mary, when she wrote the letter referred to above did so "fraudulently" is not only unjustified but grossly unfair.

In these circumstances the narrow legal challenge to the validity of the leases on the ground of non-compliance with Section 16 of the *Deeds Registry Act* and, if so its consequences in respect of Appellant's right to occupy the land in question, does not require to be adjudicated upon.

It is clear from the above reasoning that there was

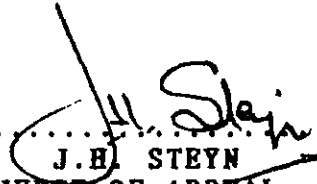
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no legal basis established upon which Respondents were entitled to challenge Appellant's rights to the undisturbed occupation of the property in question. Respondents failed to prove that they had *locus standi in judicio* to do so.

The Court *a quo* clearly erred in finding as it did. The orders granted by the Court *a quo* are set aside and in place thereof the following is decreed:

- (1) The *Rule Nisi* issued on the 14th of September, 1992 is made final.
- (2) Respondents' counterclaim is dismissed.
- (3) Second Respondent is ordered to pay the costs of suit.

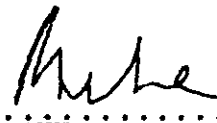
I agree

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 J. H. STEYN
 JUDGE OF APPEAL

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 J. BROWDE
 JUDGE OF APPEAL

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I agree


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R.N. LEON
JUDGE OF APPEAL

Delivered at Maseru this ^{13th}..... day of January, 1995.