CIV\APN\222\92

IN THE HIGH COURT OF LESOTHO

In the Application of :

DANIEL MOTHANDI TOMANE	Applicant
and	
TSABO MATOOANE	1st Respondent
ATTORNEY GENERAL	2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 17th day of March 1995

In his notice of motion Applicant asks for an Order for cancellation of lease number 13284-234 in the name of the First Respondent and ejecting him from the site allegedly allocated to Applicant. He also asks for costs.

The First Respondent has filed his notice of opposition and an answering affidavit. Applicant later filed his replying affidavit, supported by those of 'MALERATO HLEHLISI and 'MAPOLOKO TAU. The two supporting affidavits only go as far as to state that the disputed site is vacant and had been fenced by the

Applicant not deponents as the First Respondent contended in his answering affidavit. That a security fence was erected sometime in 1992. MAPOLOKO TAU has this to say in her affidavit:

> "3.
>
> I have since been a resident of Majoe-a-litsoene since January 1984 and I have built a house on the eastern side of the plot which belongs to the Applicant.
>
> 4.
>
> I have know the Applicant long before I resided at Majoe-a-litsoene and I know the plot originally belonged to his late mother Masekeifana Tomane whom I know very well.
>
> 5.
>
> The fence on the eastern side of the plot belongs to me, whether the barbed wire on both the north and sough of the plot was erected by the Applicant's mother on or about 1989 and verily believe that it belongs to the Applicant." (My underlining)

Indeed the Form C "Annexure A" attached to the Applicant's founding affidavit is in the name of the deceased MASEKEIFANA. It is one of the points taken by Mr. Matooane that the Applicant has no *locus standi* nor title to the land in as much as it can only amount to speculation as to how he came into the title. When being attacked by Mr. Hlaoli that he is raising the point only during argument and has not referred to it in his affidavit (which are both pleading and evidence) Mr. Matooane replied that he was entitled so to do on the following grounds: Firstly, it was a legal point which he could raise at any stage in the

proceedings. Secondly, he had never admitted that Applicant was allocated the site and had all along denied such allocation. To that extent he was entitled to raise the point as to the Applicant's title to the land. In line with his latter contention the complication in the Applicant's title is even brought to the forefront by the affidavit of MAPOLOKO TAU only in the replying stage. This means as Mr. Matooane submitted he had no chance to address the point by way of a further or additional affidavit. In any event he took a legal point which he was entitled to take on any aspect of the proceedings at any stage even without prior warning.

But it was clear as well as common cause that the Applicant's Form C was in fact in the name of MASEKEIFANA TOMANE thus bolstering Mr. Matooane's contention that the Applicant had no title to sue.

The parties however proceeded on the basis that it was common cause that:

(a) The Applicant's Form c had never been registered in accordance with section 15(3) of the Deeds Registry Act 1967 to-date and until 1979 when the First Respondent applied was issued with a Form C having been allocated the site. And that in such a situation, there having been no application for extension by the Registrar of Deeds or the High Court the rights to the site fell to be treated under section 15(4) of the Deeds Registry Act 1967.

(b) That the First Respondent's Form C had never (except for and at issue of a lease) been registered in

accordance with section 15(3) of the Deeds Registry Act 1967 (except as aforesaid) until at registration of the lease. This was held to mean that at registration of the First Respondent's lease the Form C was not a lawful certificate but has expired and had become of no force and effect on the interpretation of section 15(3) of the Deeds Registry Act 1967.

It is on this basis that Mr. Hlaoli argued that the issue of a lease to the First Respondent had been founded on a stale certificate whose basis was irregular and on that score the lease was invalid and ought to be cancelled. This was the second leg of Mr. Hlaoli's argument. Mr. Hlaoli could not accept that the effect of the registration of the lease by the Registrar was in pursuance of and was consistent with the extension of the period of extension as envisaged in section 15(4) of the Deeds Registry Act 1967. When it was suggested that the registration itself would have the effect of condoning such defect Mr. Hlaoli replied that there had to be a special certificate or endorsement issued by the Registrar and in the absence of such endorsement (to be shown to exist by the First Respondent) no remedial effect could result by the mere act of registration of the leases Mr. Hlaoli appreciated the technical problem the office of the Attorney General not being able and willing to bring forth such evidence by the ever present attitude of not opposing and deciding to abide by judgment in a way standing aside to let the other parties battle it out. It meant therefore that existence of the endorsement would amount to speculation and that the role the

First Respondent has failed to discharge the onus.

Mr. Hlaoli's first argument had been that the First Respondent had failed to prove allocation to the site. This he ought to have done by bringing forth affidavit as to application and allocation by at least a member of the allocating committee or the Chief of the area. To the extent that he has failed to do so no basis had been made for the issue of a lease to him. I agree with Mr. Hlaoli's submission based on the case of Majoro vs Sebapo 1981 (1) LLR 15 that a certificate of allocation is merely *prima facie* proof and once such is challenged the onus of proof shifts to the other side. I have already made my remarks about the proffessed nature of the Applicant's title about this site which is alleged to have been that of her grandmother. I have also understood that each side has always been contesting each other's alleged allocation. With the problems attended or resulting from the interpretation of the section 15(3) of the Deeds Registry Act 1967 being debatable or doubtful or tainted I would regard the allocations to be on the same footing. This view I take subject to my evaluation of the fact of registration of the lease by the First Respondent. I noted that at all times none of the parties occupied the site except for the prior fencing by the Applicant's mother (which the First Respondent disputes) and the security fencing by the First Respondent which is not denied.

I have understood Mr. Matooane to be having a two fold argument. The first leg is : That despite what may have been a stale certificate of allocation (Form C) the Land Act 1971 provided for registration of title as envisaged in the following scheme :

(1) In terms of section 29(1) (a) (b) (ii) and (2) a lease may be prepared by the Commissioner of Lands for registration by the Registrar of Deeds. This is in pursuance of conversion of titles to leases as envisaged in section 28 (1) and thence by persons with titles lawfully held at the date of commencement of the Act shall be deemed to be converted into leases.

(2) On receipt of application in terms of section 20 of the Land Act the Commissioner of Land shall act in terms of section 33(1) and shall cause to be published in a national newspaper notice of application for leases and licences under section 29, 30 and 31 which notice shall give the name of the Applicants and an adequate description of the land to which the application relate."

The First Respondent says that he had the application publicized in terms of section 33(1) of the Land Act 1979. I did not hear from the Applicant's Counsel that the absence of the publication (which he did not allege) or any alleged irregularity (he did not contend there was any) was a basis for his claim for cancellation of the lease. This means that as Counsels agreed there was no grounds upon which the registration of the lease would be reviewed (as a procedure in a way that lawyers understand it to mean).

Following on this agreement there was no room for review of

the matter, Mr. Matooane for the First Respondent submitted that there was therefore no basis for and no way of looking into the registration of lease which has had the effect of containing an indestructible title to the First Respondent in terms of section 23(4) of the Land Act. It meant in the lawyers' language there were no jurisdictional facts upon which the High Court would be asked to look into the lease with a view to cancelling it. That there is so despite the existence of section 7(1) of the Deeds Registry Act 1967 (in connection with cancellation of deeds upon an Order of Court). Mr. Matooane submitted that besides the approach to the High Court which is permissible when a lease is sought to be reviewed the only way a litigant would approach the Court is by way of appeal from the Land Tribunal.

If is in the intentment of the Land Act Section 23(1) that such publication in terms of section 33 having been made: "Any person claiming title to land affected by a notice under section 33(1) may within a month from the date of publication of notice in a national newspaper lodge a claim to such land before the Tribunal." Such step having not been taken by the Applicant Mr. Matooane submits that any form of inquiry or looking into the lease has been ousted by operation of the law. That this is subject to the reading of section 23(4) which goes thus: "where no claim has been lodged within the period specified in Sub-section (1), any grant made under this part conveys the legal

right to use and occupy the land subject to any rights an adverse claimant may have to payment of compensation for lawful improvements made by him to the land." (my underlining) It is on this note that the First Respondent said his right to the land was unassailable.

The said section 15(4) of the Deeds Registry Act 1967 came for consideration in the judgment of Isaacs AJ in Stephen Motlamelle vs Johannes Tekateka CIV\A\9\79 on the 23rd November 1979 which was an appeal from the decision of the magistrate on an exception which had been upheld on the following grounds :

> The Plaintiff should have first lodged an application with the Registrar within the prescribed period for the registration of the certificate of allocation or to lodge application for extension of the period for registration of the certificate within the Court of a competent jurisdiction in terms of Deeds Registry Act ....."

I was not addressed by Counsels on the significance of the innovations of the Land Act 1979 would have on this requirement of the Section 15(4) of the Deeds Registry Act 1967. But I understood quite well from the Counsels that inasmuch as the Registrar of Deeds is still the registering authority compliance therewith would still be a necessity. That is why Mr. Hlaoli spoke of formalities such as the Registrar's endorsement where extension was allowed on delayed registration as I have spoken about earlier in my judgment. I therefore feel persuaded to

adopt the reasoning of the leaned Acting Judge's reasons at page 3 (first paragraph) of the Motlamelle vs Tekateka's judgment as apposite herein in that :

> "A person who sues for ejectment of a person from land must either show that he is a registered owner or that he himself is legally entitled to possession. In the present case the applicant has shown that allocation of land to him has not been registered. He must therefore, in my view, in order to show that he is legally entitled to possession allege that he has made an application for registration within the time set out in the section or within such extended time granted to him. Without such an allegation he has not shown that he has a title to sue and therefore has not disclosed a cause of action for his claim." (my underlining)

When taking into account that the title of the Applicant has not been proved to this Court I feel that I can safely take the view that Mr. Matooane's submission is valid. On this reason alone I would dismiss the Applicant's claim.

Much debate was taken by Counsels on the applicability of the principles enumerated in the case of Ntai Mphofe vs Joseph Ranthimo and Another (CIV\APN\185\87) C of A (CIV) No. 22\1988. The margin in interpretation between the positions held was so wide that I had the impression that they were speaking about two different decisions. Firstly, the Court of Appeal was prepared to ignore the two allocations namely, of the Applicant allegedly made in 1969 and that of the Respondent allegedly made in 1973, on the basis of the section 11(1) and 11(2) of Land (procedure) Act 24\1967 read with section 15(2) and 15(4) of the Deeds

Registry Act 1967. The effect of the last mentioned sub-section is that the certificates of allocation were at the material time null and void or of no force and effect. This failure to register the respective rights of use and occupation rendered such rights to have consequently been lost and to have fallen away in the distant past. This meant further that there were no rights that could be converted into leases in terms of Land Act 1979. Secondly, there being no allocations nor competing claims as such section 82 of the Land Act 1979, which refers to lawfully allocated dual allocations and rival allocations in favour of the allottee who had made improvement to the site cannot be brought into play. Thirdly, accepting that on the 4th July 1986 the site was declared by the Minister in terms of section 44 of the Land Act to be a Selected Development Area did not make a difference to the contesting parties' rights in that "there were no extent rights to be extinguished". Fourthly in the circumstances, there had to be compliance with section 21 and 22 of the Land Act 1979.

I have already referred to the fact that no issue was made of any irregularity in the procedure of the issue of the lease nor an attack nor an allegation of no compliance with the procedure for advertising of the application which was a basis for disallowing the counter claim (cancellation of lease) in Mphofe and Ranthimo's case.

For the above reasons I would dismiss the application with costs.

T. MONAPATHI
JUDGE

17th March, 1995

For the Applicant : Mr. Phoofolo for T. Hlaoli & Co.

For the 1st Respondent : Mr. Phoofolo for Mr. Matooane