CIV/APN/229/94

IN THE HIGH COURT OF LESOTHO

In the Application of :

LETSEMA TSEHLO **Applicant**

vs

NCHELA NTSASA **Respondent**

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on 27th day of September 2000

On 18-05-1998 this Court reserved for oral evidence the portion which could not be resolved on papers. The following therefore is in essence the balance of the Judgment that was granted previously.

The present stage of the matter before court falls within a very, very narrow compass of the case, namely whether it is possible or not for the applicant to reach the field in point, and whether in fact there had existed a way which later became

occluded by the act of the respondent. That is in a nut-shell what this Court is to determine.

The applicant's counsel called oral evidence. The Court, accordingly heard the evidence of the applicant himself, Letsema, who testified that he had this field at Malefikanyana and that to reach it he has to travel between Sootho's field and that of the respondent. In this respect although he was somewhat rattled by the first question which was put in cross-examination to the effect that concerning this field the description he had given relates not to Malefikanyana but rather to Matsoeteng I am nevertheless quite satisfied that what is in issue here relates to Malefikanyana as was testified in fact by the respondent himself.

Needless to say the witness PW2 Thabiso Ntsasa who was called by the applicant supported this view *in toto* and of significance is the fact that - I don't know whether it was by design or by an accidental omission, if it was by an omission it is a regrettable one because - this witness was not cross-examined at all. That he bears the surname of the respondent is something to which I attach some significance. He said :

"I am 29 years old. My name is Thabiso Ntsasa. I know PW1. I know

> respondent also. I filed supporting affidavit supporting PW1. PW1 complains of a closed path that he uses, and which has been closed by the respondent. The fields affected by the closure of the path are in Malefikanyana area. My field is also involved. This being my father's field. My father is disabled so I plough his fields. The path that is closed is one leading to Malefikanyana it has been closed for a long time by Nchela, the respondent. The spot where there is closure is at the heath. There used to be a path such as would let two cars to pass each other in breadth (abreast). There were fields on either side. The field being of Monaheng Sootho Monyane. Monaheng's was relatively new. On the other side was Nchela's field. He ploughed his field such that only a path remained for a human being to pass through".

This is what I attach a lot of importance to. It shows that there used to be a position which later changed. The witness goes further to say Sootho was allocated this land in 1991 or 1992. He goes further and explains :

> "For I came to Maseru, when I did so that space was not ploughed. When I went back home in 1993 I found the path was ploughed up. When the respondent closed the path I was not present but I know this for I saw his cattle plough there, but I had not known when he first ploughed that".

So from this evidence which was never challenged at all, at all, at all it is clear to me

that prior to 1993 there was a path which allowed at least two cars to pass abreast but later i.e. post 1993 then there was this closure.

Now once a thing of that nature occurs then it means somebody's rights have been interfered with. The evidence that has been given by the applicant and answers to the questions which were put to the respondent seem to support the view that the applicant had cause to complain; and he did so to various chiefs. At the start the respondent tried to show that nothing of the sort happened but when confronted with documents which show that in fact, and as the record shows that indeed the applicant took upon himself to seek relief from whatever authorities, then the respondent conceded that there does seem that the applicant did take such steps although he didn't thereby concede that he himself had closed the path. That's why the court even asked him whether after Sootho had utilised the area which was used as an island for cattle, the respondent's own field increased to a certain measure. He denied that it did but I don't see how such a denial could carry the day in view of the fact that the applicant's witness indicated that it was only after Sootho had been allotted the land and during the time when Sootho had been given the adjacent land that a path remained - which was used by the applicant to reach his own field - that the respondent narrowed the remaining path to the extent that it amounted to total closure

thereof. It would seem inescapable in this particular respect that the respondent is not telling the Court the truth when he denies closing the path which had enabled the applicant to gain access to his field without unnecessary hindrance previously. Thus I reject his evidence in favour of the applicant's case.

Now it seems the applicant is no longer able to reach his field with his scotch-cart as a result of the respondent's unlawful and selfish act. But the law whose function is to protect every man's rights would entitle him to have such access. A merit was made of the fact that even if he is given that right of way then there will be further obstruction ahead. It seems that the further obstruction ahead consists of a field belonging to applicant's own family. I would rather such bridge was crossed when it is come to. For the moment it is of utmost importance that the grievance of the applicant be redressed and in my judgment a path has to run through the field of the respondent allowing the breadth of a cart because the applicant has always been saying that his scotch cart is unable to move where it used to be able to do so. So this state of affairs has to be restored to enable his scotch cart to go through where it used to do. It is not the Court's business to allocate land and do things of that nature but where it is clear as it is now to me, that prior to a certain date this way or path did exist, then it is only fair that the user should not be denied its use at the whim of

another man.

I was amazed when the respondent gaily said that the applicant in order to reach his field has to ask permission from whoever including himself. In my view that, if allowed, would be a very sad state of affairs indeed. Every man has got to have free access to his property not on sufferance or act of goodwill or charity by anybody, but as of right. Otherwise what if the other party says he shouldn't have any access to his field!! It means he has to starve with his children. That cannot be allowed.

I am also far from being in favour of the argument by *Mr Mafantiri* for the respondent that because *a trek path can be a heavy burden on another's property* then the evidence adduced for the applicant cannot be relied upon as having discharged the onus required. (Emphasis supplied). See also ***Van Heerden vs Pretorius*** 1914 AD at 80 where the italicised words were extracted.

My attention cannot be distracted by a suggestion following on the above italiced words that while an *actus* differs from a trekpath in that an *actus* can only have a width of a few feet, a trekpath may well be 800 yards wide. There has been

no suggestion in the evidence given by the applicant and his witness nor was it remotely hinted to the respondent and his witness during cross-examination that the applicant sought any relief beyond what is necessary for his scotch cart or his sledge to reach his own field without destroying crops on respondent's own field and on the field adjacent to the respondent's as had been always the case prior to 1993 when the closure took place by the respondent's own unlawful and unwarranted act.

In my judgment therefore the applicant has a right of way over the land where the respondent, after Sootho had been granted the field adjacent to his, came and ploughed it up. The respondent is ordered by judgment of this Court to stop and desist from interfering with the applicant's rights in that regard. That is the Judgment of this Court, and the applicant is entitled to costs. I may indicate that I refuse the application for half-day costs requested on behalf of the respondent as a result of a request by applicant's Counsel to have just half a day's postponement to enable her to prepare heads of arguments for the convenience of this Court.

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JUDGE
27th September, 2000

For Applicant : Mrs Kotelo
For Respondent : Mr Mafantiri