CIV/APN/32/98

IN THE HIGH COURT OF LESOTHO

In the matter between:

TSELENG 'MAPHAKISO MPOTA	**Applicant**
and	
JOSHUA LITABE	**1st Respondent**
MOEKETSI MAKARA MOJAKI	**2nd Respondent**
THE COMMISSIONER OF LANDS	**3rd Respondent**
THE REGISTRAR GENERAL	**4th Respondent**
THE ATTORNEY GENERAL	**5th Respondent**

For the Applicant : Mr. T. Molapo

For the Respondent : Mr. N. Putsoane

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 5th day of September 2001

This was an application in which this Court was approached for the prayers shown on as follows:

"1. That a *rule nisi* be issued calling upon the Respondents to show cause, if any, on a date to be determined by the Honourable Court -

(a) That the 3rd and 4th Respondents shall not be ordered to cancel and expunge from their records a certain lease no. 13282-65 Ha Mabote Maseru Urban Area issued in favour of the Respondent who is intending to transfer it to the 2nd Respondent.

(b) That the 1st Respondent shall not be restrained from transferring the said lease to the 2nd Respondent, or anyone, pending the determination of this application and the 3rd Respondent shall not be restrained from issuing the Minister's consent to transfer the said lease to either the 1st or 2nd Respondents.

(c) In the event of the Deed of transfer having been registered already, the 3rd and 4th Respondents shall not cancel the same as well.

(d) The 1st Respondent shall not be ordered to pay costs of this application.

(e) Further and or alternative relief."

The facts were that the applicant was allocated a site on or about the 15th February 1980. Proof of allocation was evidenced by annexure "A" to the founding affidavit. It was copy of a form "C" (certificate of land allocation in rural areas) Mr. Molapo contended that the allocation would be supported by the Applicant's chief inasmuch as the document even bore the local chief's signature and the stamp. Counsel would not go to the extent of saying that that would be borne by the chief's own affidavit, by register or minutes book. But I understood it to be on common ground that there had in fact been such allocation to the Applicant despite the

absence of so many things I have referred to.

The Applicant's allocation was also supported by the affidavit of Marikabe Litabe (Marikabe) who was the original allottee of the field out of which the site allocation originated. The lady was the same allottee that the First Respondent say his allocations were caused out of her field. The Second Respondent was said to have subsequently bought the same site from First Respondent who caused the transfer to the Second Respondent.

It was the story of the Applicant that when she attempted to apply for a land lease on the basis of the Form C that she had she discovered that a land lease had already been issued in the names of the First Respondent who is the son of Marikabe . This meant that the said Marikabe must have caused the allocation to be made to her own son.

The Applicant's story is that the site was allocated to her. This deprivation she discovered when she approached the relevant authorities to apply for he own land lease. That Marikabe already had a lease. Applicant could not therefore be able to have her own processed on top of the one that was already in existence. The Applicant was attempting to apply for he own lease before she could go any further she discovered that there was another lease in existence over the same plot. This had preceded her own application and had been issued in the name of the First Respondent.

The version of the First Respondent was that the same piece of land had been allocated to him. However I was asked to note that somewhere at paragraph 4 at page 13 of the record the Respondent's answering affidavit the Third Respondent seemed to suggest that the Form "C" on which the Applicant bases her

title would not possibly be a document relating to the same piece of land.

It was submitted that the supporting affidavit of Marikabe who was the owner of the field or allottee or which the sites were allocated supports the Applicant's story that indeed she had actually caused allocation of the site to the Applicant. This is the aspect that was not gainsaid by the Respondents. It was not refuted. The further submission was that in the absence of any evidence controverting the evidence of Marikabe this Court will be persuaded that in fact the allottee was the Applicant. That would mean that as a consequence the land lease allocation to anyone other than the Applicant was irregular. This Suggested as well that both leaseholder and his transferee must have rushed to get their deeds before Mr. Molapo's client. Suggesting further as Mr. Molapo did submit that all others were therefore irregular.

In support Mr. Molapo cited the case of **Tahlo Matooane v Motlatsi Qhomane and Another** CIV/T/279/83 (unreported) (date of judgment not mentioned). Mr. Molapo suggested that possession of a lease is not a conclusive proof that a person in possession of such a lease is in fact in possession of an absolute title to the land. I agreed that the case of **Majoro v Sebapo** 1981 (1) LLR 150 which spoke about possession of a Form C had enunciated that without further support a Form "C" could not be conclusive as proof of allocation where there was a dispute.

Mr. Molapo submitted further that since Marikabe was the one who had caused allocation of Form C or original allocation she must have contributed in an underhand way the registration of land lease to First Respondent as against the Applicant and as was submitted further that for those reasons the issuance of the land lease to the First Respondent had been irregular hence the prayers as in the

notice of motion.

I referred Mr. Molapo as to what the effect would have been if the place was declared a Selected Development Area (SDA) as was in reality the circumstance of the case. His reply was that it was common cause that when the Mabote Project development estate that was facilitated by the SDA all the people who already had title were invited to submit a list of their holdings or names. Applicant was one of the people who was supposed to register her name although in terms of the document annexed to the answering papers the Applicant's name does not appear. That document was not prepared by Applicant obviously but was prepared by the office of the Land Survey and Physical Planning Department the progenitor of the Mabote Project or the Mabote Project itself or whichever inasmuch as Applicant was herself uncertain. It would equally be uncertain as to what happened when the names were submitted and when the leases came out. The person who submitted the lists was the only one would know Applicant declined responsibility for such as a mishap.

Applicant submitted therefore that in the absence of any other evidence controverting that of Marikabe who was the original allottee of the field, that should therefore be taken as conclusive proof that the site was allocated to Applicant inasmuch as Marikabe supported Applicant. I thought it was not that easy.

Mr. Putsoane for Respondents submissions were very brief. He said when the area was declared an SDA all owners of fields were invited to submit lists of people who had been allocated sites from their fields. Marikabe accordingly did so like all others. The purpose was that a registration or re-division would be made in accordance with the designs of Mabote Project. It meant that when the

invitation was made for submission of lists the Applicant's name was most probably omitted. Mr. Putsoa ne for Respondents did quite fairly not rule out the possibility that Marikabe could also be the one who excluded Applicant's name. Counsel and his client did not know what exactly happened. As a fact on page 15 of the record it is shown clearly what the list ended looking like. For whatever reason the Applicant's name did not appear in the list.

Mr. Putsoane's submissions despite all concessions is that even if Applicant was indeed allocated the site once the place was declared an SDA all allottees' rights within the area became extinguished in the manner of section 44 of the Land Act No.17 of 1979. The section provides that:

> "Where it appears to the Minister in the public interest to do so for purposes of selected development the Minister may by notice in the Gazette declare any area of land to be a selected development area and, thereupon, all titles to land within the area shall be extinguished and substitute rights may be granted as provided under this part."

Mr. Putsoane did not end there. He said there is a further provision in the Act No.6 of 1984 which allows for revival of an allocation once extinguished. It is meant that this had to be done by re-application. I also read section 44 to say that substitute rights may be applied for. But as at present we are handling the Applicant's claim as it exists without those option or alternatives. My understanding is that even though she may have not outrightly applied for substitute rights she has not been ousted.

I did not understand Mr. Putsoane's reply to a simple question concerning that question of application for revival. Supposing First Respondent (by operation

of the said SDA) actually occupies the same piece of land that was previously occupied by Applicant; what would be the position? The reply was that the title could be revived over the same piece of land. I thought that was unrealistic. In my view if there had to be any revival of title at all it have to would be over a different piece of land in the spirit or effect of extinction of title and application of a substitute right I gave Mr. Putsoa ne is simple picture that if Applicant had a Form C the Form C became virtually been extinguished because in its place had become a land lease.

By revival in the loose sense would mean firstly cancelling the existing lease, or granting a different title both of which could not have been in contemplation of section 44. How would a revival be done over this piece of land that has already been leased to First Respondent? In the end Mr. Putsoa ne agreed that his instructions were that the project would have to grant Applicant another site if the interpretation of section 44 of the Land Act accorded with the reasoning. This meant, by way of repetition, that Applicant would have to be granted another piece of land. Mr. Putsoa ne's submission finally became that Applicant was virtually ousted by operation of the law unless there was cancellation of the First and Second Applicants titles which was completely untenable.

The above reasoning which I accept, that Applicant clearly lost out on her title impinges upon the viability of the interim interdict which the Applicant may have obtained. It proves that interdict did not have a sure base and I thought it ought to have been discharged. Firstly, if Applicant's title was extinguished by operation of section 44 of the Land Act 1979 she no longer had a clear right. Applicant appeared to be no longer in possession of the land. This brought me to the requirements which the Applicant should have satisfied besides that of a clear right. It was in addition that the Applicant should have had a fear that her right

was to be violated. By operation of the law whatever injury she feared had already resulted and there was nothing to protect. And finally that attempt of protecting her right by the interdict was clearly an exercise in futility. For this reason the application ought to have been discharged. See **Setlogelo v Setlogelo** 1914 AD 221 and the invaluable commentary by C B Priest in **The Law and Practice of Interdicts, 1st Edition** pages 34-41.

Respondent says the measurements of the plot which he has does not even correspond with those of the Applicant. That the Applicant's Form C it was 30 metres x 30 whereas the site registered in First Respondent's name is now 18.4 metres x 18.4 metres x 29.2metres. That while Applicant's whole metreage (as she alleges) was 900 square metres, First Respondent stood at 578 square metres. This means it is two different types of "animals" the parties are haggling over. The short significance of this is that, if the Applicant is to be believed, there has even been a lot of dismembering of this Applicant's site that the effectiveness of restoring her to what she originally had would be unreasonable if not downright impossible. By way of illustration what remains was little more than half of what Applicant would retain if this application is allowed.

Mr. Putsoane later brought what was indeed a complicating factor, not to say it made it difficult to solve the matter. He said that it had in fact been two plots allocated by Marikabe. One was to the Applicant and one to the First Respondent. According to Counsel there would have been no reason why Respondent would suddenly occupy that plot of Applicant. Indeed Applicant has always had a bigger plot while First Respondent had a smaller or so much as the present one. The probability is that the one belonging to Applicant which she has virtually lost out has now been chopped up and changed by re-surveys and re-allocations to different people but certainly not to the First Respondent. That the Applicant's name did

not appear on the list of applicants under the new regime (SDA) must have finally sounded her death knell.

I was persuaded that accepting the unexplained misfortune of the Applicant's name not appearing on the list for fresh applicants in the SDA, the law in section 44 of the Land Act was clearly against her. Indeed it had never been denied that:

"8

> I acquired the said plot from Mrs Marikabe Litabe which was part of her land. She introduced me to the chief and the plot was thereafter allocated to me according to the law."

Now look at what is said in paragraph 5 by Marikabe Litabe

> "JOSHUA (1st Respondent) has got his own plot which he could lawfully transfer instead of depriving MAPHAKISO of her rights to her plot."

Again look at Applicant's replying affidavit 3 AD PARA 5 THEREOF

> "I reiterate my depositions in paragraph 8 of my founding affidavit."

Shouldn't there have been a better reply?

When taxed further as to what is credibly objective that can demonstrate that it was two plots (allocated to two different people) and not one that is beside the word of Marikabe as shown above (paragraph 5) Mr. Putsoa ne referred me to the Applicant's Form C whose measurements were not even consistent with the survey diagram at page 16 of the record. I was not quite sure that the Mabote Project

official spoke of identifying two sites that is one belonging to Applicant and one belonging to First Respondent. Perhaps there are other explanations. One which fortunately comes to my mind being that Applicant's name was in fact mistakenly excluded from those sent for re-registration. Perhaps one can only pass a moral judgment from the question as to why Applicant's name was not included.

I have already pointed out many things that indicated against the success of this application. In addition I agreed with Mr. Putsoa ne that in reaching the decision the decision the Court must adopt the approach in **Plascon Evans Paints Ltd v Van Riebeeck Paints** 1994(4) SA 623 (AA) when Van Wyk stated:

> "..... where there is a dispute to the facts and a final interdict should only be granted in notice of motion proceedings if the facts and a final interdict should only be granted in Notice of Motion proceedings if the facts stated by the Respondents together with the admitted facts in the Applicant's affidavit justifying such an order ..... where it is clear that the facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

I agreed with both Counsel that a lot of prejudice has resulted in this application not having been dealt with earlier.

It was clear in the circumstances that the application ought to be dismissed with costs.

T. MONAPATHI
JUDGE
5th September, 2001
Judgment noted by Mr. S. Phafane and Mr. L Kotele