# IN THE COURT OF APPEAL OF LESOTHO

**C OF A (CIV) 8/2016**
**LC/APN/05/2013**

In the matter between:

**LESETELI MALEFANE** **APPELLANT**

**and**

**ROMA VALLEY CO-OPERATIVE SOCIETY** **1ST RESPONDENT**
**OM INVESTMENT (PTY) LTD** **2ND RESPONDENT**
**THE DIRECTOR OF LAND ADMINISTRATION AUTHORITY** **3RD RESPONDENT**
**LANDS ADMINISTRATION AUTHORITY** **4TH RESPONDENT**
**REGISTRAR OF LANDS** **5TH RESPONDENT**
**ATTORNEY GENERAL** **6TH RESPONDENT**

**CORAM:** W.J LOUW, AJA
M. CHINENGHO, AJA
K L MOAHLOLI, AJA (*ex officio)*

**HEARD** **:** 12 OCTOBER 2016
**DELIVERED** **:** 28 OCTOBER 2016

***SUMMARY***

*Jurisdiction of Land Court and District Land Courts-Allocation of land under Land Act, 1973-Cancellation of lease to land fraudulently obtained*

**JUDGMENT**

**LOUW, AJA:**

[1] This is an appeal against (the first and second) Judgments and orders made by Mahase, J in the Land Court, in a matter concerning competing claims to a piece of land.

[2] I shall refer herein to the appellant as such and to the first Respondent, as Roma Valley.

[3] The Appellant holds a formal lease in respect of the disputed land. It is situated in a rural area and is known as plot 18333-136 situated at Roma in the Maseru district (the site). The lease was issued on 24 June 2010, pursuant to the provisions of s29 of the Land Act, 1979, and was registered in the Deeds Registry on 2 July 2010. It is the Appellant's case that he obtained the lease pursuant to the allocation of the site to him as far back as 5 January 1980, under the provisions of the Land Act, 1973. He was issued with the prescribed Form C and the allocation was registered in the Deeds Registry on 15 January 1980.

[4] Roma Valley's case is that it applied during May, 1976 in the prescribed Form A for the allocation of the site under the provision of the Land Act, 1973 to establish a handicraft centre at the site. The allocation was duly made by Chief Maama within whose area of jurisdiction the site is situated, with the concurrence of the Local Allocation (Development) Committee. Roma Valley was issued with the prescribed Form C in respect of the site.

[5] On 23 March 1999, Roma Valley made a new application, now under s.5 of the Land Act, 1979 for the allocation of the site to establish a filling station to sell petrol, paraffin and diesel. The second application was made when a prospective tenant of the site wished to establish a filling station at the site. The application was not persisted with.

[6] Roma Valley's claim to the site is therefore based squarely on the allocation granted to it on 7 May 1976.

[7] During November 2011 Roma Valley became aware of the fact that the appellant had commenced excavation work at the site. Further enquiries established that the appellant had a registered lease to the site and that he had sublet the site to OM Investments (Pty) Ltd (the second Respondent in the Court *a quo*). These events led to Roma Valley launching proceeding in the Land Court seeking orders:

(a) Cancelling the Appellant's lease to the site;

(b) Cancelling OM Investment's sublease to the site;

(c) Directing the Appellant to surrender the lease document No. 18333 – 136 to the Director of Lease Services, Land Administration Authority;

(d) Directing that Roma Valley be issued with the appropriate documents in its name as sole owner (sic) of the site.

(e) Costs of suit on a higher scale.

[8] The Appellant joined issue on the merits of the claim and raised a point *in limine* challenging the jurisdiction of the Land Court to hear and decide the matter.

[9] Mahase, J dismissed the jurisdiction challenge in the first judgment delivered on 5 July 2013.

[10] The matter thereupon proceeded to trial in the Land Court. A number of witnesses testified on both sides and in the second judgment delivered on 23 February 2016, Mahase, J upheld Roma Valley's claim and made orders:

(a) Cancelling the Appellant's lease to the site, plot 18333-136;

(b) Cancelling the sublease of OM Investments (Pty) Ltd;

(c) Directing the Appellant to surrender the lease document to plot 18333-136 to the Director of Lease Services and/or to the Land Administration Authority.

(d) Costs on the attorney and client scale.

[11] The Appellant's appeal to this Court is against

1. The dismissal of the special plea challenging the Land Court's jurisdiction to hear and decide the matter;
2. The orders made in the favour of Roma Valley in respect of the merits of the dispute.
3. The punitive costs order.

[12] I turn to consider the challenge to the jurisdiction of the Land Court. The appellant contends that the dispute falls to be determined exclusively by the District Land Court.

[13] S73 of the Land Act, 2010, established the Land Court and the District Land Courts

> with jurisdiction, subject to the provision of this Part (Part XII), to hear and determine disputes, actions and proceedings concerning land.

The Land Court is a Division of the High Court (s74) and for the purposes of the Act, the Subordinate Courts are the District Land Courts (s 75). The Chief Justice is empowered by (s 76) to make rules for the practice and procedure in the Land Courts. In the exercise of these powers, the Chief Justice made the Land Court Rules, 2012 and the District Land Court Rules, 2012.

[14] It is common cause that the dispute in this matter is a dispute concerned with the allocation of land and title to the land in question and is therefore a dispute '*concerning land*' within the meaning of s 73 of the Land Act, 2010. (see *Lebona Fabian Lephema v Total Lesotho (Pty) Ltd and 9 Others***,** LAC par [19] to

[22], unreported judgment of this Court delivered on 24 October 2014).

[15] The Appellant contends that by virtue of the provisions of Rule 8 of the District Land Court Rules, this matter falls to be decided exclusively by the District Land Court and can, by reason of the provisions of Rule 9 (2) of the Land Court Rules, not be heard and decided in the Land Court. Rule 9 (2) provides:

> 9 (2) Pursuant to section 5 of the High Court Act 1978 and the Constitution of Lesotho, the Land Court shall have inherent jurisdiction over all matters that do not fall under the exclusive jurisdiction of the District Land Courts.

[16] Counsel for the Appellant submitted that by virtue of two provisions of Rule 8 of the District Land Court Rules, this matter falls within the exclusive jurisdiction of the District Land Courts and that the Land Court is excluded from hearing and deciding this matter. The provisions of the Rule 8 relied upon read:

> 8 The Court shall exercise subject-matter jurisdiction over the following matters.
> (a)…….
> (b) matters related to issue of lease by pertinent authority
> (c) …….
> (d) …….
> (e) adverse claims on land
> (f) …….
> (g) …….
> (h) ……

[17] The provisions of the Rules must be interpreted in accordance with s 76, the enabling provision in the Act which empowers the Chief Justice to make rules '*for the practice and*

*procedure in the Land Courts'* and must be consistent with the provisions of the Act. Rules inconsistent with the provisions of the Act are invalid to the extent of any inconsistency. ( *Letsie v Director of Public Prosecutions* LAC (1990 – 1994) 246 AT 250 D – 251 B)

[18] S 18 (3) of the Act provides that an allottee who is aggrieved by the decision of the Commissioner of Lands in regard to his application for the issue of a lease under s18, may appeal to the District Land Court. The Act envisages that the matters in question must relate to a dispute between the issuing authority and the allotee, regarding the issue of a lease, for instance, the refusal by the authority to issue the lease or the imposition of conditions on the lease. Rule 8(b) reflects the provisions of s 18(3) of the Act and it does not deal with a dispute between competing allotees.

[19] S 28, read with ss 26 and 27 deals with adverse claims to land and Rule 8(e) is the corresponding provision in the District Land Court Rules. These provisions concern the person who claims title to land which had been advertised by the Minister responsible for land in the Gazette (s26), by the Commissioner for Lands in a newspaper and at the offices of the relevant allocating authorities, as Land that is available for allocation. Such a person must lodge a claim with the Commissioner and the claim must be determined by the District Land Court.

[20] Properly interpreted in order to avoid an inconsistency with the provisions of the Act, it is clear that the provisions of Rule 8 relied upon by the Appellant do not exclude the jurisdiction of the Land Court to hear and determine the conflicting claims to allotment and title to the same piece of land.

[21] It follows that the challenge to the jurisdiction of the Land Court was correctly dismissed by the Court *a quo* in Mahase, J's first judgment. In the light of the above conclusion, it is not necessary to consider the correctness of the basis upon which the *court a quo* dismissed the jurisdictional challenge namely, that the Land Court being a division of the High Court, was the only Court with the power to set aside the registration of the Appellant's claimed allotment in the Deeds Registry.

[22] I now turn to consider the merits of the dispute between the parties.

[23] Roma Valley's case is that the appellant acquired its rights to the land through fraud and subterfuge and presented the evidence of nine witnesses to prove its case. The Court *a quo* accepted the evidence of the nine witnesses who testified on behalf of Roma Valley. It is necessary to consider the evidence in some detail. During 1976 the site was part of a larger piece of land occupied by one Blandina Tjamabu. A then recently constructed tar road divided the Land in two pieces. Roma Valley was registered as a co-operative society on 18 March 1974, and in 1976 wished to acquire the piece of land situated below and adjacent to the road

to establish a handicraft centre. Pascal Tjamabu who is the son of Blandina Tjamabu testified that he was involved in the negotiations between his mother and Roma Valley. Although it is not clear whether Blandina Tjamabu had any lawful entitlement to occupy the land, it was in effect agreed that upon payment of M1000,00 to her, the land in question would become available for allocation in terms of the provisions of the Land Act, 1973. Roma Valley does not claim to be the successor in title of Blandina Tjamabu. The Chairman of Roma Valley at the time, Manyeli and a Dutch doctor, Dr. Biemans negotiated on behalf of Roma Valley.

[24] Roma Valley completed the required Form A application for the allocation of the site with the following motivation: '*The aim of requesting this site is to establish the handicrafts centre the main reason for choosing this site is that it is situated where the members of Co-operative can easily reach and also the Customers of the products can easily get to it'*. The application was signed by the Chairman, Manyeli and the secretary, Mohlathe, of Roma Valley. Two persons signed as witnesses. Pascal Tjamabu who was present testified that Dr Biemans signed as the first and the appellant signed as the second witness. According to Pascal Tjamabu the appellant, who was a police officer stationed at Roma, was at the time a member of Roma Valley. This evidence is confirmed by Mosasa Zacharia Liphoto who joined Roma Valley in 1983 as a member and who became its Chairman in 1984, who testified that the records of Roma Valley which he consulted, reflect that the appellant became a member of Roma Valley in 1974. It is common cause that the appellant joined the Roma

Valley board in 1985 and thereafter served under the Chairmanship of the witness Liphoto.

[25] The site was allocated to Roma Valley by Chief Maama and the Local Allocating Committee and was issued with a Form C on 7 May 1976. Pascal Tjamabu was at the same time allocated the piece of his mother's land situate on the other side of the tar road at the same time.

[26] Flora Setilo testified that since 1975 she has lived on land adjacent to the land allocated to Roma Valley. In 1976 a builder, Rasemethe built a 2 roomed house on Roma Valley's land. The builders stored a container and equipment on her land during the building operations. She confirmed what other witnesses also stated, that appellant from time to time ploughed and cultivated the portion of the Roma Valley site not occupied by the building.

[27] Khaliso Liphoto joined Roma Valley in the early 1970's and he succeeded Molatsi Mohlathe as secretary in 2002. He knew the appellant during the middle 1970's as a member of Roma Valley. The two roomed house on the site was built sometime before 1980 by the builder Rasemethe who was contracted by Roma Valley. Roma Valley let the building on the site to various people over the years and while the rental was collected by an employee, Leemisa Molouoa, it was his job as secretary to see to it that the rental was paid.

[28] Liphoto Liphoto was one of the lessees. He testified that he conducted a business, Ten House General Café, at the site from 1996 to 1998 and that he paid rental to Roma Valley. He confirmed under cross-examination that the appellant, whom he knew as a policeman and board member of Roma Valley, cultivated part of the site. He, however, denied that the appellant owned the land since 1980. He paid rent to the owner, Roma Valley. He also confirmed that the house was built on the site before 1980.

[29] Leemisa Malouoa became a member of Roma Valley in 1987 and as an employee of Roma Valley he was responsible for collecting the rent from lessees. Roma Valley has a building in Roma close to the Roma police station and the site at Ha Sekautu. He collected rent from both premises. In 2004 the building on the site burnt down. He confirmed the evidence of Motsoto Mapetja who testified that he rented the building on the site where he had a shop in 2002 until the building burned down in 2004. Mapetja knew the appellant who conducted a business nearby and also ploughed the land near his shop. He had a written lease from Roma Valley but it was destroyed when the building burnt down.

[30] Mosasa Zacharia Liphoto became the chairman of Roma Valley in 1984. The appellant served as a board member under his Chairman-ship from 1985. The appellant's wife Malenka Malefane worked as a clerk in Roma Valley's offices from March 1976 up to August 1990, when she resigned. In 1989 appellant's wife reported that the key to the safe in the office, for which she was responsible, was lost. Later representatives of Chubb came

from Bloemfontein and opened the safe. It was then found that the original Form C to the site, was missing from the safe. Liphoto testified that Liphoto Brothers Company (Pty) Ltd (in which he declared his interest) hired the house at the site for a period of 3 years from 1 April 1985 to 31 March 1988 in terms of a written lease. The existence of the lease is confirmed by contemporaneous correspondence between Liphoto Brothers and the Commissioner for Income Tax wherein Liphoto Brothers declared rental paid to Roma Valley during the year ending 31 December 1988.

[31] To complete the evidence on behalf of Roma Valley, I deal briefly with the evidence of Mr. Matlasa of the Land Administration Department. His responsibilities included preparing documents for the issuing of leases pursuant to allocations of land made by Allocating Committees. He brought the file relating to the site to court under subpoena. He had not himself handled the transactions reflected in the file. He confirmed that a lease had been issued to the appellant in respect of the site and the only allocation document found in the file which could, judging by what documents were in the file, have formed the basis for the issue of the lease, was a form C2 issued to the appellant on 31 October 2002 by the Roma Community Council in respect of a residential site at Qhobosheaneng. This form C purports to have been witnessed by one Rabatho Khoete, whose son testified that his father died on 30 March 1988 and that he could not have witnesses the Form C which was purportedly issued in October 2002. In cross examination it was put to the witness Khoete that the Form C2 handed in was a later reproduction of original and that his

father was alive when the original was executed. However, the appellant's case is that in any event, the Form C2 in question relates to another of the appellant's sites in the Roma district and did not relate to the disputed site at all. How this unrelated Form C2 found its way into the file concerned with the disputed site is a mystery to which Mr Matlasa could not provide an answer, save to say that the person who had worked with the file was no longer in the employ of the LAA and that he was told that when the administration moved from the LSPP to the LAA, many files were misplaced, although the place where the offices were situated remained the same.

[32] In my view no reliance should be placed on the evidence of Mr. Matlasa. The evidence, through no fault of Mr. Matlasa, is inconclusive and does not assist in the determination of the factual issues regarding the issue of the lease to the appellant. To the extent that Mahase, J relied on the evidence of Mr. Matlasa in rejecting the appellant's version, I disagree with the learned Judge *a quo*.

[33] The appellant's claim to the site rests on an allocation of the land he says was made on 5 January 1980 under the provisions of the Land Act, 1973. The Land Act, 1979, which repealed that 1973 Act, came into operation on 16 June 1980. The Form C which was issued pursuant to the allocation was registered in the Deeds Registry on 15 January 1980.

[34] The court *a quo* found that the allocation of the site to the appellant 5 January 1980, the subsequent registration thereof in the Deeds registry and the later application for and issue of a lease on 24 June 2010 and the registration of the lease on 2 July 2010, was fraudulently acquired by the appellant by employing underhand tactics. The learned judge found the appellant's evidence evasive and contradictory. Counsel for the appellant did not to make any serious attempt to show that the trial judge's evaluation of the appellant's evidence was unfounded. Counsel confined his submissions in the main to legal arguments based on the fact that Blandina Tjamabu was not shown to have had legal entitlement to the site which could have been transferred to Roma Valley. Roma Valley does however not purport to be the successor in title of Blandina Tjamabu. A further legal argument was based on the absence of Roma Valley's original Form C which had gone missing and the weight to be given to the Form C2 found in the file related to the site and the issue of the lease to the appellant during 2010.

[34] The appellant's version that he in effect obtained the allocation of the site in 1980 as a piece of land which had not been allocated to Roma Valley flies in the face of the witnesses who testified from personal knowledge that Roma Valley had built a two roomed house on the site before 1980. Even if it is accepted that he did not become a member of Roma Valley in 1974 and that he did not with Dr. Biemans, witness Roma Valley's application Form A on May 8 1976, he could not but have been aware of the house Roma Valley had built on the site before 1980. His evidence that

he had the house built in 1980 is roundly refuted by the next door neighbour Flora Setlilo who testified that the house was built in 1976 by the builder on behalf of Roma Valley. She steadfastly insisted that it belonged to Roma Valley. In addition, the appellant was a member of the Roma Valley's board from 1985 when the site was leased out to various people and entities until the house burned down in 2004. Not once did he assert his alleged right to the site while the Roma Valley collected rent in respect thereof. He did not step forward to challenge Roma Valley's entitlement when it sought to apply during 1999 for an allocation for commercial purposes when a developer wished to open a petrol filling station on the site.

[35] On 2 December 1999 Roma Valley obtained a certificate from Chief Mafefooane A Maama that the site had been allocated to Roma Valley in 1976. The certificate was co-signed by Pascal Tjamabu and a neighbour Lori Matobo. This certificate was necessary to obtain a replacement for the Form C which had disappeared from Roma Valley's safe in 1989, shortly before the appellant's wife resigned from Roma Valley's employment. Further, when in November 2011 the Chairman of Roma Valley noticed the excavator working on the site, the secretary went to investigate and the Chairman wrote to the local Chieftainess to ask her to intervene. After setting out the excavation and leveling work observed by them, the letter continues.

> The Secretary of Roma Valley Co-op Society personally went to the above-mentioned site where Mr. Letsili Malefane also arrived and when asked by the secretary about the workings thereat, Mr. Malefane who is also

> a member of the management of Roma Valley Co-op Society explained that the site is his. As Roma Valley Co-op Society does not know that it has ever given or sold to Mr. Malefane, the said site, we humbly request the Chieftainess to intervene and order Mr. Malefane and those with whom he is working at the said site to stop with immediate effect.
> We thank you for your assistance on behalf of all the members of Roma Valley Co-op Society.

[36] A Court of Appeal will not readily interfere with a trial judge's evaluation of the witnesses and the evidence advanced at a trial. Apart from the reliance on the evidence of Mr Matlasa, with which I do not agree, the conclusion reached by the court *a quo* is supported by the other evidence which was overwhelming. This is not a case where this Court should interfere with the findings of fact of the court *a quo.* The findings are in my view in accordance with the evidence and fully justified thereby. In my view, there is no basis upon which this Court can differ from the conclusion by the Court *a quo* that the allocation in 1980, the subsequent registration thereof in the Deeds registry and the lease which was granted and registered in the Deeds Registry in 2010 was obtained fraudulently and with knowledge of the Roma Valley's claim to the site, based on the allocation and issue of the Form C in 1976. In my view the more plausible conclusion to draw from all the evidence is that the appellant with knowledge of Roma Valley's rights to the site surreptitiously acquired the allocation in 1980 and thereafter obtained its registration and later, in 2010, the lease in respect of the site.

[37] It follows that the appeal on the merits must be dismissed. As far as the order for attorney and client is concerned, it was made on the strength of the finding by the Court *a quo*, the appellant had

> burdened his answer with some irrelevant material, not relevant to the application thereby attracting costs on a higher scale.

In my view there were very few, if any irrelevant material placed before the Court *a quo*. Costs in a higher scale cannot therefore be justified on that basis. Counsel for the respondent did not seek, as he might have, to support the punitive costs order on any other basis. The punitive cost order can therefore not stand. However, appellant's limited success on appeal in regard to the scale of the costs does not justify an order entitling him to some of the cost of appeal.

[38] In the result the following order is made:

(a) Save for the appeal against the punitive costs order, the appeal is dismissed with costs.

(b) Save that the cost order made by the Court *a quo* is changed to an order for costs on the party and party scale, the orders made by the Court *a quo* are confirmed.

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**W.J. LOUW**

**ACTING JUDGE OF APPEAL**

I agree

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**M. CHINENGHO**

**ACTING JUDGE OF APPEAL**

I agree

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**K L MOAHLOLI**

**ACTING JUDGE OF APPEAL** (*ex officio)*

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|---|---|---|
| **For the Appellant** | : | Adv. Tsenoli |
| **For the Respondent** | : | Adv. Metsing |