LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) 33/20**

LC/APN/94/15

In the matter between:

THABISO THIBELI **APPELLANT**

AND

'MAKHOSHOLO KHOSHOLO **1ST RESPONDENT**

COMMISSIONER OF LANDS **2ND RESPONDENT**

LAND ADMINISTRATION AUTHORITY **3RD RESPONDENT**

CORAM: PT DAMASEB AJA
MH CHINHENGO AJA
NM MTSHIYA AJA

HEARD: 19 APRIL 2021

DELIVERED: 14 MAY 2021

SUMMARY

Appellant, holder of Form C, applying to Land Court for declaration that he is rightful allottee of land as against first respondent who had been registered as lease holder over same piece of land - Land Court holding appellant's Form C not conclusive proof of lawful allocation and that appellant did not adduce sufficient evidence therefor;

After receiving all evidence from appellant and first respondent, Land Court determined there was no evidence upon which court may enter judgment in favour of applicant and thus making an order for absolution from the instance;

Held on appeal, decision of Land Court correct and appeal dismissed with costs.

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] This is an appeal against the decision of the Land Court sitting at Maseru in terms of which it granted an order for absolution from the instance after a full trial, with evidence having been given by both appellant and 1st respondent and by representatives of the 2nd and 3rd respondents. The decision concerned an alleged erroneous or fraudulent allocation of land to the 1st respondent. In essence the contestation was over a double allocation of land. The learned judge succinctly summed up the facts of the case at the commencement of her judgment:

> "The dispute between the parties pertains to a certain piece of land, identified as Plot No. 14301-1130, situated at Lithabaneng, Maseru Urban area. It was registered in favour of the 1st respondent on the 06th June 2013 during the systematic regularisation project. The applicant [appellant on appeal] is

claiming title to this plot by virtue of a Form C allegedly issued in his favour on 08th September 1978."[1]

[2] In his application to the court *a quo*, the appellant sought the following relief –

(a) a declaration that he is the lawful allotee and holder of all rights and interests in the plot as evidenced by the Form C;

(b) that Lease No.14301-1130 registered in favour of the 1st respondent be cancelled;

(c) that the court orders the 1st respondent to vacate the plot; and

(d) that the 2nd and 3rd respondents register the lease of the plot in the appellant's name.

Issues raised by 1st respondent

[3] The learned judge identified the issues raised by the 1st respondent in opposition to the appellant's claim as being basically two. The first is that the Form C relied upon as proof of allocation of the plot to the appellant is invalid because it was issued when the appellant was eleven years old and could not, as a minor, hold title to land. The second is that the appellant presented contradictory evidence on how he acquired the rights over the plot.

[1] Para 1 of judgment.

Having so identified the issues the learned judge found against the appellant and ordered absolution from the instance.

Minority of appellant at time of alleged allocation

[4] I start with considering the issue of the appellant's minority at the relevant time. In respect of the contention that the appellant, as a minor, could not hold title in land, the judge acknowledged the decision in *Thabiso Tsoaka and others v Mapheku Pheku and Others*[2] in which Sakoane J (as he then was) dealt with the capacity of a minor to hold land under the 1979 Land Act and similar legislation ante-dating it. He said:

> "Unlike the Land Act 2010, which, in terms of section 6(1) prohibits children below 18 years to hold title except where the land is a gift or inheritance, there was no such express restriction under the Land Act 1979 ....".

[5] The learned judge *a quo* however introduced a perspective of the law as it was in 1973 which was not considered in *Mapheku Pheku*. It is appropriate to quote her *in extenso* as any paraphrasing of her rendition or interpretation of the law may not faithfully reflect what she said. She stated:

> "[41] The applicant, on the basis of the Form C claims he has title to this land by reason of which he is entitled to eject the

[2] LC/APN/174/2014.

respondent and have the lease cancelled. The onus is therefore on him to satisfy the Court that his alleged allocation has been a lawful one. *Majoro v Sebapo* CIV/A/7/80. The question is therefore whether there is evidence of the alleged lawful allocation in favour of the applicant, resulting in the issuance of the Form C, thus ruling out the possibility that the words "everything else" in the respondent's nomination letter includes the disputed land.

[41.1] To answer this, one would have to refer to the provisions of the Land Act 1973, the operative law at the time of the issuance of the Form C. In terms of section 4, [the] power to allocate land is vested in the King in trust for Basotho Nation and exercisable by the chiefs.

[41.2] In exercising his function of allocating land under section 4, the chief was bound to act after consultation with a Development Committee established for such area. Section 6(2).

[41.3] With regards to the procedure of allocation, section 12(1)(a) read with 12(2), is clear that an application for allocation of land shall be in writing and lodged with the chief in whose area of jurisdiction the land is situate. The application in respect of the land in a rural area, should be in accordance with Form 'A' of the Schedule. I observe that on this Form 'A', the details required included the age of the applicant. This is suggestive that the age of the applicant was of essence. Other details required on this form include the purpose for which allocation was sought and the reasons in support of the application for allocation or grant of interest. The chief was then required in terms of section 12(3) to notify the applicant of the date, time and place of hearing of the application and the applicant would then be entitled to appear and make any representations or submissions, if he so wished, in support of his application.

[41.4] In terms of s 12(6), a chief who acted without consultation with any development committee is guilty of an offence and any allocation made contrary to sections 6 and 9 shall be null and void.

[42] Crucially, the applicant in his testimony did not give any details on how and by whom the land was so allocated. That is to say, whether the procedure laid down under the Act was observed. He also did not bring any independent evidence by anyone who actually knows the history of the site and its alleged allocation to him. This is fatal because he was not personally engaged in the alleged allocation due to his age at the material time.

[43] It is now settled that possession of a Form C is *prima facie* evidence that the land has been allocated to the person named therein but it is not *per se* conclusive proof that the allocation was effected in accordance with the law. Where it is challenged, that is, where there is a dispute, a Form C without further support cannot be conclusive proof. *Majoro v Sebapo* (supra), see also *Maphokoane v Ramlitse* CIV/CPN/616/10; *Mothibeli v Judicial Commissioner* CIV/APN/170/06; *Nyofane v Lelosa* CIV/A/18/80. If the Form C has not been rebutted at the conclusion of the case, it may be conclusive proof. *Mothibeli v Judicial Commissioner* (supra at para 5)."

[6] The learned judge went on to express the point of departure and distinction of the case before her from *Mapheku Pheku*:

"[45] It was submitted that what the law does not prohibit, it allows, as such there was no impediment on the applicant to hold title under the Land Act 1979.

[46] It is true, as correctly submitted by the applicant's counsel that in both the Land Act 1973 and 1979, there was no express provision on age restriction to acquiring title to landed property. What is plainly clear from the quoted provisions (under para 41 above) is the procedure for allocation of land. My reading of these provisions, viewed against the details required on the prescribed application form, show that, the application had to be in writing, had to be made by the applicant himself, who in the application, [had to] record his age on the slot provided and signed by the said applicant. The applicant would thereafter appear before the chief and his committee to motivate the application on the appointed date. Clearly a minor could not personally make an application and presentations envisaged under these provisions.

[47] Under our customary law, a minor could not hold landed rights but under common law, property can be acquired on behalf of the minor. PQR Borberg, *The Law of Persons and the Family*, p 641. (p 642). No argument was made on whether it was impermissible under the Land Act 1973, for a parent or guardian to apply for allocation of land in favour of a minor. I thus refrain from reaching a conclusion on this question."

[7] From the learned judge's analysis above, it is clear that she focussed on the sufficiency of the evidence given by the appellant and not so much on whether or not land could be allocated to a minor under the legislation then applicable. Her reasoning is impeccable. It was incumbent upon the appellant to adduce

evidence that proved the lawfulness of the allocation to him as purportedly evidenced by the Form C. It could not have been sufficient proof for the appellant to waive the Form C, admittedly *prima facie* proof of allocation only, as conclusive prove thereof.

[8] The learned judge did not come to her decision merely on a finding that the appellant had failed to show lawful allocation of the land to him, but she also analysed other evidence given, not only by the appellant but also by the 1st respondent, on the validity and conclusive nature of the Form C. I deal with this aspect of the case after setting out the grounds of appeal.

Grounds of appeal

[9] The appellant was aggrieved by the decision of the court *a quo* and challenged it on four grounds namely, that the court erred –

(a) in concluding that there is no evidence adduced by the appellant to prove the lawful allocation to him of the "residential site";

(b) in concluding that the Form C document issued in relation to the site is not conclusive of lawful allocation of the site to him;

(c) in not finding that the lease issued in favour of the 1st respondent was issued "erroneously or fraudulently"; and

(d) in granting a decree of absolution from the instance instead of granting the application as sought by the appellant.

Absence of evidence of proof of fraudulent allocation and consequence of challenging an order of absolution

[10] The appellant, as far as I can tell, did not place any evidence before the court *a quo* that tended to suggest that the lease may have been issued fraudulently to the 1st respondent. For this reason, a consideration of this matter has to be limited to whether the lease was issued erroneously and not whether it was issued fraudulently.

[11] In challenging an order for absolution from the instance, the appellant runs the risk that this Court may find that the court *a quo* should in fact have dismissed his claim thereby depriving himself of the opportunity presented by such an order of re-instituting the claim upon more or better evidence becoming available to him and without having to be faced by a plea of *lis finita* or *res judicata.*[3] It is a risk which, it must be said, the appellant assumed advisedly and consciously. Luckily for him, the decision of this Court will leave open to him to take advantage of the order of the court below.

[3] See Herbstein & Van Winsen, *The Practice of the Superior Court of South Africa* 4th ed., pp 681-685 on this statement of the law and generally on the law on absolution from the instance as set out in this judgment.

Law on absolution

[12] An order of absolution from the instance is granted in many instances at the close of the plaintiff's case. It may, in appropriate circumstances, be made at the conclusion of all the evidence, including that of the defendant. The statement in the South African case of *Gascoyne v Paul & Hunter*[4] is the *locus classicus* on the law on absolution from the instance:

> "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? ... The question therefore is, at the close of the case for the plaintiff was there a *prima facie* case against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?"

[13] The situation in the present case is that the court made the order for absolution after the close of the 1st respondent's case. *Gascoyne*'s case is good authority, which is accepted in this country as well as other jurisdictions, not only in relation to an application made at the close of the plaintiff's case, but also in relation to the granting of an order for absolution from the instance after the defendant has closed its case. It is authority for the proposition that when the court considers the making of such an order at the latter stage, the inquiry is whether there is evidence upon which the court ought to give judgment in favour of the

[4] 1917 TPD 170.

plaintiff. *Ruto Four Mills (Pty) Ltd v Adelson*[5] is to the same effect. It is therefore trite law that after the court has heard the evidence of both parties and counsel's submissions, it may grant judgment in favour of either party or it may give absolution from the instance – *Bulford v Bob White's Service Station (Pty) Ltd.*[6]

[14] The learned judge *in casu* had to decide whether judgment was to be entered for the applicant or whether it was to be one for absolution from the instance bearing in mind that the *onus* of proof of lawful allocation of the plot was on the appellant. She settled on granting absolution from the instance.

Question for resolution on appeal

[15] The main question to be answered in this appeal is whether the court *a quo* erred or misdirected itself by making the order for absolution. If answered in the negative, that will dispose of the appeal. In other words, if the judge *a quo* was correct in making the order for absolution that would be the end of the matter. If she was wrong in making the order, and it emerges on an analysis of the evidence that one or other of the parties should have been granted a final judgment, then the laborious task of deciding the case on the merits may be embarked upon. Hebstein & Van Winsen *(op cit.)*, with reference to *Corbridge v Welch*[7] and *Berkowitz v Wilson*[8] in respect of the following first proposition, and to *Mills*

[5] 1958 (4) SA 307 (T) at 309E-F.
[6] 1973 (1) SA 188 (AD).
[7] (1892) 9 SC 277.
[8] 1922 OPD 230.

Litho (Pty) Ltd v Storm Quinan t/a 'Out of the Blue'[9] in respect of the second, says-

> "In terms of an old rule of practice, when an order for absolution from the instance was granted at the conclusion of the defendant's case the order could not be altered on appeal to one in favour of the defendant unless application to that effect was made in the court *a quo* immediately upon the giving of judgment. This is no longer an accepted rule of practice."[10]

[16] I proceed to deal with the propriety of the order for absolution from the instance first. In doing so I will, inevitably, have to consider some of the grounds of appeal and determine whether there was no evidence upon which the court ought to have found for the appellant at the close of all the evidence that the site was lawfully allocated to him. This takes me back to the findings or conclusions of the court *a quo* on the evidence of the appellant as juxtaposed with that of the 1st respondent.

Findings of court *a quo*

[17] The learned judge found that the appellant had given contradictory evidence regarding his alleged acquisition of rights to the plot and concluded that his version was unbelievable:

---

[9] 1987 (1) SA 781 (CC) at 785E-J.
[10] Herbstein & Van Winsen (op. cit,) at p 685.

(a) She referred to the evidence which one of the appellant's listed witnesses, Thakane, was to give but was not eventually called to testify. In this connexion, I must observe that the requirement to give a list of witnesses and the evidence that each of them will give is dictated by in Rule 13(1) of the Land Court Rules 2012. It addresses documents to be annexed to the originating application and provides –

"The applicant shall attach to his application –

(a) a list of the witnesses to be called at the hearing with their full names and addresses and purposes for which they are to be called, and of the documents on which he relies, specifying in whose possession the documents are;

(b) ....".

Rule 13(5) further provides that –

"Notwithstanding the provisions of subrule (1), under exceptional circumstances, with leave of court or by consent of the parties, a list of witnesses may be amended and further documents may be filed."

(b) The court *a quo* found to be unsatisfactory the manner in which the appellant handled the issue of Thakane. It will be noticed instantly that the appellant did not amend his list of witnesses by removing Thakane therefrom. The appellant had stated that Thakane was to testify that her father, one Peete, had sold the plot to the appellant. However, the appellant neither called the said Thakane or explained why he included him in the list of witnesses in the first place. He did not explain why he had stated that Thakane would give evidence that he had acquired the plot,

by way of purchase, from Peete. He merely commented that "the list of witnesses does not reflect the true picture". Based on this handling of the issue, the learned judge concluded that the court had been left in the dark as to why Thakane was included in the list of witnesses and, consequently, that if the appellant's parents acquired the land for him, he could not, at the same time have acquired it through sale. Appellant contended that the statement of what Thakane was expected to say but did not in fact say because she was not called, was no evidence before the court and no inference should have been drawn from it. I do not think that this contention is correct. The Land Court rule 13(1)(a) is intended to ensure that a party to the proceedings is enabled to come to the hearing fully prepared to meet the case of the other, as is generally the purpose of pleadings (*Benson & Simpson v Robinson*[11]), as well as to enable the court to isolate the issue it is called upon to adjudicate (*Robinson v Randfontein Gold Mining Co. Ltd*[12]). The nature of Land Court proceedings is such that if a party does not call a listed witness the court would be entitled to draw an adverse inference, as did the learned judge, if no satisfactory explanation is proffered for abandoning a listed witness.

(c) The court noted that it was put to the appellant during cross examination that he had hauled the 1st respondent to the chief before whom he had stated that he had bought the site from the wrong people. Although he denied the allegation, the appellant failed to clarify what happened when they met the chief, as alleged by the 1st respondent.

(d) The court also found to be unsatisfactory the evidence of both parties concerning the dimensions of the plot. The dimensions in

---

[11] 1917 WLD 126.
[12] 1925 AD 173 at 198.

the appellant's application for a lease, which lease was denied to him, and those on the Form C are different. No evidence was led to reconcile the dimensions so as to establish that the Form C described the disputed plot. The dimensions given by the 1st respondent were equally unsatisfactory.

(e) The court considered all the evidence adduced by the appellant and stated:

"... it is evident from the applicant's testimony that he is not familiar with the history of the disputed plot and how the Form C on which he relies was issued. I conclude on the basis of the above hanging issues about the Form C document that there is insufficient evidence to enable the Court to make an assessment of the lawfulness or otherwise of the alleged allocation and on whether or not this Form C describes the disputed plot."

(f) The learned judge considered the 1st respondent's evidence and found it to be such as made a case which the appellant had to jettison on the basis of credible and cogent contrary evidence. She noted that 1st respondent was born in 1950 and that, per her testimony, the plot had passed down as an inheritance from her father in-law to her husband, both late, and then to her. The 1st respondent said that in 1978 and in the 1980's her father in-law was using the plot as a ploughing field. She related the incident when she was summoned to the chief's place at the instance of the appellant who then stated that he wanted to buy the plot from her because it appeared to him that he had bought it from "wrong people." Counsel for the appellant disputed this narration of what transpired at the chief's place on the basis that the 1st respondent related the incident in her evidence in-chief without having put it to the appellant in cross- examination. The 1st respondent also explained, under cross-examination, that the letter nominating

her as heir to her husband's estate showed that the plot in issue was a part of his estate. She explained that her father-in-law did not have a Form C because, in his time, Form C was not being issued or in existence. She stated that her late husband did not acquire Form C from Maseru City Council because it was too expensive for him to do so and that, when the land regularisation exercise came on stream after her husband's death, she was able to register a lease over the plot after she met the requirements of that exercise. She took the letter from the chief confirming her right to the plot to the relevant authorities. The chief's letter was attached to the lease agreement, per the 3rd respondent's evidence who said the 1st respondent had lodged the letter together with her application for a lease.

[18] The evidence of the appellant and the 1st respondent shows that the same chief, Tseliso Matala, issued a letter to each of them confirming his or her right to the plot, as the case may be. It is to be noted that under the land regularisation exercise, a chief's letter constituted sufficient proof of allocation of land. Section 30(2) of the Systematic Land Regularisation Regulations 2010 provided that any allocation of land must be preceded by a rights adjudication exercise during which evidence of a claimant's right to possession of land was to be collected and assessed. Thereafter, a person applying for a lease had to produce any of the documents listed in that section as proof of allocation to him or her, which included "an affidavit by the chief or other proper authority that the applicant lawfully uses or occupies the land". The court noted that neither of the chief's letters, one for the appellant and the other for the 1st respondent, complied with the law. The law required that confirmation by the chief of use, occupation or

possession of land had to be in affidavit form. Both parties relied on a chief's letter that did not meet this requirement. The learned judge rightly criticised the letters issued by the chief, describing them as "casual letters", and said:

> "First, the applicant's testimony reveals that the chief did not ask him to produce documentary proof of allocation but simply proceeded to issue the letter, second, the year of acquisition of rights as recorded in each claimant's letter differs from what they stated in their evidence, third, the letters do not state how each acquired the alleged right nor the basis for confirming either or both of them as lawful user/occupier of the disputed plot. .... *The question whether the impugned lease should be cancelled, should not therefore be decided on solely on the basis of these letters. The title documents and or means of acquisition of the alleged right of either party to the disputed land should be the decisive factor."*[13] *(my emphasis)*

[19] The learned judge properly considered the fundamental questions in the case before her, being whether the plot was properly, regularly and lawfully allocated to the appellant and whether the 1st respondent actually inherited the plot. To be noted in particular is that the judge did not find the evidence of either of the parties satisfactory. She observed that, when it was put to the appellant that the field used to be that of 1st respondent's father in-law, "he simply said he does not know", thereby failing to positively challenge that evidence. On the part of the appellant, I think that had he called his parents to positively testify for him,

[13] See paras [36] and [37] of judgment.

the outcome could well have been different. Neither of them called the chief as a witness. His testimony could well have impacted positively for the appellant, as he claimed.

[20] The decision of the judge *a quo* was not an endorsement of the 1st respondent's claim to the plot. Far from it. She found, as a matter of law, that the evidence of the appellant as to how he acquired the land or how the Form C was issued to him to be such as did not justify a judgment in his favour.

[21] Counsel on both sides put up spirited arguments which were quite informative, I must say, but, in my view, they failed to show that the judge *a quo* erred in arriving at the decision to grant an order for absolution from the instance. I do not find it necessary to consider the submissions of counsel in detail, in particular the lengthy submissions of appellant's counsel. But in fairness to the good fight that appellant's counsel put up, I must record that he challenged the 1st respondent's assertion as incorrect that no document in the form of a Form C was in existence during the time of her father in-law. He may well have been correct, but I think that the stipulation in section 30(2) of the Land Regularisation Regulations that an affidavit by a chief or by three persons with knowledge of use or occupation of the land by an applicant for a lease over a period of thirty years, was an implicit acknowledgment that, on the ground and in so far as some land users or occupiers were concerned, land was hitherto legitimately used or occupied without documented evidence of allocation in the form of a Form

C. He submitted that issuance of a Form C was conclusive proof of allocation but avoided to deal with the many cases cited by the learned judge to the effect that that Form was only *prima facie* proof of allocation and held true only if not challenged: if a challenge was mounted against it as to the lawfulness of its issuance, the holder thereof had the *onus* to satisfy the court that, indeed, he had been lawfully allocated the land concerned.

[22] Counsel for the appellant submitted that the Form C had been admitted into evidence by consent at the pre-trial conference as reflected in the pre-trial conference minute. However, counsel was, in my view, mistaken as to the purpose of the admission of the Form C. To my mind the admission of the Form did not go beyond that it had been issued. It did not go so far as to constitute an admission of the lawful allocation of the plot. It was simply an admission of the fact that the Form C was given to the appellant. Counsel also submitted that the only issue identified at the pre-trial conference as remaining in contention was whether or not the lease was issued to the 1st respondent as a result of an error or fraud. That too may be so, but quite clearly the 1st respondent's position was that the Form C had not been lawfully issued, an issue that the judge found not to have been disproved by the appellant's evidence. If the Form C had been admitted in the sense adumbrated by the appellant there would have been no issue for the court to decide.

[23] It is clear to me that in challenging the decision of the learned judge, the appellant misconstrued on who the burden of proof lay. The 1st respondent was already the holder of a lease agreement given to her by the relevant authority. It was the appellant who was challenging the validity of the issuance of the lease. Accordingly, it was incumbent upon him to place satisfactory evidence before the court showing that the Form C or the alleged allocation to him of the plot had been in compliance with the law and therefore superseded the lease registration, and not be contend with the mere fact that he held a Form C in his hand.

[24] Finally, it must be recognised that the learned judge did not grant judgment in favour of the 1st respondent, and rightly so. She found the evidence of her claim to the plot potentially unsatisfactory.

[25] I am quite satisfied that the court came to the correct decision on the evidence before it and properly granted an order for absolution from the instance.

[26] The appeal is accordingly dismissed with costs.

Act Chinhengo

MH CHINHENGO

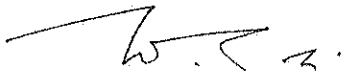
ACTING JUSTICE OF APPEAL

I agree

PT DAMASEB

ACTING JUSTICE OF APPEAL

I agree



NT MTSHIYA

ACTING JUSTICE OF APPEAL

FOR APPELLANT:	MR M RASEKOAI
FOR RESPONDENT:	ADV M KAO -THEOHA