CIV/APN/189/79
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IN THE HIGH COURT OF LESOTHO

In the Applications of :

RETSELISITSOE SELEBALO — Applicant

v.

THE PRIME MINISTER
THE COMMISSIONER OF POLICE
THE SOLICITOR GENERAL
— Respondents

and

LESOLE MAKAKOLE — Applicant

v

THE PRIME MINISTER
THE COMMISSIONER OF POLICE
THE SOLICITOR GENERAL
— Respondents

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S.Cotran on the 8th day of April, 1980

The two plots of land subject matter of these two separate applications are situate next to each other in Maseru Town. The issues that have been submitted to my adjudication are also the same. Both counsel agree that one Judgment will suffice to dispose of both applications.

It is common cause that the applicant Retselisitsoe Selebalo (CIV/APN/189/79) is the holder of a "registered certificate of title to occupy and certificate of registered title to immoveable property" (which I shall henceforth simply call a title deed) over site No. 830 Europa in Maseru reserve. Similarly applicant Lesole Makakole (CIV/APN/190/79) is the holder of a title deed to site 829 in the same district. These title deeds were issued to the two applicants by the Registrar of Deeds under the Deeds Registry Act 1967 (Vol. XII Laws of Lesotho p.42) on 15th June 1978 and 31st May 1978 respectively on the strength of two Certificates of Allocation (Form D) issued by the "Chairman of Land Advisory Committee in consultation with

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the Principal Chief" on the 8th May 1978 who purported to exercise the power to allocate the plots under the provisions of s.15(1)(b) of the Land Act 1973 (Vol. XVIII Laws of Lesotho p.182).

It may seem extraordinary that the right of these two gentlemen applicants to occupy the sites in question should be open to serious doubt, but the fact of the matter is that in Lesotho (and I need not list the decided cases for it is common cause there are many) title deeds have often been issued to wrong persons. Principal and Ward Chiefs and their Land Advisory Committees in urban areas have sometimes issued Certificates of Allocation (Form D) to persons not entitled thereto. The problem is much worse with the Chiefs and their Development Committees in rural areas, who have sometimes also issued Certificates of Allocation under s.15(1)(a) of the Land Act 1973 (Form C) to as many as three persons in respect of the same plot. The Courts have been inundated with actions for rectification of the Deeds Register, or for cancellations of allocations to holders of Form C. These two applications illustrate perhaps to a greater degree than most the difficulties that are encountered.

The applicants, after notice to the three respondents, moved the Court each seeking relief as follows :-

1. Ordering the police to remove the barbed wire surrounding the sites omnia ante and to restore to their possession the sites forthwith,
2. Restraining the police from
   (a) putting obstacles or barbed wire around the sites and
   (b) denying the applicants access to the same.
3. Ejecting the police from the sites in the event of the police occupying the same before these proceedings are finalised.

The applications are resisted by the respondents on the ground that the plots in question are within an area that has been lawfully allocated to the Police (as a State institution) in 1958 under the Police and Prisons Proclamation 1957 (No.27 of 1957 Vol. II Laws of Basutoland p.1253) by the then District Commissioner vide powers conferred upon him by the Government Reserves Proclamation 1928 (Vol. I Laws of Basutoland p.342) and Regulations passed thereunder (High Commissioners Notice No.41 of 1941, Vol. I Laws of Basutoland pp 343-356) - all since repealed - and that the plots in question were and still are in

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their occupation and under their control. The respondents, in turn, seek orders as follows :-

1. Revoking the allocation to the applicants of the sites in dispute,
2. Cancelling, in terms of s.7(1) of the Deeds Registry Act 1967, the title deeds of the applicants,
3. Declaring that the said sites are within an area set apart for occupation by members of the Police Force.

It is clear that the applicants were never at any time in physical possession of the sites. What happened was that when they tried to assume possession and control of their sites on the strength of their title deeds, they were forcibly prevented by the Police (as an institution) from gaining access thereto. The two sites were fenced (as one) with barbed wire. There is evidence that well before the applicants had obtained their "Form D" (see Annexture D to Mr. Sebatana's affidavit in CIV/APN/189/79) the Police (as an institution) have been protesting to the Lands Advisory Committee that plots within the Police lines were being unlawfully allocated to civilians. It would seem that at about the same time as the two applicants had obtained their title deeds McCarthy Construction Co. had already started building a structure having entered into a contract with the Police to do so. An inspection in loco revealed that the two sites are within an area surrounded on all sides but one (which abuts on a gorge near which it is difficult and expensive to build) by police officers houses, barracks, halls of residence and recreation grounds. Not only that but foundations of old houses or barracks, obviously once houses or barracks of police officers, (from the similarly of the colour of the brick, the concrete pillar bases and the design) are still visible on the two plots. Col. Ben Tsasanyane, a senior police officer, averred that what I have seen are the remains of Police barracks or houses that once stood on the sites but which were pulled down around 1969 on being condemned as unfit for human habitation. He adds that they had always exercised control over the plots. I am sure he is speaking the truth for the correspondence attached to the affidavits, as I have said, shows that the Police (as an institution) even before the applicants had come to the scene, were at loggerheads with the Land Advisory Committee (it has its offices in the Ministry of Interior) that allocates plots in Maseru Town. There is no evidence whatsoever of abandonment or removal by the Police

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of any part of their area. On balance of probabilities, if not beyond reasonable doubt, the plots are now, as they have been since 1958, within an "area" occupied by the Police. Mr. Maqutu has compared his clients with David and the Police with Goliath who siezed land already in their possession. This is a distortion of the truth as I see it The applicants had never had possession prior to 1978 nor had they acquired it since. They had each a title deed but these were issued, as I shall presently explain, on dubious factual grounds or a misunderstanding of the law. The applicants have not been dispoiled. The Police have acted as a householder may act when a trespasser comes to his garden; chuck them out. It makes no difference if the applicants were the holders of title deeds any more than it would make a difference if the trespasser on the householder's garden was the houseowner himself. Mandament van Spolie, an extraordinary remedy, does not lie in these circumstances. (Scholts v. Faifer 1910 TS 246; Burnham v Neumeyer 1917 TPD 633; Slabbert v. Theodoulou 1952(2) S.A. 667).

The disputes have arisen because of the rather unsatisfactory nature of land law and tenure in Lesotho which hopefully would be remedied in the Land Act 1979 when it comes into force.

In Kou v. Minister of Interior and Others CIV/APN/360/77 - unreported - I have endeavoured to summarise what I perceived to be the development that the land law and tenure in Lesotho had undergone from the date of the annexation of Lesotho by the British Crown in 1868 to the present day. I have no reason to alter my views, but in so far as it is material to the present enquiry, it can be stated that in 1868 the annexing power took upon itself, at first de facto and then de jure, the authority to allocate land in scattered areas "set apart for the use of the Government" which were called at one time, and even to this day, "camps or reserves", but in the rest of the country allocation of (and revocation of) grants over land was left to the Chieftainship. These latter were governed by custom, the "Laws of Lerotholi", legislation and of course by precedents of Court Judgments. The Government Reserves Proclamation 1928 spelt out - in s.2 - the areas "set apart" and these included Maseru. Regulation 29 of the Government Reserves Regulations 1941 provided -

> "The allocation of lands on a Government Reserve shall be the duty of the District Commissioner

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> "and he may, at his discretion, grant or refuse a land or lands to any resident of a Government Reserve or at any time to allocate the lands in the reserve".

The Police and Prisons Proclamation 1957 defined "police lines" in s.2 as meaning "an area set apart for occupation by members of the force". The Proclamation has been replaced by the Police Order 1971 (Vol. XVI Laws of Lesotho p. 97) which contains the same definition.

Col. Ben Tsasanyane averred that an area in Europa was allocated by the District Commissioner to the Police in 1958 to serve as residential quarters for police officers and their families. This is not disputed. The "area" unfortunately was apparently not demarcated and it was not apparently fenced, (it is a comparatively large area comprising several hundred acres) or if fenced, the fences have gone. I noticed on my inspection that some policemen houses are individually fenced but many are not nor are some vacant plots. The point is that the Police, as an institution, do not seem to possess an original survey map or a sketch to show that the two plots are unquestionably in their area. Any person with common sense however could see that these two plots are clearly within the lines. The survey plan prepared recently also shows this.

I have been shown one completed new private house and one other house under construction at the periphery of the gorge abutting the built up area of the Police lines (but at some distance from the two sites) and one or two new houses in the valley ½ a mile or so away but close to the far end of the Police lines, the argument advanced being that the existence of these few houses (on the edges) demonstrates the legality of the allocation of the two disputed plots. I do not agree. My observation is that there could not be any mistake whatever that the two plots in dispute are within the lines. The Police did object to the Lands Advisory Committee in the past but apparently did not physically prevent the allottees of these two or three plots from building on them presumably on the ground that these were perhaps outside the "area" allocated to them. I would not have thought so myself but these few private houses do not concern me in these applications. When the Land Advisory Committee allocated the two plots (subject matter of

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the applications) in the middle of the lines, the Police thought, and rightly so, that enough was enough.

Mr. Maqutu's second argument is that he is entitled to orders for restraint and ejectment because even if the plots in question were within an area originally allocated to the Police (and I have no doubt about that) the failure of the Police to register their allocated area as required by s.15(2) of the Deeds Registry Act 1967 (Vol. X Laws of Lesotho p.42) rendered the original allocation null and void and the land reverted to the Basotho Nation under s.15(4) of the Act. The land has therefore become available for re-allocation under the Land Act 1973 and this is precisely what the Land Advisory Committee had done.

This argument also fails. As far as I am able to discover there was no legislation with regard to title deeds or other certificates of title to land, (whether developed or undeveloped) in the "camps or reserves", until the Deeds Proclamation 1957 (No. 68 of 1957 - Vol. I Laws of Lesotho p. 418), since repealed. The Deeds Proclamation 1957 provided for the registration of certain documents including deeds relating to the transfer of immoveable property, that is of structures built on such plots of land, (s.10(2)) (subject to the consent of the proper authority) but it excluded deeds relating to plots of undeveloped land (s.10(1)). Apparently the Resident Commission had kept records (s.3) of some sort, of developed land allocated by him. These records were taken over by the Registrar of Deeds when the Proclamation came into force. It would seem that when the area in Europa was allocated to the Police in 1958 they did not apply for a certificate from the Resident Commissioner to show the boundaries of the area allocated to them. He may have kept a survey plan in his office or a sketch or correspondence but whether these are still in existence I do not know. In fact of course no certificate of registration could have been issued for the land when still undeveloped, because it is not immoveable property within the meaning of the Deeds Proclamation 1957. Until the 20th April 1965 when the Basutoland Constitution of 1965 (Vol.X Laws of Basutoland p.17) came into effect the District Commissioner was the master of land in the reserves or camps and any dispute over demarcation would have been resolved by him.

The Constitution of 1965 (since repealed) however, made a significant alteration in that land in the "camps or reserves"

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were thenceforth to be administered by the Chieftainship (s.93) in accordance with the Land (Advisory Boards Procedure) Regulations 1965 (Vol. X Laws of Basutoland p.536) since repealed, which came into force on the same day, with the result that there was no distinction in principle between land in the "camps or reserves" - now restyled Urban Areas - (Regulation 16 of 1965 Vol. X Laws of Basutoland p.514) on the one hand and land in the rest of country on the other. The Independence Constitution of 1966 (published as a Supplement to Gazette No.4 of 26th September 1966), since suspended, confirmed the position (ss 91-101). One thing, however, is certain, viz, that since 1965 and up to this day rights and interests in land (in both rural and urban areas) already allocated were protected and no person could be deprived except by due process. (s.87 of the 1965 Constitution; s. 92 of the 1966 Constitution; s.9 of Land (Procedure) Act 1967 - Vol. XII p. 157, - since repealed - and s 3 of the Land Act 1973.).

In 1967 (after Independence) 2 pieces of important legislation affecting land were passed, viz,

1. The Deeds Registry Act 1967 which came into effect on 15th May 1967
2. The Land Procedure Act 1967 which came into effect on 16th June 1967 (repealed by the Land Act 1973).

The legal position regarding allocation and revocation of land between the coming into force of the 1965 Constitution, and the coming into force of the above two Acts, was governed by the Land (Advisory Boards Procedure) Regulations 1965. There was no obligation on the grantee of land already allocated to obtain a certificate thereunder whether that land was in urban or in rural areas nor was he required to obtain one, as far as I am able to see, after the coming into force of the above two Acts.

Section 15(2) and (3) of the Deeds Registry Act 1967 makes it compulsory for a "person or body <u>holding</u> a certificate" or who prior to the commencement of the Act "<u>was issued</u> with a certificate" to register it within 3 and 9 months respectively (which period could in any event be extended by the Registrar or the Court) but says nothing about land in respect of which no certificate could have been issued prior to 1965 or need have been applied for since 1967.

What is happening unfortunately is that the Land Advisory

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Committee which consists of the Principal Chief, the District Administrator (a civil servant) and two members appointed by the Minister of Interior, (see the Land Regulations 1974 Vol. XIX Laws of Lesotho p.176) are not consulting other Ministries in charge of State instutitions like the Police, Schools, Hospitals etc... and any vacant plots, even if obviously within an area already allocated, (as in the case before me) are arbitrarily reallocated again. This is contrary to all legislation passed since 1965 and is not in my view sanctioned by the Deeds Registry Act 1967 which omits any mention of land that has been lawfully allocated to State institutions (who never needed "certificates") from the requirement of registration of their grants. It is common cause that some State institutions have registered the plots allocated to them but many have not Those that did must have done so ex abundanti cautela. If Mr. Maqutu is right then vacant plots in the PMU area, public schools areas, football fields,hospital grounds and even the space of the High Court (if they have not been registered) could be reallocated with impunity. There is surely something wrong somewhere if the Land Allocating Authority reallocates a plot in an area which has been already allocated to another Ministry under valid previous legislation This area in Europa has now been maped and surveyed and the annexture attached to Mr Sebatana's affidavit shows the police lines. These two plots are quite obviously within that area and should not have been allocated without notice to the holders or at least ascertaining from the Department of Lands and Surveys that the plots have been abandoned.

In so far as these two applications are essentially for writs mandament van spolie they are entirely misconceived. In so far as they are applications for ejectment. I hold that on balance of probabilities, the applicants have failed on these papers to make out a case entitling them to be put into possession either on the facts or on the law.

The applications are dismissed with costs to respondents.

The respondents pray for orders

(a) cancelling the title deeds in terms of s.7(1) of the Deeds Registry Act,

(b) revoking the allocations of the Lands Advisory Committee and

(c) for a declaration that the two sites are within the police lines.

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I am precluded by s. 54 of the Deeds Registry Act from acceding to (a) since the Registrar has not been given notice, nor to (b) since the Lands Advisory Committee are not a party to the proceedings, they do have an interest, and may wish to be heard. I will postpone making a declaration until the respondents bring in a fresh application citing the Lands Advisory Committee and the Registrar of Deeds for orders

(1) to quash the decision (allocating the two plots to the applicants) in terms of s.18 of the Lands Act 1973, and

(2) for cancellation of the title deeds (held by the applicants) in terms of s.7(1) of the Deeds Registry Act 1967.

CHIEF JUSTICE
8th April, 1980

For Applicants : Mr. Maqutu
For Respondents· Mr. Tsotsi