CIV/T/170/77

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MATHIBELA MOKHETHI — Plaintiff

v.

JACOBSON JEREMIAH MAKHETHA
THE REGISTRAR OF DEEDS — Defendants

J U D G M E N T

Delivered by the Hon. Mr. Justice F.X. Rooney on the 9th day of June, 1980

In this action commenced on the 8th November, 1977 the plaintiff seeks an order authorising the Registrar of Deeds (the second defendant) to cancel a Registered Certificate of Title to immovable property situated at Mafeteng granted to the first defendant, an order restraining the first defendant from interfering with the plaintiff's right and interest in the same immovable property and costs. There is an alternative claim for R10,000 damages for improvements to the said site effected by the plaintiff.

In his declaration the plaintiff claims that he is the lawful occupant of a business site, formarly numbered 244B and now numbered 999 at Mafeteng Reserve. He alleges that he was allocated the site in March 1975 and that he completed all the formalities required to obtain a certificate of title on the 1st April, 1975. He further alleges that the issue to him of a Certificate of Title was delayed by the need to resurvey sites in the Mafeteng Reserve.

He further alleges that having obtained a building permit he was authorised by the allocating authority to commence building operations on the said site. He claims that objections made to his occupation were made by the first defendant, who was unable to produce proof that the site had been allocated to him. In paragraph 7 of the declaration he says :

...../ 2

"(a) On the 16th August, 1976 Defendant fraudulently registered site Number 224 B Mafeteng Reserve under the new number 999 Mafeteng Reserve on the lapsed certificate of Title dated 7th February, 1977 accompanied by an affidavit dated 10th August, 1976 contrary to the Deeds Registry Act, 1967.

(b) Defendant knew that the land allocating authority had re-allocated the said site number 224 B Mafeteng Reserve as more fully appears in paragraph 5 (c)."

The plaintiff claims to have spent R7,000 on materials and labour which he alleges had increased the present day value of the site to R10,000.

The first defendant in his plea denied that the plaintiff was in lawful occupation of the site or that he was allocated it or that he had complied with the formalities of registration. The first defendant admits that he obtained registration of his title to the land on the date alleged but he denies that he did so fraudulently or contrary to the Deeds Registry Act. He further denies that his "certificate" had lapsed. There is a general denial of the alternative claim for damages for improvements.

As the trial evidence was given by Mrs. K.R. Hlalele, Assistant Registrar of Deeds as to the records at the Registrar-General's office, material to this case, these included a Certificate of Allocation of land issued by the Principal Chief of Likhoele dated the 23rd January 1973 in favour of the first defendant in respect of site No. 224 B, Mafeteng reserve, (EXA 3), an affidavit sworn by first defendant dated 10th August, 1976 in support of his application for a certificate of registration (EXA 5), a receipt dated 13.2.73 for R10-00 (EXA 1), being the fees payable for registration and the Certificate of Title itself dated 16th August, 1976 numbered 11810 (EXA 2). Mrs. Hlalele said that EXA.3 bore no indication that its validity had been extended beyond the 3 months allowed by law.

Cross-examined by Mr. Koorrhof, this witness agreed that EXA 3 was lodged with the Registrar-General while it was still valid.

The plaintiff said that he was allocated the site in March 1975. On the 7th April, 1975 he went to the office of the District Administrator (D.A.) at Mafeteng. He handed in the certificate and paid R10 being the fees for the registration of site 224 B Central Mafeteng Reserve. He was given a receipt No. 26386 (EXB 1) for the money and in addition a receipt under the hand and stamp of the D.A. (EXB1) which reads :

....3/ "Please ....

"Please receive the sum of R10 from Mr. E.M. Mokhethi being registration fees for the site No. 224 B." It is reasonable to assure that the plaintiff would not have received these documents if he had not, as he says, lodged a certificate of allocation in the proper form signed by the Chief of Likhoele who was the allocating authority.

On the 26th March, 1975 the plaintiff paid R14 to the D A (Maseru) for an examination of building plans and was given a receipt (EXC 2). On the 11th April, the same office issued the plaintiff with a building permit (EXC 1) which authorised him, subject to certain conditions, to build on the site within 90 days. EXC 1 states that the permit is not valid unless the holder is already in possession of an approved document of final allotment of the site.

The plaintiff said in evidence that at that time he did not know that the site which he had been allocated had already been allocated to the first defendant. His first intimation that he had not got a clear title came when he received a letter (EX.D) from Messrs. Du Preez, Liebetrau and Co. dated 16th January 1976 reading as follows:

"Dear Sir, 16th January, 1976.

Re: SITE 224 B, MAFETENG.

We act on behalf of Mr. J.J. Makhetha who is the owner of the above Site, it having been lawfully allocated to him by virtue of a Certificate of Allocation signed by the Principal Chief on 23rd January, 1973, and by the District Administrator on the 7th February, 1973.

We are advised by our client that you have commenced building operations on his site.

Your action in so doing is unlawful and we hereby inform you that unless you forthwith cease all building operations and remove all your property from the site, appropriate legal action will be taken against you to compel you to do so.

Yours faithfully,

(Sgd) Du Preez, Liebetrau & Co."

Immediately thereafter the plaintiff called upon the D.A. Mafeteng only to be told that there were no papers at his office relating to the allocation to him of the site. The papers which the plaintiff lodged with the D.A. on the 7th April, 1975 could not be found and the plaintiff was unable to produce them at the trial. By

this time the plaintiff had partially completed a building on the land, which ironically is situated within sight of the D.A.'s office at Mafeteng.

The plaintiff produced no invoices or accounts in relation to his building operation, although he said that he had employed a builder on contract and that he had spent, R7,000 at Frasers for materials and transport.

Cross-examined, the plaintiff had to admit that he never had a Certificate of Title to the land. He denied that he was warned by the Chief and D.A. that he should discontinue building work on the land before he received EX.D. Delays in construction during 1975 were due to lack of materials. On the 26th September, 1977 the first defendant obtained an interdict against him in this Court. (Civil Application 101/77).

Although the plaintiff would not agree that the present state of the building was poor, he did admit that the walls have cracked and bricks have fallen out. He blames these faults on the fact that he was prevented from completing the work or even putting a roof over it to protect the walls. He agreed that the first defendant owns the adjoining plot, once numbered 224 A.

Seeiso Griffith, (PW.3) Principal Chief of Likhoele also gave evidence for the plaintiff. He referred to sites he had allocated to both the plaintiff and the first defendant close to the D.A.'s office at Mafeteng. As he did not keep a record of allocations made he could not be sure. He tended to shift the responsibility for the matter on to the D.A. He was not prepared to admit that a mistake had been/ made/ yet he endeavoured to blame the land surveyors. I can sum up his evidence in this way - the Chief was prepared to criticise anyone but himself for what was clearly a misallocation of land to the plaintiff.

The defendant is a man of 86. He said that when he received the allocation in 1973, he was working in Johannesburg and he left it to his daughter, Mrs. Phori to attend to registration.

Two years later he heard that the plaintiff had laid foundantions on his site. He went to see the Principal Chief (PW.3). The Chief told him that he should tell the plaintiff to stop building. The first defendant told the plaintiff of the Chief's directions, whereupon the building work ceased for a while. There

5/ .....were further ...

were further complaints when the plaintiff resumed operations. He did not finally stop the work until he received the letter EX D .

The plaintiff registered his title through his attoneys in August, 1976. He realised that the plaintiff's presence on the land undermined his title. He had no reason to apply for an extension of the certificate of allocation as this had been lodged for registration within 3 months of it being granted. He did not believe that his land could be allocated to someone else.

As for the building put on the land by the plaintiff, the first defendant said that these are of no use to him. The walls were about 4 to 6 feet in height and they are cracked and broken. He has different plans for the development of the land and he has no use for the existing structures. He says the plaintiff may remove what he can from the land.

Mrs. Phori (PW. 2) supported her father's testimony. She attributes the delay in having the title registered to the fault of the Land Survey Department of Government. Eventually a private surveyor was engaged and the diagram was prepared and approved by the Chief Surveyor in June 1976.

It seems to me that the plaintiff has been the victim of an administrative error perpetrated at the office of the D.A. Mafeteng. However, the Principal Chief of Likhoele cannot avoid his responsibility in the matter. He was under statutory duty by virtue of Section 11(3) of the Land (Procedure) Act 1967 to keep or cause to be kept a register of all allocations of land. It was not enough for him to assign this duty to the D.A. Mafeteng.

The course of events suggests that when it was discovered at the D.A.'s office that the same plot of land had been allocated to two different people, there was a cover up via the waste paper basket into which was thrown all the documents lodged by the plaintiff, in the vain hope that the plaintiff or his problem would go away. It was most unwise of the plaintiff to commence building operations before receiving his certificate of title to the land.

Section 15(2) of the Deeds Registry Act 1967 requires any person holding a certificate of allocation to land to apply for registration within 3 months of the date of issue of the allocation.

6/ ..Subsection (4) ....

Subsection (4) renders such certificate null and void unless it is lodged for registration within that period or has been extended by authority. However, there is no requirement that the certificate, once lodged with the Registrar, need be thereafter renewed. I can perceive no basis whatsoever for the claim that the first defendant obtained registration of his title by fraud in August 1976. The plaintiff's building activities rendered it prudent for the plaintiff to perfect his title before taking action against the intruder.

As it has been demonstrated that the first defendant has a prior and unassailable title to the site in dispute the plaintiff's main action must be dismissed.

The alternative claim for damages for improvements effected to the land by the plaintiff as bona fide occupier thereof was not properly argued before me. Mr. Koornof pointed out that the plaintiff had to prove that the value of the land had been enhanced by the improvements carried out by him. He submitted that there was no evidence to this effect. On the contrary, the first defendant said that the buildings are of no value to him all as he has other plans to develop the site. In the absence of evidence of enhancement there must be absolution from the instance on this claim. The plaintiff may remove his building from the site provided he does so in a reasonable time.

I wish to mention an unsatisfactory feature of the preparation of this case for trial. Evidence has no place in the pleadings of a party. It is not correct to annex to pleadings or particulars either originals or copies of documents intended to be used in evidence at the trial. This was a case where there should have been discovery and inspection of documents. Time is wasted if witnesses are required to produce from the witness box documents which the Court has never seen before. The proper procedure is for the attorneys for the parties to meet before the trial and decide which documents are relevant and undisputed. These should then be collated, copied and presented to the Judge as an agreed bundle of documents. The Taxing Master may take into account any failure by the attorneys to adopt the proper procedure required either by the Rules of the Court or the dictates of common sense.

The plaintiff must pay the costs of this action.

F.X. ROONEY
9th June, 1980.

For Plaintiff : Mr. Maqutu
For Defendant : Mr. Koornhof.