IN THE HIGH COURT OF LESOTHO

In the matter between

SEFIKENG HIGH SCHOOL Applicant

and

MAAMA MASUPHA Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge, on 13th September, 1996.

This is an application brought on a certificate of urgency in which the Applicant prays for an order in the following terms:-

1. That a Rule Nisi be issued calling upon the Respondent to show cause, if any, on a date to be determined by this Honourable Court why:

   (a) The Respondent shall not be interdicted and restrained from going onto the premises of the Sefikeng High School for any unlawful purpose or without the permission of the authorities and, more specifically he shall not be interdicted from harvesting, tending or otherwise having anything to do with a certain maize crop which the Respondent has

cultivated on the premises of the said school and otherwise interfering with the running of the school in any manner whatsoever save by due process of law.

(b) The Respondent shall not be ordered to pay the costs of this Application on an attorney and client scale.

2. That Prayer 1(a) above operate as an interim interdict having immediate effect.

3. Granting the Applicant further or alternative relief.

The Rule Nisi was duly granted by Guni J on 18th March, 1996 and after several postponements the matter was finally argued before me on the 3rd September 1996.

I turn then to deal with the facts of the case. The founding affidavit is deposed to by one Rankabati Samson Kobeli who is the chairman of the Board of Governors of the Applicant School. It is not disputed that he is duly authorised to make this affidavit as more fully appears from the resolution of the Applicant's said Board annexure "A".

Paragraphs 3 - 5 of the founding affidavit are to the following effect:-

"3. On or about the 23rd December, 1994 and by means of a Supplement to a certain Government Gazette number 103 of 1994 the Minister responsible declared, after consultation with the Principal Chief of the area and the District Secretary, both of whom consulted

with the local chief, a certain unnumbered piece of land at Sefikeng a selected development area in terms of the Land Act 1979. A copy of the said Gazette Supplement is, for ease of reference, annexed hereunto marked "B". The said piece of land was required by the local community to enable the Lesotho Evangelical Church to build a High School adjacent to its existing primary school premises.

4. The said land was, in due course, made available to the said church and, pending the issuance of a lease in terms of the Land Act was duly surveyed, a map thereof made and a number allocated to it being 20272-001. At the same time a Certificate of User of the land was issued to the church to enable it to immediately start with the construction of the school premises. I annex hereunto marked "C" a copy of the said Certificate of User.

5. After the church had completed the school building and classes had begun the Respondent, who is the son of the chieftainess in office, went onto the premises during about October, 1995 and sowed maize on a portion of the site reserved for the school agricultural activities and already ploughed by the school. All appeals by the Board to the Ministry of Education, the Police and the District Secretary have been to no avail for the ostensible reason that the Respondent had instituted proceedings in the Subordinate Court, Teyateyaneng, claiming the land as his. This unlawful act by the Respondent which has been forcibly executed by him has prevented the school from planting the crops it intended for use by its pupils."

As to the question of urgency the deponent Rankabati Samson Kobeli states in paragraph 6 of his founding affidavit:-

> "I respectfully submit that the least that the school can get in damages is the harvesting of the said maize crop forcibly sown by the Respondent regard being had to the fact that the intention of the school was to cultivate beans and other vegetables. The nuisance and tresspass that the Respondent will cause in purporting to tend and ultimately harvest his crop will compound the damages already suffered by the school. I respectfully submit that this is a matter for urgent relief as otherwise the Respondent will be free to disrupt the smooth running of the school."

In his answering affidavit the Respondent takes the following points in limine:

> "(a) There was no urgency in the whole matter which warranted approach to this Honourable Court on an urgent basis in as much as the applicant has demonstrated no injury continuing or apprehended.
>
> (b) **The prayer 1 (a) was erroneously granted to operate** with immediate effect because it prevented respondent from doing what he has a lawful right to do,that is, to harvest his crop from the disputed land before he vacates the said plot if he has to.
>
> (c) The application is one of ejectment in dignise for which this Honourable Court would have no jurisdiction to entertain save by its granting applicant leave to do so.

(d) Applicant is unprocedurally paying himself off by application where he is not proving the damages he suffered."

I deem it not only convenient but also necessary for me to deal with these points in limine straight away in the sequence in which they are tabled.

(a) that there was no urgency

Mr. Phoofolo for the Respondent submits that there was no urgency entitling the Applicant to proceed ex parte without giving notice to the other side. He draws the court's attention to the fact that the Applicant by its own admission says Respondent went on to the premises during October 1995 and sowed maize on a portion of the site in question. Mr. Phoofolo further submits that this application was only filed in March 1996. He refers the court to the case of 'Masechele Khaketla v Malahleha and others C of A (Civ) No. 18 of 1991 where it was held that the audi alteram partem rule is a fundamental principle of procedural justice and that it should only be departed from in exceptional cases such as where there is a reasonable likelihood that notice to the opposing party would enable him to defeat or render nugatory the relief sought or precipitate the very harm which the applicant is seeking to avert.

I agree entirely with the principle stated in Khaketla's case (supra). I consider that this principle has always been trite law in this country and I shall bear it in mind in determining this issue. In my judgment however each case

must be decided on its own merits. The question therefore is, as I see it, what are the facts in this case relating to urgency?

In paragraph 5 of his founding affidavit Rankabati Samson Kobeli concludes by saying:-

> "This unlawful act by the Respondent which has been forcibly executed by him has prevented the school from planting the crops it intended for use by its pupils."

The question then immediately arises how much longer must the school be unlawfully prevented as alleged from planting the crops intended for use by its pupils while waiting for hearing "in due course"?

What is more I attach proper weight to paragraph 6 of the founding affidavit of Rankabati Samson Kobeli particularly the words "the nuisance and trespass that the Respondent will cause in purporting to tend and ultimately harvest his crop will compound the damages already suffered by the school." I observe that this damaging allegation has not been denied as to the fact that the Respondent will trespass, tend to and ultimately harvest the crop. On the contrary the Respondent appears to concede that he will go ahead with the harvesting. See paragraph 8 of his answering affidavit where he states in part:-

> "I deny that the harvesting of my crop will cause any more nuisance than would be caused by Respondent if it were to remove the crop on its behalf."

Nor does the matter end there.

Rankabati Samson Kobeli concludes in paragraph 6 of his founding affidavit "I respectfully submit that this is a matter for urgent relief as othewise the Respondent will be free to disrupt the smooth running of the school." Once more I observe that this damaging allegation has not been denied by the Respondent.

Instead the Respondent himself supplies the reason for urgency in paragraph 6.2 of his answering affidavit wherein he states:-

> "I wish to inform this Honourable Court about the obvious fact that my maize crop is ripe for harvesting. Unless this matter is dealt with expediously (sic) I will myself suffer irreparable harm as my crop might be spoilt or removed by applicant as this is what it is hungry to do."

It is clear to me therefore that the Respondent has not suffered any prejudice but on the contrary he has benefited from the fact that this application was brought as a matter of urgency thus dealt with expediciously according to his own wish.

The circumstances of this case have left me in no doubt that there was a continuing wrong here calling for the urgent intervention of the court.

In all the circumstances of the case I have come to the conclusion that there is no merit in this point in limine and it is accordingly dismissed.

(b) that prayer 1 (a) was erroneously granted to operate with immediate effect.

The complaint raised in this point in limine is in my view, substantially the same as in (a) above. Consequently I would dismiss it for the same reasons as stated in (a) above. I observe however that Respondent makes the assumption that he had a "lawful right" to harvest "his crop" from the land in question. In my judgment the fact that Respondent "forcibly" sowed maize on the land which had already been ploughed by Applicant (see paragraph 5 of the founding affidavit of Rankabati Samson Kobeli) raises the question of his bona fides. If it should turn out on the merits of the case that Respondent had no title to the land in question and that he sowed the maize mala fide then he would have no right to the crops in question.

(c) that this Honourable Court has no jurisdiction to entertain ejectment proceedings.

There is absolutely no merit in this point in limine which is clearly misconceived. I find that applicant's case is simply an interdict for trespass and that this court does have jurisdiction in the matter. Applicant's prayers, as I read them, have nothing to do with ejectment but then even if this was a matter for ejectment the High Court does have unlimited jurisdiction in terms of section 2 of the High Court Act No.5 of 1978 which provides in part:-

> "2. (1) The High Court of Lesotho shall continue to exist and shall, as heretofore, be a superior court of record, and shall have,

(a) unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho."

In my view, therefore, this point in limine must also fall away.

(d) that Applicant is unprocedurally paying himself off by application where he is not proving the damages he suffered.

Once more I consider that there is absolutely no merit in this point in limine. In fact I am shocked by its frivolity and vexatiousness. There is no single prayer in the applicant's notice of motion seeking for damages.

In the result all the points in limine raised in this matter are hereby dismissed with costs.

I observe regrettably that it is becoming increasingly common for attorneys to file the so called points in limine that are completely devoit of substance and are nothing but total abuse of court process. The present application before me is a typical example of this sad state of affairs which can only lead our justice system into disrepute.

A proper point in limine is no doubt meant to curtail proceedings and save costs. It is thus a very useful procedure in our justice system. But where frivolous and vexatious points in limine are taken as in this case the proper administration of justice must inevitably suffer in a number of ways such as delay in administering justice, increased costs which are for that matter unwarranted, and invconvenience to

the court, the opposing litigants as well as other litigants awaiting their turn to have their cases heard before the court (the list is not exhaustive). In my view the whole malpractice reflects badly upon attorneys responsible for drawing such frivolous and so called points in limine as we have in this case. This court warns, therefore, that in future it will not hesitate to grant costs on attorney and client scale in matters such as this or even order that costs be paid de bonis propriis as against legal representatives concerned.

Having been bogged down for so long by the applicant's "points in limine" as aforesaid I turn, then to deal with the merits of the application before me. In paragraph 3 of his affidavit Rankabati Samson Kobeli states as follows:-

> "On or about the 23rd December, 1994 and by means of a Supplement to a certain Government Gazette number 103 of 1994 the Minister responsible declared, after consultation with the Principal Chief of the area and the District Secretary, both of whom consulted with the local chief, a certain unnumbered piece of land at Sefikeng a selected development area in terms of the Land Act 1979. A copy of the said Gazette Supplement is, for ease of reference, annexed hereunto marked "B". The said piece of land was required by the local community to enable the Lesotho Evangelical Church to build a High School adjacent to its existing primary school premises."

Annexture "B" is infact a gazette for "Declaration of a Selected Development Area (Plot No. 20272-001 Berea district) in extent 65717 square metres "more or less". The schedule

thereof describes the land in question as "Plot No. 20272-001 situated at Berea district as delineated on plan 20272 held in the office of the Chief Surveyor, Maseru HA/LS/83/721."

The Respondent's response to this allegation is contained in paragraph 5 of his answering affidavit in the following terms:-

> "I do not know anything of the existence of the alleged Government Gazette. I deny however that any consultations were made with the Local Chief as I was then acting on the Chieftainess's (My Mother's) behalf in matters of administration. I would have been the one approached or my mother would have first taken Counsel from me before consenting to such a declaration although it falls within the discretion of the Minister. I aver that the said plot was inherited by me from my father by the family's and chief's consent."

I observe that while the Respondent claims not to know anything of the existence of the Government Gazette Annexture "B" and denies that any consultations were made with the local chief the Respondent himself states rather inconsistently in paragraph 6 of his answering affidavit:-

> "....I wish to state that as far as I know the last that I know of is an intention and directive from the Home Affairs Ministry that this site should be declared a selected development area. I attach hereto a letter from the Home Affairs Ministry marked "MM2". It is significant that the letter makes it clear that when this declaration and

take-over of the site by applicant occurs I must be compensated. Instead of discussing this issue of compensation with me applicant wants to take my site and even to enjoy the benefit of the crop which I planted there."

I observe further that the Respondent himself produces Annexture "B" which clearly indicates that the Minister concerned actually inspected the land in dispute and conducted "protracted discussions" with all the parties concerned (mahlakore ohle a amehang). I observe that in his translation supplied to the court the Respondent deliberately omits to translate those material last words (mahlakore ohle a amehang - meaning with all the parties concerned) his translation simply saying "protracted discussions."

In the circumstances I have come to the conclusion that there is no genuine dispute of fact here. In my view probabilities are that Respondent was in fact consulted and notified beforehand of the intention to declare the area in question a selected development area. In fact his own Annexture "B" is copied to the local chief of Sefikeng. It is significant that the Respondent claims to have been acting as chief in matters of administration at the time. I find therefore on a balance of probabilities that he knew about the land being declared a selected development area nor can he be heard to complain that he did not know the extent thereof. Both annextures "B" and "C" to this founding affidavit of Rankabati Samson Kobeli have clearly supplied the measurements and the map of the land in question.

In any event it is significant that the Respondent concedes in paragraph 5 of his answering affidavit that a declaration of Selected Development Area "falls within the discretion of the Minister."

It is Applicant's case then that after the land in question had been declared a selected development area "the said land was, in due course, made available to the said church and, pending the issuance of a lease in terms of the Land Act was duly surveyed, a map thereof made and a number allocated to it being 20272-001. At the same time a Certificate of User of the land was issued to the church to enable it to immediately start with the construction of the school premises. I annex hereunto marked "C" a copy of the said Certificate of User." (see paragraph 4 of the founding affidavit of Rankabati Samson Kobeli).

The said Annexture "C" of Applicant is termed a "Certificate of User" and it authorises the Ministry of Education to use "unencumbered State land described as Plot No. 20272-001P for the following purposes:-

ESTABLISHMENT OF A HIGH SCHOOL (SEFIKENG HIGH SCHOOL) SEFIKENG."

There is a map attached showing the area concerned to be 65717 square metres.

It is significant that the Respondent does not deny the

said contents of paragraph 4 of Rankabati Samson Kobeli. The Respondent merely contends himself by stating "I note the contents therein" in paragraph 6 of his founding affidavit. As I see it the Respondent's complaint is that he was not compensated for the land. He bases his claim for compensation on his Annexture "MM2" and concludes in paragraph 6 of his answering affidavit "instead of discussing this issue of compensation with me applicant wants to take my site and even to enjoy the benefit of the crop which I planted there."

In the circumstances of the case I am satisfied that the applicant has a clear right in the disputed land. Thus Applicant has satisfied one of the requirements for an interdict.

See the leading case of Setlogelo v Setlogelo 1914 A.D. 221 at 227 in which Innes JA stated as follows:

> "The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

Significantly the learned judge proceeds in the next sentence. "Now, the right of the applicant is perfectly clear. He is a possessor; he is in actual occupation of the land and holds it himself." With respect I find that these words are apposite to the case before me. It is not disputed that after obtaining title and documents for the land in dispute the applicant "completed the school building

and classes" (see paragraph 5 of the founding affidavit of Rankabati Samson Kobeli.)

Regarding the requirements of an "injury actually committed or reasonably apprehended" it is not disputed that the Respondent "sowed maize on a portion of the site reserved for the school agricultural activities and already ploughed by the school (see paragraph 5 of Rankabati Samson Kobeli's founding affidavit).

I am satisfied therefore that there was an injury actually committed and that it was reasonable for applicant to apprehend future transgressions by the Respondent as a follow up to the said sowing of the maize crop on the land in question.

I am equally satisfied as to the third requirement that applicant had no other remedy except to approach the court for an interdict in the circumstances. It is not disputed that "all appeals by the Board to the Ministry of Education, the police and the District Secretary have been to no avail" (se paragraph 5 of the founding affidavit of Rankabati Samson Kobeli.) In my view an interdict is the best remedy for nuisance and trespass as claimed in the case before me.

This has been a clear case of self help which courts of law cannot tolerate. The Respondent makes a bare unsubstantiated allegation in paragraph 5 of his founding affidavit to the following effect "I aver that the said plot was inherited by me from my father by the family's and chief's consent." There are no dates mentioned, no particulars furnished and no Form C attached. Worse still there is no mention that the land allocating committee of the area concerned was involved.

A chief has no authority to allocate land in this country without his land committee. Because of acute shortage of arable land in this country our land tenure system has always refused to sanction automatic inheritance to arable lands. The position then has always been that at the death of the allottee of arable land such land automatically reverted to the chieftainship for reallocation.

An attempt was made in the Land Act 1979 to make arable land inheritable and politicians in Government then made a lot of promises to the public that automatic inheritance to arable lands had finally come. But on closer examination of the Land Act 1979 there is no doubt that the politicians as usual were only buying votes and the position is not so straightforward as the public had been led to believe. There are certain procedures that must be followed before one can take over arable land that belonged to his late father. This is in terms of section 8 of the Land Act 1979. The land committee is certainly one of the main role players in the confirmation of the "inheritance" sought. The chief does not act alone.

In Neang Moabi v C. Mosalalintja C of A (Civ) No.9 of 1983 (unreported)Schreiner A.J.A. had this to say:-

> "The law relating to inheritance and the use and allocation of land is not straightforward and it is important in matters such as these that there should be a full appreciation of the legal issues which were involved and detailed evidence directed to laying a foundation of fact upon which such issues can be dicided."

With respect I entirely agree.

17/...

I find therefore that the Respondent has failed to show that he has any valid right to the land in dispute. I am satisfied that even if he had such right it was extinguished by section 44 of the Land Act 1979 which provides:-

> "Where it appears to the Minister in the public interest so to do for purposes of selected development, the Minister may, after consultation with the relevant Allocating Authority, 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 but substitute rights may be granted as provided under this Part."

Mr. Phoofolo then sought to rely on the case of Pages Stores (Pty) Ltd v Lesotho Agricultural Bank and others C of A (Civ) No. 14 of 1988. He submitted that the Respondent was not notified of the Minister's intention to declare the land in question a Selected Development Area. I have already found that on the probabilities the Respondent clearly knew about the land being declared a Selected Development Area.

In any event I am satisfied that the case of Pages Stores (Pty) Ltd. (supra) can clearly be distinguished from the case before me on the following grounds:-

> (a) In the case of Pages Stores (Pty) Ltd. a direct and specific challenge was made to the Minister's decision to declare the land in question a Selected Development Area.

(b) Accordingly the Minister was a party to the proceedings.

(c) the challenge to the SDA therein was fully ventilated by all the parties and the Minister himself even filed an affidavit.

(d) In the present case there is no such direct challenge to the Minister's decision.

(e) Taking into account Annexture "MM2" which comes from the Respondent himself probabilities are that he was consulted and given hearing before the Minister declared the land in question a Selected Development Area.

In all the circumstances of this case therefore I am satisfied that the applicant is entitled to the relief sought. I must mention however that at the hearing of this matter both attorneys for the respective parties herein informed the court that the aforesaid crops had subsequently been harvested notwithstanding the court order. They were however non-commital as to who the culprit was and did not want to blame each other. The Court was left with the impression that each party had probably helped himself or itself to the crops. Whatever the case may be this demonstrates the need for the court's urgent intervention by way of interdict in the matter.

Mr. Sello for the Applicant submits that this is a clear case where Respondent must bear costs on attorney and client scale.

In this regard the court has a discretion which it must however exercise judicially. The leading case on the question of costs on attorney and client scale is that of Nel v Waterberg Landbouwers Iko-operatiewe Vereniging 1946 A.D. 597 per Trindall J.A. This case reaffirms the court's discretion in the matter.

There are certain disturbing features about how the Respondent conducted himself in this case. I have seriously thought about granting costs on attorney and client scale as prayed in the Notice of Motion. There is only one factor that has persuaded me otherwise albeit reluctantly. It is this:

In paragraph 5 of his founding affidavit Rankabati Samson Kobeli states:

> "All appeals by the Board to the Ministry of Education, the police and the District Secretary have been to no avail for the ostensible reason that the Respondent had instituted proceedings in the subordinate court, Teyateyaneng claiming the land as his."

It seems to me that, misguided as it may be, the Respondent may well be labouring under a genuine belief that he is entitled to plough the land pending the finalisation of the proceedings in the subordinate court.

In the result, therefore and having due regard to all the circumstances of the case the Rule is hereby confirmed

with costs on the ordinary scale. For the avoidance of doubt the order of court in prayer 1 (a) shall delete the following words appearing in line 4 of the interim court order:

> "and more especially he shall not be interdicted from harvesting, tending or otherwise having anything to do with a certain maize crop which the Respondent has cultivated on the premises of the said school."

as the order in those words no longer serves any purpose in view of the fact that the said maize crop has already been harvested and removed from the land in dispute.

In the result therefore the order of court shall be in the following terms:-

(a) The Respondent is hereby interdicted and restrained from going onto the premises of the Sefikeng High School for any unlawful purpose or without the permission of the authorities and otherwise interfering with the running of the school in any manner whatsoever save by due process of law.

(b) The Respondent is ordered to pay costs of this application to the Applicant on the ordinary scale as between party and party.

M.M. RAMODIBEDI
ACTING JUDGE

For Applicant : Mr. Sello
For Respondent : Mr. Phoofolo