

C.of A (CIV) No.2/94

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

COMMISSIONER OF POLICE
ATTORNEY GENERAL

1st Appellant
2nd Appellant

and

MAAMA SEEISO

Respondent

HELD AT:
MASERU.

CORAM:

BROWDE, J.A.
KOTZE, J.A.
TEBBUTT, A.J.A

J U D G M E N T

BROWDE J.A.

Early in March 1992, Respondent served upon the First Respondent (the Commissioner of Police) and the Second Respondent (the Attorney-General) a summons in which the Respondent claimed payment of several sums of money, interest and costs. The sums claimed were the following:-

M10,000 and M8,000 being the alleged value

of two horses of which, so it was alleged in the summons, one Nyapholi, a policeman acting on the instruction of the Mafeteng Police and within the scope and function of his duties as a servant of the Lesotho Government under Commissioner of Police, wrongfully and unlawfully dispossessed the Plaintiff. This was alleged to have taken place "in or about June 1987, in the Plaintiff's absence". The Plaintiff also claimed M3,000 being the damages allegedly suffered by the Plaintiff "as a result of the aforesaid dispossession".

The Defendants contented themselves with filing a special plea only in terms of which the defence was raised that the time that had elapsed between the cause of action arising and the service of the summons was four years. This period is in excess of the six months prescriptive period laid down in Section 60 of Police Order No. 26 of 1971 (as amended) as well as being in excess of the period of prescription of two years in respect of actions against the Government in terms of Section 6 of the Government Proceedings and Contracts Act No. 4 of 1965.

The former Section also provides that the Court "may for good cause shown, proof of which shall lie

upon the Applicant, extend the said period of six months."

The argument in the Court below was directed solely towards a decision regarding the effect of the Special plea. In the result the learned Judge a quo dismissed the special plea and allowed the respondent to amend his declaration.

Before this Court Mr. Mohapi who appeared on behalf of the appellant submitted that the declaration clearly means that the cause of action arose in 1987, that is when the "wrongful and unlawful" dispossession took place. Mr. Tsotsi on behalf of the respondent pointed out, however, that the dispossession is alleged in the declaration to have taken place in the respondent's absence and that because there is an element of subjectivity in the motion of the accrual of a cause of action, it becomes necessary to know when respondent became aware of the dispossession before it can be held that the claim is prescribed.

The argument is an interesting one but for reasons which follow I do not think it is necessary to decide it for the proper determination of the present issues between the parties.

As I have already alluded, to the leave was granted to the respondent to amend the declaration. This came about as a result of an application for amendment made by the respondent during the course of argument in the court below. The application was made from the bar and was opposed by the appellant. Maqutu J. found that the amendment sought would not cause prejudice to the appellant and therefore, made an order in the following terms:-

- (a) Defendant's special plea is dismissed
- (b) Plaintiff is granted leave to amend his declaration
- (c) Each party is directed to pay its own costs.

Mr. Mohapi has submitted that leave to amend the declaration was wrongly allowed. I cannot agree with that submission. Pleadings are intended to have the issues between the parties properly defined for the benefit of the court and, in the interests of justice, may be amended at any time provided no prejudice is caused to the other side which cannot be cured by an award of costs.

see Trans-African Insurance Co. Ltd v. Maluleka 1956(2) S.A.273 at 278F.

In any event in terms of Rule 33 (9) of the High Court Rules it is provided as follows in relation to an amendment to pleadings:-

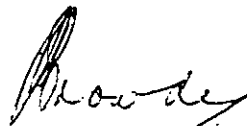
- (9) Nothing in this Rule shall be deemed to prevent any party applying to the trial court during the trial for an amendment of any pleading or document, at any time before judgment and the court on such application may grant or refuse the amendment and if granting it may make such order as to costs or adjournment or both, or otherwise as it thinks fit."

These cannot in this case be, nor has there been, any suggestion of prejudice to the appellant and the learned judge's order in regard to costs has not been criticised.

There is one further aspect of the matter which should be mentioned. The declaration also contains a claim for damages arising from the "unlawful" dispossession. It is not, ex facie the pleadings, clear when or how that claim arose and evidence would consequently be necessary before it could properly be decided whether or not the claim is prescribed. Generally speaking the need for evidence is present whenever prescription is pleaded and it is for that reason that unless special circumstances exist prescription is not a matter for exception. In my

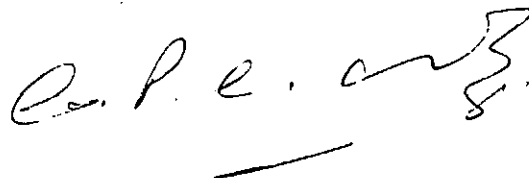
judgment evidence is necessary in the present case before the matter can be properly determined.

In the result, the appeal is dismissed with costs.



J. BROWDE

JUDGE OF APPEAL



I agree:

G.P.C. KOTZE

JUDGE OF APPEAL



I agree:

P.H. TEBBUTT

ACTING JUDGE OF APPEAL

Delivered at Maseru, this day ^{28th} July, 1994.