

IN THE HIGH COURT OF LESOTHO

In the matter between:

MANKANA FONANE

APPLICANT

V

MOSIEA MAKIBI	1ST RESPONDENT
MPATLUOA TLEBELE	2ND RESPONDENT
MAREISISI REGANT	3RD RESPONDENT
'MANKEI LETSOELA	4TH RESPONDENT
LEPOSO MASUPHA	5TH RESPONDENT
SEKILA JONATHAN	6TH RESPONDENT
MPEKETSANE MASUPHA	7TH RESPONDENT
MOHALE MASUPHA	8TH RESPONDENT
NTJA HLOLO	9TH RESPONDENT
'M'AHLOUOE AU	10TH RESPONDENT
SIMISI MOLOKOTSA	11TH RESPONDENT
NTSABENG RAMOOLLA	12TH RESPONDENT
MALEFETSANE POTLOANE	13TH RESPONDENT
NGOPE NGOPE	14TH RESPONDENT
MASUPHA MAQALIKE	15TH RESPONDENT
KOTELO AU	16TH RESPONDENT
NTO MALOKOTSA	17TH RESPONDENT
'MAKRASU KETA	18TH RESPONDENT
'MAMOTSABI MOTEELE	19TH RESPONDENT
TAOANA NKAOTA	20TH RESPONDENT
'MAMAHLAPE MOLAPO	21ST RESPONDENT
'MAMAFITO LETUKA	22ND RESPONDENT
'MANTIMANE MOFOKA	23RD RESPONDENT
FOTO RAMAQELE	24TH RESPONDENT
MALEFETSANE RAMPHEEANE	25TH RESPONDENT
POLAO MATHIBE	26TH RESPONDENT
LEBETSA LEHANA	27TH RESPONDENT
'MATHABO KHOBOTLO	28TH RESPONDENT
PALO MPHAROE	29TH RESPONDENT
MOLELEKI MOCHESANE	30TH RESPONDENT

/...

KETA KETA	31ST RESPONDENT
DISTRICT AGRICULTURAL OFFICER - LERIBE	32ND RESPONDENT
THE ATTORNEY-GENERAL	33RD RESPONDENT
CHIEF LECHESA MATHEALIRA	34TH RESPONDENT

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu  
on the 9th day of January, 1994.

On the 1st December, 1994 this matter was argued and I made the following order:-

*Rule Nisi* is discharged and costs are awarded at 1/10 of the taxed costs.

In this application which was instituted on the 29th August, 1993 thirty-four Respondents, as a matter of urgency, Kheola J. (as he then was) granted the following order:-

1. That a *Rule Nisi* be issued returnable on the 30th

/...

August 1993 calling upon the Respondents to show cause why:

- (a) Respondents should not forthwith be restrained from grazing their stock in the applicant's arable land ordinarily called TSIKOANE IRRIGATION PROJECT pending determination of this application, and the institution of an action for damages on Applicant's crop.
- (b) Directing the Principal Chief of Tsikoane, Peka and Kolbere to order his subordinate chiefs to impound the Respondents' animals or any other animals, grazing on Applicant's field.
- (c) Directing the District Agricultural Officer to release to the Applicant's authorised representatives the Savings Bank Books of the Tsikoane Project members who will operate under the said irrigation scheme in order to enable them to release funds for

/...

paying their field labourers and ploughing inputs.

(d) Directing the Respondents to pay for the costs of this application.

2. That prayers 2(a) and (b) operate with immediate effect as interim interdict.

The first problem Applicant had was that he was claiming on behalf of the Tsikoane Irrigation Project. Yet Applicant claims the land which falls under the Tsikoane Irrigation Project is his. Applicant own land is among the 310 other lands in the project. This is a body with several members and which had several blocks. The second problem was that the thirty-one stock owners who were allegedly joined together with the District Agricultural Officer Leribe and the Attorney General had nothing to do with these two Respondents. The district Agricultural Officer Leribe did not participate in the invasion of the crops of the Tsikoane Irrigation project with cattle and other animals.

This is one case where in my view joinder of the thirty-one Respondents with District Agricultural Officer Leribe and the Attorney General is incompetent. The reason being that the alleged liability of these parties has not been demonstrated to be joint or even alleged to be joint. There seems therefore not justification for this joinder. See Beck's *Theory and Principle of Pleadings in Civil Actions* by Isaacs 6th Edition Paragraphs 6 and 12.

The causes of action brought against the first thirty-one Respondents and the district Agricultural Officer Leribe and the Attorney General are separate and different. The whole thing of joinder hinges on convenience. Beck's *Theory and Principles of Pleadings in Civil Action* by Isaacs paragraph 14 summarises the modern position as follows.

"Causes of action may always be joined whenever the parties concerned are all of them interested and to the same extent in every cause of action joined provided the claims made arise out of the same transaction or series of transactions."

The District Agricultural Officer Leribe was alleged

/...

to be refusing with the Savings Books of the Tsikoane Agricultural Project. This had nothing to do with the grazing of stock over Applicant's land by the thirty-one stock farmers. There was therefore misjoinder of persons and causes of actions.

Annexure "MF1" does not authorise Applicant to sue Respondents on behalf of the Tsikoane Irrigation Project. It is simply a letter to Advocate Hae Phoofolo complaining about damage to crops. No where does it authorise anybody to sue on its behalf about the damage to crops. It only request Mr. Hae Phoofolo to put the case before the court. No names of Respondents are specified. Nothing is said about the Savings Bank Books. I note with concern that annexure "MF1" is only signed by Thuso Thoablaka of Block 9 and Mantsoili Khobotlo of Block 5. There are in all ten blocks. If we were to assume that the two signatories signed on behalf of their blocks, then eight other blocks have not signed. Applicant is from block 7. All these factors do not demonstrate that applicant was duly authorised to make this application on behalf of the Tsikoane Irrigation Project.

/...

Annexure "MF1" is a list of 158 people whose names are written in 14 different hand writings. These people are divided into what are called ten blocks. What this list is intended to convey to the court is not clear. Is it a census of members remaining in the project or evidence that applicant is authorised by these people? If there was some resolution by their committee authorising Applicant to bring this application on behalf of that body that would have helped. In that event, the Tsikoane Irrigation Project should have been one of the Applicants. I note that annexure "MF3" discloses that 310 farm families from three surrounding villages are participants in this project. Surely the 158 signatories are about half the people who are participants:

"It must be shown that the Applicant has *locus standi in judicio* to bring the application." See Herbstein and Van Winsen *The Civil Practice of the Superior Courts of South Africa* 3rd Ed page 76.

When it is clear (in case like this one) that the members are split and that each of the farmers joined the project with his land, the authority of Applicant to bring the application on behalf of others had to be demonstrated.

/...

The constitution of the Tsikoane Irrigation Project or at the very least authorisation by a committee in charge of the entire project would have helped.

Applicant's specific interest is not obvious because the project has blocks. Perhaps Applicant has a clear right to claim and act in the "block" to which he belongs because his land is probably in that area. Applicant is vague on this very matter on which his *locus standi* depends. If this is the case then Applicant cannot have established a clear right. See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

According to paragraph 36 of Applicant's affidavit, this TSIKOANE IRRIGATION PROJECT is an irrigation scheme introduced by government covering an area of 433.25 hectares. The project was divided into 10 blocks in which each block had a management subcommittee elected by the owners of the fields answerable to the main management committee, whose function was to supervise the activities of the block committees. The government was to assist the project for a period of four years. The government assistance was to be in the form of seed, fertilizer,

/...



tractors, harvesters and irrigation equipment including pipes. According to Applicant the project worked satisfactorily for only one year.

According to Applicant during the second year disagreements of all sorts began to develop among the owners of the fields. These culminated in a faction separating from and breaking away from the other members. If the members of the scheme that are left are those in annexure "MF2" it seems about half of the members have broken away from the Tsikoane Irrigation Scheme. Fourteen of Respondents are according to Applicant former members of the project. If this is the case Applicant's title to sue on behalf of the Tsikoane Irrigation Project becomes even more precarious.

From annexure "MF3" it is clear that funding for the scheme began in April 1986. The Government of Lesotho ought to have withdrawn from the Tsikoane Irrigation Project between April 1990 and 1991. If about half of members have broken away, it becomes understandable why the District Agricultural Officer Leribe found himself unable to realise the Savings Bank Books of the Tsikoane

/...

Irrigation Project to Applicant and his faction. It also becomes difficult to accept that even the 158 names most of which are in the handwritings of only 14 people are properly included in that list with their owner's knowledge and consent. That is if some of those 152 people are still part of the project.

I note that in paragraph 36.4 of Applicant's affidavit it is not suggested that the owners of the lands that broke away from the Tsikoane Irrigation Project and decided to manage their field as individuals acted illegally. I will therefore assume they were free to do so.

Applicant says the dispute that led to this break-away of the other 152 people was over rotational cropping. I am a bit puzzled that Applicant alleges at paragraph 37 of his founding affidavit that:

"On or around 1992 I and the other field owners planted cabbages and peas in all fields from blocks 1 to 10."

I cannot understand how they could have ploughed and

/...

planted even the lands of the 152 families that had broken away. Applicant's averments are not clear on this point. Applicant then says during or about 4th June 1993 Respondents' wrongfully let their animals to damage these crops. Applicant speaks of unharvested maize crop, it is not clear whose maize crop it was. Chiefs never helped despite reports that were made to them. Matšelisiso Makibi (one of the owners of the fields) was stabbed with a spear by an armed intruder. These activities of malicious damage to property and even attempted murder are matters that ought to be reported to the police for action. But the police do not seem to have been brought into the matter in order to investigate the matter and institute criminal proceedings.

On 20th July, 1993 while Applicant and others were still harvesting their maize in their fields "animals belonging to one or others of the respondents were spread over our fields particularly block 6". They reported this to the Government's co-ordinator at the branch of the Ministry of Agriculture in Leribe but received no help. It is not clear who the specific culprits among the respondents are. It is not clear why Applicant who is in

/...

block 7 is the one fighting this battle.

Applicant also complains about the detention of their Savings Bank books by the Ministry of Agriculture. In whose names these bank books are is not clear. We are not even told the number of bank books involved.

The problem Mr. Mafantiri (Counsel for Applicant) had was that of specifying where exactly the animals grazed or damaged crops. It could not be over the entire 433.25 Hectares because about half the members of the 310 members had withdrawn with their lands. If damage was concentrated on block 6 then only 44.17 Hectares were involved and Applicant was not a member of block 6.

On the 26th August, 1993 under CIV/APN/363/93 Applicant applied for committal of the Respondents to prison for failure to comply with the Court order. After a while on the 27th September, 1993 (by consent between the parties) this application for committal for contempt and this one were consolidated into one application. It would have been difficult to nail the first 31 Respondents for contempt of court because the area affected is not clearly

/...

specified and identified. It is not clear whether the damage was in Block 1 or Block 10. It could be on any of the ten Blocks.

The Ministry of Agriculture ought to have ceased to have any interest in the Tsikoane Irrigation project in 1991 if what is in annexure "MF3" is correct. If there had been an extension of its participation we have not been told. I have already stated that the District Agricultural Officer had nothing in common with the first 31 respondents. Similarly these Respondents have nothing to do with the Savings Bank Books in the hands of the District Agricultural Officer Leribe.

The thirty-one Respondents denied all allegations. Some of them did not even have animals while some claimed their animals do not go to graze in the fields because they were dairy animals. Except for the general allegation of damage on 4th June, 1992 Applicant had not nailed any of the thirty-one Respondents. To say "animals belonging to one or the others" of the Respondents was far too lacking in specificity to be of any help to this Court. The general denial of the general allegations of damage of

/...

crops on the 4th June, 1992 sufficiently met the vague allegations of Applicant. The 34th Respondent the Principal Chief of Tsikoane informed the Court through his affidavit what he did in response to the reports of Applicant and others.

The Respondents challenged Applicant's title to sue in the following words found in paragraph 3 of Mosiea Makibi's (First Respondent's) Answering Affidavit:

"I aver that Applicant/deponent has no authority whatsoever to bring these proceedings. The Applicant has *locus standi*."

Among the criticism of annexure "MF2" is that the names of nine deceased persons had been included,

"an indication that these persons could not possibly have authorized the bringing of these proceedings."

It was revealed that each block had its own savings bank book. Consequently applicant had no *locus standi* to have

/...

these savings books of other blocks released to her.

It seems according to First Respondent there was lack of accountability between committee members of the blocks and the farmers. It emerges most of the farmers have not withdrawn from the project but need a new leadership and management. First Respondent says he and others were not aware M6,000,000-00 had been spent on the project. First Respondent says her real complaint is the destination of the funds of the irrigation project.

First Respondent says it was animals from other villages such as Poulo, Mokokoane and Matsoete which did the damage. He and Pela Molatua and the late Sentšo Makibi did what they could to impound the trespassing animals but the herdboys or herdmen ran away with the animals. People like Moleleki Lepolesa and Seabata Malealea have had their trespassing animals impounded and had to pay for them. The money has been accounted for. He blamed the damage of June 1992 to animals from villages of Poulo, Mokokoane and Matsoete.

Where there is a dispute of fact Innes CJ in *Frank v*

/...

*Ohlssons' Cape Breweries* 1924 AD 289 at page 294 said:

"... it is undesirable in such case to endeavour to settle the dispute of fact upon affidavit. It is more satisfactory that evidence should be led and that the court should have an opportunity of seeing and hearing the witnesses and coming to a conclusion."

In *Rule 8(14)* of the *High Court Rules* 1980 when the Court is faced with a matter in which there is a dispute of fact:

"If in the opinion of the court the application cannot be properly decided on affidavit, the court may dismiss the application or may make such an order as to it seems appropriate with a view to ensuring a just and expeditious decision..."

Among the options open to the court (in its discretion) is to hear *viva voce* evidence. Dismissal of the application often follows:

"...when applicant should have realised when launching his application that a serious dispute of fact was bound to develop." *Abro Investments Co. Ltd. v Minister of Interior* 1956 (3) SA 345 at 350 A.

In this case the Tsikane Irrigation Project had two

/...



factions which were already pulling in different directions. A dispute of fact should have been foreseen.


Reading this affidavit and others it becomes clear that there are several material dispute of fact. The claim for damages was not and has not been brought to this day. This was the condition on which the *Rule Nisi* was granted. If the administration of villages in Leribe (about 100 Kilometres from Maseru) fails this Court cannot interpose itself and run the villages in the place of chiefs. There is a procedure for assessing damage to crops in the villages. This is found in Section 13(4) of the *Laws of Lerotholi II*. This enables action to be taken timeously and an assessment of the damage to be attempted while it is fresh. This Court is not well equipped to handle such matters. Its procedure is slow and is not geared for agricultural claims at village level.

This action was brought one and half years ago. It should have been dismissed timeously on the several grounds I have mentioned and that of title to sue. The choice of forum in which to bring this action was particularly

/...

unwise. There are no allegations that from the nature of the damage, the jurisdiction of this Court could be inferred.

In considering the question of costs the Court felt the delay had been largely because of problems for which the parties are not responsible. For this reason I awarded the Respondents 1/10 of the costs in dismissing this application.

  
 .....  
 W.C.M. MAQUTU  
 JUDGE

For Applicant	: Mr. Mafantiri
For 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 18th, 19th, 20th, 21st, 22nd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 22nd and 33rd Respondents	: Mr. Maieane
For 17th & 23rd Respondents	: Mr. Matabane
For 34th Respondent	: Mr. Ntshoki