

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 28/10

In the matter between:

CHIEFTAINNESS MALETSOABO JEREMIA JOBO

APPELLANT

and

MOEKETSI JOHN LENONO

1ST RESPONDENT

MAMAKHABANE TŠIU

2ND RESPONDENT

BIG BOY MATAMANE

3RD RESPONDENT

LITHA TJALE

4TH RESPONDENT

TLALI MOHAPI

5TH RESPONDENT

CHIEFTAINNESS MALENTSOE MAKHOALI

6TH RESPONDENT

PRINCIPAL CHIEF OF THABA BOSIU

7TH RESPONDENT

MINISTER OF LOCAL GOVERNMENT AND

CHIEFTAINSHIP AFFAIRS

8TH RESPONDENT

ATTORNEY GENERAL

9TH RESPONDENT

CORAM: RAMODIBEDI, P
SMALBERGER, JA
FARLAM, JA

HEARD : 12 APRIL 2011

DELIVERED: 20 APRIL 2011

SUMMARY

High Court – jurisdiction – claim for ejectment ancillary to main claim
– High Court has, or may assume, jurisdiction to grant ejectment.

JUDGMENT

SMALBERGER, JA

[1] In October 2008 the appellant (as plaintiff) instituted action against the respondents (as defendants) in the High Court in which she claimed the following relief:

- “(a) That it is hereby declared that the allocation of land by the 1st defendant to the 2nd, 3rd, 4th and 5th defendants at Thaba Khupa Ha Jobo on the plaintiff’s area of Governance is unlawful.
- (b) That the 2nd, 3rd, 4th and 5th defendants be ejected from the respective sites in issue.
- (c) That the 1st to 5th defendants pay costs of suit.”

For the sake of convenience I shall refer to the parties as in the court *a quo*.

[2] The first to sixth defendants filed both a special plea and a plea over on the merits. The special plea raised two issues, namely, *locus standi* and jurisdiction. It appears that at the commencement of the trial the learned trial judge (Chaka-Makhooane J) decided to deal first

with the issues raised in the special plea. The special plea relating to *locus standi* was abandoned. The issue of jurisdiction arose only in the context of prayer (b). The point taken was that the High Court lacked jurisdiction to entertain prayer (b) on the ground that, in terms of section 17(1) (c) of the Subordinate Courts Order 1988 (the Order), ejectment proceedings “fell entirely within the jurisdiction of the subordinate courts”. The trial judge upheld the special plea with costs. The present appeal is directed against her order in that regard.

[3] Before dealing with the merits of the appeal it is necessary, as promised, to give our reasons for refusing to grant a postponement of the hearing of the appeal to the next session of this Court in October 2011 at the request of the defendants. As previously mentioned, summons commencing action was issued as long ago as October 2008. The court *a quo*'s judgment was delivered on 26 August 2010. The plaintiff's notice of appeal was served on the defendants on 29 September 2010. When the roll for this session of the Court was issued

on 21 February 2011 the appeal was reflected as having been set down for 12 April 2011. The appellant filed and served her heads of argument on the defendants on 4 March 2011. It appears that on 24 March 2011 the defendants' attorney advised the Registrar that he had not yet received instructions regarding the appeal. The defendants' attorney was duly advised that the President of the Court had directed that the defendants' heads of argument were to be filed on or before 8 April 2011 and that the appeal was to be argued on 12 April 2011.

[4] When defendants' counsel moved for the postponement of the appeal it transpired that the defendant's attorney, even though there had been contact with some of the defendants, had not yet been given a mandate to oppose the appeal. No substantive application for postponement was filed, and no acceptable reasons were advanced as to why no mandate had yet been forthcoming from the defendants. A postponement cannot simply be had for the asking. Good and satisfactory grounds for a postponement are required (cf Practice Note

at LAC (2005-2006) p 315). No such grounds were apparent in the present instance. Bearing in mind that the plaintiff claims that second to fifth defendants are in unlawful occupation of certain residential sites, a six month postponement to the next session of this Court, in a matter which commenced in October 2008, is potentially prejudicial to the plaintiff's cause. In the circumstances the application for postponement fell to be dismissed.

[5] In terms of section 17(1) (c) of the Subordinate Courts Order, 1988 a subordinate court has jurisdiction in an action for ejectment against an occupier of "any house, land or premises" within its district. While s 2(1) (a) of the High Court Act, No.5 of 1978 (the Act), confers on the High Court "unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Lesotho..." its jurisdiction in this regard is curtailed by the provisions of s 6 of the Act which provides:

"No civil cause or action within the jurisdiction of a subordinate court

(which expression includes a Local or Central court) shall be instituted in or removed into the High Court, save –

- a) By a judge of the High Court acting of his own motion; or
- b) With the leave of a judge upon application made to him in chambers, and after notice to the other party.”

(LINTŠA V MAHLOKO and OTHERS LAC (2005-2006) 193, para 4.) It is important to note that the jurisdiction of the High Court is not ousted in respect of claims for ejectment. Such jurisdiction may be acquired where the necessary leave is given under section 6(b) of the Act, or assumed where a judge in terms of section 6(a), acting of his or her own motion, expressly or impliedly permits the institution in or removal into the High Court of a claim for ejectment (cf MOTLOMELO SELEMELA v LIRAHALIBONOE LETSIE C of A (CIV) No.12/2009 (unreported) at para [14]).

[6] The proper administration of justice requires that the High Court

exercises its powers in a manner which will resolve disputes between parties as expeditiously as circumstances permit. Where it is legitimately within his or her power to do so, a trial judge should act in a way which will prevent unnecessary delay in the resolution of such disputes.

[7] In her judgment the judge *a quo* stated that “[t]he issue for determination is whether this court has jurisdiction to entertain ejectment as prayed for in the notice of motion.” This is an incorrect and too narrow a statement of the situation with which she was confronted. First, it refers to “the notice of motion” when in fact the matter before her was by way of action. Secondly, it creates the impression that all that was sought was ejectment, whereas the action went further than that and the claim for ejectment was consequential upon other relief being granted.

[8] The main issue that fell to be resolved between the parties

related to the declaratory order sought in prayer (a) of the plaintiff's declaration. It is not disputed that only the High Court had jurisdiction to entertain that prayer as the relief sought exceeded the magistrates courts' jurisdiction. The claim for ejection was ancillary to prayer (a) and depended upon the plaintiff being successful in regard to that prayer. In arriving at her decision the trial judge appears to have chosen to ignore the existence of prayer (a). It was inappropriate in the circumstances to do so. Prayer (a) was fundamental to the action, it had to be determined at some stage, and prayer (b) only arose for consideration if prayer (a) succeeded. At that stage the issue of jurisdiction in respect of prayer (b) was premature.

[9] The trial judge upheld the special plea on the ground that "leave of court is to be sought by the plaintiff to have the matter brought to the High Court". The effect of such an order would be to cause inevitable delay and additional cost. In my view the special plea could and should have been dismissed on the following independent grounds,

either of which would have sufficed. First, ejectment was not the only claim sought. Nor was it an independent claim. It was incidental to, and consequential upon, the granting of prayer (a), which was justiciable only in the High Court. Given those circumstances, the wide jurisdictional powers conferred on the High Court in terms of section 2(1)(a) of the Act and the absence of an express ouster of jurisdiction in respect of claims for ejectment, it could never have been intended by the legislature that the High Court, in circumstances such as the present, would not have the jurisdiction to entertain and grant an ancillary claim for ejectment. Secondly, given the ancillary nature of the claim for ejectment, and the need to avoid unnecessary delay and costs in litigation, the trial judge should, in the proper and responsible exercise of her powers under section 6(a) of the Act, have assumed jurisdiction under that section in respect of the claim for ejectment. Where a judge may legitimately assume jurisdiction, and can do so without prejudice to the parties, he or she should not hesitate to do so in the interests of the administration of justice.

[10] It is interesting to note that in the case of MJM (PTY) LTD and ANOTHER v MOKHUTHE and OTHERS LAC (2005-2006) 477 various orders were sought in an action brought in the High Court and, consequent upon their being granted, an order for ejection. The plaintiffs in that case were successful, and a subsequent appeal to this Court was dismissed. There was never any suggestion, in my view rightly so, that the High Court was unable to exercise jurisdiction in respect of the claim for ejection.

[11] In the result:

1. The appeal is upheld, with costs.
2. The order of the court *a quo* is set aside and substituted with the following order:

“The defendants’ special plea is dismissed, with costs.”

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

I.G. FARLAM
JUSTICE OF APPEAL

For the Appellant : Adv M.A. Molise
For the Respondents : No Appearance