IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO. 54/ 2011

In the matter between:

MOJALEFA RAKOMETSI APPELLANT

AND

SELLO RAKOMETSI RESPONDENT

CORAM: HOWIE JA
FARLAM JA
TEELE AJA

Heard : 18 April 2012
Delivered: 27 April 2012

SUMMARY

Judgment – Judge giving judgment purportedly clarifying earlier judgment – whether the latter judgment truly interpretative of something unclear in earlier judgment or whether earlier judgment clear and Judge on later occasion functus officio.

JUDGMENT

HOWIE JA:

[1] The respondent sued the appellant for ejectment in the Maseru Subordinate Court in case 470/92. The property concerned was said in the summons to be a house. In a later case in the same court (1151/94) ejectment was sought by and against the same parties. The property concerned was referred to in the summons as three unnumbered residential sites.

[2] An order of ejectment was granted. It was given in case 470/92, being the only case of the two which proceeded to a hearing. In error the magistrate referred to the three unnumbered sites. The magistrate's order has not been included in the record.

[3] The appellant appealed to the High Court in case CIV/A/21/04 against the ejectment order given in case 470/92. The appeal was heard by Mofolo J. He dealt with

the matter on the basis that the issue before him concerned the three unnumbered sites. He found that two sites were the property of the respondent and that the third was the property of the appellant. However he concluded his judgment without making any order. That was on 12 August 2005.

[4] Because the site considered by Mofolo J to be that of the defendant had been sold by one Makalo Rakometsi to Maneo Mosoeunyane in 1992, Maneo and her husband applied in the High Court in July 2009 for an order inter alia staying the respective judgments of the magistrate and Mofolo J pending rescission of the judgment of Mofolo J (strangely enough not also the order of the magistrate) as having been granted in error without their having been joined as parties before the magistrate and on appeal.

[5] A rule nisi having been granted in August 2009 provisionally granting that relief, the rule was confirmed by Mahase J in September 2009. Paragraphs (b) and (c) of her order read (in so far as is relevant) –

> "(b) The final judgment delivered on the 12th day of August 2005 by the Honourable Mr. Justice G.N. Mofolo is stayed.
>
> (c) The said judgment . . . . (is) rescinded and set aside as having been granted in error".

[6] Apart from the error in not joining the Mosoeunyanes, the error made by the magistrate and Mofolo J was to regard the ejectment proceedings as applicable to the unnumbered sites instead of the house.

[7] In seeking rescission the Mosoeunyanes made it plain that rescission was sought of the whole judgment of Mofolo J. No doubt it would have been possible to limit the

rescission sought had Mofolo J made an order dealing separately with the other sites on the one hand and their site on the other. Because the Judge made no order at all the formulation of such limited rescission was made difficult. But it was not even attempted.

[8] Aggrieved by the breadth of the order of Mahase J, the respondent launched the application which has led to this appeal. He applied for a declarator based on what he contended was the proper construction of that order namely, that Mahase J's order rescinded the judgment of Mofolo J only in so far as the Mosoeunyane site was concerned and -

> "did not affect the judgment and order of Mofolo J ... to the extent to which that judgment and order related to the other two sites ... which are unlawfully occupied by (the appellant)."

As already observed Mofolo J made no order.

[9] The application for the declarator referred to came before Mahase J who gave a judgment on 14 September 2011 culminating in the statement that -

> "the judgment of my brother Mofolo J has since (sic) been rescinded in so far as concerns the (Mosoeunyane) site only."

The word "since" was inappropriate. There was no intervening order which limited Mofolo J's judgment. That limitation was attempted solely by Mahase J in her judgment of September 2011 that is now the subject of the appeal.

[10] The argument for the appellant was that the order of Mahase J of September 2009 was unambiguous and that thereafter the learned Judge was functus officio. For the respondent it was said that the order meant, on a proper

construction, that the rescission was limited to the Mosoeunyane site.

[11] Counsel for the respondent was driven to argue that the order in contention was ambiguous when read in the light of the fact that there were admittedly three sites and that the Mosoeunyanes' by now undisputed claim to one of them meant that rescission was only necessary in respect of that site. In the Mosoeunyane application the respondent filed a notice of opposition but the record contains no opposing affidavit by him – if he ever did depose to one. Nor does his founding affidavit in the present proceedings refer to any such opposition.

[12] The context provided by the Mosoeunyane application and the order by Mahase J of September 2009 makes it clear that that application was not aimed at achieving a

limited rescission of Mofolo J's order. The applicants wanted it set aside in its entirety. Their purpose was, no doubt, that they would have the opportunity to join in the ejectment proceedings and achieve a result favourable to themselves. Mahase J's order of September 2009 reads consistently with such an objective on the part of the Mosoeunyanes. Her order was short, simple and clear. Moreover, a limited rescissions of Mofolo J's order would not assist given that the magistrate's order still subsisted and involved all three sites. Indeed the magistrate's order still stands.

[13] I conclude that Mahase J's order of September 2009 was unambiguous not only when read in isolation but also when read in context. It is not open to the construction urged upon us by counsel for the respondent. Having

made it, the learned Judge was thereafter functus officio and could not amend it.

[14] In the result the appeal must succeed. The order of this Court is as follows:

1. The appeal is allowed, with costs.

2. The order of the court below dated 14 September 2011 is set aside. In its stead the following order is made:

   "The application is dismissed with costs".

_____
C.T. HOWIE
JUSTICE OF APPEAL

I agree:

_____
I.G. FARLAM
JUSTICE OF APPEAL

I agree:

_____
M.E. TEELE
ACTING JUSTICE OF APPEAL

For the appellant : Adv. R.D. Setlojoane
For the respondent: Adv. K. Ndebele