

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.63/2013

In the matter between:-

THE ATTORNEY-GENERAL

APPELLANT

and

‘MAHLATHE MAJARA & 40 OTHERS

RESPONDENTS

CORAM: SCOTT, A.P.
FARLAM, J.A.
CLEAVER, A.J.A.

HEARD: 8 and 15 OCTOBER, 2014
DELIVERED: 24 OCTOBER, 2014

SUMMARY

Prescription – Evidence not required, where information relevant for decision common cause on the pleadings.

JUDGMENT

FARLAM J.A.

[1] This is an appeal from a judgment delivered by Peete J in the High Court in which he ordered the government to restore to the respondents (whom he described as ‘the former owners’) certain lands which had been taken by the government, failing which each of the respondents was to be compensated appropriately.

[2] In their declaration the respondents made the following allegations:

- ‘4. In 1985 around the month of September the plaintiffs herein were divested of their arable land by the government through the instrumentality of the armed soldiers. The said arable lands are situate in the vicinity of the national abattoir.
5. When the said fields and/or arable lands were taken the plaintiffs were neither given a fair hearing and/or any hearing at all, nor were they compensated for their said interests in the arable land.
6. As a result thereof the plaintiffs suffered loss of their said interests in the land and have never been compensated in connection therewith to date.’

[3] The respondents’ declaration contained claims for (a) a declaration that ‘the purported taking away of the said fields

(arable lands) belonging to plaintiffs is unlawful and null and void and of no force or effect’;

(b) (i) *‘an order directing the government to return the said arable lands to the plaintiffs;*

(ii) *‘compensation for the said arable lands.’*

[4] The respondents’ summons was filed in October 2001.

[5] Besides pleading on the merits of the respondents’ claim the appellant filed a special plea of prescription and an exception to the declaration on the ground that it did not disclose a cause of action.

[6] In a special plea of prescription the appellant pleaded that ‘the cause of action herein arose as far back as 1985’ and went on to allege that ‘the summons having been filed in October 2001, sixteen years since the cause of action arose, plaintiffs are hopelessly out of time in terms of the Government Proceedings and Contracts Act of 1965.’

[7] The special plea concluded with a prayer that the action be dismissed with costs.

[8] The case was set down for hearing on the contested roll on 19 September 2005. When the matter was heard the special plea of prescription and the exception were argued before Peete J but no evidence was led.

[9] On 23 October 2013 the learned Judge delivered judgment. He dismissed the exception and the special plea of prescription and made the order I have quoted above.

[10] In his judgment the Judge said that he took ‘a serious view of the grave public interest involved in this matter and of the trite principle of our law that prescription has to be pleaded as a defence and cannot be taken by way of exception.’ He clearly overlooked the fact that the appellant had raised the defence of prescription by way of a special plea.

[11] When the appeal came before this court only the dismissal of the prescription defence was argued. The attitude of the appellant was that the judgment of the court below should be set aside and the case sent back to the High Court for the hearing of evidence and determination on the merits if this court was not able on the pleadings without evidence to uphold the plea of

prescription. On behalf of the respondents Ms Maieane contended that evidence was also necessary for the prescription defence to be considered and that this court should not decide the prescription point but that this aspect of the case should also go back to the High Court. She referred to Commissioner of Police and Another v Seeiso LAC (1990-1994) 628 at 631 C-D where Browde JA, with whom Kotze JA and Tebbutt AJA concurred, said:

'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.'

[12] Ms Maieane also referred to Likotsi Civic Association and 14 Others v Minister of Local Government and 4 Others, C of A (CIV) 42/2012, the judgment in which was delivered on 19 April 2013 but which is not yet reported. In that case, two points in limine, one that the application was barred by the effluxion of time in terms of section 6 of the Government Proceedings and Contracts Act 4 of 1965, were upheld by the court without evidence being

led. Thring J.A, with whom Howie and Hurt JJA agreed, said in that the case should not have been decided on the papers because disputes of fact had arisen which required vive voce evidence.

[13] Ms Maieane also referred to Gericke v Sack 1978 (1) SA 821 (A) as authority for the proposition that the party who raises prescription must allege and prove the date of the inception of the period of prescription.

[14] In my view the cases cited by Ms Maieane are distinguishable. In the present case the respondents pleaded in paragraph 4 of their declaration that they were divested of their arable land in about September 1985.

[15] This allegation was accepted as correct by the appellant in the special plea in which, it will be recalled, it was pleaded that the cause of action arose 'as far back as 1985'.

Regard being that to the fact that it was common cause on the pleadings that the acts complained of which gave rise to the

respondents' cause of action had occurred 'as far back as 1985' it was in my view unnecessary for evidence to be led on the point.

[16] In terms of section 6 of the Government Proceedings and Contracts Act the relevant period of prescription is two years and it is thus clear that by the time the present proceedings were instituted the respondents' claims could not be enforced against the government.

[17] The respondents' counsel in the High Court had sought to resist this conclusion by contending that the respondents' claims were based not on a single wrongful act but a continuing wrong which caused damage from day to day. This contention was upheld by the Judge who relied on Mbuyisa v Ministry of Police – Transkei, 1995 (2) SA 362; Slomowitz v Vereeniging Town Council, 1966 (3) SA 317 (A) and Symmonds v Rhodesia Railways, 1917 AD 582. These three cases involved continuing acts by the defendant which caused damage from day to day.

[18] The respondents' cause of action is based on a single wrongful act as a result of which they were 'divested of their land' and 'suffered loss of their interests in the land'. The Judge

actually recognized that this was so because in his order he referred to them as the ‘former owners’ of the land.

[19] In my view the special plea of prescription should have been upheld and the costs thereof awarded to the appellant.

[20] In his judgment the Judge does not explain why he took so long to give judgment. All he says is that this case ‘nearly “drifted into the abyss of oblivion”’. In my view the delay was regrettable and unacceptable.

[21] The following order is made:

The appeal is allowed with costs. The order of the High Court is set aside and the following order is substituted therefor: ‘The special plea of prescription is upheld and the action is dismissed with costs.’

I.G. FARLAM
JUSTICE OF APPEAL

I agree:

D.G. SCOTT
ACTING PRESIDENT OF APPEAL

I agree:

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

For Appellant : Mr. M. Sekati

For Respondents : Ms T. Maieane

