IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.3 OF 2015

In the matter between

NTOA ABEL BUSHMAN **APPELLANT**

And

LESOTHO DEVELOPMENT AND CONSTRUCTION (PTY) LTD **1ST DESPONDENT**

HONOURABLE JOANG MOLAPO **2ND RESPONDENT**

LAND ADMINISTRATION AUTHORITY **3RD RESPONDENT**

CORAM: K. E. MOSITO P

S.N. PEETE JA

Y. MOKGORO AJA

HEARD: 30 JULY 2015

DELIVERED: 7 AUGUST 2015

SUMMARY

Application in Land Court – points in limine – generally inappropriate in such applications – matter remitted to that Court – Defences of lis pendens and prescription not upheld - Costs to be costs in the cause a quo.

JUDGMENT

MOSITO P

BACKGROUND

[1] This is an appeal against the decision of the Land Court Division of the High Court of Lesotho. In the Land Court the appellant filed an "originating application" against the respondents in terms of Rule 11 of the Land Court Rules ("the Rules"). In it, he sought an order in the following terms:

- That the 3rd Respondent be directed to cancel lease No.22124-184 which had been issued in favour of the 2nd Respondent's father, one MOOKI VITUS MOLAPO.
- That the 3rd Respondent be directed to cancel the Deed of Transfer in respect of the above plot which was registered by the 2nd Respondent's father in favour of the 1st Respondent.
- That the 1st Respondent be evicted from that portion of the Applicant's site.
- That the 1st and 2nd Respondents be directed to pay costs of this application on attorney and client's scale.

[2] The application was opposed by the 1st and 2nd Respondents. In their answer, the 1st and 2nd Respondents raised preliminary objections, namely; *locus standi* and prescription.

[3] The point of *locus standi* was dismissed while that of prescription was upheld by the Court *a quo*. The Court *a quo* went further to hold that the case before it was lis *pendens*.

CONSIDERATION OF THE GROUNDS OF APPEAL

[4] There are in essence three complaints on appeal before us. The 1st complaint is that the Court *a quo* erred in holding that a period of ten (10) years had lapsed before the appellant launched the proceedings before the Court. The second complaint was that the learned judge a quo erred in holding that the very cause of action in the case before him was pending in the Subordinate Court. The last ground of appeal was that the Court *a quo* erred in directing the appellant to pursue the proceedings in the Subordinate Court as, according to the appellant, the matter in the Subordinate Court had become academic (by which he meant *moot*). The case in the Subordinate Court in **CC/57/04** was said to be moot because the learned judge had already held that the appellant's right to challenge and/or correct the encroachment had prescribed.

[5] In terms of Rule 66 of the ***Land Court Rules 2012,*** preliminary objections are permissible before the Land Court.

Rule 66(1) provides that before proceeding with the trial, the Court shall decide such objections as may be made by the parties by way of a special answer. Rule 66(2) provides for a number of objections that may be made and the grounds upon which such objections may be made. The grounds of objection may be based on: (a) jurisdiction; (b) *res judicata*; (c) *lis pendens*; (d) *locus standi*; (e) prescription and (f) compromise or other agreement.

[6] As indicated above, these objections must be decided before going into the merits of the trial. Failure to make an objection at the first court hearing results in the waiver of the objection unless the ground of the objection is such as to prevent a valid judgment from being entered.

[7] In terms of Rule 67(1) the Court must decide an objection made under Rule 66 after hearing the opposite party and ordering the production of such evidence as may be appropriate for the decision to be made.

[8] The Court *a quo,* without hearing evidence or examining the parties or any of them, and, without first giving any directions as contemplated in Rule 67(1), dealt summarily on the papers with the two points in *limine* raised by the fourth respondent, upheld them both and disposed of the application by dismissing it, with costs. In my view, the Court a quo erred in so doing. The taking of such preliminary points in motion proceedings is generally speaking not appropriate. One of the reasons for this is that

often, as is indeed the case here, disputes of fact arise in regard thereto (such as whether each individual appellant had title) which cannot be properly decided on the papers and require evidence.

A plea of lis alibi pendens

[9] I have already indicated that *lis alibi pendens* is one of the preliminary objections that may be raised in terms of Rule 66 (2) (c). However, such an objection has to be raised by way of a special answer (the equivalent of a special plea). The learned judge *a quo* commented on *lis alibi pendens* in paragraph 14 of his judgment. He pointed out that 'the issue of encroachment is yet to be determined by the Court *a quo* in CC/57/04 following the rescission of the judgment of 8th November 2011 on 27th July 2012. To this extent, that issue can be said to be *lis alibi pendens.'*

[10] The issue of *lis alibi pendens* had not been pleaded and it apparently appears for the first time in the judgment on the record before us. It seems to me that the Court *a quo* did not consider the issue consequent upon its having been raised in terms of Rule 66(2) (c) above. In my opinion, the learned judge erred in this regard. As was pointed out in ***Nestlé (South Africa) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA)*** para 16:

> *"The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought once and finally."*

[11] Remarks to this effect can also be found in **Voet 45.2.7 (Gane's translation vol 6 at 560)**. This principle has been stated and repeated by the authorities over a period of more than a century.

[12] There was a disagreement between counsels before us whether the parties were invited to address the Court a *quo* on the subject of *lis alibi pendens.* They were however agreed that, the plea of *lis alibi pendens* was not pleaded on the papers. This Court was informed by the counsel that, the Court *a quo* raised the issue of *lis alibi pendens mero motu sua* on the basis of the process reflecting that there was litigation pending between the appellant and 2nd respondent's predecessor in title. If this is what happened in the Court a *quo,* then that was procedurally inappropriate.

[13] The reasons for the above view are that: firstly, the plea of *lis alibi pendens* is preferably raised by way of a special plea. Secondly, a court is not entitled to raise the issue of *lis alibi pendens* unless the defendant pleads it specifically (See: ***Kerbel v***

Kerbel 1987 (1) SA 562 (W)): Rule 66 (2) (c). Thirdly, the other proceedings must be pending between the same parties or their previes *(See:* ***Marks & Kantor v Van Diggelen 1935 TPD 29; Muller v Cook and Others 1973 (2) SA 247 (N)****).* [11] In the case before the learned Judge a quo, the matter in the Subordinate Court was between the appellant and the 2nd respondent's late father. The first and third respondents were not parties. Fourthly, the causes of action and reliefs sought were different. Additionally, oral evidence would be admissible to support or defend a plea of *lis pendens* (See:***Muller v Cook and Others 1973 (2) SA 247 (N)***). No evidence was received to prove *lis pendes*.

Prescription

As particularised in paragraph B of the answer:

- 'On Applicant's own papers, the cause of action herein is nothing new, it is **ten (10)** years old. He became aware that he 2nd Respondent's father had caused the sub-division of Plot **No. 22124-001** into **Plot No. 22124-183** and **Plot No. 22124-184** in **2004.**
- According to the Applicant's version, the 1st Respondent acquired the Plot **No. 22124-184** in **2005**. The 1st Respondent has been in occupation of the plot in question for more than a decade and has enhanced and developed the land in question in an amount of more than **Two Million**.
- Applicant has abandoned the land in question for at least ten (10) years. The

> **status quo ante** cannot be restores under the circumstances. His claim against the 1st and 2nd Respondents had since prescribed. On this point alone, this Application must be dismissed with costs.'

[14] The learned judge upheld the special answer (the equivalent of special plea) of prescription as particularised above. In upholding the above special answer, the learned judge pointed out that 'the preliminary objection on prescription is upheld and the application struck out with costs in terms of Rule 67(2) of the **Land Court Rules, 2012**. The applicant is free to persue the matter in the Leribe Magistrate's Court proceedings which are pending finalisation'

[15] As can be seen from the particulars of the prescription pleaded above, it was not clear from the papers whether the basis of the prescription was a statute or the common law. I say this because if the common law, then ten (10) years could not serve as the basis for prescription. A common law.

[16] It seems that the learned judge based his conclusion that, the matter had prescribed on the submissions by Counsel for the respondents that the appellant had done nothing since 2004 when he became aware of the encroachment. The learned judge held that the effect of this delay of ten (10) years is abandonment of his rights and unavoidability of judicial intervention to restore the status quo ante. He then held that as he understood the report (which was to be made an order of court but was not, and

was not even tendered in evidence), the encroachment is on the plot which 2nd respondent's father is a lease-holder and not on the unnumbered site of the appellant.

[17] To come to this finding, the learned judge ought to have relied on admissible evidence placed before him and/or facts that would be so clear that, they would need no evidence as to the basis of ten (10) year period forming the basis of prescription in law. It is not clear why he decided to rely on the said ten year period as opposed to the common law period. This is moreso when the particulars of prescription as pleaded did not establish a basis for either.

[18] Before us, the parties were unable to say whether the prescription as pleaded was based on statute or the common law. 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.

[19] The particular problem with the case before us is that, there is no knowing when the prescription period started running. One is reminded of the decision of this Court in **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."*

[20] As was said in Gericke ***v Sack 1978 (1) SA 821 (A),*** the party who raises prescription must allege and prove the date of the inception of the period of prescription. One is also reminded of the decision of this Court in ***Likotsi Civic Association and 14 Others v Minister of Local Government and 4 Others, C of A (CIV) 42/2012***, in which a point was taken 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. The appeal was upheld by the Court *a quo* without evidence being led. **Thring J.A**, with whom **Howie** and **Hurt JJA** agreed, said that the case should not have been decided on the papers because disputes of fact had arisen which required *vive voce* evidence. In the case before us, there was neither an allegation nor evidence as to when the period of prescription started running.

[21] In the present case, it is not possible to determine when it was that the 1st respondent first became aware of the encroachment forming the basis of the prescription upon which the Court *a quo* made a decision to uphold the objection.

[22] For the above reasons the appeal is upheld and the order of the Court *a quo* is set aside. The matter is remitted to the Court *a quo* so that it may proceed in accordance with the Rules of that Court. It is further ordered that the costs to date in the Court a quo will be costs in the cause.

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DR K.E.MOSITO

President of the Court of Appeal

I agree

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S.N PEETE

Justice of Appeal

I agree

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Y.MOKGORO

Acting Justice of Appeal

For Appellant : Advocate P.T Nteso

For Respondent: Advocate R. Setlojoane