IN THE APPEAL COURT OF LESOTHO

HELD AT MASERU **C of A (CIV) 10/2021**
LC/APN/15/2018

In the matter between:

'MAMAHLOMOLA RANOHA AND 30 OTHERS APPELLANTS

AND

THE MINISTER OF LOCAL GOVERNMENT & CHIEFTAINSHIP	**FIRST RESPONDENT**
MINISTER OF AGRICULTURE & FOOD SECURITY	**SECOND RESPONDENT**
THE COMMISSIONER OF POLICE	**THIRD RESPONDENT**
O/C MABOTE CHARGE OFFICE	**FOURTH RESPONDENT**
LAND ADMINISTRATION AUTHORITY	**FIFTH RESPONDENT**
ATTORNEY-GENERAL	**SIXTH RESPONDENT**

CORAM : P.T. DAMASEB, AJA
M. H. CHINHENGO, AJA AND
N MTHISYA, AJA

HEARD **:** 27 OCTOBER 2021

DELIVERED **:** 12 NOVEMBER 2021

SUMMARY

Land Court dismissing originating application as being res judicata and not dealing with prescription, when on pleadings parties made common cause that on the face of it the land in respect of which appellants now sought to be restored in present case question was different to the land in previous litigation. Land Court's order set aside and matter remitted to that court to determine the pleas of res judicata and prescription after hearing evidence.

JUDGMENT

PT DAMASEB, AJA:

[1] The crisp issue to be decided on this appeal is whether the Land Court misdirected itself in deciding the dispute before it solely on the papers and without hearing oral evidence.

Common cause facts

[2] In 1983, the then military Government of Lesotho, by proclamation, expropriated certain land described in Legal Notice No. 88 of 1983 as:

> *'All arable lands compounded by leporo-poro stream on the west, caldon river on the north, the track from lema to the river on the east and the leubua Highway on the North,*

And delineated on miscellaneous plan 04083 held in the office of the chief surveyor, Maseru, in extent 169 Hectares situated at ha Fosa in the Berea District'.

[3] I will henceforth refer to it as the *'1983 expropriation notice'*. It is common cause that the affected land was legally occupied by Basotho nationals at the time of the 1983 expropriation notice. It made provision to compensate the occupiers whose interests were adversely affected in the following terms:

'In return for loss of title, compensation in respect of lawful improvements made to the land so set aside shall be paid and persons with claims are invited to lodge these with the Commissioner of Lands P.O. Box 876, Maseru 100.'

[4] In October 2001, some individuals commenced litigation against the government under CIV/T/411/2001 (the 2001 litigation), alleging that in:

'1985 around the month of September' they 'were divested of their arable land by the Government through the instrumentality of armed soldiers. The said arable Lands are situated in the vicinity of the national abattoir'.

[5] As will later become apparent, the 2001 litigation made no specific reference to the 1983 expropriation notice.

[6] The Government of Lesotho (GoL) defended the 2001 litigation and raised a special plea that the claims had prescribed[1] on account of the fact that the claimants alleged that the cause of action arose in September 1985.

[7] Peete J before whom the matter came dismissed the special plea of prescription and on 23 October 2013 found in favour of the claimants and ordered that:

> *'All arable lands that were taken by then Government of Lesotho pursuant to legal Notice No. 88 of 1983 be restored to their respective former owners i.e. the present plaintiffs, failing which each of the plaintiffs, should be compensated appropriately.'*

[8] Peete J made an important finding, that:

> *'It was not in dispute that in 1983 several plots of arable lands* ***near the abattoir at Khubetsoana*** *previously used by the Plaintiffs were removed from their lawful possession and use pursuant to the Legal Notice No. 88 of 1983.'*

[9] It is not clear on what basis Peete J came to the conclusion that the cause of action on which the which 2001 litigation was premised was the 1983 expropriation notice.

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[1] Section 2 of the Government Proceedings and Contracts Act 4 of 1965 provides that after the expiry of two years any claim against the Crown arising out of any contract or out of any wrong committed by any servant of the Crown or of the Government shall prescribe.

[10] That judgment was appealed to this Court by the GoL. The applicants defended and actively supported the judgment and order of Peete J on appeal.

[11] This Court (Farlam JA, Scott AP and Cleaver AJA) upheld the appeal, set aside the judgement and order of Peete J and ordered that:

> *'The special plea of prescription is upheld and the action is dismissed with costs'.*

[12] In his judgement, Farlam JA makes no reference whatsoever that the claim which he found to have prescribed was triggered by the 1983 expropriation notice. In fact, in his narration of the applicants' declaration the learned judge of appeal stated the cause of action to be founded on the following averments:

> *''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 are/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'.

[13] It is the claim based on the cause of action referred to by Farlam JA in the paragraph above in respect of which this Court in 2013 upheld the GoL's special plea of prescription.

Fresh litigation

[14] In May 2018, the present appellants by way of originating application instituted proceedings in the Land Court against the GoL seeking the following urgent relief *pendente lite*, with costs:

'1.

…

(c) That the 1st and 2nd Respondents shall not be restrained from interfering the arable land at ***Selakhapane*** *…*

(d) That the 5th Respondent be and is hereby restrained and interdicted from doing anything in the future to cause or authorize any transfer of the property in issue to anybody …

(e) That 1st and 2nd Respondents be interdicted from holding themselves out as the authorized people to supervise ploughing of the place in issue…

(f) And or interdicting 2nd Respondent from entering into any agreements placing encumbrance upon or creating any charge, pledge, option, mortgage or any agreement and or

understanding which have the effect of binding the place in issue in favour of any third party …

2. An order interdicting 1st Respondent from interfering with, disrupting or restricting in any manner whatsoever access to or from, peaceful, undisturbed and beneficial use, occupation and enjoyment of the arable land of Applicants.

3. An order declaring the compulsory acquisition of the land at Selakhapane, Berea by the 1st and 2nd Respondents as unlawful.

4…

5. An order permanently evicting the Respondents from the place at ***Selakhapane.'*** (Emphasis supplied).

[15] Mahase J granted the interim relief and on the return date the matter was heard by Bayana AJ. I will now set out the pleadings in some detail.

[16] The originating application states that the applicants: -

'seek to be restored to their land as holders of certificates of allocation for specified fields at Selakhapane area in the district of Berea…; that their rights to the land in dispute had not been extinguished upon proclamation of all arable lands [specified in the 1983 expropriation notice]; that the purported taking away of their fields was unlawful, and that the Minister of Interior had no right to [expropriate] their arable land without

first being consulted in terms of the law. As couched in their claim contemplated in CIV/T/411/2001 their stated case was that in any event even if [1983 expropriation notice] could not be declared as invalid, they could not be evicted from their fields except against payment of compensation.'

[17] They made the following further averments in the originating application:

'The true state of affairs is that the fields of present Applicants were never removed from their lawful possession and use pursuant to the said Legal Notice. ***The circumference of the said legal Notice relates to a totally different place*** *to which the government still retains occupation to date. This place to which a declaration of the invalidity of the SDA* [1983 expropriation notice] *affects is on the east of Leporo-poro stream, not Selakhapane as it is commonly known.*' (My emphasis).

[18] The kernel of the applicants' case is that the claims which this Court previously held to have prescribed under CIV 63/ 2013 related to land other than that which they sought to have restored in the Land Court in the case that gave rise to the present appeal.

Opposition

[19] The GoL opposed the application and the 2nd respondent filed an 'Answer'. It raised two 'points of law': *res judicata* and prescription. In relation to the first it alleged that:

> *'This matter has already been decided by court of competent jurisdiction in C of A (CIV) No. 63/2013, in the matter between Attorney General v Mahlathe Majara and 40 others*.
>
> …
>
> *Their claim was based on the fields at Selakhapane which they allege were taken from them in 1985, that is still their claim even in this application. Therefore this matter is not rightly before this court on the basis of res judicata and/ or judgment in remand (sic) it should be dismissed on this point alone'.*

[20] The second point of law is that:

> *'their claim has prescribed by law. Respondents have enjoyed peaceful and undisturbed occupation and use of the disputed land herein until to date. The law provides that no action may be brought against the Government after the expiration of a period of two years from the time when the cause of action arose. As the applicants pointed out in CIV/T/411/2001, The cause of action herein arose sometime in 1985. This*

Honourable Court can therefore not entertain this application on the basis that it has prescribed.'

[21] It is important to repeat the most critical allegation made by the applicants when they approached the Land Court in the present litigation: It is that the land they now seek to be restored to was not expropriated in terms of the 1983 expropriation notice, that they remained in occupation of that land and that they were forcibly removed without any legal basis or compensation. That is the case the GoL was required to meet.

[22] In answer to the applicants' allegation that they are seeking to be restored to the land at Selakhapane, Berea, the GoL's answer is that:

'the land was set aside more than 30 years ago by the Government of Lesotho for its use and for the establishment of the Selakhapane abattoir.'

[23] The GoL also alleged that the land being claimed by the applicants was the subject of previous litigation and that the:

'matter had been put to rest by the Court of Appeal in C of A (CIV) No. 63/2013. Applicants cannot be heard to be claiming the rights over the land after that decision. The land had been fenced by the Ministry of Agriculture and Food Security and as such, Applicants cannot allege that they had been in possession thereof.

Furthermore, the applicants were lawfully disposed of the land as it was selected for public purposes.'

[24] The Government further denied the applicants' claim that the land being claimed now was different to that covered by the 2001 litigation. It alleged in that regard that:

> *'Applicants are not being candid with this Honourable Court. In CIV/T/411/2001 their claim was basically that their rights were* ***divested from them by use of force not in respect of legal Notice No. 88 of 1983****.*
> *…*
> *[I]t is important …to note that applicants' claim in CIV/T/411/2001 was never based on legal Notice No. 88 of 1983 but rather on the use of force by Armed Forces.'* (Emphasis supplied).

[25] The GoL also denied the applicants' allegation that the Court of Appeal erroneously relied on the 1983 expropriation notice in deciding the dispute that arose under the 2001 litigation. Its answer is that:

> ***'Only the judgment of the High Court focused on Legal Notice No. 88 of 1983. The judgement of Court of Appeal is based on prescription and nothing more****.*
> *…*

> *[R]egrettably applicants' attorney misconstrued the decision of Court of Appeal in the matter.* ***They mistakenly relied on the High Court decision and applied it to the Court of Appeal decision. This led them into believing that Court of Appeal decision is based on Legal Notice No. 88 of 1983. It is clear from Court of Appeal decision that the fact that the applicants' cause of action emanates from action occurred in 1985, their claim could not be enforced against the Government'.*** (My emphasis).

[26] It is clear therefore that when the pleadings closed, both parties accepted (a) that the 1983 expropriation notice was not the basis on which land belonging to the applicants was seized in 1983; (b) that the applicants who instituted the 2001 litigation never alleged that the expropriation notice was the basis on which their land was seized.

The High Court

[27] On 28 August 2020, after oral submissions and without hearing any evidence on the disputed issues, Bayana AJ gave a ruling on 'preliminary objections'. On the issue of prescription, the learned judge initially intimated to the parties that she was going to hear evidence but later changed her mind. As she put it:

'However, after perusal of the judgment of the Court of Appeal, in particular, paragraphs 14-15 of the judgement, I reconsidered this position and directed the parties to address the point of Res judicata

only. I adopted this position because prescription had been addressed by the Court of Appeal and it formed the basis on which the Court dismissed the applicant's claim.'

[28] The learned judge then proceeded to determine the plea of res judicata and was satisfied that the present litigation was between the same parties or their privies, concerned the same subject matter and the same cause of action.

[29] Given what became common cause between the parties at the end of the pleadings and the insistence by the GoL that in both the 2001 litigation and the present litigation, the applicants placed no reliance on the 1983 expropriation notice, the crucial conclusion by Banyane AJ that the matter is *res judicata* is hard to justify:

[30] Banyane AJ said the following:

> *'[24] The cause of action first accrued when the rights in the fields were extinguished* ***through expropriation per the 1983 Legal Notice****. This is when the plaintiffs sustained loss of Rights in this arable Land. The applicants filed the prior claim on the basis of* ***this*** *'taking'.* ***Before this Court, they do not plead a separate act of expropriation that gives rise to the complaint before this Court.*** *All they do is to question the extent of the* ***expropriated Land and the effect of the Legal Notice*** *on their rights. They do not specify as to "when" they lost the right they seek to enforce in these*

proceedings as a result of the respondents' act or omission. ***My reading of the originating application reveals only one cause of action, the 1983 expropriation.*** *This means their claim before this court is founded on the same cause of action as the prior action. In other words, the same matter is in dispute before this Court.*

[25] With regards to the subject matter, ***the applicants aver, as stated earlier, that the prior litigation relates to land envisaged under the legal notice No. 88 of 1983****, as such, the earlier decision(s) are inapplicable to the land at Selakhapane, the subject matter of dispute before this Court. It should be noted that in their declaration in the initial action, they averred at paragraph 4 that the fields are situated in the "vicinity of the national abattoir". In casu, they claim the Land at Selakhapane. An abattoir translated into Sesotho in Selakhapane.*' (My emphasis).

Grounds of appeal

[31] In so far as it is relevant to the outcome of the appeal, the applicants rely on the following grounds of appeal:

'[1] *The Court erroneously determined the application on the basis that there was no need to lead evidence on prescription or investigating the requirements thereof.*

[2] *The Court a quo erred I deciding this matter on the basis that a loco inspection was not necessary as a preliminary to any enquiry or investigation of the merits of the respective claims of the parties to the fields excluded by the Legal Notice No. 88 of 1983.*

[3] *The Court a quo erred in its analysis of the issues in holding that the present dispute is not premised on different facts and circumstances to those brought before the Honourable Court for its consideration the of matter of Attorney General v Mahlathe Majara & 40 Others C of A (CIV) No. 63/2013.*

…

[5] *The court a quo erred in declining exercise of judicial power to hear evidence against the purported acquisition of land by the government, which is, on the face of the record, is not in accordance with the Constitution and Legal Notice No. 88 of 1983.*

[6] *The Learned Judge in the court a quo misconceived the cause of action as defined, the nature of the enquiry, the dispute relating to the expropriation of the fields of Appellants and the location of the fields.*

[7] *The Court a quo misdirected itself in refusing to interrogate the boundaries set out in the Legal Notice No. 88 of 1983 by loco inspection and the location targeted for implementation of government policy.*

[8] *The Learned Judge in the court a quo erred in that even though preliminary objections were raised before trial in terms of Rule 66 of*

the Land Court Rules 2012, the court should not have dismissed the main application where a dispute of fact is real as in the context of the circumference of Legal Notice No. 88 of 1983.

[9] *The court a quo erred and misdirected itself in that without hearing evidence or examining the parties and without first giving any directions as contemplated in the Rule, dealt summarily on the papers with the two points in limine raised by the Respondents and upheld them all resulting in the premature disposal of the application by dismissing the matter with costs. This was a preliminary error.*'

Disposal

[32] The applicants' criticism of the judgment and order of the Land Court is justified. That Court's conclusions at paras [24] and [25] of the judgment *a quo* are in direct conflict with the pleadings which accepted that the expropriation was not the sequel to the 1983 expropriation notice. It is also inconsistent with the GoL's own position that the Court of Appeal's upholding of the prescription plea was unrelated to the 1983 expropriation notice.

[33] The GoL was ill-advised not to challenge by way of cross-appeal the erroneous conclusions made by Bayana AJ. Those conclusions tainted the order made by the Land Court dismissing the claim based on *res judicata*. Curiously, the GoL supports the reasoning of the Land Court when it supports the order of that court that the matter is *res judicata*.

[34] The irony is heightened by the fact that the GoL in its Answer stated that Peete J wrongly relied on the 1983 expropriation notice while the Court of Appeal did not. Now in this appeal, the GoL finds no fault with Bayana AJ's finding that the claim brought under the present dispute arises from the 1983 expropriation notice.

[35] In fact, during oral argument counsel for the GoL repeated that the land at Selakhapane is not the same land as that referenced in the 1983 expropriation notice. Again, that is at odds with the Land Court's conclusion at paras [24] and [25].

[36] With all these uncertainties and contradictions about just which land is at issue, it is difficult to sustain the High Court's conclusion that the matter is *res judicata* in the sense that what the applicants lay claim to is the same land that the Court of Appeal's judgment authoritatively dealt with in its judgment and order under CIV No. 63/ 2013.

[37] The applicants are therefore entitled to succeed on appeal and the matter be remitted to the Land Court for the disputed points of law to be adjudicated afresh. The matter need not be heard by the same judge.

[38] The applicants had both in pre-litigation correspondence and in the application asserted that the best way to determine which land was in dispute would be by way of *in loco i*nspection. That

may or may not be so but it is a matter which would be best adjudicated by evidence. Only a trial court will be best placed to resolve the procedural issues.

[39] Having achieved success, the applicants are entitled to their costs, both *a quo* and on appeal. Considering that the court *a quo* remains at liberty after hearing evidence whether the plea of res judicata is sustainable, I will not make an order dismissing the res judicata plea to replace the order made by Bayana AJ. Both that plea and the one of prescription remain live issues in the light of this judgment.

Order

[40] I therefore propose the following order:

(i) The appeal succeeds and the judgment and order of the Land Court are set aside and the matter remitted to the Land Court to deal with the matter according to law in the light of this judgment.
(ii) The applicants are granted costs in the court a quo.
(iii) The applicants are granted costs of the appeal.

P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree:

M. H. CHINHENGO

ACTING JUSTICE OF APPEAL

I agree:

N MTSHIYA

ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV. C.J LEPHUTHING

FOR RESPONDENTS: ADV. T. MOHLOKI