

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/218/2010

In the matter between

MASEFABATHO LEBONA

PLAINTIFF

AND

MINISTRY OF COMMUNICATIONS

1ST DEFENDANT

MINISTRY OF LOCAL GOVERNMENT

2ND DEFENDANT

THE ATTORNEY GENERAL

3RD DEFENDANT

Neutral Citation: Masefabatho Lebona v Ministry of Communications & 2 Others CIV/T/218/2010 [2021] 93

JUDGEMENT

CORAM: BANYANE J

HEARD: 15/02/2020, 16/06/2021

DELIVERED: 24/08/2021

Summary

Special plea – prescription – prescriptive period under section 6 of the Government Proceedings and Contracts Act of 1965 – Interruption by mental disorder - whether the prescriptive period under this legislation is subject to the provisions of prescription Act of 1861. If yes, whether the evidence satisfactorily establishes that at the material time, the deceased’s disorder rendered him incapable of managing his own affairs or validly concluding contracts.

ANNOTATIONS

Cases cited:

1. Thetsane and Others v Attorney General CIV/T/142/93
2. Makamane and Others v Ministry of Communications C of A (CIV) 27/2021
3. Lelimo v Teaching Service Department C of A (CIV) 1 of 2012
4. President Insurance v Yu Kwan 1963 (3) SA 766

Statutes

1. The Government Proceedings and Contracts Act of 1965
2. The Prescription Act No.6 of 1861

Books:

1. PQR Boberg; The Law of Persons and the Family (1977) Juta & Co Ltd
2. WCM Maqutu: The Contemporary Family Law of Lesotho (2005)

BANYANE J

Introduction

[1] The plaintiff sued the defendants for damages in the amount of M2 082 829.93 arising out of deprivation of a certain piece of land through expropriation in 1986. In the alternative, she claims payment of M1 000 000.00 and to be awarded house No.106 at Maseru West, Maseru.

Background facts

[2] The background to this litigation can be summarized as follows. The plaintiff's husband Mr. Phakiso Lebona (deceased) acquired a certain piece of land identified as plot No 12292-005, situated at Europa, Maseru through a sale agreement concluded with one Lepoqo Mohale in 1984. Sometime in 1986 this land was expropriated by the erstwhile Commissioner of Lands and Minister of Communications, Science and Technology.

[3] It is common cause that the deceased received no compensation for the expropriation. He passed on in 2004. Subsequent to his demise, the plaintiff launched certain proceedings before this court under CIV/APN/344/05 wherein she sought compensation for the expropriation in the form of an alternative / replacement site or payment of an amount of M129 000.00 being the purchase price of this property.

[4] A consent order for payment of the claimed amount was made on the 17/10/05. It is common cause that instead of paying this amount, the concerned Ministry "returned" the plaintiff's site.

The plaintiff's case before this Court

- [5] The present action was launched in 2010. The plaintiff's primary complaint in these proceedings is that she has been deprived of usage of her plot since 1986 hence the claim for damages in the amount of M2 000 000.00 for deprivation of use. She avers that while the expropriation occurred in 1986, her husband was disabled by mental illness from timeously filing or instituting any proceedings and that she was similarly proscribed from instituting litigation for the reason that she lacked *locus standi* to do so due to being under her husband's marital power. She asks for condonation for the late filing of this claim.
- [6] To the declaration, the defendants requested further particulars in relation to the deceased's mental illness. The plaintiff was asked to divulge as to when the deceased was struck by mental illness. Her response was that the deceased suffered from periodic mental illness from 1981.

The special pleas

- [7] Subsequent to the furnishing of further particulars, the defendants raised a special plea of prescription on grounds that the plaintiff's claim arises out events which occurred in 1986, a period of more than twenty years ago. They contend on this basis that the claim has prescribed in terms of section 6 of the Government Proceedings and Contracts Act of 1965.
- [8] The second preliminary issue raised by the defendants is that the plaintiff failed to make a demand prior to the launching of these proceedings, contrary to this Act. And lastly that the plaintiff failed to join the Ministry of Public Service, being the Ministry responsible for government houses.

[9] I proceed to deal with the special plea of prescription. Both parties filed their heads of arguments which were later augmented by oral submissions on the date appointed for hearing of the matter. The following are their submissions.

The parties' submissions

[10] Relying on section 6 of the Government proceedings and Contracts Act, Advocate Moshoeshe contended on behalf of the defendants that the plaintiff's cause of action arose in 1986 and the summons were only filed in 2010, a period of more than 20 years later.

10.1 He contends that the provisions of section 6 are mandatory and the Court lacks competence to extend the prescription period stated therein or condone failure by the plaintiff to lodge her claim within this period. He cited the cases of **Bokang Lelimo v Teaching Service Department C of A (CIV) 1 of 2012, Mohau Makamane and Others v Ministry of Communications C of A (CIV) 27/2021** to submit that this court cannot condone the failure to bring an action within the prescription period of two years.

[11] Advocate Moerane on behalf of the plaintiff abandoned the prayer for condonation during argument and relied solely on the provisions of section 6 of the Prescription Act of 1861. She contends that the running of prescription was interrupted by the deceased's mental illness which arose in the year 1981.

11.1 She conversely argued that the provisions of section 6 of the Government Proceedings and Contracts Act are subject to section 6 of the Prescription Act, which provides that prescription does not run against persons who are of unsound mind during the period when they are under such disability. She referred the court to a psychiatrist report filed in CIV/APN/344/05 and also cited the case of **President**

Insurance v Yu Kwan 1963 (3) SA 766 to submit that prescription does not run against a person under disability during such disability and that on account of mental disorder, the deceased was unable to file any claim within the prescription period.

[12] It is her further contention that while the illness disabled the deceased from filing an action against the defendants, she was similarly proscribed from doing so by virtue of being under coverture. She cited the case of **Thetsane and Others v Attorney General CIV/T/142/93** to submit that for purposes of section 6 of the Prescription Act, a married woman is a person under coverture. She asserts on this basis that prescription could not run against her claim for the reason she was under a disability to enforce her rights.

[13] She submitted further that when the plaintiff filed the claim in 2010, she was still within the 8 years period allowed by section 3 of Prescription Act, calculable from the date of death of her husband.

13.1 She further contended that the cases relied upon by the defendants are distinguishable from the present matter in that the issue of mental illness and coverture preventing a party from filing a claim within the two years prescription period, did not arise in those cases.

[14] In reply, Mr. Moshoeshoe submitted that even if the defendants were to accept that the plaintiff was incapacitated from launching the claim prior to her husband's demise (i.e. prior to 2004), she was not incapacitated from doing so within a reasonable time after her husband's passing.

Consideration of the special plea

[15] It is indisputable that the expropriation of the land in question occurred in 1986. Although the plaintiff initially sought condonation for the late filing of the claim, she abandoned this and sought to rely on section 6 of the Prescription Act of 1861.

[16] I pause to observe that even if she did not abandon the prayer for condonation, it is clear from the authorities cited by Mr. Moshoeshoe that the prescription period under section 6 of the Government Proceedings and Contracts Act is not extendable nor condonable by the Court.

[17] It follows in my view that section 6 of the Government Proceedings and Contracts Act would not affect the plaintiff's claim only if section 6 of the of prescription Act is applicable to her claim.

[18] I proceed then to consider whether the plaintiff can successfully rely on section 6 of the Prescription Act of 1861. It is appropriate for this determination to reproduce the provisions of the Prescription Act.

18.1 Section 6 reads as follows;

"If at any time when any such cause of action as in section 3, 4 and 5 of this Act mentioned first accrued, the person to whom the same accrued was a minor, or under coverture, or of unsound mind, or absent from Basutoland, then such person or the person claiming through him may, notwithstanding that the period of prescription hereinbefore limited in regard to such cause of action has expired, bring a suit of action upon such cause of action at any time within 8 years or three years (as the case may be) next after the time at which the person to whom such cause of action first accrued ceases to be under any such disability as aforesaid or has died, whichever of these two events has first happened."(underlining mine)

18.2 Section 3 of this Act provides as follows;

Except as hereinafter is excepted, no suit or action upon any bill of exchange, promissory note or other liquid document of debt of such a nature as to be capable of sustaining a claim for provisional sentence shall be capable of being brought at any time after expiration of eight years from the time when the cause of action upon which such liquid document first accrues; provided that nothing in this Act contained shall extend to or affect any mortgage bond, general or special, or any judgment of any Court in Basutoland or elsewhere.

18.3 Section 4 reads;

The provisions of the last preceding section shall extend and apply to the respective suits and actions following, that is to say; -

- a) For money due for goods sold and delivered;
- b) For money lent by the plaintiff to the defendant;
- c) For money paid by the plaintiff for the use of the defendant;
- d) For money had and received by the defendant for the use of the plaintiff (including the *condictio indebiti*);
- e) For rent upon any lease or contract for hire;
- f) For money claimed upon or by virtue of an admission of an amount due upon an account stated or settled;
- g) For money due upon an award of arbitrators;
- h) For money due as a purchase money for immovable property;
- i) For money claimed for work and labour done and materials the same;
- j) For money claimed upon or by virtue of any policy of assurance.

18.4 Section 5 provides that no suit of action;

- a) For the fees or for the fees and disbursements of advocates, attorneys, public notaries, conveyancers, land surveyors or persons practicing any branch of the medical profession, or
- b) For the amount of any banker's, butcher's, tailor's or dressmaker's or boot or shoemaker's bill or account or

- c) For the salary or wages of any merchant's clerk or other person employed in any merchant's or dealer's store, counting house or shop;
or
- d) For the wages as a servant of any person coming under the definition of the term "servant" given in the Masters and Servants Act.

Shall (except as hereinafter excepted) be capable of being brought at any time after the expiration of three years from the time when the cause of action in any case as aforesaid first accrued;

Provided that;

- i) as often as any acknowledgement of or promise in writing to pay any such debt as is in this section mentioned has been made or given at any time before the expiration of such term of three years, then such debt may be sued for at any time within eight years from the date of such acknowledgement or promise, or, in case such acknowledgment or promise specifies some future time for the payment of the debt, then within eight years from the date at which the said debt became, by or according to the tenor or effect of such acknowledgement or promise, due and payable; and
- ii) nothing in this section contained shall prevent the application to any such debt as is in this section mentioned of any of the provisions of section *eight* of this Act.

[19] A careful-reading of the quoted provisions reveals in my view that the causes of action referred to section in 6 are those delineated under sections 3, 4 and 5. The plaintiff's cause of action is deprivation of use of land and not a claim for the purchase price of immovable property. It does not therefore fall under the category of disputes listed in sections 3, 4 nor 5. It follows in my view that the prescription period under section 6 of the Government Proceedings and Contracts Act, for purposes of the plaintiff's claim is not subject to the Prescription Act provisions. To put it differently, the plaintiff's claim

does not fall within the section 3 claims to which the 8 years period apply.

[20] Even if I am wrong in concluding as I did above, it is my considered opinion that the evidence presented before Court on the alleged mental illness is insufficient to conclude that during the prescription period, the deceased was incapacitated as alleged and consequently that the running of prescription was interrupted.

20.1 This opinion is informed by two considerations, namely; a) the findings of a Psychiatrist Dr. Solomon Agbahowe, who assessed the deceased in 2002, b) the time during which the piece of land in question was acquired. I expound below.

20.2 The psychiatrist report reveals that the deceased had been a patient of Mohlomi Hospital since January 1981 and had been diagnosed with Schizoaffective disorder, a chronic and severe mental disorder with a poor prognosis.

20.3 The author states that the deceased became his patient in December 2001 when he got admitted in Mohlomi Hospital. At this time, so the report goes, his main problems were that he was overactive, sleepless and writing so many letters to individuals, companies and institutions making inappropriate requests and inquiries; that he was irritable and aggressive towards his family members, delusional about his identity and possessions and had hallucinations.

20.4 The report also reveals that as a result of his condition, he had been unable to adequately take care of his family or engage in any meaningful employment and that he had relapsed for about 2 years prior to the assessment and had refused hospital care apparently because of his lack of insight into his problems.

20.5 According to this report, the hospital admission had to be carried through invocation of the relevant provisions of the Mental Health Law (presumably the Mental Health Act of 1964). The Psychiatrist concluded by saying;

“I last saw Mr. Lebona in May 2002 and had thereafter refused to come for further treatment despite all persuasions from his family members, despite reportedly still having the psychotic systems.

My opinion about the issues you raised in your letter is that based on the past psychiatric history and the fact that he had refused to come for his follow-up care, Mr. Lebona should not attend any court sessions until I had reevaluated him for his fitness to do so. If the legal regulations permit someone else may represent him in court while arrangements are been made for him to be assessed and placed on treatment once again.”

[21] The report unquestionably elucidates the deceased condition as at October 2002, a period of 16 years after the cause of action arose. It is clear that at this time, his condition necessitated an appointment of a *curator ad litem or bonis*. The report is however not suggestive nor conclusive that since 1981 until his assessment in 2002, his mental condition was of a degree and nature that rendered him incapable of managing his own affairs or incapable of validly concluding contracts.

[22] It is noteworthy that the agreement of sale giving rise to acquisition of rights over the plot in question was allegedly concluded in 1984.

22.1 This suggests, in the absence of evidence to the contrary, that the deceased must have at the time understood the nature of the contract and appreciated the nature of the obligations he was undertaking despite being a patient since 1981, hence the plaintiff’s reliance on the agreement in support of her claim before this Court.

22.2 To put it differently, the medical testimony based on subsequent observation cannot be relied upon since it does not suggest that the condition as at 2002 probably existed from 1984 to 1986 (the prescription period).

[23] On the evidence presented, it is therefore doubtful whether the deceased was mentally incapacitated to institute any proceedings from 1986 to 1988.

[24] Even assuming he was so incapacitated, the plaintiff who was undoubtedly under his control and guardianship by virtue of marital power at the material time, was not in terms of the law remediless. **PQR Boberg; The Law of Persons and the Family (1977)** states at p139-140 that;

“loss of a husband’s legal capacity through mental illness may have a devastating effect upon his wife. If she is subject to his marital power, she will find that, although he is no longer capable of authorizing her transactions, she remains subject to her own legal disabilities as a married woman. Bereft both of contractual capacity and a guardian to supplement the deficiency, she has no option but to turn to the court for assistance, which it may supply by authorizing her to administer the joint estate (or her separate estate) herself, or be appointing her as her husband’s curatrix...”

24.1 See also **WCM Maqutu: The Contemporary Family Law of Lesotho (2005) @ p324** in which he states that where the husband was insane, the wife would under such circumstances be appointed as her husband’s guardian.

[25] In the light of these authorities, the plaintiff cannot similarly rely on coverture to justify her failure to bring the claims within the prescription period.

Conclusion

[26] It is for the foregoing reasons that I conclude that neither the deceased nor the plaintiff were disabled from filing the claim within the 2 years period and that the claim is not covered by the Prescription Act provisions. By launching the claim after 24 years from the date on which the cause of action accrued, the plaintiff's claim is hopelessly time barred. The special plea must therefore succeed.

Order

[27] In the result, the special plea of prescription is upheld and the action is dismissed with costs.

P. BANYANE
JUDGE

For Plaintiff: Adv. Moerane

For Defendant: Adv. Moshoeshe