

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/0064/2023

In the matter between

RETS'EPILE MOHLOMI (nee MAHASE)

PLAINTIFF

AND

'MATLALI MOHLOMI

1ST DEFENDANT

KHATO MOHLOMI

2ND DEFENDANT

Neutral Citation: Rets'epile Mohlomi (nee Mahase) v 'Matlali Mohlomi and another [2024] LSHC Civ 236 (25th October 2024)

CORAM : **BANYANE J**

HEARD : **06/08/2024**

DELIVERED : **25/10/2024**

Summary

Point *in limine*-lack of jurisdiction- claim for compensation for improvements- whether claim justiciable in the Commercial division of the High Court-held that it does not-point *in limine* dismissed

ANNOTATIONS

Cited cases:

South Africa

1. Ewing v McDonald & Co Ltd v M & M Products Co 1991(1) SA 252 (A)

2. Veneta Minerarai Spa v Carolina Collieries (Pty)Ltd 1987(4) SA 883(A)
3. Graff Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A)
4. Estate Agents Board v Lek 1979 (3) SA 1048 (A)
5. Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC)
6. Galo Africa Ltd and others v Sting Music (Pty) Ltd and others 2010 (6) SA 239 (SCA)
7. The Master v Thomsons's Estate 1961(2) SA 20
8. Kerbel v Kerbel 1987(1) SA 562

Lesotho

1. Makoala v Makoala C of A (CIV) 2009
2. Makibi v Makibi LAC (2013-2014) 350
3. Steyn v Lebona CIV/T/143/83
4. Lebona Lephema v Total Lesotho (Pty) Ltd C of A (Civ0 36/14

JUDGMENT

BANYANE J

Introduction

[1] The plaintiff and 2nd defendant were married to each other in community of property. This Court dissolved their marriage on 04 September 2020. During the subsistence of their marriage, they lived on a plot belonging to their mother, 1st defendant herein.

The plaintiff's declaration

[2] The plaintiff avers that during the subsistence of their marriage, her mother-in-law donated the land to her family. On this land lay an incomplete and dilapidated two-roomed structure. Acting on the strength of the donation, they bona fide made massive improvements on this land. The dilapidated house was extended to a contemporary residential house which they occupied during the subsistence of their marriage.

[3] Although this land was never registered in their names at the time of divorce, they are entitled to the value of improvements effected on this plot, to be shared between them (plaintiff and 2nd defendant).

Relief sought

[4] Based on these allegations, the plaintiff has filed a claim against her mother-in-law for compensation for improvements on this land. The plaintiff asks for judgment in the following terms.

1. Payment in the sum of **Seven Hundred and five thousand Maloti (705, 000.00)** for land and all improvements effected on the landed property.
2. Interest at the rate of **12.5%** per annum *a tempore morae*.
3. Costs of suit on Attorney and Client Scale;
4. Further and Alternative relief;

ALTERNATIVELY

1. **Payment** in the amount of **Two Hundred and Eighteen Thousand and One Maloti, Fifty Lisente (218, 001.50)** being Plaintiff's share for all improvements effected on the landed property.
2. Interest at the rate of **12.5%** per annum *a tempore morae*.

3. Costs of suit on Attorney and Client Scale;
4. Further and Alternative relief;

The special pleas

[5] The defendants oppose the claim. They raised two special pleas of jurisdiction and *lis pendens*. Lack of jurisdiction is founded on the following grounds;

“This court does not have jurisdiction to entertain this action because the remedy plaintiff is seeking is justiciable before the Commercial Court as the plaintiff is seeking the market value of improving the 1st defendant’s house during the tenure of their tenancy at her duplex. This is purely a commercial transaction hence justiciable in the Commercial Court.”

[6] The second preliminary issue of *lis pendens* is founded on allegations that when the present action was instituted, the division of the joint estate in a divorce action between the parties was still pending. In addition, there is another case filed in the District Land Court under CIV/DLC/MSU/0060/2021 between the same parties relating to title over this plot.

The parties’ submissions

[7] Advocate Mariti for the defendants argued firstly that the Court is faced with conflicting claims of title to land. His understanding of the case before Court is that the plaintiff's claim is based on ownership of the property in question, so is the 1st defendant's defence. The matter is therefore about title to land and justiciable in the Land Courts.

[8] His alternative argument is that the matter is justiciable in the Commercial Court in terms of Rule 129 (2) (d) of the High Court Civil Litigation Rules 2024 because the dispute or claim arises out of the couple's tenancy of the 1st respondent's property.

[9] Advocate Setlojoane for the plaintiff conversely argued that the matter falls within the jurisdiction of this Court because the cause of action and reliefs sought are interlinked with the divorce proceedings filed in this Court.

[10] On *lis pendens*, counsel argued that there is no pending divorce action between the parties. Moreover, the cause of action in the divorce proceedings was the marriage itself and its dissolution whereas in the present proceedings, the cause of action is improvements on the land based on a donation, as well as compensation for these improvements.

[11] Concerning the proceedings in CIV/DLC/MSU/0060/2021 he argued that these proceedings were instituted by the 1st defendant against the plaintiff to prevent her from entering the property. He further contended that the 1st defendant never pursued this case.

[12] Advocate Setlojoane further argued that this matter falls outside the ambit of commercial disputes because the occupancy of the land in question arose from the subsistence of the marriage between the parties and not from a landlord–tenant relationship.

The law on jurisdiction

[13] The term jurisdiction has many meanings. Jurisdiction is defined as the power vested in a court by law to adjudicate upon, determine, and dispose of a matter.¹

[14] The jurisdiction of a court depends on either the nature of the proceedings or the nature of the relief claimed or, in some cases on both, but does not depend on the substantive merits of the case or the defence relied upon by the defendant.²

¹ Ewing v McDonald & Co Ltd v M & M Products Co 1991(1) SA 252(A) at 256G, see also Veneta Minerarai Spa v Carolina Collieries (Pty)Ltd 1987(4) SA 883(A_) at 886 D, Graff Reinet Municipality v Van Ryneve'dt's Pass Irrigation Board 1950(2) SA 420(A) at 424.

² Estate agents Board v Lek 1979(3) SA 1048(A), Gcaba v Minister of Safety and security 2010(1) SA 238(CC). Galo Africa Ltd and others v sting Music (Pty)Ltd and others 2010 (6)SA 239(SCA) para 6.

[15] For purposes of deciding the validity of the preliminary point, the applicant's pleadings alone should be considered.³ This means the disposal of a jurisdictional challenge entails no more than a factual inquiry, with reference to only the particulars of the claim to establish the nature of the right that is being asserted in support of the claim.⁴ Sometimes the right that is being asserted might be identified expressly. At other times, it might be discoverable by inference from the facts that are alleged and the relief that is being claimed.⁵

[16] With these principles in mind, I proceed to highlight the jurisdictional parameters of the Land Court and the Commercial Court.

[17] Section 73 of the **Land Act 2010** establishes the Land Court and District Land Courts with jurisdiction, *to hear and determine disputes, actions and proceedings concerning land.*' In 2012, this section was amended by the **Land (Amendment) Act 2012** by inserting the word "*all*" between "determine" and "disputes".

³ Makoala v Makoala C of A 2009

⁴ Makhanya v University of Zululand (218/08) [2009] ZASCA 69 (29 May 2009) para 31

⁵ Makhanya v University of Zululand para 31

[18] The nature of disputes referred to under section 73 are those involving claims of *title to land, claims relying on derogations from title or claims to rights overriding title*.⁶

[19] Jurisdiction of the Commercial Court is defined in Rule 10 Commercial Court Rules 2011. These Rules applied when this action was instituted in 2023. The new Rules were promulgated in June 2024. It is to these old rules that we must look.

[20] Rule 10 of the Commercial Court Rules enumerates categories of disputes that justiciable in the commercial Court. It provides;

“10 (1) the business of the commercial Court shall comprise all actions arising out of or connected with any relationship of a commercial or business nature, whether contractual or not, and shall include, among other things;

a..

b...

...

[21] Having summarized the type of disputes envisaged under the constitutive instruments of the two Courts, the sole issue is whether the instant matter is justiciable in either the Land Courts or the Commercial Court.

⁶ Lebona Lephema V Total Lesotho (Pty) Ltd C of A (CIV) 36/14

[22] Although the averments that are in the declaration are inelegantly drafted, my understanding of the applicant's claim is that she is not asserting title to land but it is an enrichment action by a bona fide possessor or occupier. She relies on an unregistered donation as the basis for developing this land with her ex-husband. She asserts the rights of *bona fide* possessors or occupiers to claim compensation for improvements made on land. A *bona fide* possessor is defined as someone who occupies land under the belief that he is the owner of the property⁷.

[23] Can a transaction of a donation be defined as a contract of a commercial or business nature? I do not think so. A donation is a promise whereby a person, without being under a legal obligation so to do, binds himself to give to another something belonging to himself without receiving anything in return or stipulating anything of his own benefit.⁸ It is a transaction *inter vivos* between the donor and donee whereby the donee is enriched and the donor correspondingly impoverished. To be a donation, the gift must be liberality at the expense of the donor, an act whereby the donee is enriched, and the donor impoverished.

Disposal

⁷ Steyn v Lebona CIV/T/143/82

⁸ The Master v Thomsons's Estate 1961(2) SA 20, Makibi v Makibi LAC (2013-2014) 350

[24] For reasons set out above, I conclude therefore that the claim is not based on title because the plaintiff asserts that although they developed the land based on the donation, the land was not registered in their names. The question of whether the 1st defendant denies existence of the donation and conversely pleads a tenancy agreement is irrelevant for purposes of the jurisdictional inquiry because according to the authorities cited, the plaintiff's pleadings are decisive in this inquiry. Resultantly, the dispute is neither a land dispute nor commercial dispute.

Requisites of Lis pendens

[25] I turn now to deal with the question whether the plea of *lis pendens* is validly raised in this matter. It is trite that *lis pendens* must be pleaded and supported by relevant facts⁹. The requisites of a valid plea of *lis pendens* are that the actions must be between the same parties, on the same cause of action and in respect of the same subject matter.¹⁰ This means the party raising *lis pendens* must establish that the applicant has already instituted an action but has brought another action against the same defendant on the same cause of action and in respect of the same subject-matter whether in the same or in a different Court.¹¹

⁹ Kerbel v Kerbel 1987(1) SA 562 Ntoa abel Bush man

¹⁰ Williams v Shub 1976 (4) SA 567 at 570

¹¹ Khoali v His Worship Mr Selebeleng C of A (CIV) 23/20.

[25.1] In **Nestle (SA) Pty Ltd v Mars Incorporated**¹² it was held that;

“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.”

[25.2] In deciding what is meant by the *same cause of action or same matter in issue*, the Court of Appeal in **Sechele v Sechele**¹³ held that for a successful *res judicata* plea, the *matter in dispute* must be identical in both proceedings; though it is not necessary that it should be the only point in issue in either. That the *matter in dispute* mean exactly the same as *matter in issue*.

[26] The 2nd defendants merely allege that there is a pending case between the same parties in the District Land Court without giving details of the case. I am not told what the cause of action is or the reliefs sought in those proceedings.

[27] Concerning the alleged pendency of division of the joint estate, it is common cause that the divorce proceedings have been finalized and property belonging to the estate divided. The property in question is on the land belonging to the 1st

¹² 2001 (4) SA 342

¹³ (1985-1989) LAC 297

defendant and the couple have no title document to this property hence no order of division in relation to this property was made nor could it be competently made in those proceedings.

Order

[28] For reasons set out above, both special pleas are not well grounded and must therefore fail. As a result:

The special pleas are dismissed with costs.

P. BANYANE
JUDGE

For Plaintiff : Adv Setlojoane

For Defendant : Adv Mariti