IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 01/2017

In the matter between:

LETSOSO MOHASOA	**APPELLANT**
And	
MATEKANE TRANSPORT & PLANT HIRE (PTY) LTD	**1ST RESPONDENT**
MINISTRY OF LOCAL GOVERNMENT AND CHIEFTAINSHIP	**2ND RESPONDENT**
COMMISSIONER OF LANDS	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

CORAM : DR. K. E. MOSITO P.
DR P. MUSONDA AJA
M. MOKHESI AJA

HEARD : 30 November 2018

DELIVERED : 07 December 2018

SUMMARY

Appeal against the dismissal in the High Court of the plaintiff's action encroachment – plaintiff failing to lead expert evidence of encroachment – order in court below should have been one of absolution from the instance with costs – order of court a quo altered accordingly – appeal otherwise dismissed with costs.

JUDGMENT

DR. K. E. MOSITO P

BACKGROUND

[1] This is an appeal against the judgment of the High Court (**Nomngcongo J**) on 1 December 2016. The appellant instituted action proceedings in the High Court in terms of which he sought an order in the following terms:

> *(a) An order declaring that the second defendant's allocation of land situated at Manthabiseng Maseru Urban Area to the first defendant held by the appellant under lease number **13291-768** or any portion thereof is null and void;*
> *(b) An order declaring that the second defendant's allocation of land situated at 'Manthabiseng Maseru Urban Area to the first defendant held by plaintif under lease number 13291-768 or any portion thereof is null and void.*
>
> *(c) An order compelling the first defendant to remove the encroachment and make good the land upon which it stands;*
>
> *(d) Costs of suit.*

[2] First respondent opposed the action by means of a plea and prayed that the claim be dismissed with costs on attorney and client scale.

THE FACTS

[3] In the High Court, the present appellant as plaintiff, pleaded that he is the lawful owner of the property held under lease number **13291-768** registered in the deeds registry on the 6th March 2009. He further pleaded that on or about 6 October 2009, the second respondent allocated land to the first respondent measuring 19 945 square metres at 'Manthabiseng Maseru Urban Area, which area is commonly known as Parliamentary village. Thereafter, the first respondent constructed houses, one of which encroaches on the appellant's property. He further pleaded that the respondent refused or neglected to remove the encroachment and/or halt construction pending resolution of the dispute. He further pleaded that the said respondent is even claiming rights over the said property.

[4] For its part, the first respondent raised a defence that the appellant had failed to identify the site he alleges to be his. It further pleaded that appellant was not the lawful owner of the plot. It pleaded in the alternative that the appellant's rights were not in respect of any of the plots known as 13291-1035 to 13291-1055 inclusive. First respondent pleaded that the plot subject of dispute belonged to the first respondent. It further pleaded that there could be no encroachment if the plot subject of dispute was part of the

Parliamentary village. It pleaded further that there could be no encroachment as the first respondent had already completed building its houses on its plot.

THE PROCEEDINGS IN THE HIGH COURT

[5] At the hearing of the matter in the High Court, prayer (a) was abandoned by the appellant. In evidence, appellant denied that the plot which he contends belongs to himself is different from the respondent's property or that he failed to identify his site when requested to do so by the respondent. He testified that he engaged his surveyors and they produced a report showing that his property had been affected by the development of the area by the first respondent. However, no such surveyors were called in evidence.

[6] The court a quo held that no evidence of encroachment was placed before it in light of the fact that there was no evidence as to the location of the alleged encroachment. Dissatisfied with that decision, the appellant appealed to this Court.

APPELLANT'S APPEAL

[7] The appellant's complaint in this appeal is that, the court a quo erred in holding that the plaintiff did not place evidence of encroachment before court, when the evidence before court clearly demonstrated that appellant is the lawful owner of the property held under lease number **13291-768;** the first respondent had placed a building on part of of the plaintiff's property; the respondent was unlawfully allocated land situated at

'Manthabiseng Maseru Urban Area under lease number **13291-768**. The appellant further complains that, the court a quo erred in holding that the plaintiff did not demarcate where his property was and/or holding that, failure to demarcate where his property is, was fatal to the plaintiff's action when evidence placed before court shows the location of plaintiff's property.

[8] Indeed, in his judgment, the learned judge a quo said that, no evidence of encroachment was placed before him.

THE ISSUE

[9] Stripped to the bone, the issue to be determined in this appeal is whether there was evidence of encroachment put before the court a quo.

THE LAW

[10] An owner who wishes to claim relief consequent to an encroachment onto property must allege and prove: (a), ownership of the property encroached upon; and (b), that the encroaching owner has erected a structure or building partly on the claimant's property and partly on the adjoining property.[1] The appellant may then claim damages suffered as a result of the encroachment.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[11] It was submitted before us, that the court *a quo* erred in holding that there was no evidence of encroachment put before Court. There can be no doubt that the appellant testified that he

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[1] *Smith v Basson* 1979 (1) SA 559 (W).

is the lawful owner of the property held under lease number **13291-768**.

[12] He also testified that he engaged the services of surveyors to do a site correction on the disputed property. He testified that his surveyors determined the coordinates of the area of encroachment and compared the coordinates with those that appeared in the cadastral map on his immediate property. He confirmed that the surveyors determined that the site where the respondent had encroached upon belonged to him.

[13] It was also submitted that it was put to the first respondent's witness during cross examination that the appellant owns immovable property described as plot number **13291-768** on the area where the first respondent had made its developments. The witness's response was that he could not verify the location of the appellant's property because he was not the person who gives the sites.

[14] In our cadastral law, it is clear from section 3 of the **Land Survey (Amendment) Act** [2] that, it is the function of the office of the Chief Surveyor to administer the land cadastre system which includes: retaining accurate information and maps on the land cadastre system; registering land onto the cadastre; updating the cadastre with details of any consolidations, sub-divisions or other changes in legal boundaries; providing maps on other information regarding the cadastre; resolve cadastre complaints and disputes with regard to land parcels boundaries. It was therefore imperative

[2] Land Survey (Amendment) Act No 15 of 2012.

in this kind of case, for the plaintiff to bring this kind of expert evidence.

[15] Apart from the desirability to have before the court oral expert testimony which assists it to understand and interpret the survey records concerning the appellant's property, it would be of great assistance to view those applicable to the respondent's property as well. The survey records pertaining to the appellant's property would also be essential to have regard to since it adjoins the first respondent's property.

[16] I agree with the remarks by Hartle J in **Shell South Africa Marketing (Pty) Ltd v Thamsanqa Steve Haku** that, 'accurate surveys are a prerequisite for the establishment and recording of the position of boundaries between different plots of land. An effective system of land title registration is impossible unless land is divided into units which are properly surveyed and represented on a diagram or general plan. A duly approved diagram establishes, for cadastral purposes, the description of a specific land unit; the extent and boundaries of such a unit; the description of the beacons marking the unit and co-ordinates fixing the position of the beacons; and the description, position on or in relation to the unit of any servitude feature already registered, or to be registered, which affects the unit.'[3]

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[3] See *Shell South Africa Marketing (Pty) Ltd v Thamsanqa Steve Haku Case No: 1581/11;* LAWSA, Surveying of Land; Volume 14 (1) at par 176.

[17] I also share the learned judges views that, this is 'exactly one of those matters in which the court will be assisted by the opinion of a land surveyor who, as a result of his qualifications, training and experience would be able to interpret, from what appears in all the available information in respect of previous surveys of every involved and relevant piece of land, how the first applicant's property is demarcated from the respondent's and hold it up for comparison with a field inspection.' It is for the foregoing reason that, a prudent inspection would also have regard to the extent and boundaries of the property allocated to the respondent (as well as the other contiguous properties) as recorded in the deeds office in order to make a meaningful comparison and to discern whether any possible error exists in the records of the deeds office. If a problem exists merely in understanding and applying the rules applicable to a determination of the boundaries of the involved properties, such expert guidance would also be of great assistance to the court.

COURT'S FINDINGS AND DETERMINATIONS

[18] Whatever the true juridical niche of an action such as this might be, what is clear is that in his judgment, the learned judge a quo found that, "[n]o evidence of encroachment was placed before me. All that the plaintiff has placed before me is evidence of his title to plot under **lease no. 13291-768** which apparently nobody disputes, but he has called neither his own surveyors not those of the Land allocating authority to demarcate where it is situated in order to determine whether there has been any encroachment

upon it or not. He had every opportunity to do so but failed to avail himself of it. That failure is fatal in action for encroachment."

[19] If indeed, no evidence of encroachment was placed before him, then this was a clear case of absolution from the instance and not dismissal of the action. Thus, the test to be applied did not have to be whether the evidence led by plaintiff established what would finally be required to be established, but rather, whether there was evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.[4] It follows that the Court a quo erred in dismissing the action on the ground that, the appellant had led insufficient evidence to enable the Court to make an assessment of encroachment, if any.

[20] The order that should have been made in the court below was one absolving the defendant from the instance with costs. As this Court held in ***Monamatha v Matabooe*** [5] such an order can be substituted without there being any cost implications either in the court below or in respect of the appeal. If, in the Court below, defendant's counsel had applied for absolution from the instance on the ground that insufficient evidence as to encroachment had been led, it would unquestionably have been open to appellant to attempt to meet that argument by asking leave to re-open his case for the purpose of leading expert evidence relative to encroachment. Whether such an application would have

[4] See: *Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson (2), 1958 (4) SA 307 (T)).*

[5] Monamatha v Matabooe C of A (CIV) 24/2009 .

succeeded is a question which cannot now be answered by this Court but there is certainly nothing to indicate that the application would necessarily, or even probably, have failed. The decision of the trial Court that appellant had no case on the merits put an effective end to the matter and if that decision was wrong, as I consider it was, it appears to me that considerations of fairness and justice require that the decision should be set aside and the case be sent back for further hearing. It would then be open to appellant, if he were so advised, to ask for leave to lead further evidence on encroachment and for the trial Court to consider and decide upon that application.

COURT ORDER

[21] The following order is made: "Save that the order in the court below is altered to one of absolution from the instance with costs, the appeal is dismissed, with costs."

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DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

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DR.P MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

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M. MOKHESI
ACTING JUSTICE OF APPEAL

For the Applicant	:	Mr Q. Letsika
For Respondents	:	Adv T. Mpaka