C. of A. (CIV) No. 4 of 1981

IN THE LESOTHO COURT OF APPEAL

In the matter between :

CELINA RAMAKORO Appellant

and

POSHOLI PEETE Respondent

HELD AT MASERU

Coram:

MAISELS P.
SCHUTZ J.A.
VAN WINSEN J.A.

J U D G M E N T

Schutz, J.A.

This is an appeal from a judgment of the learned Chief Justice upholding an exception brought by the respondent (to whom I shall refer as the defendant) against the summons and declaration of the appellant (to whom I shall refer as the plaintiff). The exception was a double-barrelled one based both upon vagueness and embarrassment and upon absence of a cause of action.

In her summons the plaintiff sought an order restraining the defendant from interfering with her performance of her chiefly rights in the area of Khubetsoana, Ha Ramakoro, Matsekheng in the Berea district.

The summons was accompanied by a declaration. Two requests for further particulars were directed at this declaration, by different attorneys. Both were answered. The material allegations that are made are the following : The plaintiff, a widow, is the proclaimed chieftainess of Khubetsoana, Ha Ramakoro, Matsekheng in the Berea district. The defendant is proclaimed as chief of Moletsane, Matsekheng in the district of Berea. Then the plaintiff alleges, in paragraph 3, that before the defendant was proclaimed chief as

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aforesaid, the defendant, towards the end of 1963, was placed by the principal chief of Kueneng, to whom the plaintiff is subordinate, in one of the plaintiff's villages called Setorong, Ha Mofolo to man an office which the principal chief was opening in that village. The plaintiff was asked what is the boundary between the parties in relation to the so called village, and she answered that there is none. In answer to a further question as to whether there has been a boundary dispute between the parties, the plaintiff answered that there has been none as far as she is concerned. The following further questions by the defendant drew the response that the defendant was not entitled to particulars or that they were not required by him, namely, was the defendant proclaimed chief of Ha Moletsane after he had been placed at Setorong and Ha Mofolo; where exactly is Setorong and Ha Mofolo in relation to Ha Moletsane Matsekheng; would the plaintiff supply a sketch plan indicating where Moletsane Matsekheng, Setorong Ha Mofolo are situated; where exactly is Khubetsoana Ha Ramakoro in relation to Moletsane; would the plaintiff supply a sketch plan indicating where these two last-mentioned areas are situated; where exactly is the boundary that is "Lesela-tsela" between the parties; and would the plaintiff indicate in the last-mentioned sketch plan the boundary between the parties. Asked what action she had taken when the defendant was placed at Setorong, Ha Mofolo the plaintiff answered that she had taken none.

The plaintiff's next allegation, contained in paragraph 4 of the declaration, is that since about 1973, but more particularly since about the year 1976 the defendant has despite demand to desist wrongfully and unlawfully been allocating fields and building sites at Setorong village as well as at the plaintiff's other villages; cutting thatching grass and trees under the plaintiff's control; reserving pastures on land under the plaintiff's control, and when the plaintiff has herself reserved pastures, grazing such pastures; and impounding live-stock on land under the plaintiff's control. The following questions directed to this paragraph were all unanswered on the basis that they were said to constitute matters for evidence :

"(a)(i) What fields and building sites were allocated by the defendant and to whom?

(ii) When were these fields, and buildings allocated?

(iii) In what 'other villages' of the plaintiff is the defendant allocating fields and building sites?

/3. (b).....

(b) Where exactly was the thatching grass and trees cut? A sketch plan showing land marks and boundaries indicating where the trees and thatching grass were cut would be helpful.

(c) Where exactly did the defendant interfere with grazing rights of the plaintiff's subjects?

(d) Where exactly was livestock impounded?

....."

Finally, in paragraph 5 the plaintiff alleges that the defendant's conduct causes a great deal of confusion and dissension among the plaintiff's subjects; interferes with the plaintiff's proper administration of her area; and amounts to the area being under dual control contrary to law. The following questions directed at this paragraph also drew the answer that the matter requested was matter for evidence :

"(a) The plaintiff is required to state exactly which area falls under the plaintiff and which area falls under the defendant.

(b) The plaintiff is required to state what portion of his (sic) area falls under dual control and what area does not.

(c) The plaintiff is required to state how this dual control came about?

(d)(i) Did the plaintiff refer this matter to the Ministry of the Interior?

(ii) If so what action was taken? Full particulars of the action taken are required."

The grounds advanced by the defendant for his exception that the plaintiff's pleadings are vague and embarassing are the following :

"(i) The area in which the defendant wrongfully exercises jurisdiction is not clearly stated.

(ii) It is not clear whether the defendant has any area of jurisdiction at all.

(iii) It is similarly not clear whether the defendant has encroached on the plaintiff's area of jurisdiction.

(iv) It is not clear whether the defendant's proclamation as chief and placement at Setorong was in fact an encroachment on the plaintiff's rights".

The grounds for the exception of no cause of action are the following :

"(i) If the defendant is proclaimed as chief and

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placed at Setorong Ha Mofolo he is entitled to allocate soil, distribute thatching grass, reserve pastures and impound stock.

(ii) The defendant cannot be restrained from exercising the powers of a chief if he is proclaimed.

(iii) If there is no boundary between the plaintiff and the defendant and this results in confusion (the remedy) is the one prescribed in section 5(8) to (12) (of the Chieftainship Act 22 of 1968, as amended by Order No.29 of 1970).

(iv) It is ultra vires of the courts to make a boundary between the parties or to stop chiefs within an administrative area from exercising their lawful powers.

(v) The plaintiff (sic) has been gazetted in terms of the law, and his powers flow from the law, and his powers flow from law (sic)".

The learned Chief Justice upheld the exception. He pointed to the problems with which jurisdictional disputes between chiefs are often fraught, indicated that underlying the case there probably was a dispute as to boundaries, and drew attention to the administrative remedies provided by section 5 of the Chieftainship Act 22 of 1968, stating that "this Court has on many occasions insisted upon these being exhausted before it will interfere". It appears that the exception was upheld not on the basis of there being no cause of action but on the grounds of vagueness and embarrassment. This is made apparent by the following passages in the judgment:

"It may be the plaintiff has a cause of action but the real objection to the declaration is that on the facts as disclosed it is impossible for the defendant to make a sensible plea unless the request for further particulars (is) adequately dealt with. ..... But unless this (the boundary dispute) is clarified in the pleadings the Court will inevitably get bogged down with side issues... The High Court is a superior court of record and I shall not be a party to a reduction of its status to the level of pleadings we often see in local and central courts".

As regards the exception based on vagueness and embarrassment, Mr. Beckley for the plaintiff originally took the point that no prior notice to remove the cause of embarrassment had been given by the defendant as is required by Rule 29(2) of the High Court Rules. That Rule reads :

"(2)(a) Where any pleading is vague and embarrassing, the opposing party may(the word "may" is inserted by the list of Printers Errors and Omissions High Court Rules 1980 dated 2nd

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> January 1981), within the period allowed for the delivery of any subsequent pleading, deliver a notice to the party whose pleading is attacked, stating that the pleading is vague and embarrasing setting out the particulars which are alleged to make the pleading so vague and embarrassing, and calling upon him to remove the cause of complaint within seven days and informing him that if he does not do so an exception would (sic) be taken to such pleading.
>
> (b) If the cause of complaint is not removed to the satisfaction of the opposing party within the time stated such party may take an exception to the pleading on the grounds that it is vague and embarrassing. ..... "

This rule has a counterpart in the Uniform Rules of the Supreme Court of the Republic of South Africa (Rule 23(1) thereof) and for many years there has been a similar provision in the rules of the magistrates' courts of that country, (Rule 17(5)(c) of the rules under the Magistrates' Courts Act 32 of 1944)

In South Africa the corresponding rules have been held to lay down a peremptory pre-condition to the taking of an exception on the grounds of vagueness and embarrassment. See Viljoen v. Federated Trust Ltd 1971(1) S.A. 750(O) at 753 E-H; N K P Kunsmisverspreiders(Edms) Bpk v. Sentrale Kunsmis Korporasie(Edms) Bpk en 'n ander 1973(2) S.A. 680(T) at 688; Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa 7th Ed Vol. 2 p.161; and Nathan Barnett and Brink Uniform Rules of Court 2nd Ed p.154. It seems to me, it is unnecessary to decide the question, that the same construction should be placed on the local rule despite the use of the word "may". The purpose of this kind of rule is to discourage the taking of unnecessary exceptions, and the intention of the legislative body appears to be that no exception on the grounds of vagueness and embarrassment may be taken until an opportunity to remedy has been given and declined.

However, unfortunately for Mr. Beckley's point, the present High Court Rules on which he relied came into force three months after date of publication, which publication occurred on 25th July 1980. Notice of exception was given on 7th March 1980, that is many months before the new rules had come into force. Rule 29(2) is the kind of rule which cannot possibly be retroactive in operation. Under the old rules, which are practically silent on the question of exceptions, there is no

provision corresponding to Rule 29(2) (see Rule 20 of the Rules of the High Court - High Commissioner's Notice 8 of 1941).

It therefore becomes necessary to decide whether the plaintiff's pleadings are in fact vague and embarrassing. As to the test to be applied Beck's Theory and Principles of Pleadings in Civil Actions 4th Ed (by I. Isaacs Q.C. - quondam acting Judge of the Lesotho High Court) para 63 puts the matter this way :

> "A pleading may disclose a cause of action or defence but may be worded in such a way that the opposite party is prevented from clearly understanding the case he is called upon to meet. In such a case the pleading may be attacked on the ground that it is vague and embarrassing".

The learned author goes on to cite the well known passage from the judgment of Schreiner J in Getz v. Pahlavi 1943 WLD 142 at 145 :

> "For a man who has not an explicable cause of action is in the same position as one who has no cause of action at all".

By the expression "vague" is intended that a statement is either meaningless or that it is capable of more than one meaning. By the expression "embarrassing" is intended that it cannot be gathered from it what ground is relied on by the pleader. See Leathern v. Tredoux (1911) 32 NPD 346 at 348; Lockhat and Others v. Minister of the Interior 1960(3) S.A. 765(D) at 777 D.

A sufficient test as to when an exception of no cause of action should succeed is set out by Wessels J in Champion v. J.D. Celliers & Co. Ltd. 1904 TS 788 at 790-1. The fact that the case was concerned with a plea does not affect the principle. The learned Judge said :

> "..... where a plea is so drawn that a plaintiff can say, 'I admit all your facts, but even if I do the facts that you set out do not constitute an answer in law to my claim', there the plaintiff must except to the whole plea, ... In other words, the plaintiff may admit the defendant's facts, but challenge the conclusion."

See further Beck (op cit) para 62.

I turn to the exception based on vagueness and embarrassment. Two matters must be dealt with at the outset.

/Mr. Beckley

Mr. Beckley contended that the defendant's proper remedy was to compel particulars. I do not agree. The defendant had asked for particulars and the plaintiff had, broadly speaking, refused them. It was not incumbent on the defendant to pursue this course further and he was entitled to except. Mr. Beckley also contended that if there was any vagueness the defendant could always deny. Again I do not agree. The purpose of pleadings is to define issues. This entails, in the first place, that a party receiving a pleading should be able to understand it in order to decide whether his reply will be admission, denial, or confession and avoidance. Secondaly, once there has been a reply it should be clear what has been admitted and what denied. If this is not the result then when the trial is reached there may be uncertainty as to what is common cause, and what is in issue.

The question is whether the plaintiff's pleadings are vague and embarrassing. I must say that I have read her pleadings carefully, and have had the advantage of a full argument but it is still not clear to me quite what her case is. Once one moves from the general complaint that certain acts of the defendant constitute a usurpation of the plaintiff's rights, which cause confusion, most things are obscure. During argument at one stage Mr. Beckley conceded that paragraph 3 contained no more than historical introduction and could just as well be deleted. But then he argued that it contained an allegation of a placing by the superior chief but without conferment of the power to do the things done by the defendant which were the subject of the plaintiff's complaint. So that the case may be concerned with the place in the hierarchy of the two parties. But that is not clear. Mr. Beckley could not clearly tell us, nor can I determine it from the pleadings.

The matter does not end there. When one seeks to find out exactly where the plaintiff's rights exist and where the defendant is said to have committed wrongful acts no answer is forthcoming. A blatant example of this is the reference to the "Plaintiff's other villages" (unspecified) in paragraph 4(a). What a pleader is to make of that I do not know. More generally the plaintiff has not defined the area which she "controls" and has indeed declined to do so. The potential difficulties facing a pleader are at once apparent. What does he say with regard to any particular unlawful act? He may be desirous of admitting or denying it, but how does he do either if he does not know where it was committed so that it may be identified? Or he may wish

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to confess and avoid, for instance by pleading that he has the rights of a chief in the particular area to the exclusion or superior to those of the plaintiff. But how does he do that if he is not told what area is the one in question? It is no good to say, as was argued, that he knows. He is entitled to be told by the plaintiff what she complains of before he puts forward his case.

Another way of testing the matter is to ask what a court would do if it were to make an order in the plaintiff's favour. As matters stand I think that a court would have great difficulty, at the least, in granting an order containing sufficient definition.

In the result I am of the view that the plaintiff's pleadings are vague and embarrassing and that the exception on those grounds was rightly upheld.

That leaves the exception based on no cause of action. A difficulty in deciding this question is the uncertainty in the pleadings already discussed. Mr. Maqutu has sought to turn this to his advantage by arguing that everything is so obscure that no cause of action can be perceived. I do not agree with that argument. A cause of action can be dimly perceived. The plaintiff complains that she controls an area as chieftainess and that the defendant is trespassing upon it. That is a cause of action. Although the courts do not determine boundaries they may decide whether there has been a trespass Moshoeshoe v. Motloheloa 1926-1953 High Commission Territories Law Reports 220 at 221. However, Mr. Maqutu has argued that once the plaintiff concedes, as she does in her further particulars, that there is no boundary between the parties she has no cause of action, because the fixing of boundaries is an administrative act and cannot be performed by the courts. For this submission he relies on Peete v. Ramakoro JC 27/52; Duncan Sotho Laws and Customs 58-60 and, more recently, s.5(8) - (13) of the Chieftainship Act 22 of 1968. It is well established that it is not for the courts to determine boundaries, but this does not necessarily lead on to Mr. Maqutu's contention. The very fact that the Chieftainship Act contains a machinery for resolving boundary disputes shows that there may be chiefs whose boundaries are in a state of uncertainty. To suggest that such persons have no right at all to take action against trespassers seems far fetched. The exact location of their boundaries may possibly not come into issue. On the plaintiff's pleadings, and they alone may be looked

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to at this stage, she falls into that class. She alleges that she is proclaimed chieftainess over an area even if not a clearly defined one. From this conclusion at this stage of the case it does not follow that it may not be essential that for an administrative definition of boundaries to be made before the case can proceed to trial. It may well yet emerge that this case is concerned with a boundary dispute, in which case the plaintiff's procedure may have been ill-chosen. But that question yet requires definition.

Accordingly I am of the view that the exception based on there being no cause of action should not succeed. It is thus unnecessary to decide whether Mr. Beckley is right in contending that the point argued by Mr. Maqutu is not covered by his notice of exception.

As regards costs. I do not agree with Mr. Beckley's submission that some special order be made if the one exception should fail. It is customary, and usually a wise precaution for an excipient to bring a double-barrelled exception, and if only one of the exceptions should succede he has achieved substantial success. Nor am I prepared to accede to Mr.Maqutu' motion for an order for costs on the attorney and client scale. Misconceived the plaintiff's claim may be, but I do not think that any of the special features justifying such an order are present in this case.

In the final result I am of the view that the appeal should be dismissed with costs, and the defendant be given leave to amend within 21 days of this order.

Signed: W.P. Schutz
W.P. SCHUTZ
Judge of Appeal

I agree Signed: I.A. Maisels
I.A. MAISELS
President

I agree Signed: L.de V. van Winsen
L.DE V. VAN WINSEN
Judge of Appeal

Delivered this 3rd day of July 1981 at MASERU

For Appellant : Mr. Beckley
For Respondent: Mr. Maqutu