

IN THE HIGH COURT OF LESOTHO

In the Matter of :

CELINA RAMAKORO Plaintiff

v

POSHOLI PEETE Defendant

JUDGMENT

Delivered by Hon. Mr. Justice F.X. Rooney
on the 2nd day of August, 1982.

Mr. Sello for the Plaintiff
Mr. Maqutu for the Defendant.

This action was instituted on the 18th May, 1979 and has made little real progress since that date as the parties have become involved in procedural disputes. The defendant has not yet filed a plea. The plaintiff who is a chief seeks an order restraining the defendant (who is also a chief) from interfering with the plaintiff's performance of her chiefly rights in an area in the Berea district.

On the 27th March, 1981, the learned Chief Justice upheld an exception to the plaintiff's declaration on the grounds that

- (a) it was vague and embarrassing and
- (b) that it disclosed no cause of action.

The plaintiff took the matter to the Court of Appeal and on the 3rd July, 1981, that Court upheld the view that the pleadings were vague and embarrassing and gave the defendant leave to amend her declaration within 21 days of the Court's order. However, the Court of Appeal held that the exception based on there being no cause of action should not succeed.

2/ On the 24th July, ...

On the 24th July, 1981, the plaintiff filed an amended declaration. In response thereto the defendant applied to strike out paragraph 3 of the plaintiff's amended declaration on the grounds that it is inconsistent with a statement contained in further particulars supplied on the 25th July, 1979 at the request of the defendant.

Paragraph 3 of the amended declaration reads as follows :

"Notwithstanding the fact that there is a clear and established boundary between the respective areas of jurisdiction of the parties herein, the defendant has been guilty of the acts hereinafter set out".

In paragraph 1 of the further particulars already referred to, the plaintiff stated :

"There is no boundary between plaintiff and defendant".

The exact position of the plaintiff on this issue is of importance to the defendant. In its judgment the Court of Appeal drew a clear distinction between a dispute as to boundaries and an action for trespass. It is well established that it is not for the Court to determine boundaries and if the issue in this action is a disputed boundary, this is a matter for the administration and not for the Courts.

Mr. Macutu for the defendant submitted that the plaintiff's amended declaration involves a change of front on her part without explanation which should not be permitted. He relied upon Hansen v. Concor-Grinaker Pty Ltd. 1974(4) S.A. 27 and President - Versekeringsmeatkappy (BPK) v. Moodly 1964(4) S.A. 109 in support of his contention. These cases are authority for the proposition that where a party seeks to amend his pleadings in such a way as to present allegations inconsistent with ones already made, this should not be allowed without an adequate explanation to convince the court that the application is bona fide.

In the present case the plaintiff's original declaration was in effect struck out and he was granted a

3/unconditional leave

unconditional leave to amend. The Court of Appeal was acting in accordance with Order No. 29 (7) of the High Court Rules. Rule 25 (3) provides that a request for particulars together with a reply thereto shall form part of the pleadings. However, it appears to me that the particulars of a pleading which has been successfully excepted to, as in this case, cannot be allowed to stand as pleadings in the absence of the declaration or plea or other pleading to which they relate. When the Court of Appeal upheld the exception to the declaration it left the plaintiff in the position that she would have been in if she had issued a summons without a declaration. She has now made her case afresh and the defendant knows what it is that he must now meet. The apparent contradiction between the former particulars and the present declaration may be a matter for comment when the action comes to trial. The position of the defendant would be no different, if the plaintiff had elected to abandon the present action and issue a fresh summons and declaration on the lines that she is presently pursuing. In the circumstances, the defendant's application must be dismissed with costs.

I may add that in the course of his argument Mr. Maqutu contended that Section 6 of the High Court Act 1978 applied to these proceedings and that the dispute between the parties was within the jurisdiction of a subordinate court, namely the Central Court for the Berea District. He said that this Court has not given leave for the institution of the action in the High Court.

In reply, Mr. Sello for the plaintiff argued that the relief which was sought was by way of permanent interdict and that a central court, constituted under the Central and Local Courts Proclamation 1938, did not have the power to grant such relief.

Mr. Maqutu's point was raised for the first time more than three years after the action was begun. In the intervening period the cause of action has been considered both in this Court and in the Court of Appeal without the

issue of jurisdiction being raised. To decline jurisdiction at this late stage would be prejudicial to the plaintiff. The parties have chosen their forum and they must now abide by its decision.

F.X. ROONEY,
JUDGE

2nd August, 1982.

Attorney for the Plaintiff, Mohaleroe, Sello & Co.
Attorney for the Defendant, Mr. Macutu.