

IN THE HIGH COURT OF LESOTHO

In the Matter of:

TSIETSI LEBAPlaintiff

and

TALI MALEKE 1st Defendant

MOKETETSA MOKETETSA 2nd Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 3rd day of February, 1989.

In an action wherein Plaintiff has sued the defendants for payment of ten (10) head of cattle or the equivalence of M7,000, costs of suit and/or alternative relief, the latter have raised, in limine, points of law.

The facts disclosed by the declaration to the summons are that on 25th December, 1986 the defendants assaulted and inflicted upon 'Maliphapang Leba certain injuries which brought about her death. The defendants were subsequently charged and convicted of culpable homicide before a subordinate court.

Wherefor, on 5th November, 1987 Plaintiff, who is allegedly a brother in law and the only surviving head of the family of the deceased, 'Maliphapang Leba, filed with the Registrar of the High Court, summons

2/ commencing an

commencing an action in which he claimed, against the defendants, as aforesaid, in accordance with Sesotho law and custom. It is not clear when the summons was served upon them but on 5th July, 1988 the defendants intimated their intention to defend the action.

It is significant to note that on 4th August, 1988 and before the defendants had filed their plea to the declaration to the summons, Plaintiff filed application for leave to institute his action before the High Court. Defendants again intimated their intention to oppose the application and, on 19th August, 1988, served the Plaintiff with notice of intention to raise questions of law in terms of Rule 8(10)(e) of the High Court Rules 1980. The questions of law raised, in limine, are framed in the following terms:

- "1. That the applicant/plaintiff instituted a civil action which is within the jurisdiction of Local or Central Court in the High Court contrary to Section 6 of the High Court Rules (sic)
2. That application for leave to proceed with the action in CIV/T/696/87 in the High Court ought to have been made before instituting the action - vide S. 6 (b) of the High Court Act referred to above."

Plaintiff's action is clearly based on Sesotho Law and Custom according to which a person who had killed another can be sued by relatives of the deceased for ten (10) head of cattle as compensation. A proper reading of Patrick Duncan's invaluable work Sesotho Law

3/ and Customs

and Customs (1960 Ed) at p. 105 leaves no doubt in my mind that the claim is actionable before the Central and Local Courts. That being so, Plaintiff ought to have instituted these proceedings before the High Court only after the provisions of S. 6 of the High Court Act, 1978 had been complied with. The section reads:

"6. No civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court) shall be instituted in or removed into the High Court.,

save -

(a) by a judge of the High Court acting of his own motion;

or

(b) with the leave of a judge upon application made to him in chambers and after notice to the other party."

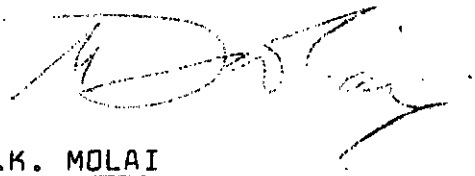
It is common cause that when, on 5th November, 1987, Plaintiff instituted the present action the provisions of S. 6 of the High Court Act, supra, had not been complied with. The action was, therefore, not properly brought before this court. It was only on 4th August, 1988 that Plaintiff tried to rectify the position by filing application for leave to institute the proceedings before the High Court. That application has not, as yet, been determined by the court.

I have considered the question whether Plaintiff could be permitted to institute this action before the High Court on the ground that the amount of M7,000

4/ alleged to

alleged to be the equivalence of ten (10) head of cattle is beyond the jurisdictions of the Central and Local courts. It is, however, important to observe that the amount of M7,000 is, in terms of the provisions of the Subordinate Courts Order, 1988 which came into operation on 14th July, 1988, now within the jurisdiction of the court of a Resident Magistrate. That being so, there would be no proper justification for the court to allow Plaintiff to institute, before the High Court, an action which is clearly within the jurisdiction of the Subordinate Courts.

In the result, I take the view that the questions of law were properly raised in this matter. I would allow them and accordingly dismiss both plaintiff's action and application, with costs.



B.K. MOLAI
JUDGE

3rd February, 1989.

For Applicant : Miss Mofolo.
For Respondent : Mr. Hlaoli.