

IN THE HIGH COURT OF LESOTHO

In the matter of :

FLORINA 'MAPAPALI NKO

Plaintiff

v

LIJANE NKO

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lenonla  
on the 3rd day of June, 1991  
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The defendant has taken an exception to the plaintiff bringing this matter by way of summons to this Court for judgment -

- (1) declaring that the plaintiff is the rightful successor to the headmanship of Phuthiatsana Ha Nko;
- (2) declaring that the appointment of the defendant as successor of Phuthiatsana Ha Nko is null and void;
- (3) ordering costs of this action against the defendant.

The terms of the defendant's exception consist of paragraphs 1(a) (b) and 2. The defendant has however chosen at the last moment to abandon the terms of his exception set out in paragraph 1(a) and (b).

He accordingly prayed to be granted judgment in terms of paragraph 2 couched as follows :-

"Inasmuch as this is a matter within the jurisdiction of a Subordinate Court(a Basotho

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Customary Court the Local and Central Court) this action has been irregularly brought before this Court contrary to the provisions of the High Court Act of 1978".

It is an undeniable fact that the jurisdiction of the High Court is unlimited and in that regard covers any matter sought to be adjudicated on in this territory.

There is also a very salutary principle in law that if each court observes not its jurisdiction then confusion sets in. Put in another way the principle is to the effect that if you observe not your jurisdiction then you begin to wander.

Mr. Maqutu for the excipient submitted that the law requires in order for a matter of this nature to be brought before this Court that the Court should either mero motu call it for hearing before it or that the Court be approached in chambers and leave sought for the matter to be heard in there.

Pointing out that none of these alternatives has been satisfied he asked this Court to uphold the defendant's exception.

While this Court has no difficulty in visualising what circumstances would naturally precede its hearing this type of application after leave has been obtained it was somewhat in a quandary to see how the first set of circumstances would apply such that it can find itself hearing a matter of this nature without having been prompted by any of the parties but strictly mero motu. I ultimately thought that such a thing could perhaps happen if on a motion list where the interested party has set down the matter for hearing but for one reason or other moves that it be postponed then a judge who espies the contents of the application on his own motion can order that he would like to deal with the matter on such and such a day.

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I do feel that it would not be acting in accordance with the terms of the provisions of the 1978 Act if this Court were to adopt the attitude that a plaintiff who is at fault for failure to follow either of the two procedures laid down the Court would have fulfilled the first alternative procedure if it comes to the plaintiff's rescue by suddenly adopting the plaintiff's defective move as its own and glorifying it as a move it has adopted mero motu.

In reply Mr. Moorosi for the plaintiff pointed out that the exception has been taken belatedly. He rightly pointed out that the Chieftainship Act of 1968 Section 11(2) says matters involving succession to Chieftainship should be referred to a court of competent jurisdiction. He pointed out that the section does not restrict the hearing of the matter to local or Basotho Courts. Moreover it does not define the court of competent jurisdiction.

He submitted further that if the legislature meant by this section that a court of competent jurisdiction refers to Basotho Courts or local courts then it should have spelt that out in clear terms. Accordingly he submitted that this court is rightly seized of the action instituted by the plaintiff. Thus he implied that it is not necessary to insist on the application of the provision requiring that leave should have been sought in Chambers. Asked if he found anything wrong if the court even without having considered the exception did mero motu throw the matter out for failure to comply with the provisions of the High Court Act Mr. Moorosi was plainly in a cleft stick. He however pleaded that should the Court decide not to take on itself to deal with this matter mero motu in the event that it does not condone failure to approach it in Chambers for leave to hear the matter, plaintiff should not be ordered to pay the costs.

In reply Mr. Maqutu correctly pointed out that

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the question of jurisdiction cannot be time-barred.

In the result I uphold the exception. But because of the inexcusable delay in raising this exception the defendant is denied the costs of the pleadings and granted only the costs of refusal to hear the action in this Court.

J U D G E

3rd day of June, 1991

For Plaintiff : Mr. Moorosi

For Defendant : Mr. Maqutu