CIV/T/418/90

IN THE HIGH COURT OF LESOTHO

In the Matter between

PAKI MOAKI

and

MOJABENG MOAKI

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge of the High Court on the 15th day of February 1994

On the 3rd February, 1994 Mr Snyman for Plaintiff and Mr. Matooane for Defendant appeared before me Mr Matooane raised a question of law as to the jurisdiction of this Court to hear the plaintiff's claim, without leave of the High Court, as argued in terms of Section 6 of the High Court Act No 5 of 1978 which provide as follows

> " 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."

A judgment of a Court which has no jurisdiction in the matter concerned is of no effect A Judge may consider and decide whether he has jurisdiction to consider the matter brought before him.

It is a fact t hat no Judge of the High Court of his own motion or on application authorized the institution in or removal to the High Court of the present action in terms of section 6 of the High Court Act.

The Plaintiff's claims are framed as follows

"1 An Order declaring the marriage entered into between the parties on 21st April 1961 to b e null and void ab initio,

2. Costs of suit,

3. Further and/or alternative relief."

It is correct that this matter was not raised in the papers as can be seen in the Defendant's plea. Mr. Matooane said that he was entitled to raise the question in this way he has done without application and without notice by virtue of the special character of the objection, that is to jurisdiction, which Mr. Matooane said can be raised at any time before judgment and can also be raised on appeal for the first time, I am aware that there is no need to raise this question in ones papers the way one would do with other objections or pleas. I do not agree with Mr. Snyman's submission that the objection need only be pleaded and on notice. The instant situation is not that which one could be said to have consented to jurisdiction, as in the Magistrate's Court, where one would therefore be prevented from raising the matter on appeal as has been held in some cases (see CARABUROS vs PRETORIUS 1950 (1) SA 348 (T)).

It is common cause that the parties before this Court have also filed two claims in this Court, one for maintenance and one for division of the joint estate In both claims the present Defendant was Plaintiff. Both Counsels acceded to the "presumption" that it was after the two (still pending) matters were filed by the Plaintiff that one party became aware of the existence of the Defendant's alleged prior marriage to one

LEONARD CAMPBELL, at the Magistrate's Court at Klerksdorp on the 23rd February 1953, which is alleged to b e still subsisting and not dissolved.

I observe that the High Court is a Creature of Statute and has unlimited jurisdiction in terms of the provisions of Section 2 of the High Court Act No.5 of 1978 as amended by Section 34 of the High Court Act of 1984 The effect of this will be *discussed later in addressing the aspect of limitation to the* powers of the Court as against its powers to regulate its own procedure.

Mr. Matooane has submitted that in investigating whether this Court has jurisdiction we need not be confined to the word declaration but should look further as to "over what the declaration is being sought." In a similar manner as in the case of FLORINA MANTIA PAPALI NKO vs LIJANE NKO C of A (CIV) 14/91, where the Court of Appeal was concerned with Chieftainship and succession to Chieftainship, a declaration having been sought in the High Court. In the instant matter we are concerned with a customary marriage between the parties We will come later in this judgment as to where we would properly think the jurisdiction of the matter, to do with customary marriage, should be looked for Suffice it to add that what is sought to be declared null and void is the customary marriage

between Plaintiff and Defendant as against the marriage of Defendant and *LEONARD CAMPBELL*. It is from the point of view of the validity of the customary marriage, looked at from Defendant's side, because what is at issue is the alleged polyandry of the Defendant. A woman in Sesotho custom cannot have more than two or more husbands (see MASUPHA v MASUPHA 1977 LLR page 54).

Reference was made to the Court of Appeal case THEKO MASOBENG vs MOTHAE THAANE C of A (CIV) 14/92 in which objection was raised (similar to the present one) concerning the jurisdiction of the High Court "whether or not an action for provisional sentence was an action within the jurisdiction of the Subordinate Court." The basis of the objection was that provisional sentence was being claimed on a sum of M2,500.00 which sum was within the jurisdiction of the High Court. The analogy being sought to b e drawn in the THEKO MASOBENG case was on the basis of whether the remedy of a declaration was available to the Subordinate Courts. The learned Judge of the Court of Appeal BROWDE J.A. in adverting to the matter had this to say "It seems to me that the High Court has jurisdiction to hear provisional sentence matters in which any amount is claimed and that if the jurisdiction was intended to b e removed or diminished by the Subordinate Courts Order it would have to b e clearly stated."

Mr Snyman contended that in as much as this Court has in its possession matters which are incidentally or closely related to the instant matter, it would be absurd to have this matter removed to another Court and a local or central court for that matter. He submitted t hat the resultant inconvenience is clear for all to see. Mr. Matooane's reply was that, while he was sympathetic to the plight of the Plaintiff, who has a case in this Court, which case has to be thrown out, by reason of having run out of Section 5 of the High Court, it means that the Plaintiff should have applied for leave, first, before filing his present claim in this Court. This is correct. Has this Court a jurisdiction in the matter? If not which Subordinate Court has jurisdiction in this matter. I do not agree with the submission that the Laws of Lerotholi are a guide in this respect. It is the Magistrate's Court (which is also a Subordinate Court in terms of Subordinate's Courts Act 1988) into respective provisions we have to look. The Subordinate Court Order of 1988 has repealed the Subordinate Courts Proclamation of 1938 The new Order provides for the Constitution of Subordinate Courts, presided over by Magistrates (Sec. 5) Section 29 declares matter which are beyond the jurisdiction of Subordinate Courts, specifically Section 29 "are matters" in which the dissolution of a marriage are separation from bed and board or of goods of married person is sought, save as provided by any other law". Most clearly, then,

there cannot be any resort to the Magistrate's Court. On the other hand, the Central and Local Courts are established or recognized in terms of section 20 of proclamation No.62 of 1938 (as reprinted in volume X of the Laws of Basutoland 1965 at page 186). Section 9 of the proclamation provides for matters that shall be administered by the Courts and specifically at section 9. They shall administer "the native law and custom prevailing in the territory, so far as it is not repugnant to justice or morality or inconsistent with the provisions of any law in force in the territory. There should not be anything more to say about the statutory provisions as regards more than that a Sesotho marriage is within the meaning of native law and custom and so it the marriage between Plaintiff and Defendant.

The onus is on the Plaintiff to s how that the Court in which he sues has jurisdiction. Plaintiff has not even made an averment in his summons that this Court is possessed of jurisdiction. It is a bad summons. Even if he had done that, that averment would only b e a conclusion of law rather than an allegation of fact. There would still be need for Plaintiff to put up such facts and state why this Court does have jurisdiction. As said before failure to take an objection to jurisdiction nor the filing of plea by Defendant could not automatically amount to acceptance jurisdiction where there is none. What Plaintiff must establish is waiver by Defendant

of his right to object. There has been no waiver. I agree with Mr. Matooane that Defendant would be entitled even on appeal to raise this question for the first time.

This Plaintiff's action is rather unfortunate in that there are other actions by Defendant in this Court, which Mr. Snyman says,should influence this Court to decide that this action necessarily belongs to this Court This he said b y analogy of incidental jurisdiction. I do not think I am persuaded. As it is said one should as a matter of must, go over the hurdle of section 6 of the High Court Act No.5 of 1978, concerning the requirement of leave to sue in this Court.

I am satisfied that this is not a situation such as where this Court is dealing with its own rules which it can in terms of Rule 40(22) " ... make any Order with regard to t he conduct of the trial as it seems fit and it may vary any procedure laid down in this Rule". It is where limitations are imposed on the powers of the Court itself by Section 5 of the High Court Act 1978 as distict from its inherent jurisdiction to regulate its own procedure

From the foregoing, it is obvious that, I take the view that the Plaintiff's action ought to be dismissed for the reason that it has irregularly come to this Court. I order

that each party shall bear its own costs.

T. MONAPATHI
ACTING JUDGE

For the Plaintiff Mr. Snyman

For the Respondent Mr. Matooane