C OF A (CIV) NO. 11 OF 1995

IN THE LESOTHO COURT OF APPEAL

In the matter between:

SENYANE MPATI	APPELLANT
AND	
'MANCHAFATO LEKAKA	RESPONDENT

HELD AT:

MASERU

CORAM:

Steyn JA
Browde JA
Kotzé JA

JUDGMENT

STEYN JA

This appeal concern the exercise of discretion by the Presiding Officer in the Magistrate's Court for the district of Maseru. He ruled that a matter that came before him for hearing, should be transferred to a "Local Court of competent jurisdiction".

/...

The issue is a simple one. Did the Magistrate in so ruling act judicially? I proceed to deal with this question herein below.

The facts are the following:

Appellant sued the Respondent for payment of the sum of M7400. In his particulars of claim he alleges that:

"On or about 19th January 1992 and at or near Semonkong Ha Mateketa the Plaintiff and Defendant entered into an agreement in terms of which the latter agreed to pay to the former a total of M8000.00 as dowry payment for Plaintiff a daughter Halifele Mpati who was getting married to Defendant's son Ts'oeute Lekaka."

Appellant goes on to plead that Respondent (Defendant) paid a deposit of M600 "leaving a balance of M7600 which remains unpaid to date".

The action was defended. Further particulars were requested and supplied. It appeared that the argument was partly verbal and partly in writing. The written portion of the agreement was supplied. In translation it read as follows:

MARRIAGE AFFAIRS 19-01-92

This is to certify that I Senyane Mpati have received the sum of M600.00 from 'Me 'Manchafatso Lekaka as deposit while a head of cattle is M800-00

SGD: SENYANE MPATI 'MANCHAFATSO LEKAKA

Witnesses of Senyane Mpati

(1) MOTEKA MABOEE

(2) EPHRAIM MPATI

Witnesses of 'Manchafatso Lekaka

'MA-ELIZA LEKAKA"

Respondent filed a Plea. Her defence was the following:

"AD PARA 4 THEREOF

Save to admit that there was an agreement entered into in respect of the marriage between Plaintiff's daughter and defendant's son, defendant denies that she agreed to pay M8000.00 (Eight thousand Maloti) as dowry payment thereof. Defendant says that there was never an agreement as to the total amount of dowry to be paid."

On the question of part payment the Respondent pleaded the following:

"AD PARA 5 THEREOF

(a) Save to admit that an amount of M600.00 was paid, Defendant denies that the said M600.00 was paid in part payment of an amount which had been agreed upon. Defendant says that the payment of M600.00 was made as deposit to an amount which was going to be agreed upon by the parties. It was decided that the parties would meet at a later date and agree as to the full amount to be paid as well as other issues in relation to the marriage especially the behaviour of Plaintiff's daughter.

(b) Defendant further says that Plaintiff has neglected to meet with defendant to agree as to the full amount to be paid and to date Plaintiff has not made himself available despite repeated requests."

The matter was set down for hearing in the Magistrate's Court and was duly called for the hearing of oral evidence on the 13th of July, 1994 before the Senior Resident Magistrate. The Presiding Officer then *mero motu* raised the issue as to whether his Court was the proper forum.

Appellant's Counsel contended that the Court in which the proceedings had been brought and which was ripe for hearing, was the proper forum. He specifically referred to the fact that:

> "We are claiming the amount of M7,400. That is certainly beyond the jurisdiction of any Local and Central Court."

Counsel for the Respondent, although she had accepted the jurisdiction of the Magistrate's Court by pleading over on the merits and by not raising the issue of jurisdiction, associated herself with the contention that the matter should be referred to a Local Court.

The Magistrate proceeded to rule as follows:

"COURT RULING

I am persuaded on the authority of ROBERT POTLANA NTLE v KHUBELU KHAKETLA C/A/3/83 that a Magistrate's Court has jurisdiction over a purely customary law action. However Sec. 17(2) of the Subordinate Courts Order empowers the Court to transfer a case to a Court, other than the High Court, where it can more conveniently be dealt with.

The question of Bohali is preeminently a matter of custom and as such a matter peculiarly within the competence of our Basotho Courts. In this regard it has been held that the fact that there is a money equivalent of the bohali cattle does not oust the jurisdiction of these Courts even if the equivalent seems to exceed its monetary jurisdiction.

I accordingly order that this case be transferred to a Local Court of competent jurisdiction.

/...

I would have ordered that each party should bear its costs but because the defendant chose to argue against the Plaintiff on the question of the jurisdiction raised by the Court *mero motu* the defendant is ordered to pay the costs of to-day's argument."

Appellant appealed against this ruling to the High Court. Molai J upheld the judgment of the Senior Resident Magistrate. In the course of his reasoning, the learned Judge refers to Section 8(1) of *Proclamation 62* of 1938 dealing with Central and Local Courts.

He cites the section as follows. He says it specifically provides:

"8(1) Subject to any express provisions conferring jurisdiction, no Central and Local Courts shall have jurisdiction to try -

(a) .....
(b) Cases in connection with marriage contracted under or in accordance with native law or custom, except where and in so far as the case concerns the payment or return or disposal of dowry."

He then goes on to say:

"Assuming the correctness of my view that the subject matter of the present dispute is payment of bohali I am, on the above cited authorities, satisfied that the Basotho Courts have jurisdiction to entertain this case. Plaintiff's argument to the contrary cannot,

therefore, hold water."

The learned Judge does not appear to have cited the terms of the Proclamation in full. It, in fact, is reflected as follows in the law advisor's copy of *The Laws of Basutoland* Vol.X made available to us.

Section 8(1) reads as follows according to this version:

> "8(1) Subject to any express provision conferring jurisdiction, no Central and Local Courts shall have *jurisdiction to try*—
>
> (a) cases in which a person is charged with an offence in consequence of which death is alleged to have occurred or which is punishable under any law with death or imprisonment for life;
>
> (b) cases in connection with marriage other than a marriage contracted under or in accordance with native law or custom, except where and in so far as the case concerns the payment or return or disposal of dowry."

It is however not necessary to resolve the anomaly arising from the official version of the Proclamation. I say this because there are very persuasive reasons why the ruling made by the Magistrate and upheld by the High Court appear to us to be wrong.

In the first place Counsel was unable to place any legal provision or

authority before us which indicates that the limited jurisdiction of the Local Court can be exceeded in cases involving the payment of a dowry. We were advised by both Counsel that this jurisdiction was limited to M500 at the time the action was heard and the ruling given. In the absence of any such provision, it is difficult for us to see how this action, in which the payment of the sum of M7400 is claimed, could be competently heard in the Local Court merely because it involved the recovery of a dowry.

Secondly, the discretion to be exercised in deciding whether or not to transfer a case needs to be exercised judicially. The resolution of this issue requires an examination of the relevant statutory provisions and their application to the facts of this case.

Counsel for the Appellant summarised the issue thus:

> "Is there evidence at all relating to convenience upon which a reasonable Court could have removed Plaintiff's claim from his chosen forum?"

Counsel went on to contend "Plaintiff as the *dominus litis* is in law entitled to choose the forum in which he will institute the action and the Court will not lightly interfere with Plaintiff's right to choose the forum". Counsel is supported in this view by the authors Van Winsen, Eksteen and Cilliers in their work *The*

Civil Practice of the Superior Courts in South Africa" (Third Edition) at p.394. It is also clear that due weight is to be accorded to the fact that Respondent consented to the Magistrate's Court's jurisdiction by pleading over on the merits, by failing to raise the issue of jurisdiction in her pleading and by allowing the matter to proceed to trial before the relevant Court. See in this regard: *Lundy v. Lundy* 1962(2) SA 481 at 486(N).

Clearly the Court was entitled *mero motu* to raise the issue of the appropriateness of the forum. Also, it was entitled to exercise a discretion to order the case to be removed to another Court. That discretion had however to be exercised judicially. As can be seen from the Magistrate's ruling cited above, he relied upon the provisions of Section 17(2) of the *Subordinate Courts Order* 1988 to do so. This Order reads as follows:

> "If at any time after issue of Summons it appears to the Court that the action is within the jurisdiction of any other Court established within Lesotho other than the High Court, and would be more conveniently dealt with in such other Court, the Court may transfer the action to such other Court."

Counsel pointed to the fact that Section 17(2) is "substantially similar" to the provisions of Section 9 of the *Supreme Court Act of the Republic of South Africa*. This Section reads as follows:

> "If any civil cause, proceeding or matter has been instituted in any

> provincial or local division, and it is made to appear to the Court concerned that the same may be more conveniently or more fitly heard or determined in another division, that court may, upon application by any party thereto and after hearing all other parties thereto, order such cause, proceeding or matter to be removed to that other division."

There is much force in this contention. It is therefore entirely appropriate for us to have regard to the decisions of South African Courts concerning the meaning to be ascribed to the word "convenient" in such Courts. Before doing so, it is necessary to summarize the contention advanced by Mrs. *Kotelo* on behalf of Respondent concerning the propriety of the exercise of discretion by the presiding Magistrate. She relied very heavily in this regard on the statement by him recorded above in his ruling that

> The question of Bohali is pre-eminently a matter of custom and as such a matter peculiarly within the competence of our Basotho Courts."

Counsel for the Appellant vigorously disputed the contention that the manner in which the cause was pleaded by both parties permitted of the dispute between them being categorized as a matter concerning "bohali". It was, he submitted, a claim for the payment of money due in terms of a contract. Only the terms of the contract and the manner in which payment was to be effected, were in dispute and it required no special knowledge of customary law to be judicially determined.

There is substantial merit in this submission on the pleadings as drafted. I am however prepared to assume that the fact that the payment was due as a dowry could have justified the matter being considered appropriate for reference to a local court.

The question remains, however, was it right for the Court to deem it "convenient" to do so within the meaning to be ascribed to this term? A seminal judgment concerning the term "convenience" in this context is to be found in the judgment in *Minister of Agriculture v. Tongaat Group Ltd.* 1976(2) SA 357 (N). At p.363 Miller J (as he then was) says the following:

> "The word "convenient" in the context of Rule 33(4) is not used, I think, in the narrow sense in which it is sometimes used to convey the notion of facility or ease or expedience. It appears to be used to convey also the notion of appropriateness; the procedure would be convenient if, in all the circumstances, it appeared to be fitting, and fair to the parties concerned. (*Shorter Oxford English Dictionary, s.v.* "convenient", and see *Burkill v. Thomas,* (1892) 1 Q.B. 99 at p. 102). It must be borne in mind that the grant of an application under the Rule, although it might result in the saving of many days of evidence in Court, might nevertheless cause considerable delay in the reaching of a final decision in the case because of the possibility of a lengthy, barren *interregnum* between the conclusion of the first hearing at which the special questions are canvassed and the commencement of the trial proper. (cf. *Netherlands Insurance Co. of S.A. Ltd. v. Simrie,* 1974 (4) S.A. 287 (C) at p. 289). In such a case, the advantages, in the form of curtailment of time actually spent in Court, which would result from the separate decision of the special questions might be outweighed by the disadvantages of delaying the ultimate decision of the case; it might cause great prejudice to the party who ultimately obtains judgment in his favour and who might suffer very considerable pecuniary loss through the circumstance that he could only receive payment of what was found to be due to him very much later than he would have received it had the trial been

allowed to proceed in the ordinary way."

After dealing with other factors less relevant to the present case, the learned Judge says the following at p.364:

> "It follows from what I have said that the function of the Court in an application of this nature is to gauge to the best of its ability the nature and extent of the advantages which would flow from the grant of the order sought and of the disadvantages. If, overall, and with due regard to the divergent interests and considerations of convenience (in the wide sense I have indicated) affecting the parties, it appears that such advantages would outweigh the disadvantages, it would normally grant the application."

Let us apply these principles to the facts of the present case. On the one hand we have the fact that some of the evidence adduced may well have required special knowledge of and experience in the customary law concerning "bohali" not readily available from a reading of Sebastian Poulter's work on *Family Law and Litigation in Basotho Society* or W.C.M. Maqutu's *Contemporary Family Law of Lesotho*.

Arraigned against this consideration are the following factors affecting the convenience of the parties:

1. The parties had selected the Magistrate's Court as their forum of choice for the resolution of their dispute.

2. The issues raised on the pleadings concerned the determination of the terms of an agreement between the parties partly oral partly written. It was certainly not a dispute that was primarily a matter of an inchoate agreement that would depend on a high level of expertise or knowledge concerning "bohali".

3. The Court of preference had jurisdiction to try the matter. The Court to which it referred had a jurisdiction limited to a value of M500 whilst the claim was for payment of M7400.

4. Perhaps most importantly the parties were ready to proceed. The case was ripe for hearing. The witnesses were present. Convenience in respect of one of the most important aspects of justice, i.e. a speedy resolution of the dispute cried out for the need to proceed, not to prevaricate.

5. We were assured by both parties that the presiding Magistrate was indeed as skilled in customary law as any Presiding Officer in a Local Court.

Weighing up these competing considerations, I am satisfied that the Magistrate was clearly wrong to refer the matter to another Court. He should have tried the matter and done justice between the parties by resolving their dispute

instead of delaying it and burdening them with the costs attendant upon such delay.

Accordingly he failed in my view to exercise his discretion judicially. The appeal succeeds. The order granted referring the hearing to a Basotho Court is set aside with costs both in this Court and in the High Court. The matter is referred back to the Magistrate's Court for hearing on the first available date.

J.H. STEYN
JUDGE OF APPEAL

I agree

J. BROWDE
JUDGE OF APPEAL

I agree

G.P.C. KOTZÉ
JUDGE OF APPEAL

Delivered at Maseru this 27th day of October, 1995.