CIV/A/28/94

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

SENYANE MPATI .....Appellant

vs

'MANCHAFATSO LEKAKA .....Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 24th day of February, 1995.

This is an appeal against an order of a Magistrate Court, transferring a case to Basotho Courts.

On 13th August,. 1992 the appellant (hereinafter referred to as Plaintiff) instituted, before the Maseru Magistrate Court Summons commencing an action in which he claimed against the Respondent (hereinafter referred to as Defendant) payment of M7,400, interest at the rate of 11% a tempore morae and costs of suit. The Defendant intimated her intention to defend the action.

In his declaration to the Summons, as amplified by further particulars, Plaintiff alleged that on 19th January, 1992 and at or near Semonkong in the district of Maseru he and Defendant concluded a written agreement whereby his daughter would get married to the son of the defendant who, in consideration thereof, would pay him a total amount of M8,000 as dowry. Pursuant to the said agreement the defendant paid M600, thus leaving a balance of M7,400. Notwithstanding demand the defendant refused/neglected to pay the aforesaid outstanding balance of M7,400. Hence the institution of these proceedings for judgment against the defendant as claimed in the summons.

In his plea defendant admitted that she and Plaintiff had entered into the agreement whereby her son and the latter's daughter would get married to each other. Defendant denied, however, that the parties reached agreement as to the quantum of the dowry. According to defendant, the question of the quantum of dowry was deferred to a later meeting. She conceded, however, paying, to Plaintiff, the amount of M600 which was part payment of a total amount of dowry yet to be agreed by the parties.

It is, perhaps, necessary to mention, at this juncture, that in reply to defendant's request for

further particulars, Plaintiff attached annexure "A" which was a copy of the written agreement concluded and signed by the parties on 19th January, 1992. In terms of annexure "A" the parties had agreed on the marriage between their children and that the monetary equivalence of a dowry beast could be M800. Indeed, Plaintiff acknowledged receipt of the amount of M600, from the defendant, as part payment of the money equivalence of a dowry beast. Nowhere in annexure "A" was the question of the quantum of dowry in the amount of M8,000 mentioned. Assuming its correctness annexure "A" was in itself no proof, therefore, that the parties had agreed on the quantum of dowry in the amount of M8,000 or at all.

Be that as it may, the salient point is that when on 13th July, 1994 the case came for hearing, the trial magistrate, mero motu, raised in lamine the question whether or not a magistrate court was a proper forum. Having heard arguments from either side, the trial magistrate proceeded to make a ruling in the following terms:

> "I am persuaded on the authority of Robert Potlane Ntle v. Khubelu Khaketla C/A/3/83 that a magistrate court has jurisdiction over a purely customary law action. However, Section 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 pre-eminently 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 monetary 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."

The appeal is based on a long list of grounds which may, however, be summed up in that the trial magistrate misdirected himself in making the order which was, therefore, bad in law.

It has been argued, on behalf of the appellant that regard being had to the amount claimed by the Plaintiff, Basotho Courts have no jurisdiction to entertain this case which is within the jurisdiction of magistrate courts. There can be no doubt, from the pleading, that on 19th January, 1992, the parties concluded an agreement whereby their children would enter into a contract of a customary law marriage. Although in his claim Plaintiff has avoided the use of the term "bohali" the subject matter of the present dispute is, in my view, payment of "bohali", in consequence of the parties' customary law marriage agreement concluded on 19th January, 1992.

In his work Family Law and Litigation in Basotho Society Poulter has this to say at p. 127:

> ""Bohali" claims constitute the largest proportion of court cases."

I agree. Indeed section 8(1) (b) of the Central and Local Courts Proclamation, 1938 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."

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.

It was further argued, that even if the dispute in the present case involved a customary law issue, the magistrate courts were, on the authority of the decision in Robert Potlane Ntle v. Khubeli Khaketla C of A (CIV) No.3 of 1983, empowered to entertain it. In that decision Goldin, J.A. had this to say at p. 7 :

> "It will be observed that while in any court customary law may be administered , Central and Local courts shall administer such law. One is permissive while the latter is

peremptory."

In my view the decision in Robert Potlane Ntle v. Khubelu Khaketla, is the authority that a magistrate court may entertain a case involving a customary law issue. It is no authority that the magistrate court cannot transfer a case to Basotho Courts under the provisions of subjection (2) of Section 17 of the Subordinate Courts Order, 1988.

As it has already been pointed out earlier, in transferring the present case to Basotho Courts, as he did, the trial magistrate relied on the provisions of subsection (2) of Section 17 of the Subordinate Courts Order, 1988. The subsection reads:

> "(2) If, at any time after the 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."
> (my underlining)

I have underscored the word "may" in the above cited subsection to indicate my view that the provisions thereof empower the trial magistrate with a discretion to transfer a case to a court of competent jurisdiction, other than the High Court. It is, however, trite law that such a discretion must always be exercised judiciously. In the instant case

the trail magistrate found, and rightly so in my opinion, that claims for payment of bohali in cases involving customary law marriage were matters of pure custom. As such claims for payment of bohali were, therefore, well within the jurisdiction of the Basotho courts, which normally entertain them. That being so, the appellant cannot be heard to say the trial magistrate has failed to exercise his discretion judiciously.

I agree with the contention of the trial magistrate that the fact that there is a monetary equivalence of the bohali cattle does not oust the jurisdiction of the Basotho Courts even where the equivalence exceeds their monetary jurisdiction.

In the circumstances, it seems to me the order of the trail magistrate transferring this case to Basotho Courts, as it did, cannot be faulted.

The appeal is, therefore, dismissed with costs.

B.K. MOLAI
JUDGE

24th February, 1995.

For Appellant : Mr. Ramolibeli
For Respondent: Mrs Kotelo.