CIV\T\113\93

IN THE HIGH COURT OF LESOTHO

In the matter between:

SETHA LEHLOENYA	PLAINTIFF
vs	
TUMO LEHLOENYA	1ST DEFENDANT
ACTING PRINCIPAL CHIEF OF MATSIENG	2ND DEFENDANT
MINISTER OF INTERIOR	3RD DEFENDANT
ATTORNEY GENERAL	4TH DEFENDANT

J U D G M E N T

Delivered by the Honourable Acting Mrs Justice J.K. Guni
on the 19th day of June, 1995

In this action plaintiff issued out summons in the High Court against these four (4) defendants. Tumo lehloenya of Rapoleboea ha Mahlomola is the 1st defendant. The second defendant is the Acting principal chief of Matsieng. The 3rd defendant is the Minister of Interior. The 4th defendant is the Attorney General sited in his capacity as the legal representative of the Government of Lesotho.

In his prayers the plaintiff seeks an order in the following terms:-

(a) Declaring that First Defendant is not the rightful heir to the headmanship of Rapoleboea Ha Mahlomola;

(b) Declaring null and void and of no legal effect the placement by Second Defendant of First Defendant;

(c) Directing the Third defendant to gazette the Plaintiff as the headman of Rapoleboea Ha Mahlomola;

The jest of the plaintiff's complaint as indicated in his declaration is to the effect that the 1st defendant Tumo Lehloenya is wrongfully and unlawfully placed as the headman of Rapoleboea Ha Mahlomola. This wrong should be rectified or corrected by this court by declaring that placing of Tumo Lehloenya as the headman of Rapoleboea Ha Mahlomola, null and void and of no legal effect. This declaration will in its effect create a vacancy at the office of the chief or headman of Rapoleboea Ha Mahlomola. Part of the plaintiff's prayer is to the effect that such a vacancy is filled by his own placement in that office of the chief of Rapoleboea Ha Mahlomola.

This dispute arises from the operations of the CHIEFTAINSHIP ACT NO.22 OF 1968. Part III of this Act regulates succession to the office the chief\headman.

Section II (2) of chieftainship Act provides the forum for the settlement of disputes arising from the nomination or placement of chiefs or headmen. The relevant portion of that section reads as follows:

> "(1), and any other person claiming that the person nominated is incapable of succeeding, or that some other person who is capable of succeeding should have been so nominated instead of the person who was nominated, the person so claiming may apply to a court of competent jurisdiction to have the nomination set aside or varied accordingly."
> (my underlining)

Plaintiff has followed the terms of this provision for some distance. He has so far shown this court that "the person nominated (TUMO LEHLOENYA) is incapable of succeeding or that some other person who is capable of succeeding (himself SETHA LEHLOENYA) should have been so nominated instead of Tumo Lehloenya. The second step that the plaintiff should have taken, was to take his claim to the proper forum to determine the dispute and take corrective measures that would effect the change the plaintiff desires.

It is, in the common cause that the dispute between these two parties involves succession to the office of the chief or headman. It is also in the common cause that such dispute should be resolved in accordance with the chieftainship Act which has specified the court before which such disputes should be taken.

1st Defendant specially pleaded that; the Plaintiff's action violates section 6 of the High Court Act of 1978: In that it has been brought to the High Court without leave of court although it is a succession to the chieftainship matter which a subordinate court has jurisdiction. According to the argument of the 1st Defendant's counsel the summons commencing this action should have been issued out by the subordinate court, not the High Court. The counsel for the Plaintiff does not agree that the Plaintiff's action should have been commenced at the Subordinate Court for the following reasons:-

(1) Plaintiff has a right to commence his action in any court of his choice depending on his considerations as regards where he fancies his matter will receive best handling.

(2) The Court of Appeal when it confirmed the meaning of the terms "Court of Competent Jurisdiction" to mean the Subordinate Court, lacked proper appreciation of Basotho Custom, culture and tradition pertaining to Chieftainship especially considering the lack of Ethnicity in that court's composition.

(3) Even if there is a requirement to apply for and obtain leave of the court before the action was brought, this court must proceed to hear the matter without that leave having been obtained because, had the leave been applied for it would have been granted anyway.

(4) Plaintiff in his prayers seeks specific performance. The removal of one headmen and his replacement by another. By the nature of the relief sought this matter is put beyond the jurisdiction of the Subordinate court.

Section 29 Subordinate Court Order 1988 makes the list of matters which are beyond the jurisdiction of the subordinate

court. Section 29 (d) " provides that the court will have no jurisdiction in matters in which is sought the specific performance of an act without an alternative of payment of damages."

Plaintiff's claim may be of that nature. But there are statutory provisions specifically enacted to regulate and govern the determination of disputes in matters of chieftainship. This section must be read in conjunction with those provisions which have greater weigh in this matter. This point was raised and therefore the Court of Appeal did decide upon it in the case of NKO C. OF A. (CIV) NO. 14\91. This case of Nko is on fours with our present case. The orders sought in these two cases are identical. The words used to ask for those orders may be different but the effect of the order is the same. The Court of Appeal in Nko's case declared in no uncertain terms that "*chieftainship ad succession to chieftainship are* <u>*not excluded by section 29*</u>" of subordinate court order 1988. In that case Florina Mantja Mapapali Nko instituted an action in the High Court against respondent, for an order declaring her to be the rightful successor to the headmanship of Phuthiatsana Ha Nko. The plaintiff in our present case did exactly the same. He sought an order directing the Minister of Interior to gazette him as the headman of Rapoleboea Ha Mahlomola. This is to happen

after plaintiff had ask the court to order that the placement of the present holder of that office of headman at Rapoleboea Ha Mahlomola null and void and of no legal force.

To argue that in our present case plaintiff is seeking specific performance, and therefore the matter is excluded from the jurisdiction of the subordinate court is unsuccessful attempt to circumvent the authority of Nko's case. There are no difference whatsoever between these two cases. The Court of Appeal made the pronouncement that "Chieftainship and succession to chieftainship are not excluded by section 29" after that court had thoroughly examined those provisions contained in section 29 of subordinate court order 1988.

There is a further criticism made against the judgment in Nko's case regarding the lack of proper appreciation of Basotho Custom, culture and tradition in relation to chieftainship. Plaintiff's counsel seemed to suggest that because their Lordships are of a different culture, fail to appreciate properly or are not sensitive enough to the Basotho culture and tradition. The decision in relation to the propriety or improprieties of culture as far as it affects chieftainship, has already been made by the legislator of our law. It is our legislators who decided that the dispute arising from chieftainship Act must be

determined by a Court of competent jurisdiction. That forum is chosen by our legislators. - not by the Court of Appeal. The Court of Appeal merely interpreted our relevant statute law to arrive at what the law maker intended. Their sensitivity to, or appreciation of our culture has no bearing on the conclusion they arrived at in their interpretation of our statutes. Our legislators: in the form of the parliament or orders by Military Council, are all Basothos. Sentiments expressed here, of lack of proper appreciation of our culture are absolutely ridiculous, considering that it is the legislators intention which is embodied in the wording of the statutory provisions that were being interpreted.

Another point raised by plaintiff's attorney appeared to suggest that even though leave was not applied for nor obtained before this action was instituted, now from the bar such an application was being made or the court itself on its own motion may grant such leave. The authority sited in support of this submission was Seisa Nqojane vs National University of Lesotho. C. of A. (civ) No 21\92. In this case the honourable Leon J.A observed as follows: " I have not a slightest doubt that, had the point been taken, leave would have been granted because prayers 2 (c) and (d) are ancillary to the main relief sought." In this case Mr. Nqojane was seeking an order that would effect his

reinstatement and payment of his salary in terms of the contract of employment. As a fringe benefit that went with the job there was a provision of accommodation. Restoration of occupation of the University house by Mr. Nqojane was an ancillary to the main relief of reinstatement to his previous job or post. In our present case the order sought directing the Minister of Interior to gazette plaintiff as the headman of Rapoleboea Ha Mahlomola is the main and the only relief sought. The special plea was timeously made. It was not belatedly raised as the exception taken in Nqojane's case.

It is in this circumstances that I am satisfied that 1st Defendant's special plea must succeed with costs. It is so ordered.

K.J. GUNI
ACTING JUDGE

For Plaintiff : Mr. Hlaoli
For Defendant : Mrs Kotelo