**CIV\APN\229\94**

**IN THE HIGH COURT OF LESOTHO**

**In the Application of :**

**LETSEMA TSEHLO** **Applicant**

**vs**

**NCHELA NTSASA** **Respondent**

**JUDGMENT ON POINTS OF LAW**

**Delivered by the Hon. Mr Justice M L Lehohla on the 18th day of May,1998**

In C of A (CIV) No. 12\97 ***Stella Kaka vs Lesotho Bank and 4 Ors*** (unreported) at pp 1,2 and 3 van den Heever J.A. demurred at the appalling state of the record and said in January this year :

> "I point out with a measure of detail the faults both in form and in substance apparent from the record, not as an expression of displeasure, but in the hope that it will provide guidance useful to the future of administration of justice in the Kingdom of Lesotho.....".

The learned judge then started picking at instances of poor typing and\or

proof-reading.

It is most distressing that the type of complaint she raised in that appeal reared its ugly head with a vengeance in the instant application where either words which should have been included to make sense in a sentence are missing or the diction employed leaves the reader in a state of frustration as to what the intended meaning in the sentence could have been. See for an example page 5 paragraph 5.4 where it is written

> ".....The arable land which Respondent and SOOTHO MONYANE became holders of which had been lying unused for as long as I could remember and they have recently acquired it"

5.5 "With our plough pulled by cattle to go and plough our fields and tractors and also passed with our sledges and wagons to load produce from our fields after harvesting"

7.2 "With the closure *if* the passage by Respondent I.....*have absolutely impossible to reach my* ..... lands with sledges ploughs and wagons ...."

All these appear in the founding affidavit.

In the replying affidavit the distress experienced is not alleviated by one's confrontation with paragraph 4.2 page 27 saying

> "..... I have specifically referred to hardships which I and the other people are suffering as a result of closure *of the my to our lands* ....."

or

4.3 to the following effect

> "It is obvious to anybody who is not *paying* games that my father Kopang in his affidavit confirms that he is among the 'others' I have referred to ....."

The respondent has his share of the blame if only to a negligible degree at page 25 where it is stated in paragraph 3 of the translated version of a letter written by J.T. Ntepe to the Acting Chief ".....Now the decision is that Nchela has ploughed his own field which appears not to have *lied* fallow....".

So much then for the above; and it remains now to grapple with the matter due for consideration.

The points raised in *limine* by *Mr Mafantiri* for the respondents are that -

> (a) there is a dispute of facts which cannot be resolved on the affidavits alone. Consequently the application ought to fail on this ground alone.

My view is that such a point ought to fail provided it is shown that the dispute of fact is genuine and that the applicant ought to have foreseen that it was likely to be raised. Where the Court is of the view that although the existence of the dispute is undeniable and that it cannot be resolved on papers but feels that dismissing the

application would amount to injustice in the sense that moving otherwise than on the basis of urgency would result in irreparable harm, the Court is at large to refer the disputed point only to oral evidence.

> (b) The applicant has no *locus standi* to bring the present application as the field in question does not belong to him but to his father. See paragraph 3.1 of Kopang Tsehlo's supporting affidavit.

While at first blush the respondent could be said to be justified in making an exception in regard to the contents of the paragraph in question, the context in which the words are used is consistent with the contention by the applicant that not only his but other people's access to their respective fields has been occluded by the respondent's action. Thus I am satisfied that when applicant's father Kopang refers to a certain field as his he doesn't refer to the particular field which the applicant is aggrieved that he himself is unable to reach.

> © The applicant has ignored provisions of section 6 of the High Court Act 1978 requiring that any civil cause or action which is within the jurisdiction of a subordinate court can only be instituted in or removed into the High Court
>
> (i) by a judge of the High Court acting on his own motion;
>
> (ii) with the leave of a judge upon application made to him in Chambers, and after notice to the other party".

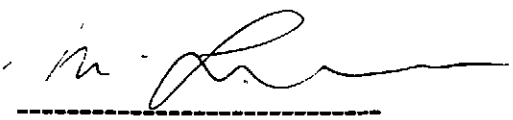
My view is that since the form of interdict being sought is of a permanent nature it scarcely makes sense that the applicant could seriously be required to move his application in the subordinate court in the first place. If my view stands in this connection it would seem only natural that on account of the exigency of the remedy being sought the applicant did well to approach the only court where his plea if sustainable would fetch a permanent relief.

(d) The applicant has not exhausted domestic remedies.

This argument arises from the fact that when first the applicant felt aggrieved he went to his chief but now without bothering to go through the pecking order of chiefs in reverse order he has approached this Court. I think this argument is too little to the point to merit serious consideration. The foregoing arguments to the counter should suffice to cover it. Suffice it to say, it is all very well for the applicant to seek cheap means of redressing his grievance. Going to the chief would seem to be ideal in that regard. But the fact that he did so in the first place; and much of his time was wasted without any progress in the meantime, should not be used as a bar to an avenue to which he is entitled whether or not he tried the local chief's intervention in the first place. Suffice it to emphasise that the nature of relief sought is of extreme urgency in respect of which the applicant would have been entitled to an interdict if he sought one. A remedy for spoliation is always sought on an urgent basis.

All the points raised in *limine* are dismissed with 65% costs only on account of the slipshod nature of the preparation of the applicant's papers.

The Court orders that the point raised which happens not to be common cause regarding means of access to the applicant's field be referred to oral evidence as the Court finds it impossible to resolve it on the papers as they stand.



JUDGE
18th May, 1998

For Applicant : Mrs Kotelo
For Respondent : Mr Mafantiri