

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru:

In the appeal of

FLORINAH MANTIA MAPAPALI NKO

Appellant

and

LIJANE NKO

Respondent

Coram: ACKERMANN J.A., STEYN J.A. and KOTZÉ J.A.

KOTZÉ J.A.:-

The appellant, as plaintiff, instituted action in the High Court against the respondent, as defendant, for an order declaring her to be the rightful successor to the headmanship of Phuthiatsana Ha Nko in the district of Maseru and the appointment of defendant as successor to the said headmanship to be null and void. Exception was taken to appellant's summons and declaration and upheld by Lehohla J. on the ground that "in as much as (the cause of action) is a matter within the jurisdiction of a subordinate court (the) action has been irregularly brought" before the High Court "contrary to the provisions of section 6 of the High Court Act of 1978". The present is an appeal against the order of Lehohla J.

The High Court is a creature of statute which, in terms of section 2 of Act No 5 of 1978 as amended by section 2 of Act No 34 of 1984 (the Act) inter alia has "unlimited jurisdiction to hear and determine any civil or criminal proceedings under any Law in force in Lesotho ... (and) in its discretion and at the instance of any interested person, power to inquire into and determine any existing future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination ..."

The aforesaid unlimited grant of jurisdiction to the High Court to determine any civil proceeding manifestly includes the power to settle matters concerning the succession to chieftanship or headmanship unless such jurisdiction is validly curtailed or limited elsewhere. The Act itself contains such a limitation in section 6 which provides that

"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."

For the purpose of the exception it is to be assumed that no judge of the High Court of his own motion or on application authorised the institution in or removal to the High Court of the present action. Accordingly the crucial question which arises for decision is whether jurisdiction concerning succession to chieftanship is the sole prerogative of the High Court or whether, in addition, a subordinate court within the meaning of section 6 is possessed of jurisdiction to decide the rightful succession to the headmanship of Phuthiatsana Ha Nko. If the answer to the last part of this question is in the affirmative, an approach to the High Court is barred; if the answer is in the negative the unlimited jurisdiction of the High Court remains unabridged.

The word "includes", in the context in which it is used in section 6, clearly is designed to extend the meaning of "subordinate court" and not to limit it in the sense of confining it to local or central courts. It follows, therefore, that what has to be enquired into is whether local or central courts or other courts properly regarded as subordinate courts are possessed of jurisdiction to decide the rightful succession to the headmanship of Phuthiatsana Ha Nko.

I pass at once to a consideration of the crucial question referred to. Since local and central courts are in terms of section 6 of the Act by specific inclusion subordinate courts it is necessary at the outset to examine whether they are endowed with jurisdiction to determine questions of chieftanship succession. Local and central courts are, like the High Court, creatures of statute. They are established or recognised in terms of section 2 of the Central and Local Courts Proclamation 62 of 1938 by warrant and exercise such jurisdiction within such limits as determined by the warrant. Counsel have not referred us to nor have we been able to find any warrant conferring jurisdiction to determine questions of succession in general or to Phuthiatsana Ha Nko in particular. A finding is therefore justified that no local and central court is possessed of jurisdiction to decide questions of succession to chieftanship.

Subordinate Courts Order, 1988 repeals the Subordinate Courts Proclamation 1938. It provides for the constitution of subordinate courts presided over by magistrates (section 3). Section 29 declares which matters are beyond the jurisdiction of subordinate courts. Chieftanship and succession to chieftanship are not excluded by section 29. It is necessary, therefore, to consider whether section 17 that pronounces which causes of action fall within the ambit of jurisdiction

of subordinate courts confers such power. It does not expressly confer such power but sub-section 1(e) thereof does provide that a subordinate court shall have "such other jurisdiction as shall be specially conferred by any other law."

The Chieftanship Act 22 of 1968 is one such "other law" within the meaning of section (1)(e) aforesaid. Section 11(2) of the Chieftanship Act vests a "court of competent jurisdiction" with power to set aside or vary an announced nomination to the office of chief (which by definition includes headman) and thus to determine succession. Such is the relief claimed by the appellant in the present action. "Court of competent jurisdiction" is not defined but it is clear from section 11(5) that the order of such a court may be "the subject of an appeal". In terms of section 11(6) it is the prerogative of the Chief Justice to make rules "with respect to the practice and procedure" inter alia of a court of appeal contemplated by section 11(5). (Attention should be drawn to the patent omission of the word "under" immediately before the words "that subsection" in section 11(6).) This rule-making power is indicative that "courts of competent jurisdiction" contemplated by section 11(2) of necessity include courts subordinate to the High Court for if the High Court is to be regarded as the sole court of "competent jurisdiction" the appropriate appellate tribunal

would be the Court of Appeal in respect of which the rule-making power does not vest in the Chief Justice but in the President of the Court of Appeal. (See section 22 of the Court of Appeal Act, 1978). Put differently: by vesting the rule-making power in the Chief Justice the clear indication is that "a court of competent jurisdiction" within the meaning of section 11(2) would include a court subordinate to the High Court i.e. a subordinate court established in accordance with the Subordinate Courts Order, 1988. In arriving at this conclusion I am mindful of the inclusion of the word "specially" in section 17(1)(e) of the Subordinate Courts Order. The word used is not "specifically" which would require an express conferment of jurisdiction whereas "specially" is a word of somewhat wider import - wide enough to embrace an implied conferment of power. Further confirmation of the view that the term "court of competent jurisdiction" in section 11(2) of the Chieftanship Act should not be confined to the High Court is to be found in the style of draftmanship employed in the preparation of the Act : if the High Court is intended to be referred to it is clearly stated - cf., e.g. section 12(3).

The conclusion stated above that a subordinate court falls within the meaning of "court of competent jurisdiction" in section 11(2) of the Chieftanship Act is the logical end of the present enquiry viz. that the plaintiff's action was instituted in the High Court contrary to the provisions

of section 6 of the High Court Act and renders unnecessary consideration of arguments addressed to us concerning the Declaration of Basuto Law and Custom commonly known as Part I of the Laws of Lerotholi.

The appeal is dismissed with costs.



G P C KOTZÉ
Judge of Appeal

I agree



L W H ACKERMANN
Judge of Appeal

I agree



J H STEYN
Judge of Appeal