CIV/A/14/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

TAOLI LESETLA APPELLANT

and

'MATLHORISO MATSOSO RESPONDENT
(duly substituted for her husband
Mr. Gabriel Matsoso)

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 15th day of August 2001

The real point of dispute in this case is a short one namely whether Central and Local Courts have jurisdiction to hear cases involving motor vehicle accidents or the common law. First the salient facts which are themselves hardly in dispute.

It all began on or about the 2nd day of October 1992 when the Respondent's husband (hereinafter conveniently referred to as the Respondent) who was driving his motor vehicle gave a lift to the Appellant's wife at the latter's request. As fate would have it the

Respondent lost control of his motor vehicle along the way as a result of which it overturned injuring the Appellant's wife in the process.

The Appellant then sued the Respondent at Tale Local Court for damages (the papers are silent on the actual amount) for his wife's injuries under case No. 59/96 and won. Respondent's appeal to Tšifalimali Central Court in case No. 104/96 was also unsuccessful and he lodged a further appeal to the Judicial Commissioner's Court. While the latter appeal was pending however the Respondent brought a review application before the Leribe Magistrate's Court in case No. 153/97 on the ground that the lower courts had no jurisdiction in the matter. The Magistrates' Court duly agreed and accordingly ordered that the proceedings in the lower court in the said case No. CC59/96 of the Tale Local Court were null and void *ab initio* for want of jurisdiction of the local court in question.

The Appellant has accordingly appealed to this Court against the decision of the Magistrate's Court. He relies on three grounds of appeal as follows:

"1.

The Learned Magistrate erred in holding that the Local Court had no jurisdiction to hear a matter concerning damages such as the one in CC:59/96 Tale Local Court.

2.

The Learned Magistrate erred in granting the application, relying on the Insurance Order 1989, yet the Local Court and Central Court never purported to administer the Insurance Order.

3.

The Learned Magistrate erred in granting the application yet respondent was not entitled or was estopped from coming on review on a matter in respect of which he prosecuted an unsuccessful appeal, while he still knew of the irregularity (if there be any)."

The third ground of appeal can quickly be disposed of but before doing so and in order to understand the motivation behind the Respondent's review application where the appeal was still pending it is necessary to refer to the uncontroverted contents of paragraph 6 of his founding affidavit in support of the review application in which he averred as follows:

"6.

I have recently sought legal advise (sic) concerning this matter and I was advised that matters concerning motor vehicle accidents should not be dealt with in the Basotho Courts because damages flowing from such accidents are regulated by the Motor Vehicle Insurance Order 1989. I am advised further that this matter cannot be dealt with under customary law as the issue of conveyance of persons by motor vehicles is a peculiarly foreign concept to Sesotho custom and issues of damages arising therefrom are regulated by received laws and by statute which would therefore fall outside the scope of the local courts."

It seems to me beyond question that what the Respondent actually meant in paragraph 6 of his founding affidavit as fully reproduced above is that he was not aware of his right to review the matter at the time he lodged an appeal on the merits of the case. A similar situation arose in *Katz v Peri Urban Areas Health Board and others 1950 (1) SA 306 (W)* wherein Clayden J stated the following at page 310 thereof:

"Finally it was argued that as the applicant had chosen to exercise his right to appeal from the decision of the valuation court he was precluded from bringing its decision in review before this Court. Reliance was placed on *Mahomed v. Middlewick, N.O., and Another* (1917, C.P.D. 539) and *Rex v.*

Mtombeni (1946, T.P.D. 401). These cases are, I consider, quite inapplicable. They are based upon the reluctance of a court to disturb the finality of its own judgment on appeal in subsequent review proceedings: not on any refusal to interfere with the decision of some other appeal tribunal. And on the facts of this case it appears that the applicant was not aware of his right to review these proceedings when, futilely, he tried to appeal from them. The applicant is I consider entitled to the relief for which he firstly asks."

I respectfully agree with these remarks which are apposite to the instant matter.

Adv Teele for the Appellant relies on the following passage by Herbstein & Van Winsen: The Civil Practice of the Superior Courts in South Africa 3rd ed p752 (the passage actually appears in the 4th edition at p936):-

"The fact that an appeal has been unsuccessfully brought against a judgment will bar review proceedings if the appeal was heard on the merits and a final decision given thereon by the appeal Court."

In my view I do not think that the above quoted passage avails the Appellant in the special circumstances of this case as set out in paragraph 6 of the Respondent's founding affidavit in the review application. I mention only five reasons. Firstly, at best for the Appellant the appeal in question had not been finalised but was admittedly pending before the Judicial Commissioner's Court. Secondly the Central and Local Courts in question including the Judicial Commissioner's Court had not dealt with the merits of the jurisdictional issue raised by the Respondent on review before the Magistrate's Court. Thirdly the Appellant did not raise any objection to the matter proceeding by the way of review and must be held to have acquiesced to such procedure. Fourthly there was no real prejudice shown for adopting a speedy remedy by way of review as opposed to appeal (afterall both procedures have one aim in common namely the setting aside of the decision of the lower court) except in so far as costs of the appeal itself may be concerned. The Appellant is however not precluded from recovering such costs (if any) if so advised. Fifthly by successfully moving for review the Respondent must no doubt be taken to have abandoned the futile appeal in question. It is significant that this was on legal advice as there can be no doubt in my mind, judging

by the aforesaid contents of paragraph 6 of his founding affidavit, that the Respondent was unaware of his right to review the proceedings as opposed to an appeal on the merits.

I turn then to the real point of dispute raised at the beginning of this judgment namely whether Cental and Local Courts have jurisdiction to hear cases involving motor vehicle accidents or the common law. In order to determine this issue it is necessary to have regard to the provisions of the Central and Local Courts Proclamation No.62 of 1938 (the Proclamation). Three sections thereof shall suffice for the purposes of this judgment namely sections 6, 9 and 10 which provide as follows:-

> "6. Every Central and Local Court shall have and may exercise civil jurisdiction, to the extent set out in its warrant and subject to the provisions of this Proclamation, over causes and matters in which the defendant is ordinarily resident within the area of the jurisdiction of the Court, or in which the cause of action shall have arisen within the said area: Provided that notwithstanding anything contained in this or any other Proclamation, such jurisdiction shall be deemed to extend to the hearing and determination of suits for the

recovery of civil debts due to His Majesty under the provisions of any law, where such jurisdiction has been expressly conferred upon a Central or Local Court under section nine: Provided further that civil proceedings relating to immovable property shall be taken in the Central or Local Court within the area of whose jurisdiction the property is situated.

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9. Subject to the provisions of this Proclamation a Central or Local Court shall administer -

(a) the native law and custom prevailing in the Territory, so far as it is not repugnant to justice or morality or inconsistent with the provisions of any law in force in the Territory;

(b) the provisions of all rules or orders made by the Paramount Chief or a Chief, Sub-Chief or Headman under the Chieftainship (Powers) Proclamation, and in force within the area of jurisdiction of the Court;

(c) the provisions of any law which the Court is by or under such law authorised to administer; and

(d) the provisions of any law which the Court may be authorised to administer by an order made under section **ten.**

10. The Minister, with the concurrence of the Chief Justice, may by order confer upon all or any Central or Local Courts jurisdiction to enforce all or any of the provisions

> of any law specified in such order, subject to such restrictions and limitations, if any, as the Minister, with the concurrence of the Chief Justice, may specify."

The parties are on common ground that the warrants defining the jurisdiction of the Central and Local Courts in question in terms of Section 6 of the Proclamation do not include the common law and/or matters arising from motor accidents. Nor are such matters included in Section 9 of the Proclamation.

As I see it, it is in the very nature and scope of the proclamation that the Central and Local Courts are empowered to deal only with native law and custom and such provisions of law as are specifically conferred on them under the proclamation or by the Minister acting with the concurrence of the Chief Justice. As creatures of statute they have no power to operate beyond this clearly defined jurisdiction.

Adv Teele for the Appellant submits that customary law has developed sufficiently to cater for issues which might otherwise fall purely under the common law or more appropriately Roman Dutch Law.

In my view this submission has merely to be articulated to be rejected. The Proclamation clearly empowers the Central and Local Courts to deal with customary law only and not the common law or Roman Dutch Law. Any change based on the perceived development of customary law is of course a matter for the Legislature and not for the courts.

Writing in his book: Legal Dualism in Lesotho Sebastian Poulter says at page 18 thereof:-

> "The jurisdiction of the Basotho Courts is circumscribed by statute in three separate ways, quite apart from the limits, mainly financial, that are set out in their individual warrants. First in terms of section 9 of the Central and Local Courts Proclamation these courts are only authorised to administer Sesotho law together with a very limited range of statutory provisions. There is no power enabling them to decide a case under the common law. Thus the fact that a plaintiff has instituted proceedings in a Basotho Court virtually amounts to an election on his part to have his case decided according to Sesotho law and he cannot complain if he discovers afterwards that he would have done better by commencing an action at common law in a subordinate court."

I agree that this is indeed so.

In an attractive argument Miss Tau for the Respondent submits that claims arising out of motor vehicle accidents as in the instant matter are statutorily governed by the Insurance Order 1989 (as amended). Section 13 (1) thereof deals with jurisdiction and provides that any action to enforce any such claim may be brought in any Lesotho court of "otherwise" competent jurisdiction within whose area of jurisdiction the incident which caused the injury or death occurred. The word "otherwise" used in the section is in my view intended to convey a strict limitation to the courts' own ordinary competent jurisdictions. It is clear to me therefore that it is not every court in Lesotho that is empowered to deal with claims arising out of motor accidents. It must be a "competent" court and for reasons fully set out above such court cannot by any stretch of the imagination include a central or a local court both of which ordinarily deal with customary law. Claims for damages arising out of motor accidents are by their very nature foreign to Sesotho law and custom. They involve a completely different concept altogether from customary law in as much the same way as motor vehicles are themselves

a foreign phenomenon to the Basotho traditional way of living.

It follows from the aforegoing considerations that the learned magistrate in the court below was fully justified in coming to the conclusion that the Central and Local Courts in question had no jurisdiction in the matter and that accordingly the proceedings before them were null and void *ab initio* for that reason.

In Attorney-General v Dlamini Holdings CIV/APN/7/97 (unreported) this Court had occasion to warn against lack of adherence to jurisdictional limits in the following words at page 16 thereof:-

> "Mr. Pheko sung praises for the Learned Magistrate's bravery in entertaining a matter of this nature. This Court is not impressed. Misplaced bravery such as is the case here cannot be tolerated. It is certainly the feeling of this Court that it is a recipe for chaos if Magistrates do not observe their own jurisdictional limits."

Those remarks apply with equal force to the presidents of the Central and Local Courts who are therefore warned to toe up the line and strictly

observe their own jurisdictional limits.

In the result the appeal is dismissed with costs.

M.M. Ramodibedi
JUDGE
15th day of August 2001

For Appellant : Adv M.E. Teele
For Respondent : Miss M. Tau