IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 22/2016
CIV/A 32/2013

In the matter between

KOSE HLASA **Appellant**

And

MORENA MOTJOTJO PATSI **Respondent**

CORAM : CLEAVER A.J.A
CHINHENGO A.J.A
GRIESEL A.J.A

HEARD : 15 OCTOBER 2016
DELIVERED : 28 OCTOBER 2016

SUMMARY

A ruling by the Office of a Chief in respect of a dispute between two parties has no legal effect since the Courts of Chiefs are merely institutional forms of conciliation and mediation - a party dissatisfied with a ruling of the Office of a Chief is therefore entitled to institute proceedings afresh in a local court.

JUDGMENT

CLEAVER AJA

[1] This is an appeal against a judgment of the High Court which dismissed an appeal to it against a judgment of the Judicial Commissioner's Court, the effect of which was to uphold a decision in the Bela Bela Local Court.

[2] The only issue in the notice of appeal is a crisp one, namely whether the Bela Bela Local Court had the jurisdiction to hear the matter. The issue between the parties concerned the removal of wood from a plantation by the appellant, which the respondent contended belonged to the community of Tuke of which he was a headman. The appellant's contention that the plantation was situated in his grandfather's field was rejected by the court, which ordered that the appellant was to desist from using the plantation and never to use it.

[3] The appellant was not satisfied with the ruling and then appealed, unsuccessfully, first to the Tsifalimali Central Court, then to the Judicial Commissioner's Court and finally to the High Court.

[4] The challenge to the jurisdiction of the Local Court is based on the fact that the proceedings before it had been preceded by a hearing in the Office of the Principal Chief of Kueneng Mapoteng (described in the judgment of the High Court as the Principal chief of Berea), which had found in favour of the appellant. Counsel for the appellant submitted, as he had also submitted before the High Court, that in hearing the parties and reaching a decision on the dispute between them, the Office of the Principal Chief had exercised a quasi-judicial function. In the result, he submitted that it was not open to the respondent to have instituted proceedings in the Local Court. As his remedy

was to have taken the ruling on review to the Minister or the Local Court, that court did not have the jurisdiction to entertain the proceedings initiated before it by the appellant.

[5] This argument did not find favour with the Chief Justice who heard the appeal in the court below. She explained that chiefs are custodians of peace within their communities as set out in the Chieftainship Act, Act 22 of 1968 (the Act) the purpose of which is, according to the long title of the Act, to *"make provision determining the nature and duties of the Office of Chief…."* She was of the view that since chiefs are expected to administer peace within their communities at all times, when there is a dispute between parties within their communities they act as mediators or arbitrators but their decisions are not legally binding on the parties. Consequently she was not persuaded that the Office of the Principal Chief exercised a quasi-judicial function in hearing the parties and making a ruling. Therefore the appellant was entitled to initiate proceedings afresh in the Local Court.

[6] Support for the view of the Chief Justice that that the role of the Office of the Chief when dealing with disputes is to act as a mediator and not as a court of law is to be found in the work by Poulter S in (1977) Marriage, Divorce and Legitimacy in Lesotho Journal of African Law 21(1), 66-78, retrieved from http://www.jstor.org/stable/744945

The author writes:

> *'Secondly, the chiefs who had traditionally administered the customary law in their courts and who were allowed to maintain this prerogative after Basutoland was removed from Cape rule in 1883, were eventually deprived of all judicial powers in 1938. Sweeping reforms were introduced by the colonial administration following serious complaints from the public over many years that the chiefs*

were unfit for the efficient and impartial dispensing of justice. In their place were established courts which are today styled "Central and Local Courts" but more colloquially referred to as "Basotho Courts". Broadly speaking, they operate according to western procedures. The traditional courts of chiefs and headmen therefore exist now merely as institutional forms of conciliation and mediation'

[7] In seeking to persuade us counsel relied principally on the provisions of S8 (2) of the Act the relevant portion thereof reads:-

"If a Chief has exercised a power or performed a duty, a Minister of the Government of Lesotho or an immediately superior chief may direct that Chief to revoke, withdraw, amend or otherwise deal with whatever has been done or omitted under that power or duty, as may be lawfully specified in that direction….."

[8] The functions of the office of the Chief are set out in S6 (1) of the Act. These are that it is his duty to support the King and his government according to the Constitution and the other laws of Lesotho and to serve the people in the area of his authority, to promote their welfare and lawful interests, to maintain public safety and public order among them. This he must do impartially, efficiently and quickly according to law.

[9] The provisions of S8 (2) clearly apply to the manner in which the Office of a Chief has carried out his functions as set out in S6(1) and do not apply to a decision made in the adjudication of a dispute between members of the community in his area. In her judgment in the court below the Chief Justice,

correctly in my view analyzed the meaning of the subsection as follows:- *"In my view, the section regulates the functions of chiefs in terms of their hierarchy in their respective offices. Thus its application should be understood within the context of where a chief has performed or failed to perform a duty directed or expected to do under the Act. Its purpose is more to limit and regulate chiefs in order to prevent them from abusing their powers when adjudicating their administrative functions in their respective offices"*. For this reason the Chief Justice concluded that S8 (2) had no relevance to the case, a conclusion with which I agree.

[10] I also agree with the Chief Justice that the Act contains no specific provision relating to the functions or powers of the Office of a Chief which would clothe the hearing of a dispute between parties in the community with quasi-judicial authority. In fact, the Act does not specifically mention the hearing of disputes as being one of the functions of the Office of a Chief.

[11] In the result the finding by the Office of the Chief did not preclude the appellant from seeking recourse in the Local Court.

[12] Although the appellant had before the Central Court, the Judicial Commissioner's Court and the High Court based his case on the submission that because the ruling of the Office of the Chief was quasi-judicial in nature the Central Court did not have the jurisdiction to hear the fresh suit initiated by the respondent, his counsel belatedly submitted before us that the dispute between the parties was one which was subject to resolution in the Land Court or the District Land Court and that none of the courts which had heard the matter had the necessary jurisdiction to do so. Although counsel had represented the appellant in all the courts in which the matter had been heard, he had not in any of the courts made this submission, nor had it appeared in his

notice of appeal to this court or in his heads of argument. In advancing the submission he did not take the trouble to explain to provide any authority for his submission and did no more than to refer us to the definition section of the Land Act. This court is entitled to expect and to require better assistance from counsel.

[13] Be that as it may, and even if we were to entertain the appellant's belated argument, the point is in any event without merit. The Land Court and District Land courts were established by Section 73 of the Land Act 2010 *" to hear and determine disputes, actions and proceedings concerning land"*.

[14] The Land Act defines "land" as including *"land covered by water, all things natural or man-made growing on land, and buildings or other structures permanently affixed or attached to land"*

[15] In **LEPHEMA v TOTAL LESOTHO (PTY) LTD** [2014] LSCA 30 this court had occasion to consider the meaning of "*disputes concerning land"*. After referring to the long title of the Act, it held, at para [22]

> *"In regard to the jurisdiction issue the enquiry as to what the expressions 'relating to land' or 'concerning land' mean, must therefore focus on the provisions of the Act. It is clear, in my view, that the Act is concerned (apart from the presently irrelevant matter of allocations unaccompanied by the grant of title) with title to land, derogations from title and rights which override title. The dispute raised by Lephema's application, for example, unquestionably relates to or concerns property but it is common cause that it is not a dispute 'relating to' or 'concerning' land within the meaning of the Act. Those expressions are of wide and general import but they*

must be interpreted within their context so that the disputes to which they refer are disputes involving claims to title, claims relying on derogations from title or claims to rights overriding title."

[16] In my view the dispute between the parties is clearly not a dispute involving claims to title, claims relying on derogation from title or claims overriding title and the submission that the dispute must be dealt with in the Land Court or the District land court cannot be upheld.

In the result the appeal cannot succeed, and I would issue the following order-

The Appeal is dismissed with costs

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R.B CLEAVER

ACTING JUSTICE OF APPEAL

I agree

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M. CHINHENGO

ACTING JUSTICE OF APPEAL

I agree

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B.M. GRIESEL

ACTING JUSTICE OF APPEAL

Counsel for the Appellant : Adv M.P. Tlapana

Counsel for the Respondent : Adv M. Masoabi