C. of A. (CIV) No. 6 of 1983

IN THE LESOTHO COURT OF APPEAL

In the matter between:

'MAMOKHELE MOHATLA Appellant

v.

COMMISSIONER OF POLICE AND 2 OTHERS Respondents

HELD AT MASERU

Coram:

Mahomed, J.A.
Aaron, J.A.
Wentzel, J.A.

J U D G M E N T

MAHOMED J.A.

The appellant in this matter brought an application in the High Court for an order directing the respondents to release THAKANE MOHAPI ("the detainee") who it was alleged had been arrested by the Police and detained by the police. The notice of motion also prayed for other ancillary relief.

A rule nisi was granted by Cotran C.J. on the first of June 1983 calling upon the respondents inter alia to produce the body of the detainee on the 6th June, and to show cause why they should not release the detainee forthwith.

It is common cause that the detainee was in fact released on the 1st of June, 1983. For that reason the respondents filed a short affidavit on the return day from Colonel Mabote to the effect that the detainee had been released on the first of June 1983, and that the respondents were unable to produce the body of the detainee in compliance with the Court Order.

2/ The sole issue .....

The sole issue before Cotran C.J. on the return day was, therefore, the issue of costs, and the learned Chief Justice ordered that each party was "to bear his or her costs". The appellant appeals against this decision and contends that the respondents should have been ordered to pay the costs of the proceedings in the High Court.

It was common cause in the Court a quo that the rule nisi was served on the offices of the Solicitor General at about 4 p.m. on 1st June in accordance with normal practice where the respondent is a Government department. The detaine says that she was released at about 2.59 p.m. on that day. The respondents were, therefore, not in a position to comply with the Court Order at the time when it was served on the Solicitor General.

This circumstance is not per se a ground on which the Court would be precluded from ordering costs against the respondents. The correct approach is to ask:

1. Was the application for the release of the detainee reasonably necessary when it was made? (See Thoahlane v. Commissioner of Police and Solicitor General, CIV/APN/9/82 in the High Court of Lesotho 15th February 1982 - unreported)

2. Was the applicant entitled to succeed in the application if the detainee had not been released?

As to the first question, I am of the view that on the papers before us the application was clearly necessary at the time when it was made. The detainee had been in custody for some 48 days and there was absolutely nothing to indicate that the respondents were about to release her, or that they would have done so if the application had not been launched by the filing of the notice of motion and the supporting affidavits of the 31st of May 1983.

3/ The main question .....

The main question which must, therefore, be examined is the merits of the application. In this regard, the Judge a quo held that it would not be justifiable "on the papers as they stand to jump to the conclusion that the detention was illegal", and he drew attention to the paucity of relevant and admissible evidence before him and the possibility of further litigation in the matter.

It is necessary to examine the merits of the application more closely. The appellant had contended that :

1. The detainee was arrested and detained on the 13th April, 1983. (This was admitted by Colonel Mabote and was, therefore, clearly correct)

2. The detainee was in detention for a period of some 57 days when the application was brought. (This computation is incorrect because only 48 days had elapsed since the 13th of April, 1983).

3. This constituted a contravention of the Internal Security Act which provided a maximum period of 42 days during which person could be detained.

4. The detention of the detainee was unlawful "as no provisions of any law have been observed."

The last two contentions were also raised before the Judge a quo who dealt with these contentions in his judgment as follows :-

> "Mr.Gwentshe says they have been detained for 57 days, but in fact it was 48 days from 13th April 1983 to 1st June. I see no express limit of 42 maximum in any section of the Act but the submission was that the days counted arose by implication of other Sections of the Act, notably sections 32 to 35. It was pointed out that advisors had not been appointed until 19th April, 1983, and in the absence of a further temporary detention in terms of section 33 the term has expired so the applications were justified on this ground. I am not able with respect to follow that argument. In this application it is not possible to get into the merits .. .." (He then goes on to refer to the paucity of the averments in the affidavits)

In order to appreciate this problem it is necessary to deal more fully with the relevant provisions of the Internal Security Act No.6 of 1982 which were of application.

4/ 1. Section 32 ....

1. Section 32 provides that a member of the police force may, without warrant, arrest a person whom he reasonably suspects to be person concerned in subversive activity.

2. A person so arrested in terms of section 32 by a member of the police force shall not be detained for more than 14 days, but he may further temporarily be detained by an Interim Custody Order of the Commissioner under Section 33 (Section 32(2))

3. The further interim custody order made by a Commissioner in terms of Section 33 must be reported by him to the Minister (Supra 33(2))

   (a) The Minister has a period of 14 days after the Commissioner has made his order to refer the case to an adviser if he so wishes. If he does not do so, the order of the Commissioner ceases to have effect (Section 35(1))

   (b) If the Minister does refer the matter to an adviser, the machinery of Sections 36 and 37 comes into operation to enable the adviser to make a report to the Minister, after giving the detainee a proper opportunity to make representations in terms of Section 36.

4. Upon receipt of the adviser's report, the Minister must consider the case of the detainee in order to satisfy himself that the detainee has been concerned in subversive activities, and that his detention is necessary for the investigation of those activities with a view to criminal proceedings before a Court

   (a) If he is not so satisfied he shall sign a written order releasing the detainee (Section 38(1)).

   (b) If he is so satisfied, he may make a further detention order :-

      (i) The Minister must make such a detention order, within 14 days following the date of the Commissioner's interim custody order (Section 38(2)

      (ii) The Ministerial detention order itself can only be effective for a maximum period of 14 days from the date of the Order. (Section 38(3)).

5. It follows from the aforegoing (subject to a

5/qualification in .....

qualification in Section 38(2) which is dealt with in paragraph 6 hereunder) that the maximum period for which a person can be detained in terms of Part IV is 42 days, being

(a) the initial 14 days persuant to a police arrest under Section 32;

(b) the succeedure of 14 days of the commissioner interim custody order made under section 33; and

(c) the further period of 14 days persuant to a Ministerial order under Section 38(3), which must be made within 14 days following upon the date of the Commissioner's interim custody order.

6. Within a maximum period of 42 days after his first detention, the detainee must, therefore, be released from detention unless he falls under the qualification set out in Section 38(2), that is

> "unless he is in custody under some other provision of this or any other law, or is arrested under the provisions of this Part on information other than, or for reasons other than, those stated under Section 36(1) in respect of that interim order".

Clearly a detainee, cannot make a lawful claim to be released if,

(a) "he is in custody under some other provision of this or any other law". He may for example, have appeared in Court on a criminal charge and have been refused bail, or may have been actually convicted and sentenced to imprisonment.

(b) he is arrested under the provisions of Part (IV) of the Act "on information other than, or for reasons other than, those stated under Section 36(1) in respect of that interim custody order" when the detainee is informed about the case alleged against him in order to enable him to make representations.

The phrase "reasons other than those stated under Section 36(1) in respect of that interim custody order" requires some consideration. The "reasons" referred to must mean "the statement in writing of the activities of which he is suspected". That would refer back to the sub-

6/ versive activities .....

versive activities on suspicion of which he was arrested by the member of the police force, or on suspicion of which he was made subject to an interim custody order for temporary detention.

It follows that the qualification in Section 38(2) contemplates new information or new reasons justifying a detention having come to light after the Commissioner has made his interim custody order and after the detainee has in terms of Section 36(1) been informed about the activities of which he is suspected, for the purposes of enabling him to make representations. It is clear, however, that a new "arrest" would then have had to be made on this basis.

In the present case, the appellant alleged in her founding affidavit that the detainee had been detained for more than 42 days since her arrest and further alleged that the detention was unlawful. The respondents did not file any affidavit, setting out reasons why the detention was unlawful. The respondents did not file any affidavit, setting out reasons why the detention was lawful, or that notwithstanding the lapse of the period of 42 days, the detainee had been in lawful custody thereafter because of a fresh "arrest" under the Act. There is no suggestion that such further custody followed upon a charge in a Criminal Court, before whom the detainee might have appeared, and which refused bail or sentenced her to imprisonment. In the circumstances, the applicant had established in my view a prima facie case of unlawful detention which the respondents made no attempt to contradict.

The English remedy of habeas corpus finds its equivalent in the Roman Dutch Law in the interdictum de homine libero exhibendo which is referred to in Voet: 43 : 29, based on the Practor's Edict as set out in Digest 43.29

(See 1962 S.A. L.J. 283
Hahlo and Kahn : The Union of South Africa:
The Development of its Laws and Constitution
(1960) p.137)

Invoking this remedy, in the case of Principal Immigration

Officer and Minister of Interior v. Narayansamy 1916 T.P.D. 274, Wessels J said

> "Apart from any legislative enactment, there is an inherent right in every subject, and in every stranger ..... to sue out a writ of habeas corpus. This right is given not only by English law but also by Roman-Dutch Law prima facie, therefore, every person arrested by the warrant of the Minister, or by any other person, is entitled to ask this Court for his release, and this Court is bound to grant it unless there is some lawful cause for his detention."

Where an applicant has, therefore, shown prima facie grounds for believing that a detention is unlawful, the Courts have consistently required the detaining authority to show cause why the detention is lawful. This was the approach adopted by Mofokeng J. in his very thorough and lucid judgment in the case of Sello v. Commissioner of Police and Another 1980(1) L.L.R. 158 at 168 where the Learned Judge stated

> "It is argued, on behalf of the first respondent, that there is no evidence in the petition to support the allegation that the arrest and detention of the detainee is wrongful and unlawful. The contents of paragraph 5 of the said Sello's affidavit..... in my view, have established prima facie case against the first respondent. In any event there is never any presumption that the arrest and detention of an individual is lawful until the contrary is shown. The Act in question does not purport to establish anything of the sort. In my view the onus is on the first respondent to show, on a balance of probabilities, that his arrest and the detention of the detainee is lawful, that is : that it is strictly in accordance with the provisions of the Act. Or as Bankes L.J. said in Rex v. Secretary of State for Home Affairs Ex parte O'Brien 1923(2) K.B. at 375.
>
> " "The duty of the Court is clear, the liberty of a subject is in question. The Court must enquire closely into the question whether the order of internment complained of was or was not lawfully made."
>
> The Act is a very drastic one indeed on an individual. Parliament has seen fit to curtail the liberty of an individual in order to protect that of the State. Parliament has seen fit to give to an individual the authority to terminate another infividual's liberty if the former individual is of a certain opinion. The detained person is at the mercy of that individual

8/ as to when he will .....

> as to when he will be allowed to regain his liberty .... It is the main function of the Courts in our Kingdom to protect the rights of an individual. It is equally the function of Parliament. If those rights are infringed or curtailed, however, slightly, and the situation is brought to the notice of the Courts, our Courts will jealously guard against such an erosion of the individual's rights. Any person who infringes or takes away the rights of an individual must show a legal right to do so. The rights of an individual being infringed or taken away, even if a legal right is shown, the Courts will scrutinise such legal right very closely indeed. If it is an Act of Parliament, the Courts will give it the usual strict interpretation in order to see whether the provisions of the said Act have been strictly observed. If the Courts come to the conclusion that the provisions of such an Act are not being strictly observed then the detention of the detainee would be illegal and the Courts will not hesitate to say so ....."

The approach, adopted by Mofokeng J, as to the duty of a detaining authority where there are prima facie grounds for believing the detention to be unlawful, is supported by a large number of authorities.

> In re William Kok 1879 Buch 45 at 60; Kazee v Principal Immigration Officer 1954(3) S.A. 759 at 761: In re Merechane (1882)(1) S.A.R. 27; Tonge v Governor of Johannesburg Gaol 1903 T.H. 393.

Such an approach is in accordance with both logic and sound jurisprudential values. The protection of the liberty of the subject and the need for recourse to due process of law where there are legitimate grounds for its curtailment are basic to the foundations of civilized society. They constitute a crucial heritage of our legal culture, which the Courts would be anxious to protect against unlawful invasion.

The appellant established prima facie grounds for the belief that there was an unlawful invasion of the liberty of the detainee. The Court called upon the respondents to justify its actions. The respondents chose not to do so. They did not even deny the averment that the detention of the detainee was unlawful. In these circumstances, I see no reason why the appellant should not have been entitled to her

costs. She was clearly justified in coming to Court to enforce the rights of the detainee, and to be compensated for the costs incurred in doing so.

In addition to alleging unlawful detention, the appellant in her founding affidavit made a number of other allegations to the effect that even if the detention of the detainee was lawful, there were other contraventions of the Internal Security Act of 1982. It was contended by the respondent's Counsel that many of these allegations were based on hearsay evidence, although it was conceded that the appellant's averments that the detainee was wrongfully refused the right to receive food from outside the prison was based on admissible evidence.

Since the appellant was,in my view,in any event entitled to the costs of the application in the High Court, because of the failure of the respondents to rebut in any way the prima facie grounds adduced by the appellant in support of the averment that the detention of the detainee was unlawful, it is unnecessary to examine more closely all these allegations of contraventions of the Act. The only issue on appeal is the issue of costs

The question of costs is primarily a matter to have been determined in the exercise of the discretion of the Court a quo. An Appeal Court would not interfere with the the judicial exercise of such a discretion simply because it is of the view that if it had been sitting as a Court of first instance, it would have made a different order.

In the present matter, however, the Court of Appeal is free to substitute its own discretion because I have found that the appellant had established a prima facie case of unlawful detention which the respondent had failed to answer. This finding was not made by the Court a quo whose discretion on the question of costs was, therefore, not predicated thereon.

In the result, it is ordered that :

1. The appeal be upheld with costs.

2. The order of the High Court to the effect that each party bears its own costs is set aside and substituted by the following order :-

"The respondents are directed to pay the applicant's costs in the application."

Signed by I. Mahomed
I. MAHOMED
Judge of Appeal

I agree Signed by S. Aaron
S. AARON
Judge of Appral

I agree Signed by E.M. Wentzel
E.M. WENTZEL
Judge of Appeal

Delivered on 28th this day of January, 1985 at MASERU

For Appellant : Mr. W.C.M. Maqutu
For Respondent : Mr. E.D. Muguluma

C.of A. (CIV) No.3 of 1984.

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

MIKHANE MAQETOANE — Appellant

and

MINISTER OF INTERIOR	1st Respondent
CHIEF DAVID G. MASUPHA	2nd Respondent
CHIEF MOJEA MASUPHA	3rd Respondent
CHIEF MATHEALIRA J.MASUPHA	4th Respondent

HELD AT MASERU

Coram :

SCHUTZ, P.
AARON, J.A.
WENTZEL, J.A.

J U D G M E N T

Wentzel, J.A.

In 1983 the appellant applied to the High Court for an order -

" (a) Declaring the Applicant, the official headman of Maqetoane's pursuant to the High Commissioner's Notice No. 170 of 1950.

(b) Declaring that Government Notice No.25 in the official Gazette Extraordinary No. 3413 of the 11th February, 1964 is invalid insofar as it relates to Applicant and the Headmanship of Maqetoane.

(c) Granting such further or alternative relief as the above Honourable Court may deem fit.

(d) Costs of this application only if the Respondents oppose it."

He cited as respondents the Minister of the Interior as 1st respondent and the Principal Chief of 'Mamathe's and 2 Ward Chiefs of that area as 2nd, 3rd and 4th respondents.

He failed in the High Court and appeals now to this Court. I shall state the facts as I outline the history of the relevant enactments affecting the chieftainship in this

Kingdom. In doing so I have had the benefit of Mr. Tsotsi's very extensive heads of argument and most helpful oral submissions.

PROCLAMATION 61 OF 1938

In terms of Section 3(1) of Proclamation 61 of 1938, the High Commissioner was empowered after consultation with the Paramount Chief to declare any Chief, Sub-Chief or Headman to be Chief, Sub-Chief or Headman for any specified area or areas by notice in the Gazette. In terms of High Commissioner's Notice No. 170 of 1950, the appellant was declared to be the Headman for the area of Maqetoanes.

THE BASUTOLAND (CONSTITUTION) 1959

The Basutoald (Constitution) Order in Council 1959 in Part VI under the title "The Chieftainship" established a College of Chiefs. (Section 73(1)). In the 2nd Schedule, there were set out the names of the Principal and Ward Chiefs, who were then members of the College together with other persons elected to the college. The proviso to Section 73(1) makes specific mention of Headman as members of the College; but the office of Headman did not in itself imply such membership.

The powers and duties of the College of Chiefs were defined in Section 74(1). The relevant provisions are -

"(b) The recommendation for recognition by the Paramount Chief, of Chiefs and Headmen, or for an acting appointment during minority, illiness, absence, incapacity, removal or suspension of a Chief or Headman.

(c) The settlement of disputes concerning the succession to the offices of Paramount Chief, Chief or Headman or concerning other matters relating to the powers and duties annexed to the offices of Paramount Chief, Chief or Headman which are regulated by Basuto law and custom.

(d) The definition and adjustment of the territorial boundaries of areas within which Chiefs and Headmen exercise their powers and perform their duties: .

3/ Provided that .....

Provided that the definition or adjustment of the boundaries of the area of jurisdiction of a Principal or Ward Chief shall be subject to the approval of the High Commissioner.

(e) The investigation of allegations of misconduct, inefficiency or absenteeism of any Chief or Headman, and, as a result of such investigation, the making of recommendations to the Paramount Chief for the suspension or removal of any Chief or Headman by the Paramount Chief.

(f) The review and amendment of the grading or classification of Chiefs and Headmen.

(g) The review and amendment of the lists of persons holding the appointment of Chief and Headman."

A Standing Committee of the College was established in terms of Section 75(1). Section 76 empowered the College to make Standing Orders both for the College and its standing committees and "without prejudice to the generality of the ..... power" (i.e. to make standing orders) Section 76 particularly referred to the procedure to be adopted in exercising the powers of the College under paragraph (a)(b) (f) and (g) of Section 74(1). Section 77 required the concurrence of the Chief Justice for standing orders made to deal with the matters referred to in paragraphs (c) (d) and (e).

Section 78 of the 1959 Order in Council provided the following procedure for proceedings under Section 74:

"(1) The finding, decision or recommendation shall be communicated to the Paramount Chief who shall either notify his <u>provisional</u> acceptance to the College or Standing Committee or refer it back for further consideration.(my underlining)

(2) When the Paramount Chief has notified his provisional acceptance or the matter has been reconsidered then -

(Section 78 (2))

" <u>all parties shall be informed</u> of such finding decision or recommendation in the prescribed manner" (my underlining)

Section 79(1) provided for a review in the High Court by any person aggrieved within 30 days of the decision being communicated to him. After the expiration of the 30 day period, or, if there was a review, after the High

Court had determined the matter, the Paramount Chief was to give his decision (in accordance with the determination of the College or Standing Committee or the High Court as the case may be) and that decision was to be "made public in such manner as may be prescribed and thereupon shall be conclusive and binding on all persons affected thereby" There was, however, a proviso - the Paramount Chief was not entitled to exercise any authority to recognise, suspend or remove any Chief or Headman except after prior consultation with the Resident Commissioner. These matters are dealt with in Section 80.

THE STANDING ORDERS

Under Government Notice No. 15 of 1960, Standing Orders for the College of Chiefs were published. Part K dealt inter alia with the "Recognition of Chiefs and Headmen. Review and Recognition of Chiefdoms and Headmanships". Under Standing Order 45, the Headman concerned in the matter was entitled to attend and speak on the matter.

Standing Order 46 provided for publication in the Gazette of a final decision by the Paramount Chief made in terms of Section 80 of the 1959 Order in Council.

Under Government Notice 16 of 1960, Standing Orders for the Standing Committee were published. Standing Order No. 19 provides -

> " Whenever a finding, decision or recommendation of the Standing Committee has been provisionally accepted or reconsidered in pursuance of sub-section (2) of section seventy-eight of the Basutoland (Constitution) Order In Council, 1969, the Chairman shall with notice to the parties fix a day for the re-opening of the proceedings. On that day the Chairman shall announce in Open Committee the finding, decision or recommendation in the form in which it was provisionally accepted or in the form agreed upon after reconsideration. Announcement under this Rule shall be communicated to the parties within the meaning of sub-section (1) of section seventy-nine of the Basutoland (Constitution) Order in Council, 1959."

Under Government Notice 17 of 1960, the High Court (College of Chiefs's Review) Rules, 1960 were published.

5/ It is thus .....

It is thus apparent that, as is befitting its status in the Kingdom, the office of Chief or Headman was one which was to be created with prescribed formality and, similarly, if the particular office itself was to be ended or its incumbent removed, the law prescribed a procedure whereby affected persons would be heard, and a procedure for publication, so that the public would be aware of these matters so significant in their effect on the lives of the people of Lesotho.

THE 1964 GOVERNMENT NOTICE

On 11th February, 1964, Government Notice No. 25 was published in terms of Section 80 of the Basutoland (Constitution) Order in Council 1959. That notice was one in which the Paramount Chief's final decision in terms of Section 80 was notified for general information recognising the persons named in a schedule thereto as Principal Chiefs, Chiefs, and Headmen. The area Maqetoane was excluded and appellant was accordingly not recognised as a Headman therein.

Why appellant's appointment was not continued is a matter of controversy. There is a suggestion that it was by mistake but the 1st Respondent averred in these proceedings that the office in question was abolished "consciously in 1964".

In the 1950 Notice under heading "Ward of 'Mamathe's and Thupa-Kubu", the appellant was gazetted by name as Headman of Maqetoane subordinate to the Principal Chief of 'Mamathe's and Thupa-Kubu. In the 1964 Notice, it is patent that a major restructuring of the ward, its hierarcy and areas was done.

Whatever the situation, however, as to why and how appellant's name came to be omitted, what is plain is that the procedures for informing appellant were not followed, nor was appellant ever called upon to address the College of Chiefs. That being so, it seems to have been not merely a particular headmanship, but that the area of which he was Headman was itself omitted from the list, along with others, and had appellant brought a review in the High Court, he would have succeeded on the facts

6/ as they are .....

as they are now presented to us. (D.T. Griffith vs T.C. Makara, HCTLR 1963 - 1966 p. 292).

APPELLANT'S DELAY

Appellant came to learn of the decision in 1964. It was only in 1983 that he launched proceedings for the orders set out earlier in this judgment. The delay is, on the face of it, inordinate and even gross. The proceedings are not based on Section 79(1) of the 1959 Order in Council; that has long since been repealed. Nor are the proceedings a review of a decision but rather an application for a declaration of rights; appellant says in effect, that he was and still is the Headman of Maqekoane, and that the Government Notice which purported to remove him from office was invalid.

Nonetheless and even if the remedy is not review, but a declaration of rights, the delay is a factor to be considered, as the remedy of a declaratory order is a discretionery one.

The grounds upon which a Court can excuse delay are set out in Wolgroiers Afslaers (Edms) Bpk v. Munisipaliteit van Kaapstad 1978 (1) S.A. 13. Prejudice to those affected by an order is ordinarily one of the most significant of these factors.

In this case, appellant, on learning of the omission, made representations to his Superior Chiefs for his reinstatement. Even the 4th respondent who would be directly affect by the gazetting of Maqetoane, as it presently is in his area, supported appellant. He is the Chief of Pulane and according to the determination of 1964, Maqetoane forms a part of his area, having on the face of it disappeared as a separate entity; he was served with the application and did not oppose.

We invited counsel for respondent to suggest the prejudice which might arise if appellant were reinstated; she relied only on the fact that he would be reinstated to an office which no longer exists.

It does not appear as if there will be prejudice to any body if the application is granted. Appellant has also given

7/ an explanation for .....

an explanation for his delay. Soon after he heard that his name was on the list, he approached the authorities through the Chiefs directly superior to him, hoping for some kind of administrative action. Evidence of some letters was placed before us. The representation apparently went on for many years, because appellant believed it was a matter for the administration to put right.

Finally the Permanent Secretary to the Ministry of Interior and Chieftainship Affairs in March, 1983, referred appellant to Griffith's case (supra) and suggested that possibly an application might be made to Court.

In the very unusual circumstances and despite the delay, we would not on that ground refuse to give appellant relief. However, the fact that relief was available in 1964 does not mean that a declaration as sought by appellant is competent now in 1985.

I turn now accordingly to the legislative provisions from 1964 relevant to the office of Chief and Headman.

THE BASUTOLAND ORDER 1965.

Schedule 2 to the Basutoland Order 1965 (an Order of the United Kingdom in Council) established the Constitution of Basutoland. The 1959 Order was repealed in the First Schedule, but in Section 11(3) provision was made for the continuation in force of certain relevant sections and rules in respect of pending matters. Section 83 of the Constitution provided -

> "(1) The twenty-two offices of Principal Chiefs and Ward Chiefs set out in Schedule 2 to this Constitution and the other offices of Chief recognised under the law in force immediately before the commencement of this constitution are hereby established.
>
> (2) Nothing in sub-section (1) of this section shall prevent the alteration from time to time, by our under any law in that behalf, of the number of offices of Chief of any kind (other than Principal or Ward Chief) or the area of Jurisdiction of any Chief (other than a Principal Chief or a Ward Chief).

8/ (3) Each Chief .....

(3) Each Chief shall have such functions as are conferred on him by this Constitution or by or under any other law."

Section 130(1) defined Chief as -

"Chief" does not include Motlotlehi but includes Principal Chief, Ward Chief and Headman and any other Chief whose office is established by section eighty-three (1) of this Constitution, and references to a Chief are references to the person who, under the law for the time being in force in that behalf, is recognised as entitled to exercise the functions of the office of that Chief;"

Schedule 2 stated the Principal and Ward Chiefs, and included as one of the Principal Chieftainships that of 'Mamathe's, Thupa-Kubu, Teyateyaneng and Jordan. The second respondent is the Principal Chief of 'Mamathe's.

In terms of Section 84 of the Constitution, the College of Chiefs was retained, but it appears from this Section read with Section 22 that for the time its functions were limited to those relating to the Paramount Chieftancy and the Regency.

THE INDEPENDENCE ACT OF 1966

The Lesotho Independence Act of 1966 (an Act of the United Kingdom Parliament) did not affect the position.

THE CHIEFTAINSHIP ACT

Act No.22 of 1968 (The Chieftainship Act) dealt extensively with the office of a Chief. Section 2(1) initially read as follows :

"Chief does not include the King but includes a Principal Chief, a Ward Chief, and a Headman and any other Chief whose office is established by Section 88(1) of the Constitution and references to a Chief or references to the person who under this Act is entitled to exercise the functions of the office of that Chief."

It would appear that this reference to Section 88(1) is an error; perhaps section 83(1) was intended. In the light of the view I take, I fortunately do not have to determine this Section 5(1), to which I refer later also has that error.

9/ As Section 2(1) .....

As Section 2(1) provided, after its amendment by the Chieftainship (Amendment) Order 29 of 1970:

> "Chief does not include the King but includes a Principal Chief, a Ward Chief and a Headman and any other Chief:
>
> (a) whose office is acknowledged by Order No. 26 of 1970; and
>
> (b) whose succession to an office of chief has been approved by the King acting in accordance with the advice of the Minister."

In terms of an amendment in terms of Act 12 of 1984 that definition was amended to read -

> "'Chief' does not include the King but includes a Principal Chief, a Ward Chief, a Headman and any Chief whose -
>
> (a) Office is acknowedged by the offices of Chief Order 1970;
>
> (b) Succession to an office of Chief has been approved by the King acting in accordance with the advice of the Minister; or
>
> (c) hereditary right to the office of a Chief is recognised under customary law, and his succession to the office of Chief has been approved by the King acting in accordance with the advice of the Minister."

Section 5(1) (as amended by Order 29 of 1970) provided -

> "No person is a Chief unless he lawfully holds an office of Chief acknowledged by Order No. 26 of 1970 or unless his succession to an office of Chief has been approved by the King acting in accordance with the advice of the Minister."

That Section too was amended by Act 12 of 1984. It now reads -

Section 5(1)

"No person is a Chief unless -

(a) he holds an office of Chief acknowledged by the offices of Chief Order 1970;

(b) his succession to an office of a Chief has been approved by the King acting in accordance with the advice of the Minister; or

10/ (c) he has .....

(c) he has a hereditary right to the office of Chief under customary law, and his succession to an office of Chief has been approved by the King acting in accordance with the advice of the Minister."

It too, as it initially was published, had read:

"No person is a Chief unless he lawfully holds an office of Chief established by Section 88(1) of the constitution".

I have mentioned earlier my view that this reference to Section 88(1) is an error.

Part V of the Chieftainship Act under the Title "Lists of Holders of Office of Chief" provides in Section 14 :

"(1) Until such time as the Minister has, by notice in the Gazette under subsection (2), amended or replaced them, the following Notices have effect as giving public notice for general information of the names of each person who is authorised to exercise the powers and perform the duties of an office of Chief, that is to say, each High Commissioner's Notice and Government Notice in force immediately before the commencement of this Act relating to offices of Chief, to the extent that each such Notice is not inconsistent with the provisions and principles of this Act, and to the extent that a person to whom any such Notice applies has not been deprived according to law of the right to exercise the powers and perform the duties of an office of Chief.

(2) The Minister may from time to time, by Notice in the Gazette, give public notice for general information of the names of persons who hold the office of Chief, or who are authorised to exercise the powers and perform the duties of the office of Chief, and may amend, revoke and replace a notice specified in subsection (1) or a notice made under this subsection for the purpose of giving public notice of anything affecting those offices or the holders thereof, including any punishment under the provisions of Part VI relating to discipline and anything done under the provisions of Part VII relating to the emoluments of an office of Chief.

(3) The provisions of this section are in addition to, and not in derogation from, the other provisions of this Act, and do not affect any remedy that may exist, or may have existed at the material time, in respect of holding or succeeding to, or exercising the powers and performing the duties of, an office of Chief, and accordingly a Notice referred to in subsection (1) or made under subsection (2) does not affect any such remedy."