CIV/APN/158/82

IN THE HIGH COURT OF LESOTHO

In the Application of :

CHIEF SHOAEPANE MASUPHA Applicant

v

1. MINISTER OF INTERIOR)
2. SOLICITOR GENERAL) Respondents

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 2nd day of March, 1984

The original Court file in this application has been lost or mislaid and minutes of proceedings before various Judges who have been seised of the application at different stages are not available but there is no dispute as to what had actually taken place.

On the 12th July 1982 the applicant, Chief Shoaepane Masupha, sought and was granted a rule nisi, calling upon the respondents, the Minister of Interior and the Solicitor General, to show cause why:-

(a) First Respondent shall not be restrained from enforcing his order dated the 18th March 1982 depriving the Tlhakoli people of lands allocated to them by

/Applicant

Applicant in the Lits'iphong area.

(b) First Respondent shall not be interdicted from compelling Applicant to deprive the Tlhakoli land allotees of their arable lands as that is ultra vires of Applicant.

(c) First Respondent's order shall not be declared null and void as it is ultra vires of First Respondent.

(d) First Respondent shall not be restrained from exercising the judicial powers of the courts.

(e) First Respondent shall not in future be compelled to observe the audi alteram partem rule in whatever he does which affects the rights of other people.

The application was opposed and as the return date was extended from time to time, twenty five persons whose names appeared in Annexure C of the applicant's founding affidavit moved the Court on the 19th October 1983 for leave to intervene purportedly in terms of Rule 12(1) of the High Court Rules citing the applicant in the original application, together with the Minister of Interior and Solicitor General, the respondents in the original applications, as respondents. The original applicant who became first respondent in the application to intervene, and the Minister of Interior and Solicitor General, the two original respondents in the application, who were cited as second and third respondents, were given until

/the

the 26th October 1983 to file affidavits, the return date being set originally for the 31st October 1983 and then to the 7th November 1983. As I said I have no minutes of the Judges' notes but it seems that application for intervention was unopposed and was accordingly granted. Subsequently to that, affidavits from twenty three out of the twenty five applicants in the intervention were filed. These persons called themselves applicants but the original applicant treated and referred to them as respondents. On the 12th January 1984 the original applicant filed an affidavit in answer to the affidavit of the "fourth respondent" in the application for intervention, also known as the second applicant in the intervention proceedings, Matlamela Motsoene. On the 13th January 1984 a gentleman called Potsane Thabo Letsie, the chairman of the "disciplinary committee established in terms of the Chieftainship Act 1968" filed an affidavit saying that the original applicant has been deprived of his "powers and duties for 7 years, 2 of which are suspended for 2 years on condition that he behaves properly" during that period, and implied that the applicant has no locus standi from the date of his suspension, i.e. 23rd July 1982.

With this melee the application was argued before me on 17th January 1984, Mr. Maqutu appearing for the

/original

original applicant, Mr. Tampi for the original two respondents, and Mr. Sello, for the twenty five applicants for intervention, twenty three of whom filed affidavits, but who were respondents as far as the original applicant is concerned. Rule 12(1) of the High Court Rules provides:-

> "Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action, may on notice to all parties, at any stage in the proceedings before judgment, apply to court for leave to intervene as a plaintiff or a defendant. The court may, on such application, make any order, including any order as to costs which it thinks fit and may, if granting such order, give such directions as to further pleadings or other procedure in the action as it thinks fit."

As I read it this rule permits of intervention only in actions and does not apply to applications from which it follows either

(a) that intervention should not have been permitted, or

(b) if permitted, there should have been a simultaneous order that the application be converted to a trial in the normal way.

It is too late to do anything about it now. The intervention may have been in order not in terms of Rule 12(1) but in terms of Rule 8(5) of the Rules which permits a person having an interest which may be affected by a decision in the application for leave to oppose. I must treat the "intervention" by the twenty five persons on the basis of this latter Rule because they do clearly have an

/interest

interest.

Mr. Maqutu argued in brief that the Minister acted ultra vires his powers in s.8 of the Chieftainship Act 1968, that he had interfered in the judicial process, that if the applicant had wrongfully deprived the applicants in intervention (or respondents) they were, and still are, free to take the matter up in the law Courts but the Minister cannot take the matter up on their behalf administratively. Mr. Tampi argued in brief that the Minister acted within his powers under both s.8 of the Chieftainship Act 1968 and s.12 of the Land Act 1979. Mr. Sello argued that the Minister acted within his powers under the Chieftainship Act, and within the context of Central Government legislation to control both land and the chieftainship by laws and that in any event, they are entitled, in their own right, to a declaration on whether the deprivation of their land by the applicant was lawful or unlawful and if it was unlawful in the first place, the applicant, as far as they were concerned cannot seek equity when he himself had not exercised equity i.e. he who seeks equity must come with clean hands and the applicant's hands were not clean.

The history of the dispute goes back to many years ago but to understand the situation a synopsis of Lesotho land tenure and chieftainship institutions must be given.

/1. Until

1. Until well after the annexation of Lesotho in 1868 by the British Crown all questions relating to land were dealt with by the chieftainship hierarchy the final arbiter being the Paramount Chief. No central government legislative intervention (except in the camps or reserves) worthy of note took place until the Basutoland (Constitution) Order in Council 1959 (Vol. I Laws of Lesotho p.23).

2. Two of the vexed problems relating to land use were the questions of "paballo" and "interploughing" rights. The meaning of these terms can be found in Duncan Sotho Laws and Customs who was writing about the situation as understood by him until the year 1960. These are found in chapter 36 page 70-73 but land problem are interwind with the chieftainship, and chapter 28 page 47-58 throws light on the complications arising from the system especially that of "placings", and chapter 44 page 86-94 which deals with the subject of arable land tenure.

3. The Paramount Chief, by order under s.8(1)(g) of the Native Administration Proclamation 61 of 1938, issued in 1958, a rule (Laws of Lerotholi 40) called "Elimination of Lipaballo".

/4. Quite

4. Quite apart from the problems of paballo and interploughing, allocation of land and deprivation of land already allotted, was in effect, until comparatively recent times, controlled by the chiefs as from time to time directed by the "Laws of Lerotholi" the first codified version of which appeared in 1905. There were of course certain "customary understandings" of what is fair or what is not, but abuse was unfortunately rampant. An individual aggrieved party, could in theory, reach the top, i.e. the Paramount Chief's Court but not many had either the resources or the time or the power. For the few who managed to reach the top "decisions" or "judgments" were pronounced but these were in the form of admonitions or exhortations to obey. Some were obeyed, some not obeyed, and many were obeyed in theory but sabotaged in practice by the chief, if not personally, through surrogates, viz. lower ranked chiefs subordinate to him down the line and their phalas messengers and hangers on. Enforcement was difficult because execution could not be obtained effectively except with the aid of the District Commissioner or the District Officer, not always successfully; or through the offending chiefs themselves, and few of them accepted to be their own executioners.

/What

What happened in this case gleaned from evidence in affidavit form and annexures and not after viva voce evidence appear to be as follows.-

1. In the year 1966 the applicant succeeded as chief of an area known as Tlhakoli and Thaba Phatsoa in the district of Leribe but subordinate to the Principal Chief of Leribe. He was gazetted as such.

2. An area of land known as Litsiphong and Thaba was administered by the Chief of Matlakeng who was the Principal Chief of Leribe or his nominee.

3. The position on the grounds before the applicant's accession was that the area was occupied by the twenty five "interveners" who, or whose forebears, were allocated the plots in 1921. They owed allegiance to the Principal Chief of Leribe and Matlakeng who not only claimed Litsiphong and Thaba but which was in fact under his effective control. It may be that the applicant's predecessor in office was unhappy with the boundary.

4. When the applicant assumed the chieftainship of Tlhakoli and Thaba Phatsoa he claimed that the area of Litsiphong and Thaba fell within his jurisdiction and not that of the Principal Chief of Leribe.

/5. The

5. The respondents allege, and twenty three of the interveners swear, that in the year 1967 the applicant and his men invaded the area, reaped the crops thereon, and forcibly expelled them from the plots in the area in question. The applicant purported to allocate the area, in effect, mostly to himself, but placed some persons who owed allegiance to him, to utilise it, mostly, if perhaps not entirely, to his benefit by way of the custom of crop sharing.

6. On more than balance of probabilities the applicant did in fact invade the area but he says that he has lawfully deprived the twenty five interveners of their plots in terms of the law as it then stood. This is contradicted by affidavit evidence of his then second in command Makhobalo K. Molapo. What may have happened is that after he took the law into his own hands and ex-poste facto the invasion, he went through some motions, on balance shady and shadowy, to deprive the original owners and he purportedly allocated the land to others.

7. One (may be two) of the twenty five "interveners" took direct action at law in his individual capacity not against "the chief", i.e. the applicant but against the person who was allocated his plot by

/applicant

applicant. (See CIV/A/18/80 dated 17.3.82). This was a safer method in rural areas because the aggrieved party can escape the wrath of the chief and has better chances of survival. However, twenty three of the interveners did not take this lying down so to speak. There is no doubt that skirmishing took place although in what form no evidence is forthcoming (and it can take several forms) which skirmishing resulted in the applicant lodging an action at law in the Local Courts against the Principal Chief of Leribe. The form of action was in the nature of a dispute about boundaries. The twenty five interveners were not cited as parties. The applicant apparently lost in the Local Court, won in the Central Court, the Judicial Commissioner's Court and the High Court on the 17th December 1973 (CIV/APN/12/70) - Annexure A to applicant's founding affidavit. That action of course (see Duncan, supra, p.93) resolved the boundaries, not the legality of the forcible expulsion of the "interveners" who had been on the land. The applicant's argument, thought Mr. Maqutu, was that the Minister's action in ordering the applicant to restore the plots to the original owners and "interveners" runs counter to the Court's Judgment and is ultra vires the powers of the Minister.

/That

That order which was given in February or March 1982 after an administrative enquiry held by the Minister himself, was not obeyed.

8. Until the decision of the Minister therefore the position was as follows:-

(a) The "interveners" (or their forebears) were in physical occupation of their plots from the year 1921 to the year 1967, that is a period of 46 years.

(b) These persons owed allegiance to the Principal Chief of Leribe and Matlakeng and his successors.

(c) There is no clear evidence under what basis the interveners were originally allotted the land. If the boundaries were established and recognised or thought to be so there was neither paballo or interploughing. If it was paballo there is no evidence that the "interveners" (or their forebears) were called upon to elect in 1958 by the applicant's predecessor in accordance with the elimination of lipaballo rule. Indeed it may well be that they did not have to elect because no change of allegiance was involved and no one demanded it. The applicant's predecessor as chief did not manifest any claim to the area, or if he did, he did not pursue it, or there is no evidence that he did, or if he did, he was not successful.

(d) The twenty five "interveners" were forcibly expelled in 1967 by the applicant. This was 15 years before the Minister finally resolved the problem in their favour.

/9. The

9. The law between 1958 and 1982 had undergone a drastic change and the Central Government acquired, by legislation, administrative powers to control both the chiefs and the land (urban as well as rural) so that chiefs are no longer mandarins they formerly were and became subject to laws, to decisions pronounced whether by the administrative and executive organs, if intra vires their power, or by Courts of law, i.e. they are by and large civil servants of a special class.

10. The first legislative step towards achieving a semblance of order in individual land allocation and deprivation was taken under s.13 of the Basutoland Order 1965 in the Land (Advisory Board Procedure) Regulations 1965 (Vol. X Laws of Lesotho p.536), followed by the Land Procedure Act 1967 (Vol.XII Laws of Lesotho p.155), followed by the Chieftainship Act 1968 (Vol.XIII p.181) followed by the Land Act 1973 (Vol. XVIII Laws of Lesotho p.182), followed by the Land Act 1979 (Vol. XXIV p.96).

The evidence on affidavit shows on balance of probabilities that the applicant did oust the twenty five interveners in 1967 by force without recourse to the provision of the Land (Procedure) Act 1967 which the parties agree was applicable at the time. I say this

/because

because the applicant did not take legal steps to establish that the area of Litsiphong and Thaba was within his jurisdiction or boundary until he sued in February 1968 and he did not succeed until the High Court pronounced Judgment on boundaries in December 1973 after his physical occupation of the area. What he did was to use strong arm methods for expelling allotees established since 1921 protected to some extent by the written law of 1965 (the Land (Advisory Boards Procedure) Regulations) and more so by the Land (Procedure) Act 1967. The legal way of proceeding was for the applicant to go to the law first against the chief and after his claim to the boundaries was established in 1973 to give the twenty f.. - interveners if they really held by way of paballo, notice in terms of the Land (Paballo Rights) Act 1969 - (which repealed Rule 40 Part II of Laws of Lerotholi already referred) - to declare their allegiance. If they refused to accept he was still not allowed to help himself. He had to proceed to derogate the grant strictly in accordance with s.9 of the Land (Procedure) Act 1967 or the Land Act 1973 which came into force on the 1st March 1974 which provided for paballo and inter-ploughing (ss.16 and 17).

Legislative powers to control the chieftainship since Independence is found in the Chieftainship Act 1968 which has given the Minister vast powers.

/It

It is not disputed that the Minister does possess executive powers of control in s.8(1), 8(2), and 8(3). The applicant can succeed only if he is able to discharge the onus placed on him that the ministerial decision is either

(a) contrary to s.8(4) because it revoked the High Court's Judgment of 1973, or

(b) it was arrived at mala fide, or capriciously or without him following the tenets of natural justice.

On (a) it is clear that he did not disturb the High Court Judgment which pronounced in applicant's favour on boundaries not on the individual rights of those persons already on the land who were not affected at either under the customary law (Duncan, supra p.93-94) or under the written law starting from 1959 - as explained supra.

On (b) a scrutiny of the proceedings he held in situ (Annexure B of the founding affidavit) demonstrates that the Minister was scrupulously fair, listened to all points of view, weighed and took into account the High Court Judgment, and the position of one aggrieved party who took direct legal action against the new allottee and desisted from pronouncing on his case, and then gave

/a direction

a direction which was not of a nature that warrants any interference.

The application must accordingly be dismissed with costs.

Sgd. T.S. Cotran
CHIEF JUSTICE
2nd March, 1984

For Applicant Mr. Maqutu

For Respondents Mr. Tampi
Mr. Sello