

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

SEKHONYANA LETLATSA MASUPHA Appellant

and

LEROTHOLI THEBE MASUPHA Respondent

HELD AT MASERU

Coram:

SCHUTZ, J.A.
VAN WINSEN, J.A.
SCHREINER, A.J.A.

J U D G M E N T

Schreiner, A.J.A.

The Respondent sought an order restraining the Appellant from exercising either personally or through the agency of his wife 'Maletlatsa Masupha, or anyone else any chiefly powers, rights or functions in and over the area Ha 'Malehi in the Berea District.

In his founding affidavit the Respondent stated the following:

"1. I am the Applicant herein a male adult and the proclaimed chief of Thuathe in the Berea District where I also reside.

.....

3. In my capacity as chief of Thuathe I exercise jurisdiction over the area known as Ha 'Malehi through the agency of my ungazetted headman one Khaohano 'Malehi who resides there".

He then goes on to allege that the Respondent has been exercising chiefly powers in Ha 'Malehi.

The Appellant replied to the paragraphs set out above as follows:

AD PARAGRAPH 1

2. Save to deny that the Applicant is the proclaimed chief of Thuathe in the Berea District and to put the Applicant to the proof thereof, the contents of this paragraph are admitted.

.....

AD PARAGRAPH 3

4. (a) I deny that the Applicant is the Chief of Thuathe as he was lawfully suspended therefrom and has since not been reinstated as such and put the Applicant to the proof thereof. In the premises I deny that the Applicant has any right in law to exercise jurisdiction over the area known as Ha 'Malehi.

(b)"

The Appellant then contends that if the Respondent has been reinstated he denies that he has jurisdiction over the area inasmuch as the area was placed under his jurisdiction by the Principal Chief of Ha 'Mamathe whose decision was confirmed by a decision of the Motjoka Central Court in 1980 which decision was confirmed by the Minister of the Interior and Chieftainship on the 8th April, 1983.

Mr. Pheko who appeared for the Appellant asked that the matter be referred back to the Court of first instance for the hearing of evidence upon two issues. The first issue was whether the Respondent was the gazetted chief over an area which included Ha 'Malehi and the second was whether, he, the Appellant, had been appointed by the Principal Chief as his agent to exercise powers in Ha 'Malehi. He explained how his argument would then proceed in the event of it being found as a fact that the Respondent was not the gazetted chief in respect of Ha 'Malehi. He conceded that, in the absence of a formal gazetting, the Appellant could not claim chiefly powers which were derived purely by an appointment by the Principal Chief. However, if there was no person officially gazetted to be chief over Ha 'Malehi, Mr. Pheko contends that the chiefly power rests in the

Principal Chief who is then entitled to appoint a person of his choice to act for him in that area. Such a person would not be a gazetted chief but would be entitled to carry out such functions as the Principal Chief might depute to him.

Mr. Sello, who appeared for the Respondent did not dispute that if the Appellant was not the gazetted chief of the area, the Principal Chief could depute someone to carry out his functions in that area.

The first question, therefore, is whether, on the affidavits, there is a bona fide dispute of fact regarding the appointment of the Respondent raised on the papers. As was said in Peterson v. Cuthbert & Co. Ltd. 1945 AD 420 at p. 428, the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence.

The problem in the present case seems to be that the present submission of Mr. Pheko was not the basis of the original contention as it appeared from the affidavits. The affidavits make out a case that, during the suspension of the Respondent, the Principal Chief was entitled to, and did, appoint the Appellant in his place as far as the Ha 'Malehi area was concerned. As a result of this the Appellant was the rightful "chief", though not necessarily gazetted, of that area. However, it seems to be now common cause between the parties that the Appellant could not acquire chieftainship rights in this way. In the case of a suspension of a chief, there is a special procedure laid down for appointing a substitute.

An analysis of the passages in the affidavits quoted above shows that the denial by the Appellant of paragraph 1 was not an unqualified one enabling the question of the appointment of the Respondent to be placed in issue. The denial must be read with paragraph 3(a) which is in terms which impliedly accepts the validity of the appointment but alleges that the Appellant was thereafter "lawfully suspended". To

render paragraph 2 a proper denial of a valid appointment para 3(a) would have had to be framed in such a way as to make it clear that the allegations contained therein were to be considered only in the event of it being held that there had been a proper appointment. Instead of this the deponent again says that he denies that the Respondent was the chief of Thuate and adds "as he was lawfully suspended therefrom and has since not been reinstated as such". The only real issue on the affidavits was, therefore, the question of the suspension and its effect.

There is, therefore, no real issue between the parties as to the validity of the appointment of the Respondent. Mr. Pheko rightly conceded that unless this matter was referred to evidence no purpose would be served in referring to the second question of the Appellant's authority for determination by evidence.

Without disturbing the position as far as the Respondent's appointment is concerned the Appellant is unable to put forward the argument outlined during argument.

The application to refer the matter for oral evidence as to the appointment of the Respondent as chief of Thuathe is refused. The appeal is dismissed with costs.

Signed by

W.H.R. Schreiner
W.H.R. SCHREINER
Acting Judge of Appeal

I agree

Signed by

W.P. Schutz
W.P. SCHUTZ

I agree

Signed by

L.De V. Van Winsen
L.DE V. VAN WINSEN
Judge of Appeal

Delivered on this 27th day of April 1984 at Maseru.

For Appellant : Mr. Pheko,
For Respondent : Mr. Sello.