# IN THE HIGH COURT OF LESOTHO

In the matter between:

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| SAMUEL NTSEKHE | Applicant |
| and | |
| PITSO MORUNYANA | 1st Respondent |
| CHIEF LOBIANE MASUPHA | 2nd Respondent |
| CHIEF DAVID MASUPHA | 3rd Respondent |
| DISTRICT SECRETARY OF BEREA | 4th Respondent |
| ATTORNEY GENERAL | 5th Respondent |
| NAPO MAPESHOANE | 6th Respondent |
| PIET KATA | 7th Respondent |
| PHALATSA PHALATSA | 8th Respondent |
| MPHOSI SECWECWANA | 9th Respondent |
| MALIEHE MALIEHE | 10th Respondent |
| PAUL AUJANE | 11th Respondent |
| NYOKOLE SEKOATI | 12th Respondent |

## J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 10th day of January, 1990.

This is an application for an order:

"(a) Restraining Third and Fourth Respondent from permitting Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Respondent from remaining in and using the arable lands situated at the Plateau of Mampete in the Ntsekhe area of Malimong which has been confirmed as being part of the Ntsekhe area by His Majesty in terms of the Ad-hoc boundary committee recommendation as falling under Applicant's jurisdiction of chieftainship.

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(b) Restraining First, Second, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Respondents from using the arable lands in the plateau of Mampete which in terms of His Majesty's decision has been confirmed to be in the Ntsekhe area of Malimong.

(c) Directing Respondents to pay costs".

In his founding affidavit the applicant has deposed that there has been a dispute between him and the chieftainship of Ha Mapeshoane of which the second respondent is the gazetted chief. He avers that the sixth respondent, Napo Mapeshoane, interfered with a portion of his territory at 'Mampete plateau claiming to be acting on behalf of his chief. He allocated his (applicant's) subjects' arable lands to the seventh, eighth, ninth, tenth, eleventh and twelveth, respondents in around 1966. The respondents (7th to 12th) simply seized the lands in question and ploughed them.

The matter was taken to the administrative authorities and to Motjoka Central Court. Chief Leshoboro Masopha who is the second respondent's predecessor submitted to the Central Court that the area in question belongs to him (applicant) and that he (Chief Leshoboro) had been brought to the area as the senior chief's son and knew nothing about the dispute.

If I may be allowed to digress to point out that the judgment of the Central Court is Annexure "A" to the founding affidavit and that according to that judgment Chief Leshoboro Masopha said that

the area in question belonged to both the present applicant and the sixth respondent. The Central Court dismissed the applicant's action.

The applicant avers that further inquiry into the matter with the administrative authorities revealed that the best solution was that there should be an ascertainment of the boundary. He brought his matter before the ad hoc boundary committee where it was found that the second respondent was the proper man to deal with as the sixth respondent was only a subject. (The decision of the ad hoc boundary committee is Annexure "B" to the founding affidavit).

It is common cause that the ad hoc boundary committee had been duly appointed by the Minister of Interior in terms of the Chieftainship Act, 1968. It found in favour of the applicant and in terms of section 5 of the Chieftainship Act, 1968 the Minister of Interior accepted the recommendation of the ad hoc boundary dispute committee and submitted it to His Majesty for approval. His Majesty approved the recommendation. (See Annexure "C" to the founding affidavit).

The recommendation of the ad hoc boundary committe entitles only Sefako Sefako amongst the people of the second respondent to remain in occupation of his arable land.

In April, 1987 after the recommendation of the ad hoc boundary committee was approved by His Majesty and read to the litigants, the applicant wrote a letter to the second respondent

advising him to tell his subjects tovacate the arable lands which they unlawfully seized from his subjects. In reply to this letter the first respondent, apparently acting on behalf of the second respondent said that the decision of the ad hoc boundary committee was not specific on the question of arable lands and refused to tell his subjects to vacate the arable lands in question (See Annexure "D" to the founding affidavit).

After this there was chaos because applicant's subjects planted some crops on the lands in question and subjects of the second respondent ploughed them under and planted their own crops. As a result of this the applicant appealed to the third and fourth respondents. The third respondent convened a public meeting at which all the respondents were invited and were formally informed of the decision of the ad hoc boundary committee which was approved by His Majesty.

In his opposing affidavit the sixth respondent avers that the applicant ought to have appealed against the judgment of Motjoka Central Court. He avers that he has been advised that the ad hoc boundary committee had no power to decide on its own as to who the parties to the enquiry should be. It had to carry out its task in accordance with its terms of reference.

He alleges that according to Annexure "A" the third respondent had taken a decision on the boundary. In all fairness he should not have been a member of the ad hoc boundary committee. The decision clearly indicates that there was interploughing in

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relation to the area in question. Applicant may have the right to administer fields in his area of jurisdiction as determined by t the committee in accordance with the accepted practice of interploughing. He alleges that the committee had no power to make a decision in respect of people who were allocated the land as this fell outside its terms of reference. Natural justice demands that they ought to have been heard before an adverse decision was taken against them.

He futher avers that at the public meeting convened on the 13th January, 1988 the third and fourth respondents instructed the subjects of the first and second respondents not to cause any problems. However, it was agreed that despite the decision of the committee on the boundary the practice of interploughing was still recognized. The respondents were never instructed to stop using the lands in question.

The first respondent avers that the practice of inter-ploughing still obtains in his area of jurisdiction.

The second respondent admits that there was a boundary dispute between himself and the applicant and that the recommendations made by the ad hoc boundary committee have been approved by His Majesty the King. He is also of the opinion that the recommendations of the committee did not affect the practice of interploughing in that area.

The averments of the rest of the respondents - except the third, fourth and fifth respondents who have filed no opposing affidavits - are that they were allocated the arable lands in question by their respective chiefs and that the practice of interploughing has not been abolished in their area.

The first question to be decided by this Court is whether or not according to Annexure "A" the third respondent had made a decision on the boundary and therefore ought not to have been appointed as a member of the ad hoc boundary committee. I do not find any statement in Annexure "A" that the third respondent or his predecessor ever made a final determination on the boundary between the applicant and the second or first or sixth respondents. It seems that in his evidence or outline of his case in the Central Court the applicant said that at one time the dispute was taken to the Principal Chief who was then Chieftainess 'Mamathe. The applicant said that Chieftainess 'Mamathe issued an order that the said area should not be used until the case was finalised. There was no compliance with that order and the said area was used.

In his evidence or outline of the his case in the Central Court Chief Leshoboro Masopha who is the second respondent's predecessor said that he did not know that the Principal Chief ever issued an order that this area should not be used. He further stated that they had recently been before the Principal Chief and that no decision was made, yet it was incumbent upon the Principal Chief so to do.

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The Central Court dismissed the case without making any finding that the Principal Chief had already made a decision on the boundary. I have carefully studied the judgment of the Central Court and have come to the conclusion that the third respondent or his predecessor never made a decision on the boundary in question. The allegation that he did has no basis at all. At best it can be said that the complaint that was put before the third respondent or his predecessor was never finalised until the matter was taken to the Central Court. There is nothing in Annexure "A" to show that the third respondent sat as a judge in the boundary dispute in question and that he made a decision.

The respondents have failed to show that there was a decision and deliberately refrained from disclosing to this Court in whose favour that decision was. The reason for their failure to disclose this point is that there was never any decision.

Section 5 (11) of the Chieftainship Act, 1968 provides that the committee shall consist of not less than two members, one of whom shall be the Principal or Ward Chief of the area of authority in which the boundary concerned is situated. There is a proviso that if the boundary dispute is between two Principal or Ward Chiefs such Principal or Ward Chiefs shall not be appointed to the committee. The third respondent cannot be disqualified under the proviso because he is not a party to the dispute.

I come to the conclusion that the appointment of the third respondent as a member of the ad hoc boundary committee was proper

and in accordance with the provisions of section 5 of the Chieftainship Act, 1968. The respondents have failed to show that the third respondent had already made any decision in the matter. The decision of the three-member boundary committee appears to have been unanimous.

The respondents have alleged that there was interploughing between the applicant and the subjects of the first, second and sixth respondents. They have not stated when and how the interploughing started. Interploughing is defined by Patrick Duncan in his book, Sesotho Law and Custom on pages 72 - 73 in the following terms:

> "Interploughing is a word coined in Basutoland to describe the state of affairs described in Sotho as mekopu e namelane (the pumpkins have intertwined). When no boundary has been made between two chiefs there is often an area in which both chiefs allot lands, and in which the subjects of both chiefs are mixed up. This is not a form of paballo, but is similar enough to it to find a place in this chapter. With paballo there is a boundary, but a loan of rights has been made across it; but with interploughing there is no boundary. Some times interploughing leads to trouble, and the remedy is to define a boundary. When the boundary has been defined all the lands on one side are under one chief; and all on the other side to the other. The people are then given the opportunity of choosing. A land occupier who finds that the boundary has been drawn between himself and his lands may either (a) give up his lands and remain under his chief in his dwelling-site, or (b) give up his site and his chief, and follow his lands, becoming a person of the chief under whom lie the lands."

If the respondents claim that there was never any boundary between the applicant and the second respondent, they are wrong because according to the evidence of the applicant before the

ad hoc boundary committee and this Court was that the trouble started only in 1966 when the subjects of the sixth and the first respondents suddenly seized the arable lands by force. It cannot be said that before 1966 there was no boundary between the applicant and the chiefs under the second respondent. The boundary had been there and was violated by the sixth and the first respondent only in 1966. The ad hoc boundary committee found that the boundary between the applicant and the second respondent was as defined by the applicant and made their recommendation accordingly. They did not say they were determining a new boundary because they impliedly found that the arable lands in question were seized by force by the subjects of the second respondent. I say impliedly because the second respondent's evidence was that when he was placed as a chief over the area, the third respondent never showed him the boundary. Even the sixth respondent who was second respondent's witness before the ad hoc boundary committee did not contradict what the applicant said. He never told the committee what he regarded as the boundary between himself and the applicant.

I have stated above that the suggestion that there had been no boundary between the applicant and the second respondent is not supported by any evidence. It seems that prior to 1966 the subjects of the applicant were in peaceful and undisturbed possession of the arable lands in question and that means that the second respondent and the sixth respondent accepted that the area was on the side of the applicant. I am of the opinion that there has never been any interploughing between the applicant and the sixth respondent.

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The respondents, i.e. sixth to twelveth inclusive, complain that the ad hoc boundary committee never gave them the chance to be heard before it deprived them of their arable lands. They depose that on this ground alone the application should be dismissed because the decision of the committee is invalid as far as it concerns them. I do not find any substance in this argument because the respondents in question have never applied to any court of law to have the decision set aside.

Secondly, the dispute was between chiefs and concerned a boundary between those two chiefs. It follows that the allocations which were made by the chief who lost the case are invalid and have to fall away automatically when the decision is against the chief who made them. Because the dispute was not between the subjects of the applicant and the subjects of the sixth respondent, the argument that they were not given the chance to be heard cannot stand. They derive their titles from the allocation by a person who did not have the right to allocate land over that area.

In a recent case between the Minister of Interior and others v. Chief Letsie Bereng, C. of A. (CIV) No. 17 of 1987 (unreported) dated the 20th July, 1988 Plewman, J.A. said

> "I will assume , for present purposes that if an appointment were made (let us say) for an improper purpose the court could intervene in an application to review the Minister's action. But where no improper conduct can or had been shown, in my view, the court has no jurisdiction to pronounce upon the Minister's acts. Again if the Minister appointed a committee which did not comply with the requirements of subsection (11) the court could intervene. If however, the Act is complied with no court can concern itself in the matter. The committee acts administratively and for the same reason (and subject to compliance with subsection 12) the committee may come to its own conclusion and the court may not substitute its findings, on the evidence before the commission for those of the commission."

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In the present case the respondents have failed to show that there was non-compliance with the provisions of section 5 of the Chieftainship Act, 1968 and this Court cannot concern itself in the matter.

In the result the application is granted as prayed in terms of prayers (a), (b) and (c) of the Notice of Motion.

J.L. KHEOLA
JUDGE

10th January, 1990.

For the Applicant - Mr. W.C.M. Maqutu
For the Respondents - Mr. Pheko