

IN THE HIGH COURT OF LESOTHO

In the matter of :

TAELO MATHAPHOLANE

Plaintiff

V

CONSTABLE MATHAPHOLANE
THE MINISTER OF THE INTERIOR
THE SOLICITOR GENERAL

1st Defendant
2nd Defendant
3rd Defendant

R U L I N G

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 6th day of February, 1990.

At the initial hearing of this matter before Sir Peter Allen J. the 2nd and 3rd defendants withdrew their defences. The dispute remained between the plaintiff and the 1st defendant.

The learned Judge preferred to make no order for costs in respect of the withdrawn defences, and further ruled that with regard to the 1st defendant costs should be costs in the cause. This was on 6th April 1987.

The matter was deferred for hearing on a date to be arranged with the Registrar.

Subsequent days for hearing were fixed but for a variety of reasons the matter was always postponed until partial progress in the hearing of this matter was achieved

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on 18th June 1988. Mr Matlhare was conducting the case for the remaining defendant.

When the hearing was resumed on 20th September, 1989 Mr Sello, now appearing for the defendant, sought to raise the point that it was not necessary to have proceeded in this matter by way of leading oral evidence and that; further leading of oral evidence would only increase the costs in this matter as the only issues that will stand to be determined at the end of the day are obviously and exclusively legal issues.

For this submission he relied on Rule 41(22) saying :-

"Notwithstanding anything in this Rule the court may, at any time make any order with regard to the conduct of the trial as it seems fit and it may vary any procedure laid down in this Rule."

In his summons the plaintiff sought an order of this Court

- (a) declaring him chief of the area known as Ha Suane in the Thaba Tseka district;
- (b) setting aside the judgment of the Minister of the Interior dated 12th August 1983.

In an argument that preceded today's proceedings the court was told that the defendant had since died leaving his widow and a male adult son either of whom would in due course be substituted for the deceased.

To return to the charge: Mr Mphalane for the plaintiff referred me to Part V section 14 of the 1968 Chieftainship Act 22 which deals with duty of the Minister concerned to give public notices of holders of office of chief including under subsection (2) the Minister's powers and duties to amend, revoke and replace a notice specified under subsection (1); or giving public notice of matters affecting holders of the office of chief including punishment.

He pointed out that the 1970 Gazette No. 1 emanates

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from the 1968 Act. He further stated that the 1988 Gazette No. 33 emanates from the provisions of section 10(7) of the 1968 Act.

By contrast with the 1970 Gazette No. 1 in terms of which the plaintiff was created chief in a virtually virgin and therefore newly created office section 10(7) of the 1968 Act deals with succession to the office of Chief.

He submitted that a gazette is an official document meant for the information of the public. It should be presumed valid for what it purports to convey for at its bottom it reflects that it was published by authority of His Majesty the King.

He advised that caution should be exercised to avoid confusing these two acts i.e. the 1970 and the 1988 Acts for they derive from sections 10 and 14 respectively of the 1968 Act.

He challenged what he thought Mr Sello implied by saying the publication of the plaintiff's name as chief was by order of one Mahlaha who signed the publication on behalf of the Permanent Secretary for the Interior see page 14 and 15 of "Ex.1" the 1970 Gazette 1.

He accordingly submitted that whatever position Mahlaha held he was delegatd to sign that document. Thus this does not invalidate the gazette for in any case this gazette has not been set aside.

He urged that as the defendant's counsel's argument takes the matter no further it should be proceeded with notwithstanding submissions on behalf of the defendant.

He reiterated that the plaintiff sought relief in thi Court following the ministerial decision to oust him from chieftainship. He pointed out that the late Constable was aware of the fact that the plaintiff had been gazette

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when the same Constable sought to benefit from the Ministerial decision.

In reply Mr Sello refuted the submission that he was not entitled to raise the points referred to above by relying on the provisions of Rule 41(22). He stressed that if the court finds that it shouldn't have been asked to hear oral evidence but instead should have been addressed on law, then the provision of this Rule is intended to meet just that situation. I most heartily endorse this submission.

He disputed that he ever addressed the court on the validity of the 1970 gazette. My alert attention to the tempests which were prevailing in the arena lends support to his contention.

For the benefit of the other side he explained that it struck him as strange that the plaintiff who was proclaimed chief should come to this court to be proclaimed chief.

He accordingly submitted that it was incorrect to labour under an illusion that he was asking the court to make a finding on the validity of the said gazette.

Assuming without conceding that the plaintiff was entitled to a declaration sought, he called in question the wisdom of or the need for hearing oral evidence. I find that there is indeed substance in this criticism because the question whether the plaintiff is a chief or not is a question of law.

Mr Sello explained that he only referred to the gazette bearing in mind that the proclamation might be fatally flawed. He conceded that a gazette is a prima facie evidence of what it says. To substantiate his misgivings about the proclamation he referred me to gazette No. 33 of 1988 where it appears that the King acting in terms of section 10(7) of the Chieftainship Act No. 22 of 1968 is the one who signed the document and thus did not assign this important task to Mahlaha acting on behalf of

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the permanent secretary, for chieftainship is conferred by the King himself and nobody else. See page 226 of Gazette No. 33 of 1988.

The central issue is whether the plaintiff despite having been made chief by the King is entitled to an order by this Court.

Having raised this deliberative question Mr sello submitted that he was not saying that the matter should be disposed of on grounds of the invalidity of the gazette but rather that it serves no purpose wasting time over oral evidence instead of proceeding with hearing the legal arguments on which this case is anchored.

Wisdom dictates that time spent whether accidentally or disignedly for the purpose of increasing costs is time ill spent.

With regard to prayer 2 in the summons seeking that the decision of the Minister of the Interior be set aside it appears that aproaching this Court by way of action was ill-advised because Rule 50(1) provides that the decisions of tribunals, boards Subordinate Courts (where coming not on appeal) persons performing quasi-judicial or administrative functions can be set aside only on review brought by way of notice of motion. In the instant matter this rule has been breached. The provision says proceedings in question shall be brought by way of notice of motion supported by affidavit. In subsection (1)(b) of the Rule it is provided as a sine qua non that the party seeking the review shall cause to be furnished to the Court and persons affected the record of proceedings sought to be reviewed.

Thus Mr Sello observed and brought to the attention of the court that at the time that it was asked to deal with this matter the court was not possessed of the decision of the Minister. Causes are lost when forms and rules are not observed. See C of A (CIV) No. 16 of 1984 Kutloano Building Construction vs Matsogo and 2 Others (unreported) at 7 para 2.

I order that this matter be dealt with exclusively on the point of law and without reference to oral evidence any more of which is by operation of this order terminated. The plaintiff is ordered to pay the costs of this application together with those incurred in the leading of oral evidence heard up to this point.

J U D G E.

6th February, 1990.

For Plaintiff : Mr Mphalane
For Defendant : Mr Sello.