CIV\APN\201\90

IN THE HIGH COURT OF LESOTHO

In the Application of :

SETHO MOLAPO	Applicant
v	
MOHALE MOLAPO	1st Respondent
SELEBALO RAMATEKOA	2nd Respondent
MINISTER OF THE INTERIOR	3rd Respondent
ATTORNEY GENERAL	4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 9th day of December, 1991

The applicant sought an order in this Court

(a) Declaring that the applicant was duly nominated and presented as the headman of 'Mankhololi or 'Mamafura with authority over Lenyakoane Ha Ramatekoa and Ha Ntholi and subordinate to the Chief of Linotsing Ha Mokokoana in the Ward of Peka, Tsikoane and Kolbere in the Leribe district.

(b) Declaring that Government Notice No.93 of 1969 as published in Government Gazette No.24 of the 23rd May 1969 is null and void and setting it aside insofar as it recognised and published the 2nd respondent as the headman of Lenyakoane Ha Ramatekoa subordinate to the Chief of Linotsing Ha Mokokoana.

(c) Directing the 1st respondent to take such proceedings as may be necessary and appropriate to inform the Chief of Peka, Tsikoane and Kolbere, the Principal Chief of Leribe and the King(sic) through the 3rd respondent of the applicant's nomination and presentation as the headman of 'Mankhololi otherwise known as 'Mamafura with authority over Lenyakoane Ha Ramatekoa and Ha Ntholi and subordinate to the

Chief of Linotsing Ha Mokokoana in the Leribe district.

(d) In the event of the 1st respondent failing to comply with the order prayed for in sub-paragraph (c) above authorising the 3rd respondent to publish a new Notice in the Gazette giving public notice of the name of the applicant as the headman of 'Mankhololi otherwise known as 'Mamafura, with authority over Lenyakoane Ha Ramatekoa and Ha Ntholi and subordinate to the Chief of Linotsing Ha Mokokoana in the Leribe district.

(e) Awarding applicant costs of this Application.

(f) Granting the applicant such further and\or alternative relief as this Court deems fit.

It is common cause that the applicant is the first male child in the second house of the late Chief Mokokoana Jonathan Molapo while the 1st respondent is the 1st male child of the same Chief Mokokoana in this Chief's 1st house. The late chief had chiefly rights which he exercised over Linotsing Ha Mokokoana in the Ward of Peka, Tsikoane and Kolbere in the Leribe district. It is also common cause that the 2nd respondent is the headman of Lenyakoane Ha Matekoa within the area of Linotsing Ha Mokokoana.

While admitting contents of the applicant's averments in paragraphs 2 and 3, the 1st respondent goes a step further by making a qualification to those averments and stating that he and the 2nd respondents are gazetted chief and headman in their respective areas of jurisdiction.

The applicant avers in paragraph 4 page 5 of the record that in 1953 the late Chief Mokokoana nominated him headman of 'Mankhololi or 'Mamafura with authority over Ha Ramatekoa and Ha

Ntholi and subordinate to him or to the Chief of Linotsing Ha Mokokoana thereby divesting himself of all direct authority over these villages. He further avers that the late Chief called the customary headmen of Ha Ramatekoa and Ha Ntholi and advised them of his decision, thereafter he called a Pitso where he announced the applicant's nomination and the new order of things to all his subjects including those who would be affected by these things at Ha Ramatekoa and Ha Ntholi.

The first respondent denies these averments. He goes further to assert that the late Chief Mokokoana would never have unilaterally nominated the applicant as headman without the consent of the family especially in view of the fact that the applicant had no automatic right to the headmanship of the area by virtue of the fact that he comes from a junior house which had never held the headmaship before. The first respondent goes further to assert that all the late Chief Mokokoana did was merely to allocate the applicant a residential site which had nothing to do with headmanship rights at all.

The 2nd respondent confesses his ignorance of the applicant's averments referred to above but denies them and puts the applicant under the necessity to prove them.

The applicant sets great store by the allegation that the late Chief Mokokoana instructed one Mahloko Ramatekoa, the then headman of Ha Ramatekoa to lead a band of men under the general supervision

of one Faere Nkhetse in the building of a hut at 'Mankhololi for purposes of letting the applicant live there. Nkhetse has filed an affidavit to that effect.

The 2nd respondent in reaction to above averment says that he was the headman of Lenyakoane Ha Ramatekoa in 1953 when the alleged events are said to have taken place, but was in South Africa where he was then working. The acting headman in his absence was Mahloko Ramatekoa who, the 2nd respondent avers, had no authority to associate himself with any actions calculated at undermining the status of his office. The 1st respondent on his part categorically denies the applicant's averment for reasons supplied earlier.

Reading from the papers it seems the alleged nomination took place in 1953. The late Chief Mokokoana died in 1955 i.e. two years after that nomination. His son the 1st respondent became the late Chief's successor.

The applicant avers that it was the late chief's intention to create him headman of the area in question. When the chief died two years after the nomination but before confirmation of the applicant as headman the applicant expected and approached the successor in office to the late chief to carry out the late chief's intention to have the applicant installed as headman for the new place where his father had hived him off to with a band of the late chief's original villagers.

The successor in office i.e. the 1st respondent temporised for

close on forty five years when the applicant ultimately brought this application in 1990.

The applicant avers that he was kept waiting all these years by the respondent who was expressing his regrets that he had made a mistake by creating the 2nd respondent headman of the area.

It only dawned on the applicant that the 1st respondent's regrets could not have been seriously meant when in 1969 he heard the 1st respondent advise the 2nd respondent that he had had the latter's name published in the Government Gazette as headman of Lenyakoane Ha Ramatekoa immediately subordinate to the 1st respondent. The relevant Gazette No. 24 dated 23rd May 1969 of which Government Notice No. 93 of 1969 is a part is on hand marked "A".

The applicant relies on Annexure "B" in support of the existence of the family meeting held to query the 1st respondent's "publication" of the Gazette creating the 2nd respondent headman.

Mr. Ramodibedi for the respondent buttressing his argument on the 1st respondent's denial of the existence of any such meeting submitted that Annexure "B" appears to be the work of one man only in that there are no signatures to indicate that people mentioned in Annexure "B" in fact attended the alleged meeting.

It was further submitted by Mr. Ramodibedi that the creation or recognition of a chief is the prerogative of the King acting in accordance with the advice of the Minister concerned. See the

Chieftainship Act No.22 of 1968 section 5(1) read with section 3 of the 1984 Chieftainship Act No.12. See also Leihlo v. Lenono 1976 LLR 171 at 175 to 176.

The 1st respondent's Counsel attached much importance to the fact that the applicant does not, nor can he in fact, even claim a hereditary right to the office of headman in the disputed area because the headmanship of that area devolved from a different family.

The interpretation and consideration of the relevant legislation before independence is dealt with in Maqetoane v Minister of the Interior and 3 Others C. of A.(CIV) No.3 of 1984 (unreported).

It seems a sound argument and one that the party seeking the Court's assistance should not recoil from that in order to succeed the applicant has to show that he has a clear right. He has to show that he has a vested right of being a headman as his request is for declaration of rights. See Beck's Theory and Principles of Pleadings in Civil Actions at page 49.

Mr. Ramodibedi pointed out that the applicant's difficulty consists in at once saying he had been nominated to the area in question by the late Mokokoana and showing that the so called nomination was not complete. The learned Counsel thus indicated that the applicant seeks to have the Court complete that nomination. He properly pointed out that such is not the Court's

function. Indeed page 2 of the applicant's heads of argument reads

> "The Applicant was nominated and presented to the public as the headman by his late father, the right person to do so. When the late chief died he had not completed the stages he had to go through for purposes of the gazettement of the applicant".

Yet in contrast to the above position Nkhetse's affidavit filed in support of the applicant's case sets out that the applicant is the headman of 'Mankhololi.

Thus it was submitted Nkhetse could not have been telling the truth. Further that because the so called nomination is hotly disputed by the 1st respondent the disputed fact should logically be resolved in favour of the version advanced by the 1st respondent otherwise the applicant should fail on the score that he should have anticipated the dispute and consequently shunned procedure by way of application as opposed to procedure by action.

Maqetoane above sets out the year 1950 as the year when gazettement of chiefs was already in operation. In that case the name of an applicant had been omitted in the gazettement. The history of the legislation regarding nominations and recommendations of chiefs is dealt with in the above case.

In terms of Proclamation 61 of 1938 section 3(1) it was the High Commissioner who was empowered acting in consultation with the Paramount Chief, to declare any chief, sub-chief, headman etc. in respect of any area by notice in the gazette.

This is not the situation relied on by the applicant yet one would have thought that by virtue of the framework of the time to

which his case seems to fall he should have availed himself of the law existing then. He instead relies solely on the nomination by his father.

The next category of legislation that should have covered his case is the Basutoland Order in Council 1959 Clause 74(1). This empowered the College of Chiefs to recommend chiefs or headmen. This Clause does not give the applicant's late father the power to nominate or recommend a headman or chief.

Indeed if the argument is sound as advanced in the applicant's favour that the headman who was in the area and exercising the functions of that office before the applicant's nomination, gave in to the applicant's father's attitude to make way to the applicant, it seems an even more compelling argument that the successor to the late chief could in exercise of his rights prefer anybody other than the applicant to that office as long as the applicant's nomination was incomplete and the presentation to the more senior chief was still pending.

The Government Notice 25 of 1964 gives chiefs and headmen powers to execute their functions. This law gave the Paramount Chief the final say in the recognition of Chiefs and Headmen. Maqetoane above buttresses this position by stating that the 1966 Independence Act did not affect the position of chiefs. See therefore the 1968 Chieftainship Act.

The applicant's Counsel seeks at head 2 to rely on section 11

of the 1968 Chieftainship Act. But that section could not have given Chief Mokokoana power to nominate the applicant because it was not in existence before the Chief died in 1955.

The reading of that section presupposes the existence of an office discharging the functions of a chief or headman. But the area of 'Mankhololi or 'Mamafura had no office of chief or headman before the other and previous Ramatekoa came to exercise powers pertaining thereto.

With regard to the gazettement of the 2nd respondent it is only wise to rely on the presumption of regularity to the effect that everything done was done correctly thus casting an onus on the applicant to show that the gazette was not issued lawfully.

But this question of irregularity surfaces for the first time in the replying affidavit. Little wonder then that contrary to common sense the applicant did not only wait and waste his time until 1969 when the gazette was issued, thinking that the 1st respondent was going to reverse his decision to overlook him, but even when the gazette was issued he still thought the 1st respondent was going to change his mind and in the process reverse the gazettement. Indeed with what power!!

Mr. Mafisa for the applicant submitted that this being a question of status the time cannot operate against the applicant's case. True. But considerations of public policy coupled with the

well-worn legal maxim that he who sleeps on his rights forfeits them may well have detrimental effect on the applicant's interest.

However enough exists in this case to show that the applicant's case was ill-fated even on the procedural footing to the extent that it cannot be rescued.

For instance as the position was correctly stated by Mr. Ramodibedi the question of the defect in the gazette was raised for the 1st time in the reply. Thus the respondents had no opportunity to deal with that. Yet section 11(2) (c) and (3) shows that the authorities were entitled to issue the gazette in the manner they did. See Vol. X of 1965 at page 14; the saving clause.

There is a clear dispute of fact with regard to Annexure "B" because the document appears to bear the same handwriting in respect of the names appearing in it. One would have expected to see signatures instead or in addition. Thus the respondent's denial of the existence of the meeting or contention concerning the absence of the participants whose names appear there cannot be discarded as totally unfounded.

The 1968 Act section 5(1) favours the 2nd respondent as against the applicant. The 2nd respondent has been approved by the King on the advice of the Minister. He has also been a hereditary

chief. See Jonathan v Mathealira 1977 LLR 314 at 319 to 320.

It is indeed improbable that a man can sit on his rights for upwards of 21 years and another 18 years before then and allege at this late hour that he was held back by promises made by his adversary all that while. The allegation in any case is denied. The only forum to challenge the gazette in was the Court but the appellant did not avail himself of that opportunity when he could have reasonably done so. The excuse given for failure is the lame one that promises were made to him to reverse the adverse effect suffered at the hand of his adversary.

The question of declaration of rights is a discretionary one. See again Maqetoane above.

The application is dismissed with costs.

J U D G E

9th December, 1991

For Applicant : Mr. Mafisa

For 1st Respondent: Mr. Ramodibedi

for 2nd Respondent: Mr. Teele