

CIV/APN/401/93IN THE HIGH COURT OF LESOTHO

In the matter between:

CHIEFTAINNESS 'MAQAJELA L. LEBONA

Applicant

and

MAPHOHLOANE LEBONA

1st Respondent

MINISTER OF HOME AFFAIRS MASERU

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

J U D G M E N T

Delivered by the Honourable Chief Justice
 Mr. Justice J.L. Kheola on the 15th day
of July, 1994

This is an application for an order in the following terms:

1. That a Rule Nisi be issued and returnable on the date and time to be determined by the above Honourable Court calling upon the Respondents to show cause why -
 - (a) Second Respondent's order appointing First Respondent acting Chief of Thaba-Tsoeu Ha Lebona shall not be set aside as being contrary to law and as having been made contrary to the **audi alteram partem** rule.
 - (b) First Respondent shall not be restrained from exercising the

powers of acting Chief of Thaba-Tsoeu Ha Lebona without the permission of applicant who is her minor son's regent.

(c) Respondent shall not be directed to pay costs of this application.

2. That prayer 1 (b) operate as an interim interdict.

The facts of this case which are not in dispute are as follows:

1. The applicant is the widow of the late Chief Lebona Lebona who was the chief of Thaba-Tsoeu.
2. After the death of her husband the applicant was appointed as the acting Chief of Thaba-Tsoeu during the age of minority of her son Qajela.
3. In May, 1993 the applicant was appointed to the Senate by His Majesty King Letsie III.
4. Following the applicant's appointment to the Senate the Lebona family convened a meeting at which they nominated the first respondent to act as chief of Thaba-Tsoeu in the absence of the applicant.

5. A recommendation was made to the Minister of Home Affairs. He accepted it and duly appointed the first respondent as the Acting Chief of Thaba-Tsoeu (See Annexures "ML5" and "ML4" to the founding affidavit).

6. In the meantime the applicant had also made her own nomination of a certain Morena Mojalefa Ntepe. She was acting in terms of section 5(6) of the Chieftainship Act 1968 (the Act).

The question which immediately arises is whether the applicant followed the proper procedure when she appointed Morena Mojalefa Ntepe to act as chief of Thaba-Tsoeu, Section 5(6) of the Act reads as follows:

"It is the duty of every Chief intending to be absent from the area of authority of his Principal or Ward Chief from whatever purpose to notify the Chief immediately senior to him in writing of his intended absence and the place to be visited by him, and to inform that Chief of the name of the person who is authorised in accordance with the provisions of section 13 to exercise the powers and perform the duties of his office during his absence. For so long as an authorisation is in force under this subsection, the person so authorised may exercise the powers and perform the functions of the office of the Chief while he is absent."

Section 13 (4) and (5) of the Act, as amended, provide that:

"(4) Subject to the provisions of section 5, the person who has the first right to succeed to an office of Chief (or failing him, one of the persons, in order of prior right, who have the right to succeed to that office) exercises the powers and performs the duties of that office in the following circumstances -

- (a) when the holder of that office is exercising the functions of the office of King as Regent or otherwise during the absence or illness of the King;
- (b) while the holder of that office is deprived under the provisions of this Act of the right to exercise the powers and perform the duties of that office;
- (c) when the holder of that office (and any person who has been designated as having a prior right to succeed to that office) is unable by reason of absence from the place to which that office relates, or by reason of infirmity of body or of mental incapacity, [or by reason of his

being detained in prison,] to exercise the powers and perform the duties of that office;

(d) when, for any reason not specified in the preceding paragraphs, it is not possible for any person to succeed effectively to that office.

(5). Subject to the provisions of section 5, the holder of an office of Chief may either generally or from time to time as occasion may arise, and subject to authorisation under the provisions of section 5 and to such conditions and limitations as he may impose, designate the person who is to exercise any of the powers and perform any of the duties of that office; and the person so designated may subject to the provisions of section 5, exercise those powers and perform those duties, subject to those conditions and limitations."

It seems to me that section 5(6) of the Act deals with the procedure which has to be followed when the holder of the office of chief intends to be absent from his office for only a short time for the purpose of visiting a place which he must name in his letter to his chief. It is his duty to inform his chief of his temporary absence from his office of Chief. This subsection does not deal with the manner in which that person who is to act

as chief during the absence of the holder of that office, should be appointed. The procedure of how such a person should be appointed is described in section 13 of the Act. Section 5(6) actually refers to section 13 for the procedure to be followed.

It is common cause that the applicant did not notify her senior chief in terms of section 5(6) of the Act. Instead she notified The District Secretary as per Annexure "ML3" to her founding affidavit. This was the first irregularity which she committed.

Section 13(5) of the Act, as amended, gives the holder of the office of Chief the authority to appoint on *ad hoc* basis or generally, a person to exercise any of the powers and perform any of the duties of that office whenever the occasion arises. I suppose that the applicant's going to attend the Senate is one of such occasions. Annexure "ML3" is not clear whether it was a general designation or an *ad hoc* one. In any case it is clear from the evidence of the applicant in her affidavit that she regarded her going to the Senate as a temporary absence from her office of chief. On the other hand the first respondent regarded her absence from her office as a permanent one because she will be a Senator for a period of five years.

The applicant is the holder of the office of chief or exercises the powers and performs the duties of that office in terms of section 13(1) of the Act, as amended, because she is the senior surviving or only wife of the previous holder of the

office of chief in her area. She is the acting Chief because her son is still a minor. Section 13(4)(c) of the Act provides that the person who has the first right to succeed to an office of Chief (or failing him, is one of the persons, in order of prior right, who have the right to succeed to that office) exercises the powers and performs the duties of that office in the following circumstance: when the holder of that office (and any person who has been designated as having a prior right to succeed to that office) is unable by reason of absence from the place to which that office relates, or by reason of infirmity of body or mental incapacity or by reason of his being detained in prison, to exercise the powers and perform the duties of that office.

The applicant is unable to exercise her powers and to perform duties of the office of Chief at Thaba-Tsoeu because she has been appointed a Senator. She is absent from that office either temporarily or permanently in order to attend the meetings of the Senate. I do not propose to decide whether her absence from her office is permanent or temporary because it seems to me that the main and decisive issue here is whether the applicant has a right to choose any person she pleases when she leaves her office.

It is very clear that in terms of section 13(4) of the Act the person or persons who are entitled to act as chief when the applicant is absent must be nominated or appointed in the order of their prior rights to succeed to that office. In terms of section 13(2) of the Act the oldest of the surviving legitimate

brothers of the late husband of the applicant have a prior right to be appointed to act as chief when the applicant is absent. I do not know who Morena Mojalefa Ntepe is, but what is clear from the papers in this case is that he is certainly not a brother of the applicant's late husband. It is also clear that the first respondent is not the oldest legitimate brother of the applicant's husband. However in order of prior right he ranks much higher than Morena Mojalefa Ntepe.

In paragraph 8.2 of her founding affidavit the applicant refers to the provisions of section 5(6) and section 13(3) of the Act, as amended. I think that the last section ought to be 13(5) because when the Act was amended in 1974 the numbering of the subsections was changed. What is clear is that the applicant overlooked the provisions of section 13(4) which specifically mentions the people who are eligible for appointment to act as chief in the absence of the holder of that office. The brothers of the applicant's late husband cannot be bypassed without sound reasons such as infirmity of the body or mental incapacity. The applicant has not given any reasons why she did not follow the order of prior right of the people who have the right to succeed to that office. Although this was not a case of succession as such, but even in acting positions the order of prior right to succeed to that office must be followed.

In the result the rule is discharged with costs.

J.L. Kheola
(J.L. KHEOLA)
CHIEF JUSTICE

15th July, 1994.

For Applicant - Mrs Kotelo
For Respondent - Mr. Malebanye.