

IN THE LESOTHO COURT OF APPEAL

In the matter between:

CHIEF SEEISO BERENG SEEISO

APPELLANT

AND

THE HON. MINISTER OF HOME AFFAIRS  
THE ATTORNEY GENERAL  
THE COMMISSIONER OF POLICE

1ST RESPONDENT  
2ND RESPONDENT  
3RD RESPONDENT

HELD AT

MASERU

CORAM:

STEYN, AP  
BROWDE, JA  
TEBBUTT, AJA

JUDGEMENT

STEYN, AP

This matter comes before us by way of an appeal against the decision of the High Court refusing the applicant the relief set out herein below. He had in the Court a quo requested that a rule nisi should be issued calling on Respondents to show cause why -

*"(a) The letter written by the first respondent dated 11th March 1994, and addressed to the applicant, should not be declared null and void.*

*(b) The lawful gathering at Matsieng called by the Applicant and another principal chief in a letter dated 25th February 1994, and addressed to all*

***principal chiefs should not be allowed to be convened on a date and time that shall be later fixed.***

***(c) The police of the first respondent should not be ordered not to interfere with the lawful conduct of the applicant's gathering at Matsieng, save by due process of law, and the first respondent to refrain from issuing threatening letters, or threats of whatever nature to the applicant in regards to the convening by applicant of a lawful gathering.***

***(d) Granting applicant further and/or alternative relief.***

***(e) Respondents should not be ordered to pay for the costs hereof."***

As will appear from the terms of this judgement, although the rule nisi was issued, it was dismissed after a hearing on the return day.

The founding affidavit was deposed to by one Seeiso Bereng Seeiso. He is the Principal Chief of Matsieng, Maseru District. The facts which underlie this application are the following. (I refer to the parties as in the Court below):

According to Applicant, His Majesty King Letsie III, in his New Year message to the nation referred inter alia to the issue of His father, His Majesty Moshoeshoe. In this message King Letsie III made a special request to the whole Basotho nation "to recall his never-ending cry over the actions of the rulers who had placed him in His Majesty's seat contrary to Basotho custom and that (the) dethronement of his father His Majesty Moshoeshoe II forcefully, was contrary to justice and (in) violation of his rights".

Applicant then goes on to say that King Letsie III had called on the whole nation to give its opinion on the issue of the monarchy in Lesotho, "in particular the injustice that has been done to him and his parents, (sic) His Majesty Moshoeshoe II".

At the end of 1993 the government had through its Ministry of Information and Broadcasting issued a statement in which it said that "it would be prepared to follow the decision of the people on the issue of the restoration to the throne of His Majesty King Moshoeshoe II".

In pursuance of this New Year message as well as "the government's stated policy on the matter", Applicant, two other Principal Chiefs whom he names and "several other ward Chiefs and headmen" met at Matsieng during the month of February, 1994. One of the issues discussed at this meeting was a briefing on the King's New Year message as well as the government's response. According to Applicant, "it was resolved that a gathering of all Basotho be convened at Matsieng on the 12th March, 1994 for the sole purpose of exchanging ideas and opinions on the King's New Year address and formulate certain resolutions as may be decided by the gathering for presentation to the government on the matter of His Majesty Moshoeshoe II reinstatement". In furtherance of this resolution it was decided by those present that a formal letter of invitation would be sent to all the Principal Chiefs in the country inviting them, their subordinate chiefs and subjects to attend the gathering at Matsieng to discuss the matter referred to above. This letter is attached to Applicant's founding affidavit and it reads as follows:

***"Matsieng***

***P O Matsieng 192***

***25 February 1994***

***TO: The Principal Chiefs  
Chief,***

***ISSUE: INVITATION TO THE CHIEFS AND THE WHOLE NATION TO MATSIENG  
ON MOSHOESHOE'S DAY 12TH MARCH 1994***

***We greet you chief and your subordinate chiefs, and have been asked by some  
Basotho Chiefs, from different parts of Lesotho, who gathered in Matsieng today,***

***to invite you and your subjects to be in Matsieng on the special day in Basotho History of the 12th March 1994 this year, known as "MOSHOESHOE'S DAY" to come and give opinions on the issue of the monarchy in Lesotho.***

***You will remember chief, that in his close of the year 1993 and ushering of the new year message, His Majesty Letsie III, made a special request to the whole Basotho Nation to remember his usual cry of worrying about the action of the Rulers, who have placed him in the Majesty's seat contrary to Basotho customs, and the removal from that seat of his parent, His Majesty Moshoeshoe II, forcefully and contrary to justice. From the time His Majesty Letsie III raised his alarm, the mentioned chiefs have employed all means to bring about a remedy over this problem which has lasted for a long time. Consequently the chiefs have reached a conclusion that a genuine remedy will be executed in line with the nation's opinion and that the whole Basotho nation should be given an opportunity to give opinions on this special day.***

***The mentioned chiefs have requested us, with respect chief, to invite you and your subjects to be present at this important meeting whose object is to assist one another with ideas as to how to answer this endless cry of your child, who is spiritually worried over what has been done to him and his parent, where justice has been trampled by the rulers who did this. We trust chief, that it will please you to give a helping hand, with your subordinate chiefs and all your subjects, to bring stability to the governing of the country, by blessing this special gathering with your presence. The difficult problems of this nation will be solved by uniting the nation so that it could give a united opinion.***

***In the name of the mentioned chiefs, we request your support chief, and the support of your subordinates in administration together with that of your subjects.***

***Unity is strength in the service of the government of the nation.***

***With greetings***

**SEEISO BERENG SEEISO**  
**PRINCIPAL CHIEF OF MATSIENG**

**KHOABANE LETSIE THEKO**  
**PRINCIPAL CHIEF-THABA-BOSIU"**

Applicant says that the meeting held to formulate this resolution was attended by members of the government's National Security Service (N.S.S.) whom the deponent says he knows very well and he observed them taking notes of what was said at the meeting.

Preparations for the meeting to be held in pursuance of the resolution went ahead and Applicant, who it would appear was the driving force behind the holding of the meeting, gave written notice to the headman of Matsieng and received permission from the Matsieng village headman. He avers that this was the only legal requirement he had to comply with before convening the meeting which was to take place on the 12th of March, 1994.

However, late in the evening of the 11th of March 1994, he received a letter from first respondent (The Honourable Minister of Home Affairs) which was hand-delivered to him. Its effect was, he says, to order him and his colleagues " to abandon the idea of a meeting on the 12th March 1994". The translated version of this letter is an annexure to the founding affidavit and it reads as follows:

**"11th March 1994**

**Chief Seeiso Bereng Seelso  
Principal Chief  
Matsieng**

**My Chief,**

**ISSUE - INVITATION TO THE NATION AND THE CHIEFS TO MATSIENG ON  
MOSHOESHOE'S DAY 12TH MARCH 1994**

**It has come to the attention of Government that you are inviting chiefs and the nation to Matsieng on Moshoeshoe's day, on the 12th March 1994.**

**It appears again that the matter for which the chiefs and nation are being invited, is the matter of the monarchy and the dethronement of His Majesty Moshoeshoe II.**

**Government directly does not accept this gathering which you intend to convene at Matsieng which is intended to subvert the Government. Accordingly you are requested to prevent immediately chiefs and the nation which you have invited. Government will not hesitate to prevent in all sorts of ways this gathering which has not followed proper channels. It is unfortunate that while Government is attending to the matter of erstwhile Majesty Moshoeshoe II, the Chiefs choose to follow channels which may be in collision with peace and stability in the country. It was the intention of Government that at this present session of parliament, that this matter be discussed. It is regretted that the chiefs are taking different channels. You will remember that it is not this Government which made matters this way.**

***I will expect that this instruction of Government should be executed and that there should be no gathering of the chiefs and the nation at Matsieng on the 12th March 1994. Peace!***

***Your servant,***

**ARCHIBALD LASAO LEHOHLA  
MINISTER OF HOME AFFAIRS (LOCAL GOVERNMENT,  
VILLAGE AND URBAN DEVELOPMENT)"**

It was too late, Applicant avers, to cancel the meeting as many people had already arrived at the venue. Applicant and other organisers decided to allow the gathering to go ahead, but only for the purpose of reading the Minister's letter. This was done and he (Applicant) then asked those attending the gathering to disperse peacefully, which they did.

Applicant's submissions upon which he based his claim for relief, are formulated as follows in his founding affidavit:

- "(a) When first respondent took action to write annexure "SB7", he exercised a quasi-judicial function.***
- (b) First respondent's preventing of the gathering aforesaid was a gross violation of my right and the right of the people to assemble peacefully.***
- (c) Since the first respondent was performing a quasi-judicial function by interfering as he did with my rights as entrenched in the constitution, he could only do so after giving me notice of his intended action and a hearing, particularly because he was for a long time aware of the planned meeting due to the presence of the N.S.S. at the time it was***

***decided to hold this gathering as far back as February. In fact by writing to me in the eleventh hour when the meeting was scheduled to begin only the next morning, first respondent acted with mala fides, and abused his powers without caring about the inconvenience being caused to the people going to the gathering.***

- (d) The police of the third respondent should not have prevented a lawful gathering even before it begun. I am advised and reasonably believe same to be true that by so doing they acted outside their powers."***

His Lordship Mr Justice Kheola (as he then was) on the 24th March 1994 issued a rule nisi as set out above, returnable on the 31st March. On the return day the rule nisi was opposed by Respondents and the following relevant averments were made in opposition to the relief sought by Applicant. First Respondent (the Minister) says that it has always been the perception of the present government that issues connected with the monarchy are matters of supreme national importance and "have to be decided by the Basotho nation as a whole". He goes on to say that this position " had been articulated by the Right Honourable Prime Minister in the statement he made before Parliament on 28th March, 1994 and which received wide media coverage".

The Minister goes on to say that Applicant and his associates do not have the correct apprehension of the relevant powers of Chiefs. He says that in terms of section 6 of the Chieftainship Act of 1968 it is the duty of every Chief "to support, aid and maintain the King and his government of Lesotho according to the constitution and the other laws of Lesotho". Chiefs in terms of this legislation also have the duty to maintain public safety and public order.

He then says the following:

***"In terms of section 157 (1) of the Constitution, the person holding the office of King under the office of King Order, 1990 immediately before the***



***coming into operation of the constitution shall continue to hold that office and shall take and subscribe the oath for the due execution of his office. It is common knowledge that King Letsie III took and subscribed to the oath as set out in schedule I of the Constitution.***

***In the light of what had been stated in the preceding paragraph the action of the applicant and others named in paragraph 8 to convene a meeting for the purposes set out therein, was unwarranted and against their duties as chiefs. It is clear that they purported to convene a meeting in their official positions as chiefs. The issue of the former King was of vital concern to the country at large and in accordance with democratic proprieties it has to be resolved by parliament or by the entire nation. In my perception it was not a matter to be discussed and decided in a conclave of a few chiefs."***

The Minister also avers that the timing of the meeting was "ominous". He says that the nation knows that the 12th of March was Moshoeshoe Day and is a significant day in the national calendar. Applicant should have known that a number of public functions had been organised under the auspices of the government to celebrate the day in the spirit of unity and dedication to the nation. He avers that it was the duty of Applicant to assist the government in their efforts rather than using their official position "to further their own agenda". Respondent then sets out the essence of his opposition to the granting of the order in the following terms:

***"I admit that I did write a letter to the applicant, a copy of which is annexed to the founding affidavit and marked "SB7". It is well within the knowledge (sic) that as a result of traumatic events which took place in Maseru at the end of January, 1994, the law and order situation was generally tense. As the Minister in charge of police, I had a duty to prevent within the confines of the law any exacerbation of an already fragile situation. Based on all available information from a variety of sources I came to a conclusion that***

***in the interests of national security, the proposed meeting should not take place. Section 8 of Chieftainship Act 1968 enables the minister to direct a chief to revoke, withdraw, amend or otherwise deal with whatever has been done. My letter should be construed as the direction in terms of the law to the applicant and associates to abbey (sic) from holding a proposed meeting. In the said letter I had clearly stated that the matter of the former King will be discussed by parliament and that it was regrettable that the chiefs are taking different channels. Basically, what was objectionable was that the chiefs were using their official positions in embarking on a cause (sic) of action which had the potential of creating law and order problems."***

The Minister concludes by making two statements. The first was that in writing Annexure "SB7", he was only exercising the powers vested in him by section 8 of the Chieftainship Act of 1968. He avers that this was an administrative decision "pure and simple". He says that in doing so he had not violated the applicant's right or the right of the people to assemble peacefully. He concludes by saying: "The chiefs are recipients of allowances paid by the government."

The second statement is contained in the final paragraph of his opposing affidavit. In it the Minister says the entire issue of the former King is before Parliament and that he asked the country to await the decision. "The government is ever committed to resolution of national issues in a democratic manner."

In his replying affidavit Applicant denies that when convening this meeting he and his colleagues were acting "against our duties as chiefs". He says that when chiefs convene meetings in their official capacities they give orders to their subjects within areas of their jurisdiction. For example, he contends that he could not give orders to people of Qwa Qwa to come to a meeting in Matsieng. He goes on to say, "we were there not acting in our official capacities by so doing. We were merely facilitating the convening of a meeting as was appealed to the people to attend and not to order them."

He also avers that there is nothing in law to prevent them facilitating the convening of the meeting of subjects if its purpose was merely to discuss an issue of national interest. Inasmuch as the Minister has referred to the events of January and February 1994, the Applicant says that "he should not be allowed to do that". He says the military fracas was confined to the soldiers and that "no gathering of any kind by civilians was ever prevented both during and after the fracas." He therefore denies that the situation in the country on the 12th of March was fragile as alleged by the Minister. He avers that the fact that the meeting was prevented was an abuse of administrative authority, because the Ministry did not find it fitting to appraise Applicant of the information now contained in his opposing affidavit. Finally Applicant challenges the Interpretation which Respondents place on the powers conferred upon the Minister under section 8 of the Chieftainship Act. It was on these powers that an opposed hearing took place on April 8, 1994.

Judgement was reserved and on the 29th day of April 1994, Mr Justice Monapathi delivered a carefully reasoned judgement in which he dismissed the application with costs, holding in essence that "the right to a fair hearing may have to yield to overriding considerations of public order and security".

Appellant noted an appeal against this judgement on the following grounds:

**1.**

***"The Learned Acting Judge a quo misdirected himself in holding that the Minister's exercise of his statutory powers under the Chieftainship Act 1968, were administrative instead of being quasi-judicial in the circumstances of the instant case.***

**2.**

***The learned Acting Judge a quo erred in not finding that Appellant had a legitimate expectation and a right to be heard where its right to call a gathering as a Principal Chief is withdrawn by the Minister in the exercise of the Minister's powers under the Chieftainship Act.***

**3.**

***The Learned Judge a quo erred in holding that the Appellant and another convened the gathering as Chiefs, hence the wrong application of the Minister's statutory powers under the Chieftainship Act in the circumstances of this case.***

**4.**

***Even if the Court a quo decided as it did, that the Minister's action was merely administrative, the court a quo should have held that on the facts, the Minister's Act was actuated by a mala fides.***

**5.**

***The Learned Acting Judge a quo misdirected himself on the issue whether there was proof of the existence of any jurisdictional facts before the Minister validly exercised his statutory powers under the Chieftainship Act.***

**6.**

***The Court a quo should have found that Respondent's act was a violation of Applicant's constitutional right to freedom of peaceful and lawful assembly."***

In view of the fact that it raises a fundamental constitutional issue, it would be appropriate to consider the last ground of appeal first.

Section 4(1)(k) of Chapter II of the Constitution which in terms of its headnote deals with the "Protection of Fundamental Human Rights and Freedoms", records the entitlement of every person in Lesotho to freedom of assembly. There is a qualification built into Section 4(1) which, after identifying the "rights and freedoms" stipulates that "the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

Section 15 elaborates on these general provisions and under the heading "Freedom of Peaceful Assembly" enacts the following:

***"15. (1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom of peaceful assembly, without arms, that is to say, freedom to assemble with other persons.***

***(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -***

***(a) in the interests of defence, public safety, public order, public morality or public health;***

***(b) for the purpose of protecting the rights and freedoms of other persons; or***

**(c) for the purpose of imposing restrictions upon public officers.**

**(3) A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that provision or, as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2)(a) or for any of the purposes specified in subsection (2)(b) or (c)."**

There are certain other provisions of the Constitution which appear to me to be relevant. I say this because they relate to the role of the College of Chiefs in regard to what is called "succession to the throne of Lesotho". Section 45(1) confers the power on the College of Chiefs to "designate, in accordance with the customary law of Lesotho, the person (or the persons, in order of prior right) who are entitled to succeed to the office of King upon the death of the holder of, or the occurrence of any vacancy in, that office and if on such death or vacancy, there is a person who has previously been designated in pursuance of this section and who is capable under the customary law of Lesotho of succeeding to that office, that person (or, if there is more than one such person), that one of them who has been designated as having the first right to succeed to the office, shall become King."

Sub sections 45(2) and (3) also confer specific powers on the College of Chiefs and read as follows:

**"If, on the death of the holder of, or the occurrence of any vacancy in, the office of King, there is no person who becomes King under subsection (1), the College of Chiefs shall, with all practical speed and in accordance with the customary law**

***of Lesotho, proceed to designate a person to succeed to the office of King and the person so designated shall thereupon become King.***

***Whenever the holder of the office of King or a Regent -***

- (a) has occasion to be absent from Lesotho for a period which the College of Chiefs has reason to believe will be of short duration; or***
- (b) is suffering from an illness which the College of Chiefs has reason to believe will be of short duration,***

***the College of Chiefs may for the time being designate a person, in accordance with the customary law of Lesotho, to exercise the functions of the office of King, and any person for the time being so designated may exercise all the functions of the office of King during the absence or illness of the holder of that office of the Regent."***

These provisions make it clear that the Constitution has conferred very real powers on the College of Chiefs in relation to the determination of who shall be King and how a temporary absence from office may be dealt with by them. (See in this regard also the provisions of Section 46 which empowers the Chiefs to designate a person as Regent.)

I have outlined these provisions of the Constitution because they form the backdrop against which all other legislative provisions and administrative decrees have to be evaluated. Section 2 of the Constitution makes this clear when it records that "the Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void".

It would next be appropriate to examine the relevant provisions of the Chieftainship Act, 1968. I have already referred to that part of the provisions of Section 6(1) cited by Respondents in support of their opposition to Applicant's claim for relief. The section reads as follows:

***"6(1) It is the duty of every Chief to support, aid and maintain the King in his government of Lesotho according to the Constitution and the other laws of Lesotho, and subject to their authority and direction, to serve the people in the area of this authority, to promote their welfare and lawful interests, to maintain public safety and public order among them, and to exercise all lawful powers and perform all lawful duties of this office impartially, efficiently and quickly according to law."***

Section 8 of the Act is the Section relied on by first Respondent as the legislation which confers upon him the power to regulate the functions of a Chief and authorises him to instruct Applicant to the effect "that there should be no gathering of the Chiefs and the nation at Matsieng on the 12th of March 1994." (First Respondent's letter dated March 11, 1994 - Annexure "S.B.8"). Section 8 of the Act provides as follows:

***"8.(1) If a Chief may lawfully exercise a power or perform a duty, a Minister of the Government of Lesotho or an immediately superior Chief may direct that Chief to exercise that power or to perform that duty in any lawful manner specified in that direction. If that Chief fails or refuses to comply with that direction or to comply with it in the manner directed, that Minister, or a person specially authorised by that Minister, or that immediately superior Chief, may exercise that power or perform that duty in the manner specified in the direction. A power so exercised or a duty so performed by that Minister or that person or that immediately superior Chief has effect for all***



***purposes as if it had been exercised or performed by the Chief to whom the direction was given.***

- (2) If a Chief has exercised a power or performed a duty, a Minister of the Government of Lesotho or an immediately superior Chief may direct that Chief to revoke, withdraw, amend or otherwise deal with whatever has been done or omitted under that power or duty, as may be lawfully specified in that direction. If that Chief fails or refuses to comply with that direction or to comply with it in the manner directed, that Minister, or a person specially authorised by that Minister, or that immediately superior Chief, may revoke, withdraw, amend or otherwise change whatever has been done or omitted under that power or duty, as may be so specified in the direction. Such a revocation, withdrawal, amendment or other change by that Minister or by that person or by that immediately superior chief has effect for all purposes as if it had been made or done by the Chief to whom the direction was given.***
- (3) The power to give directions under this section includes the power to give directions in respect of anything done or omitted to be done in pursuance of the provisions of this section.***
- (4) No provision of this section shall be applied or construed in any way that is contrary to the provisions of the Constitution or any other law relating to the allocation of land, the making of grants of interests or rights in or over land, the revocation or derogation from those interests or rights, or their termination, save as may be provided in the Constitution or that other law."***

Clearly, this legislation and the powers conferred upon the Minister under it, are subordinate to the provisions of the Constitution. Therefore, the directive or instruction issued by the Minister must in the first place be tested as to its validity against the right of freedom of peaceful assembly as enshrined and protected in Sections 4(1)(k) and 15(1), (2) and (3) of the Constitution cited above.

It is also clear from the provisions of Section 15(2) that no act done under the authority of any law to the extent that "the law in question makes provision - in the interests of ..... public safety, public order....." shall be held to be inconsistent with the right to free, peaceful assembly conferred in Section 15(1). At the same time, however, Section 15(3) severely limits the right "to rely in any judicial proceedings" upon a provision of law as aforesaid "except to the extent to which he satisfies the Court that that provision ..... or the thing done under authority thereof, does not abridge the rights and freedoms guaranteed by Section (1) to a greater extent than is necessary in a practical sense in a democratic society ...."

Two questions arise. The first is whether the First Respondent was entitled to rely on the provisions of Section 8 of the Chieftainship Act as a provision which authorised him to issue the instruction he did as falling within the exceptions stipulated under Section 15 (2)(a), and more particularly, that "the law in question makes provision .... in the interests of public safety (or) public order".

I am of the opinion that Section 8 of the Act is not a law that "makes provision in the interests of public safety or public order". It is a section that was introduced in order to exercise some government control over the authority vested in the office of Chieftainship in the exercise by Chiefs of their duties. See in this regard the comment in Contemporary Constitutional History of Lesotho (1990) by W C M Maqutu, Chapter 3.1 at pp 18 - 24.

The powers conferred on the Minister were not enacted in order to promote "public safety" or "public order". Neither do I believe they authorised

the Minister to issue instructions which were designed to prevent a Chief - either qua Chief or qua citizen - to hold a meeting for the purpose of discussing a matter which was perfectly proper for both them and their tribespersons to debate, more particularly in the light of the powers and duties conferred upon them under the provisions of Sections 45 and 46 of the Constitution.

The existence of these provisions are in part an answer to the submission of Mr Tampi for the Respondents that Applicant was not as a Chief entitled to participate in a debate on the issue of the Monarchy. In this regard he referred us to the provisions of Section 157(1) of the Constitutions which reads as follows:

***"The person holding the office of King under the Office of King Order 1990 immediately before the coming into operation of this Constitution shall, subject to the provisions of this Constitution, continue to hold that office and shall take and subscribe the oath for the due execution of his office which is set out in Schedule 1 to this Constitution."***

In view of the provisions of Section 6 of the Chieftainship Act which oblige Chiefs "to support, aid and maintain the King in his Government of Lesotho according to the Constitution .....", Mr Tampi submitted that it was "not permissible" for them

to debate the issue of the Monarchy at all. This submission cannot be upheld. Convening a meeting to debate the comments of the King in his New Year's address as referred to in their letter, is not necessarily to be construed as being in conflict with the provisions of Section 6. Secondly, even if it were, the remedy was not to do what the Minister purported to do, i.e. to ban a meeting which was being convened in terms of rights conferred by the Constitution, but to take such disciplinary steps as such conduct may justify him to take and which he was legally entitled to impose.

I say all of the above with an acute understanding of the sensitivities at stake. It must be a troublesome task to marry the needs and requirements of a tribally based authority with the demands of a democratic system of government. Yet

these very demands require an adherence to the fundamental values and principles of a free and open society, such as freedom of assembly and association. In S van Turrell 1973(1) SA 248(C) at 256 the Court emphasised the importance of the freedom of assembly in a democratic order in the following terms: "Freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these rights jealously for they are part of the very foundations upon which Parliament itself rests. Free assembly is a most important right for it is generally only organised public opinion that carries weight and it is extremely difficult to organise it. If there is no right of public assembly." <sup>(my emphasis)</sup> See also in this regard "Theory and Practice of the European Convention on Human Rights (Second Edition) by P van Dijk and G J H van Hoof at pp 428 - 431.

Therefore, in view of the provisions of the Constitution articulating and protecting this fundamental freedom, the Court should be loath to give a strained or extended meaning to a statute which would through such an interpretative process seek to confer power to abridge or curtail the right to free assembly.

I am firmly of the view that the statute in casu does not confer such a power on the Minister and that he had no authority in terms of the Chieftainship Act to seek to prohibit the meeting convened by Applicant and his colleagues.

However, I am also of the view that even if an extended meaning were to be given to the words "public order" and it were to be held that he did have such power within the limited purview of Section 15 of the Constitution (read with Sections 6 and 8 of the Chieftainship Act), he failed to establish that it was "necessary in a practical sense" in the interests of "public safety or public order" for him to prevent the holding of the meeting.

I have cited in extenso Respondent's averments upon which they seek to base their case that "in the interests of national security the proposed meeting should not take place". This Court has on more than one occasion emphasised that where an

authority seeks to rely on allegations affecting the security of State such as e.g. a person allegedly "indulging in subversive activities" or that "disclosure in judicial proceedings would be prejudicial to the public interest" (See Maseko v. Attorney General and another C of A (CIV) No. 27 of 1988 and Sopeng and others v. The Minister of Interior and another C of A (CIV) 15 of 1992, it must do so in clear, unambiguous and factually precise terms. Ackerman U.A. put the requirements in this regard as follows in Maseko's case.

***"It is insufficient merely to state a conclusion without supplying some information on which such conclusion or suspicion is based. In the first place an evidential onus is discharged by proof of facts, not by statements of conclusions. Secondly, by not proving facts in support of the conclusion the Court is precluded from assessing the reasonableness of the conclusion or suspicion and accordingly precluded from finding that the onus has been discharged."***

See also Sopeng's case cited above at p. 19 - 20.

Regrettably the present case again reveals a failure to meet the need for clarity and particularity necessary to discharge the onus on Respondents as required by the provisions of Section 15(3) of the Constitution. To say that "the law and order situation was generally tense" and that Respondent had a duty "to prevent within the confines of the law any exacerbation of an already fragile situation" falls far short of the evidential requirements stipulated for by this Court. This is the more so when it is deposed on oath by Applicant that "the fracas was confined to the military" and that no civilian meetings were prohibited "both during and after the fracas".

Phrases such as "the security of the State", "the protection of the public interest" and "the maintenance of law and order" cannot be used as shields which by mere assertion can be invoked to ward off the challenges levelled at an authority who

acts in curtailment or denial of a fundamental freedom entrenched in the Constitution. Their invocation will only be sustained by a vigilant Court where such fundamental and important considerations as e.g. the security of the State, the public interest and the public order are legitimately raised and are supported by factual allegations (evidence) which can be evaluated by the Court. See in this regard also C.C.S.U v. Minister for Civil Service 1985 AC 374 at 420 where Lord Roskill says:

***"The Courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field the Courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds. That this principle exists is, I think, beyond doubt."***

In view of these findings it is not necessary for me to deal with the other grounds of appeal advanced on behalf of the Applicant.

For these reasons the appeal must succeed. In view of the fact that the legal process was overtaken by events it will suffice if the following order is substituted for the order refusing the application, i.e.

**"Prayer (a) of the Rule Nisi is confirmed with costs."**

The appeal is upheld with costs and the order set out above is substituted for the order decreed by the Court a quo.

J H STEYN,        AP.

BROWDE,        JA.

TEBBUTT,        AJA.

DATED AT CAPE TOWN THIS ~~10th~~ DAY OF AUGUST 1994.

DELIVERED BY THE CHIEF JUSTICE IN MASERU ON THE        DAY OF AUGUST  
1994.