CIV/APN/85/94

IN THE HIGH COURT OF LESOTHO

In the application of :

CHIEF SEEISO BERENG SEEISO	Applicant
vs	
THE HON. MINISTER OF HOME AFFAIRS	1st Respondent
THE ATTORNEY-GENERAL	2nd Respondent
THE COMMISSIONER OF POLICE	3rd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge on the 29th day of April, 1994

The Applicant approached this Court on urgent basis on Notice of Motion for the following orders:

"1. The periods of notice as required by the Rules of Court should be dispensed with on account of urgency.

2. That a Rule Nisi be and it is hereby issued returnable on the 31st March 1994, calling upon the respondents to show cause if any, 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.

3. Prayer 1 to operate with immediate effect.

The prayer 3 was granted by the chief Justice J. L. Kheola

on the 24th March, 1994. The rule was extended to the 8th April, 1994 when the matter was argued. Mr. Phoofolo represented the Applicant and Mr. Letsie represented the Respondents. The matter was ultimately postponed to the 26th April, 1994. The Rule was extended accordingly judgment having been reserved. This application has a certain novelty about it but I believe that it is not as complicated as I had first had sight of it.

The Applicant say that following a meeting at Matsieng in February 1994 Chief Khoabane Theko of Thaba Bosiu, Chief Lerotholi Seeiso, several other ward chiefs and headmen met at Matsieng. At the meeting people present were briefed on His Majesty's New Year's message as well as a Government press release. His Majesty's New Year's message was annexed to the Applicant's papers as annexure SB2. The message (the extract from the original speech) reads:

> "I once more again appeal to you my country men, that my father, my parent, His Majesty Moshoeshoe II was forcefully exiled to England by the Military Council, which ended up by declaring that he has been deprived of his rights, unfortunately and spitefully. If our policy is really to defend the rights of every person, without discrimination, I humbly request you my country men that as quickly as can be afforded, my father His Majesty Moshoeshoe II's matter,

should be examined, and be resolved as it is his right as a person to be granted usefulness justly, and that he be given true protection."

It was resolved that a gathering of all Basotho be convened for the sole purpose of exchanging ideas and opinions on the King's New Year address and to formulate certain resolutions as may be decided upon by the gathering for presentation to the government on the matter of King Moshoeshoe II's reinstatement.

Applicant goes on further to say that it was decided by those present at the meeting that a formal letter of invitation be written to all the Principal Chief in the country, inviting them, their subordinates chief and subjects to attend a gathering at to discuss the matter already mentioned. A circular letter was duly written and a translated copy has been annexed to the papers marked SB4 "..... 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." "..... His Majesty Letsie III made a special request to the whole Basotho Nation, to remember his usual cry of working about the action of the Rulers, who have placed him in His Majesty's seat contrary to Basotho custom, and the removal of his seat of his parent, His Majesty Moshoeshoe II forcefully

and contrary to the justice." Two Principal Chiefs signed on to this letter of invitation namely Chief KHOABANE THEKO and the Applicant. It is significant that the Applicant admits that the Chief Khoabane and him did the invitation in their capacity as chiefs. The Applicant concedes further that for that reason the Minister has interest in the duties and the function of each chief by virtue of the provisions of the Chieftainship Act No. 22 of 1968. Section 6(1) of the said Chieftainship Act provides as follows:

> "It is the duty of every chief to support, aid and maintain the King in His Government of Lesotho according to the constitution and other laws of Lesotho, and subject to the authority and direction, to serve the people in the area of his authority, to promote their welfare and lawful interests, to maintain public safety, public order among them, and to exercise all lawful power and perform all lawful duties of his office impartially, efficiently and quickly according to law."

The Minister after having had information of the intended meeting wrote a letter dated the 11th March 1994 in which he said "It is unfortunate that while Government is attending to the matter of the erstwhile Moshoeshoe II, the chiefs chose to follow the channels which may be in collision with peace and stability

in the country. It was the intention of the Government that at this present session of parliament that this matter be discussed. It is regrettable that chiefs are taking different channel." The Minister then in the letter instructed the Applicant to stop and not proceed with the gathering.

In his Opposing Affidavit the Minister proceeded in paragraph 5 thereof to state the perceived fact of Applicant and other chiefs being unmindful of the duties under the said section 6 of the Chieftainship Act and their duty "to maintain public safety and public order." The Minister adds further "In terms of Section 157(i) of the Constitution, the person holding the Office of King under the King's Order 1990 immediately before coming into operation of the Constitution shall continue to hold that Office and shall subscribe to the Oath for due execution of his Office. It is common knowledge that King Letsie III took and subscribed to the Oath set out in Schedule I of the constitution: In the light of what has been stated in the preceding paragraph the action of the Applicant and others named in the paragraph 8, to convene a meeting for the purpose set out thereon, was unwarranted and against their duties as chief." The Minister continues in his Affidavit that: The timing of the purported meeting of the 12th March 1994 at Matsieng was ominous. The entire nation knows that 12th March being Moshoeshoe's day is a significant day in the national calendar. The Applicant and his

associates should have known that a number of public functions had been organized under the auspices of the Government to celebrate the said day in a spirit of unity and dedication to the nation. It was the duty of the Applicant and his associates to assist Government in their efforts rather than using their official position to their own agenda."

The Applicant's attitude is that while not denying what their duties are or what is to be expected of them but do not admit that in convening the meeting they were not acting against their duties as chiefs. He continued to state that the meeting was to be convened in his official capacity (together with his associate chiefs) in order to give orders to their subjects within his jurisdiction. This now leads to the provision of section 8(2) of the said Chieftainship Act part of which I need to quote as follows: "If a chief has exercised a power or performed a duty, a Minister of the Government of Lesotho or immediately supervise chief may direct that chief to revoke, withdraw, and or otherwise deal with whatever has been done or committed not that power or duty as may lawfully be specified in that directive .....". At this stage we have to learn and accept that the Minister is immediately superior to the Applicant and that he is empowered in the manner suggested in relation to the Applicant and on his fellow principal chiefs. It is important to note that the other main question - besides

whether the Minister ought to have intervened in what was alleged to be matter of legitimate public interest - was how the Minister exercised his powers under the last mentioned provision of the said Chieftainship Act.

The other provisions of the said Chieftainship Act which I take to have relevance in this proceedings were the last two subsection of the Act which read "(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 provision of this section. (4) No provision of this Section shall be applied or construed in a way contrary to the provisions of the Constitution.....". The said sub section (3) is clear enough as being supplementary, in effect, to the provisions of the preceeding section. I have appreciated that it was only very fair but unhelpful in the Applicant's argument to have submitted that the Minister's action was contrary to the provisions of clauses 14, 15 and 16 under chapter II of the Constitution of this country which are the freedoms of expression, peaceful assembly and association. I would hold that interpreted again the above cited provisions of the Chieftainship Act and granted that again the Minister is given certain powers which cannot but be constitutional and under a prerogative of Government, I would not accept this test in favour of the Applicant. To do so would amount to pronouncing the power of the

Minister as under the Act as unconstitutional thus denying him control over the chiefs. This I would not do. I am prepared to accept that a previous Internal Security Act tested against the present Constitution was found to be wanting and irregular and then gave birth to the new Internal Security (Amendment) Act of 1993. That the Applicant says he complied with the requirement of the said Act I would not quarrel with.

I would find that the other policy of the Chieftainship Act is to prevent the smooth running of Government becoming impossible if chiefs regard themselves as a State within a State. When the Chieftainship Act is carefully considered it becomes crystal clear that not only do chiefs have a distinct role to play, they must be seen to support the government in certain functions in which the hands of the government cannot reach the populace except through the support of the chiefs. I would regard that the support that the government expects during Moshoeshoe's Day is not strange or out of the usual The chiefs at all times, have to follow the directives of the Minister in regard to the administration of the country. To say that the chiefs' role is supportive of the government is not an understatement.

This issue of the present King's statement in highlighting the plight of the former King Moshoeshoe II in his having been

brought down from his former status is not merely sentimental as other people would want to believe. I agree that it is a serious national issue. It is of national interest. It is surely not important whether it is of majority or minority interest. In the democratic milieu it is such issues that must be debated and frankly so. The Government should be seen to be carving out a monopoly in how the matter should be debated or dealt with. I do not however want to underestimate the feeling of the Minister that the attitude the present King, King Letsie III, amounts to an act in conflict with the King's Office and his Oath of office under Section 157(1) of the Constitution and as such is in bad taste when tested against the Constitution and what is expected in Constitutional convention. I use the word bad taste for absence of a better word I avoid even surmising whether the act would be judged to be illegal or unconstitutional. But what remains important is that it is the King's statement, containing his attitude that has influenced the Applicant and his fellow chiefs in wanting to convene a meeting.

It is not any of the things taken in isolation that is important. It is the cumulative effect of all of them in the perception of the Minister. I observe that the factors are, a previous meeting in Matsieng (of February 1994), the issue of the King, that the intended meeting would be held on the 12th March 1994 and finally as in the paragraph 6 of the Minister's

Answering Affidavit that "It is well within the knowledge 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 a Minister in charge of police. I had a duty to prevent within the confines of the law any excercebation of an already fragile situation. Based on all available information from a variety of sources I came to a conclusion that in the interest of national security, the proposed meeting should not take place." Counsels have persuaded me that the matter should be objectively looked at. I agree. I would observe that the Minister was right in his perception or to say the least nothing was urged me to find that the Minister was unduly timid overcautious or mala fide in his estimation of the situation. The Minister argued that the events leading up to the decision to issue his letter justified his belief that national security required action without consultation. I am not unmindful of the case of JOHNY WA KA MASEKO vs A.G. and ANOTHER (C of A (CIV) 27/88. There was sufficient information with regard to the need to supply sufficient information on which the conclusion is based.

What remains is the validity of the Minister's action in his use of his powers in terms of the said Chieftainship Act. This is to be evaluated as against the inquiry as to whether the Minister's action was administrative or quasi-judicial and

whether there was a need to give the Applicant a hearing before finally taking the step of writing the letter interdicting the intended meeting. It is to investigate the procedural requirements of the principles which our law does recognize. It is to be reiterated that this is mainly towards finding out if the Minister exercised his powers properly as against whether he had such powers.

The Applicant urges upon me to find that the main question for determination by this Court is whether a Statutory Official such as the Minister is carrying out his under section 8 of the Chieftainship Act, was being purely administrative or was exercising a quasi-judicial function. This test is being urged in order to answer the obvious question whether the Applicant ought to have been given a hearing, in accordance with the principle of *audi alteram partem*, before the Applicant's decision was withdrawn, revoked, struck off or cancelled and to answer the further inquiry whether the Minister's action was reviewable. This is so because if a public authority was acting judicially, its conduct was subject to control by the Court by way of review. But if it was acting administratively, its decisions are virtually exempt from the control by the courts. It means if the Minister was not acting administratively duty or quasi judicial duty imposed on him. Assuming for the moment that this quasi judicial as against administrative test is applicable I would say

that this test of whether the use of the power is administrative or quasi-judicial would depend upon the scope and object of the statute under which the Official uses its power or carries out his duties as Mr. Phoofolo for the Applicant has submitted. "In some cases the intention of the legislative is clear that the line of policy is to be followed which may necessarily involve disregard of elementary human rights or rights of property, for example, statute governing expropriation of land for public purposes, or preservation of public order and security" quoted from JM MAKEPE v MINISTRY OF FINANCE & ANOTHER 1971-73 LLR 24 at 27 per Jacobs CJ (I have underlined public order and security.) I have already commented on the view I take of the fact that the Constitution does not seem to fetter the powers of the Minister. Generally speaking in interdicting certain actions of chiefs for reasons of public order and security. I do not see that there is any interpretation which can be remedial fair large and liberal in its construction and interpretation as best insures the attainment of it objectives (see Section 15 Interpretation Act 1978). I agree that in interpreting a statute where security of State is involved "the Court should accord preference neither to the strand construction in favour of individual indicated in DADOO LTD AND OTHERS vs KRUGERSDORP MUNICIPAL COUNCIL 1920 AD 530 nor the "straind construction" in favour of executive referred to by Lord Atkin in LEVERSIDAE vs ANDERSON, but it should determine the meaning of its wording in the light of the

circumstances whereunder it was enacted and of its general policy and object." The preamble to the Chieftainship Act is enlightening, that is "to make provision determining the nature and duties of the office of chief, status, and relationship of the various offices of chief. One to another and ..... the government,....."

I did not seem to be persuaded that the authority and status that the chiefs have necessary colours by way of influence, the Minister's action under section 8 of the Chieftainship Act because the Acts affects the existing right, liberty or privilege of them as individuals such exercise of such power over the chief's actionis clearly quasi-judicial. I thought the understanding was that the Minister is given such powers deliberately so and precisely because his is dealing with people who have authority and status. One should not be unmindful of the facts that such authority and status is given such chiefs by the Minister himself or rather the Chieftainship Act which the Minister administers. Is it not this existing rights test that is discredited and is seen as being unsound? (See ADMINISTRATIVE LAW - L. BAXTER pages 577-588) : "The problem has been met in England by the adoption of a flexible `reasonable' or legitimate expectation test which does away with the rights as a criterion by which natural justice will be enforced" Baxter page 589-80. I would add also the statement of Lord Denning in SCHMIDT vs

SECRETARY OF STATE FOR HOME AFFAIRS 1969 2R 149 "some of those judgment in those cases were based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act. But that distinction is no longer valid. The speeches in Ridge vs Baldwin 1964 AC 40 show that an administrative body may in a proper case, be bound to give a person who is affected by the decision an opportunity of making representations. It depends on whether he has some right or interest, or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say" Lord Denning went on to say in R v Gaming Board ex parte Benaim 1970 2QB 417 It is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to the scope and extent. Everything depends on the subject matter" (my underlining).

I would agree that there is ample authority to say that the statute must expressly provide for denial of natural justice or fair hearing. This it can also do by necessary implication. I believe that the other consideration would be depending on a subject matter one is to investigate, whether it would not be fair to deprive the person concerned without hearing what he has to say. I can see no other way in the circumstances that the Minister would reasonably exercise his powers. I do not observe that it was necessary to give Applicant a hearing in the

circumstances. I repeat in the circumstances. I have already found that there "existed facts on state of affairs which objectively speaking must have existed before the statutory power could have been validly exercised. If this court could find that objectively, the facts or state of affairs did not exist, it may declare invalid the purported exercise of power" (see METAL-ALLIED WORKERS UNION vs CASTELL NO 1958(2) SA 281 at 284 per Wilson J).

As said hereinbefore the right to a fair hearing may have to yield to overriding consideration of public order and security (see J. M. MAKEPE vs MINISTER OF FINANCE & ANOTHER (SUPRA). The right may be excluded by the nature of the power for example when urgent application has to be taken (as in the instant matter) to safeguard a potentially exposure situation. This would override a finding that there was legitimate expectation. That would be more so when balanced against the dictates of public order or state security. The issue of existence of legitimate exception (even if it exists) would fall to the rear as being of no significance. The requirements of national security outweigh the right. (See Council for Civil Service Union v Minister of Civil Service (1985) AC 374). I cannot see that the Applicant would, as a chief, derive or be possessed of any basis for a legitimate expectation more than what is contained in the policy and intentment of Chieftainship Act No.22 of 1968 which administers

the Office of the Chiefs through the powers of the Minister.

In the circumstance I would dismiss the application with costs.

T. MONAPATHI
Acting Judge

29th April, 1994

For the Applicant : Mr. H. E. Phoofolo

For the Respondents : Mr. L. V. Letsie