C. OF A (CIV) NO.2/95

IN THE LESOTHO COURT OF APPEAL

In the Matter of:

CHIEFTAINESS MASENATE LEPHOTO	1st Appellant
NKOJOANA TS'EPISO	2nd Appellant

and

CHIEF HLABANA HLABANA	Respondent

CORAM

BROWDE, J.A.
LEON, J.A.
V.D. HEEVER, A.J.A.

JUDGMENT

V.D. HEEVER, A.J.A.

This matter arises out of an application brought by the respondent (as applicant) on notice of motion in the High Court. The four respondents cited were Chief Matsoso Lephoto; Chieftainess 'Masenate Bereng; Mr. Nkojoana Tsepiso; and the Minister of the Interior & Chieftainship Affairs, in that order. In what follows, I refer to the parties in accordance with their capacities in the Court of first instance.

What the applicant sought, according to his notice of motion, dated 6 March, 1991, was an order -

"(a) Directing the 1st, 2nd and 3rd Respondents to desist forthwith from interfering in any manner whatsoever not being by due process of law with Applicant's exercise of his powers as the headman over the areas of Sekoting, Leoporo and Rhodesia;

(b) Interdicting 1st and 3rd Respondents from exercising any powers of headman over the said areas;

(c) Directing 1st, 2nd and 3rd Respondents to pay the costs hereof"

The applicant's founding affidavit was brief. It amounts to this:

Applicant is the gazetted headman of Lits'iloaneng. First respondent is the gazetted headman of Thaba-Lethu. Both are answerable to the second respondent, who is the gazetted Acting Principal Chief of Phamong. The third respondent is the right-hand man of the first respondent. Areas known as Sekoting and Rhodesia are in Lits'iloaneng and so under the jurisdiction of the applicant. During February of 1989 animals belonging to subjects of the first respondent strayed or were herded into Sekoting and Rhodesia, grazed there, and were impounded. First and third respondents released them by force. Applicant reported the matter to both the police and the second respondent. She wrote a letter to both headmen, depriving both of jurisdiction in the area she describes as both "Sekoting to Leoporo" and

"Sekoting and Leoporo," until the Principal Chief came to intervene. In the meantime, she placed the chief of Khakhathane in charge of "those areas"; who however, declined the rights offered him. During December of 1990, the first respondent and his subjects including the third respondent again grazed their cattle "in the same areas as before" - therefore, in Sekoting and Rhodesia. Complaints were fruitless and the owners of the cattle continue to graze them there, disregarding the applicant's authority there and in defiance of the third respondent who seems reluctant to exercise her authority over first respondent. The latter and his right hand man, "incite, inspire and encourage" the Thaba-Lethu inhabitants to disregard the authority of the applicant over those areas, "which has .... precipitated violence amongst" the two groups.

Only the second and third respondents gave notice of intention to oppose this application.

An affidavit by the husband of the second respondent (who acts in his name because of his ill-health) disputes the jurisdiction of the High Court. The boundary between Thaba-Lethu and Lits'iloaneng was not determined when the college of chiefs recommended that applicant should be gazetted as headman of the latter and had been in dispute for many years; and his

own powers in relation to boundaries were taken away in 1960.

The third respondent opposed the application both on the facts, and the question of the court's jurisdiction.

On the facts, he alleges that no one has ever, since 1968, disputed the applicant's authority over Rhodesia. Sekoting, however, always fell under the jurisdiction of the Chief of Thaba-Lethu. It was the applicant who caused friction by illegally trying to impound Thaba-Lethu cattle where they were entitled to be. There is uncertainty about the boundary which has been disputed for more than 30 years.

The third respondent annexed two documents to his opposing affidavit. Annexure A is a 1969 judgment of the Judicial Commissioner, in an appeal by the then Chief Lephoto of Thaba-Lethu and the then Chief Hlabana of Lits'iloaneng against a judgment of the President of the Likueneng Central Court. According to Exh A it was common cause that Lits'iloaneng was "part and parcel of what was originally Thaba-Lethu"; that "I do not think it can be said that there is a proven boundary" (i.e. of the areas when they were divided); that the matter should have been settled by the Principal Chief and by the Paramount Chief if

necessary, which had not happened; and that the Central Court was correct that it had no jurisdiction in the matter.

Annexure B is a letter dated 1983 to the Administrative Officer at Mohale's Hoek from the Principal Chief of Phamong, which supports the affidavit of the second respondent that the dispute between the parties as to the boundary was still alive.

In his replying affidavit, the applicant alleges that the boundary was indeed defined on 21 March 1969 by the office of the Principal Chief of Phamong. He annexes a judgment of the Court of the Principal Chief in a matter in which Chief Lephoto and Chief Hlabana presented evidence and a boundary was spelled out as follows:

> "The boundary went down from here Mosonoaneng west down its foot until where it ends, from there to the crop thrashing ground, towards waterfall. From there it goes to the hillock above the village of Monyooe, when you get there, you go down pass near the village of Ramangau, climb the hillock above the village of Belete, when this boundary is standing thus Chief D. Hlabana will live on the South, and chief Lira Lephoto will live on the North."

There is no mention of Sekoting.

A second annexure is a judgment of November 1971

of the Judicial Commissioner on appeal in yet another action between the two chiefs, where Sekoting was directly in issue. On appeal absolution from the instance was ordered on the following grounds:

> "From this record, which consists of a large number of exhibits, this Court cannot say whether the area now disputed falls within the Thaba-Lethu area of Chief Lira Lephoto or whether it was part of the area belonging to the Principal Chief of Phamong which would have entitled the Principal Chief to award it to Chief Hlabana Hlabana when a new boundary was delineated on 21 March, 1969."

Exactly the same problem faces this Court. It is impossible to decide the dispute which has continued for decades on these papers.

The Court *a quo* ignored the dispute on the grounds that the first respondent had not himself opposed the application; ignored the pertinent challenge to its jurisdiction; queried the right of the third respondent to file an affidavit at all (despite the fact that the applicant had cited him separately and sought the equivalent of an interdict based on alleged trespass against him) and made an order allowing the application with costs, therefore also including Leoporo which had not even been mentioned by the appellant in his founding affidavit.

The fact that the first respondent did not

himself oppose the application is irrelevant where the annexure the applicant himself appended to his founding affidavit already revealed the existence of the dispute; which became more apparent in his replying affidavit.

The second respondent was clearly protecting his own interests - albeit derived from those of the first respondent; and was in my view clearly entitled to accept the applicant's invitation to join in the fray since he was cited, as stated above.

The matter was obviously not one that could or should have been determined on affidavit, nor is it one which should merely be referred for oral evidence. The issues are not clearly defined, and more complex than they appear at first blush.

On these grounds alone, the appeal must succeed. Moreover the respondent offered no acceptable reply to the contention that the Court had no jurisdiction in the matter: that it is one to be dealt with administratively in terms of sec. 5(8) - (13) of the Chieftainship Act No. 22 of 1968. Sec. 108 of the constitution appears to confirm this situation. Unless and until legislation is passed in terms of sec. 109 and such legislation provides for judicial intervention in such matters, it appears that the

challenge to the jurisdiction of the Court *a quo* should have been upheld. The proposition that the parties could confer substantive jurisdiction on the court by conceding that it existed, is obviously untenable in law. It was also challenged factually: no such concession had been made by counsel.

The appeal succeeds with costs. The order of the Court a quo is altered to read "The application is dismissed with costs".

LEONORA VAN DEN HEEVER
ACTING JUDGE OF APPEAL

I agree: Sgd: J. BROWDE
JUDGE OF APPEAL

I agree: Sgd: R.N. LEON
~~JUDGE OF~~ APPEAL

Delivered on the 19th day of January, 1996.