**CIV/APN/354/96**

**IN THE HIGH COURT OF LESOTHO**

In the matter between

| | |
|---|---|
| **KEMOELE MAHAO MOJALEFA** | **Applicant** |
| and | |
| **PAKELA PAKELA** | **1st Respondent** |
| **PRINCIPAL CHIEF OF MATSIENG** | **2nd Respondent** |
| **MINISTER OF CHIEFTAISHIP AFFAIRS** | **3rd Respondent** |
| **ATTORNEY GENERAL** | **4th Respondent** |

# JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 13th day of March 1998.

At the outset I am bound to say that this application raises a short but by no means uninteresting,and to me at any rate novel, point of law which arises in the circumstances fully set out below.

The Applicant has applied on a Notice of Motion for an order in the following terms:

> "(a) Interdicting First Respondent from administering the area of Likueneng Ha Pakela Semonkong by virtue of the gazettement as the headman of Likueneng under the Principal Chief of Phamong;

(b) Gazetting Applicant as the head (sic) of Tsenekeng and including the area of Likueneng under the Principal Chief of Matsieng;

(c). Directing Respondents to pay costs hereof;

(d) Granting Applicant further and/or alternative relief as this Honourable Court may determine."

The relevant facts are briefly as follows: The Applicant is the gazetted headman of Tsenekeng Ha Mojalefa, Semonkong in the Mafeteng district under Chieftainess 'Masetlokoane Mahao.

The First Respondent is himself the gazetted headman of Likueneng, Semonkong. This is indeed common cause. There is a dispute however as to whether the First Respondent falls under the Principal Chief of Phamong or the Principal Chief of Matsieng. The First Respondent himself avers that he falls under the latter. The Applicant is adamant however that the First Respondent falls under the former. I should state at the outset, though, that in view of the conclusion at which I have arrived in this matter as fully demonstrated in the course of this judgment, the fact whether the First Respondent falls under the former Principal Chief or the latter is immaterial as far as the present litigation is concerned.

As I see it this application has been motivated and or inspired by the decision of the Court of Appeal in Ministry of Interior and 5 others v Chief Letsie Bereng C of A No. 17 of 1987 reported in Lesotho Appeal Cases (LAC) 1985-89 at 267. The Applicant seeks to persuade the Court that in terms of the judgment of the Court of Appeal First Respondent's "gazettement" as headman of Likueneng under the

Principal Chief of Phamong "fell by the wayside as the area of Likueneng reverted to the area of Tsenekeng" over which the Applicant is gazetted (see para. 3.5 of the Applicant's founding affidavit). It should be observed here that the Applicant starts from the premise that "originally the area of Likueneng was by the 1924 delimitation in the area of Tsenekeng in the Ward of Matsieng." (para. 3.2 of the founding affaidavit). The First Respondent disputes this. He maintains in paragraph 4 of his opposing affidavit that "Likueneng and Tsenekeng have always been separate areas."

It is Applicant's case that on or about the 24th March 1948 The High Commissioner and The Paramount Chief made a new boundary between the Ward of Matsieng and the Ward of Phamong in terms of which Likueneng fell under the Ward of Phamong.

To the extent that there is a dispute of fact on whether Likueneng ever fell under Tsenekeng the Court is inclined to accept the First Respondent's version in accordance with the principle laid down by the Court of Appeal in National University of Lesotho Students Union v National University of Lesotho and 2 others Lesotho Law Reports and Legal Bulletin 1993-94 87 at 108 which in turn followed Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) S.A. 623 (A).

There is another reason why this Court has decided to prefer the version of the First Respondent on the issue. It is this. As earlier stated the Appliant and the First Respondent are gazetted headmen of two separate areas of Tsenekeng and Likueneng respectively. I consider that the fact that there is a separate gazette for each area is conclusive proof of the separate identity of the two arears in question.

I turn then to the consideration whether the decision of the Court of Appeal in Ministry of Interior and 5 others v Chief Letsie Bereng (supra) is of any assistance to the Applicant in the manner that he alleges or at all.

Firstly I observe at the outset that the Court of Appeal case was between two entirely different people from the present litigants namely Applicant and Respondent. That case was between two Principal Chiefs that is to say the Principal Chief of Matsieng and the Principal Chief of Phamong.

It concerned boundaries affecting the two chiefs in their capacities as Principal Chiefs. In short the Principal Chief of Phamong applied for an interdict against the Minister of Interior, the Principal Chief of Matsieng and the Attorney General from implementing the decision on the boundary between the terriroties administered by the Respondents. It was therefore never meant to be a determination of the rights of either the Applicant or the First Respondent as gazetted headmen in their respective arears of jurisdiction.

It is Applicant's case nontheless that the Court of Appeal case upheld the 1924 delimitation (see paragraph 3.4 of the founding affidavit) and thus implying that First Respondent's area of Likueneng fell under the Principal Chief of Phamong. This is once more disputed by the First Respondent in paragraph 4 of his opposing affidavit.

For my part I should state that I have read the judgment of the Court of Appeal in quesiton and can say with confidence that it does not have any of the attributes that the Applicant assigns to it. Nowhere in the judgment has the Court of Appeal upheld the 1924 delimitation as alleged or at all. On the contrary I am

satisfied that after having reviewed the history of the legislation in chieftainship matters as fully set out in Mikhane Maqetoane v Minister of Interior and others reported in Lesotho Appeal Cases (LAC) 71 the Court of Appeal in Ministry of Interior and 5 others v Chief Letsie Bereng (supra) at 271 specifically came to the conclusion that neither the 1924 delimitation nor the 1948 delimitation can be the true and binding one. The Court of Appeal certainly minced no words in stating categorically that "the boundaries could always, on good cause and in a proper case, be reviewed and redifined." Thus the Court rejected the argument that boundaries are immutable. I respectfully agree. To highlight the point it is perhaps necessary to quote Plewman JA in delivering the judgment of the Court of Appeal. This is what he said at page 271:

> "....what seems to have happened over the years is that there have been changes in the person or persons and bodies which were to investigate and recommend the redefinition of boundaries and as to who has to place upon any determinaiton the stamp of authority. Under the 1968 legislation the Minister is given duties (and a substantial role) in relation to the determination or redetermination of boundaries."

I respectfully wish to associate myself with these remarks.

As I see it the fact that the boundaries between the Principal Chiefs in question may have been redetermined and redefined from time to time does not per se affect the status of the Applicant and the First Respondent as gazetted headmen of Tsenekeng and Likueneng respectively. For that matter there is absolutely nowhere in the Court of Appeal judgment that this was held to be the case. Nor was

the status and gazettement of the present litigants an issue at all in that case. I have no doubt in my mind therefore that the Applicant has completely misconstrued that judgment.

It has to be borne in mind that the gazettement and creation of offices of headmen/chiefs is purely an administrative function within the terms of the Chieftainship Act 1968 in which courts of law have no role to play. As I see it, the Court's power is limited to the interpretation of the Act itself. If the administrative action complained of has been arrived at fairly and honestly in accordance with the provisions of the Act, the Court cannot intervene. Indeed I find that such is the situation here. It has not been established in the papers before me that the gazettement of First Respondent contravened the Chieftainship Act 1968 or indeed any of its predecessors in the legislative history of chieftainship in this country. I note further that the First Respondent has not been removed by proper authorities as headman of Likueneng.

In Mikhane Maqetoane v Minister of Interior and others (supra) at 74 Wentzel JA put the matter succinctly in the following terms:

> "It is thus apparent that, as is befitting its status in the Kingdom, the office of Chief or Headman was one which was to be created with prescribed formality and, similarly, if the particular office itself was to be ended or its incumbent removed, the law prescribed a procedure whereby affected persons would be heard and a procedure for publication, so that the public would be aware of these matters so significant in their effect on the lives of the people of Lesotho."

I respectfully agree.

Yet as I read prayer (b) of the Notice of Motion which seeks an order "gazetting" the Applicant as headman of Tsenekeng including the area of Likueneng I have no doubt in my mind that the Court is being invited to perform an administrative function for which it has no jurisdiction. This is apart from the anomalous situation that the Applicant is already gazetted headman of Tsenekeng in any event. When the problem of jurisdiction was raised with Mr. Pheko during the course of argument he immediately shifted the goal posts somewhat and argued that prayer (b) was in fact seeking a declaration of rights. I have no hesitation in rejecting this argument. I think the prayer speaks for itself. At any rate I am satisfied that the Applicant has failed to make out a case for a declaration of rights. This is so because the Applicant has failed to establish a right or a legitimate interest to be declared gazetted headman of Likueneng.

In dealing with declaration of rights in Family Benefit Friendly Society v Commissioner For Inland Revenue and Another 1995 (4) S.A. 120 Van Dijkhorst J said the following at page 125:

> "There must be a right or obligation which becomes the object of enquiry. It may be existing, future or contingent but it must be more tangible than the mere hope of right or mere anxiety about a possible obligation."

With respect I agree.

I should add for completeness, that the fact that the Applicant is already

gazetted headman of Tsenekeng as earlier stated would in any event render the declaration of rights in that regard academic and without any practical consequences. The Court is uninterested in academic situations.

To the extent that the Applicant seeks an interdict in prayer (a) of the Notice of Motion I am satisfied that he has failed to establish the requisites for the right to claim an interdict. Those requisites have been stated by Innes JA in the landmark case of Setlogelo v Setlogelo 1914 AD 221 to be first, a clear right; secondly, an injury actually committed or reasonably apprehended; and thirdly, the absence of similar protection by any ordinary remedy.

Lastly Mr. Pheko has made much of the fact that the second, third and fourth respondents have not opposed this application. In my view that does not relieve the Applicant from establishing his case.

For the reasons which I have endeavoured to explain I have reached the conclusion that the Applicant has failed to make out a case for the relief sought.

Accordingly the application is dismissed with costs to the First Respondent only.

**M.M. Ramodibedi**
**JUDGE**

13th March 1998

**For Applicant : Mr. Pheko**
**For 1st Respondent: Mr. Mohau**