

IN THE HIGH COURT OF LESOTHO

In the matter between:

BOATILE LEKULA MATELA

v

**PRINCIPAL CHIEF OF MAKHOAKHOA
THE ATTORNEY GENERAL**

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 27th day of November, 2000

In this matter applicant claims:

- (a) That applicant be declared as the area chief of Makhunoane in the Butha Buthe District.
- (b) That the Principal Chief of Makhoakhoa (first respondent) herein be ordered to handover the keys and all property to the office of the area chief of Makhunoane to applicant.

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(c) That first respondent (the Principal Chief of Makhoakhoa) pay the costs herein.

1. **Facts on which application is based**

The applicant (hereinafter referred to as) Boatile and the first respondent (hereinafter called) Thaabe are brothers. They are both the sons of the late Tumane Matela the Principal Chief of Makhoakhoa. Thaabe as the eldest son has succeeded to the office of Principal Chief of Makhoakhoa at Makhunoane.

Boatile claims that his father (the late Tumane Matela)

"Sometime on the 6th June 1972...in his lifetime made a decision that he is shedding his responsibility as headchief of Makhunoane and that he is passing the said responsibility of the area of Chief of Makhunoane to me.

The said decision was addressed to the District Administrator Butha Buthe."

A letter dated 6-6-72 is annexed and marked "BLM1". This letter is in Sesotho and is untranslated contrary to the rules of court. Boatile says the Deputy District Administrative Secretary Mr Lethe called a national gathering and presented applicant as the Chief of Makhunoane in the presence of his father, the late Tumane Matela.

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Boatile says he was accepted as Chief of Makhunoane, although his father informed him and verily believed him that he is awaiting the gazettelement of Boatile, "and that he will in the meantime run the office of the area of Makhunoane, as he did in 1978 and 1979 when he died". When Thaabe took over after their father's death and "became the principal chief of Makhunoane, since he was the eldest son", he overlooked the decision of his father. When Boatile protested, Thaabe told him that he would place his own minor son at Makhunoane when he reached majority. Thaabe could not be moved, even when Boatile went to Thaabe's attorney. Boatile appealed to the *Matela family which supported him, but Thaabe ignored them.*

Boatile says Thaabe has no right to ignore a decision taken in 1972 and implemented in 1977.

Thaabe in answer says decision about placing chiefs is governed by law not by wishes of the holder of that office. Thaabe says he succeeded to the office in 1977 as the first born son. Thaabe denies that Boatile was ever made chief of Makhunoane as he alleges. The Matela family could never nominate Boatile Chief of Makhunoane while, he Thaabe was still the incumbent. Nobody has a right to demand to be placed as chief in his area, Boatile does not even qualify to be a successor as Chief of Makhunoane.

2. **Dispute of fact**

Every allegation made by Boatile is disputed. Consequently this matter is not a matter that should be brought by way of application. It has no urgency at all since Thaabe became the substantive holder of Chief of Makhunoane in 1977. It transpires that when this happened, Chief Tumane was still alive because, he died in 1979 according to Boatile. Paragraph 7 of the founding affidavit of Boatile is completely unintelligible, I do not understand how Chief Tumane Matela could remain Chief of Makhunoane until he died in the circumstances.

I am also puzzled by the statement in paragraph 5 where it is claimed the late Chief Tumane Matela "made a decision that he is shedding his responsibility as the headchief of Makhunoane. "Headchief" translated into Sesotho means "Morena Oa Sehloho". Principal Chief is translated into Sesotho as "Morena oa Sehloho". "Head" is translated into Sesotho as "Hlooho". This "headchief" claim has increased the dispute of fact in this application.

It is also significant that in 1972 when Chief Tumane gave Boatile the chieftainship of Makhunoane, there is no allegation or even suggestion that Thaabe the heir was there. No members of the Matela family are alleged to have been there or (at least) informed of this interference with Thaabe's inheritance. It is therefore clear that not all customary procedures on chieftainship were followed.

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I am puzzled that Thaabe succeeded to the position of Principal Chief of Makhoakhoa in 1977, at the very time that Boatile claims to have been made chief of Makhunoane. As if this is not enough Boatile at paragraph 5 of his replying affidavit says:

"My father decided that I should be installed as Chief of Makhunoane and he retained the position of chief of Makhoakhoa."

How does a man vacate office in 1977 and yet give part of that office to someone else. Boatile does not say when exactly in 1977 he was made chief of Makhunoane, and when in 1977 Thaabe succeeded his father. To say that he Boatile was already chief of Makhunoane is vague. If Boatile really was the chief of Makhunoane, what did he do when Thaabe took everything? Where was Boatile all along — twenty three years have passed? He should have known that this application would be disputed among other reasons because of the delay of almost a quarter of a century. Key witnesses should have died or at any event their memories have become dim and substantially unreliable.

Another factor that puzzles me, and on which Boatile has chosen not to be frank, is that of the state of mind of his father - Chief Tumane Matela. Why was he relieved of the Principal Chieftainship,

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two years before he died. Was he still of sound mind or had he become so infirm in both body and mind that Thaabe had to be made chief in his place? It would have helped, if Boatile the applicant had been more communicative on this issue.

Boatile's silence about the reasons for removing his father two years before his death, and his inaction for over twenty-three years on this issue makes me doubt his *bona fides*. His bare allegation that some Deputy District Administrator of Butha Buthe (Mr Lethe) made him Chief of Makhunoane is not helpful at all. By what right did Mr Lethe do this? Where is this Lethe? Is he still alive? What has happened (all of a sudden) that has made Boatile claim the right he had disregarded all along? There are too many unanswered questions. Where a matter is disputed, the court needs some reasons on which to base its decision to exercise its discretion as to what the best way forward should be. Boatile has not been helpful in this regard.

3. **Definition of issues in chieftainship disputes**

It is necessary in chieftainship disputes that issues be clearly defined from the outset. If what is to be adjudicated upon is succession, this has to be specified. Courts have jurisdiction to adjudicate in matters of succession according to the common law, customary law and the *Chieftainship Act* of 1968. In other aspects of chieftainship the role of the courts is not always straight-forward.

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They have the duty to protect chiefs whose rights are clear from invasion by other chiefs and persons. But in doing so, the courts have to bear in mind that chieftainship is an administrative institution. It is the administration that creates the offices of chief to meet the requirements of administration from time to time. This has been so since the *Native Administration Proclamation* of 1938.

It was thought the *Chieftainship Act* of 1968 had changed the position, but as will be shown later, it has not. Chieftainship was expected to be governed by custom, but that did not materialise because the British colonial government and the paramount chief did not follow custom, they carried out their policy of strengthening the authority of the Paramount Chief through placement and recognition of chiefs and headmen. This created chaos and contradictions that have not been resolved to this day. See Duncan Sotho Laws at pages 47-60. This was inevitable because Principal Chiefs had a tendency to recommend their relatives to be placed over other chiefs and headmen and the Paramount Chief and the High Commissioner accepted those relatives and proclaimed them chiefs.

Cases of chieftainship are for the foregoing reasons no free from difficulties and contradictions. It becomes necessary to specify exactly what is in issue so that it can be clear whether a justiciable issue or an administrative matter is involved. As Schutz P in

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Ramakoro v Peete 1981(2) LLR 559 at 568 said about the need of clarity in pleadings

"It is no good to say, as was argued, that he knows. He is entitled to be told by plaintiff what she complains of, before he puts his case."

This problem of vagueness and generalisation in allegations has caused this court's time to be wasted unnecessarily. In above-mentioned case of *Ramakoro v Peete* because of failure to clarify issues the court heard full evidence and four years later found that it had no jurisdiction in the matter, see *Peete v Ramakoro* C of A (CIV) No.24 of 1986 (unreported). It was a case of placing of chiefs over the rights of others like this one that is before me.

In this case I am not sure whether I am dealing with a case of succession or creation of a new office of chief with the accompanying problem of boundaries. The latter is an administrative matter. Where there is lack of clarity, courts should be reluctant to dimly perceive a cause of action where it is not perceivable - lest they be taken on a wild goose chase and only to find after several years that there never was a cause of action. An issue for the court's determination requires definition at the beginning of court proceedings.

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4. **Whether courts can make orders on appointment of chief?**

In the case of *Slowley Molapo v Mateketsi Teketsi* 1971-73 LLR 235 the vexed question of the power of courts in the creation of offices of chief and the appointment of chiefs came before this court. Tied to this was the issue of appointment of persons to hold offices of chief. Jacobs CJ at page 237A said:

"It seems to me that what plaintiff in this case is trying to do is exactly what plaintiff in the case of *Molapo v Molapo* 1926-53 HCTLR 210 tried to do, namely ask the court to declare that he, the plaintiff has chieftainship rights over a portion of an area (the area of Kuenaneng) of which the defendant has already been proclaimed chief, a contention which was rejected by the court in that case."

That seems to be what Boatile the applicant is asking this court to do in respect of Makhunoane - where Thaabe as Principal Chief was proclaimed in 1977 twenty three years ago. It is also clear that Boatile like Slowley Molapo, has never been in the "existing lists of holders of offices of chiefs and headmen"—see *Slowley Molapo v Mateketsi Teketsi* at page 238A and Jacobs CJ at page 239B dealing with a similar delay said "But more than 20 years have elapsed since the decision in *Molapo's* case (supra) and plaintiff and his predecessors have had more than sufficient time to approach the proper authorities for recognition as a separate office of chief for the area which plaintiff claims".

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I do not find it mentioned anywhere that Boatile ever approached the authorities in the last 23 years. I am therefore puzzled by his entire conduct.

Courts are only empowered to intervene where succession to chieftainship is involved. In administrative matters such as delineation of boundaries, creation of new offices of chief they cannot interfere. As Isaacs AJ said in *Tefo Topi v Minister of Interior & Others* 1978 LLR 222 at page 224:

"It is the King, who is to act on the advice of the Minister, who defines boundaries. This is entirely on administrative power and the court will not interfere with an administrative act except on very limited grounds."

This new chieftainship of Makhunoane is to be carved out of the existing Principal Chieftainship, therefore it has to have a proper boundary deliniation to distinguish it from the existing Principal Chieftainship's area of jurisdiction.

The creation of a new chieftainship of Makhunoane which is distinct from the Principal Chieftainship of Makhoakhoa is a purely administrative act; so is the appointment of a new chief of Makhunoane who shall be added to the list of chiefs and headmen. In the case of *Leloko Jonathan v Lechesa Mathealira Jonathan* 1977

LLR 314 Leloko Jonathan was claiming the headmanship of Tsikoane. He had been placed by the late Jonathan Mathealira, the father of Lechesa the Ward Chief of Tsikoane, he had served as headman of Tsikoane for twenty years and was even paid a headman's stipend by the Government of Lesotho. When Lechesa succeeded his father as Ward Chief of Tsikoane, he dismissed Leloko from headmanship. This court dismissed his claim because he was ungazetted and his office of chieftainship was not recognised nor had its boundaries been delineated from the Ward Chieftainship of Tsikoane.

In *Motsarapane v Motsarapane* 1979 LLR 112 Mooki had been placed by the Chief of Hleoheng over the area of Hleoheng. Cotran CJ said such a placing has no legal validity. At pages 117 and 118 Cotran CJ concluded:

"Since the *Chieftainship Act* 1968 'placings' in the old customary sense are dead and buried."

Boatile has made a very skeletal case about his placing. In affidavit proceedings more has to be said because affidavits constitute both the pleadings and the evidence. See *Saunders Valve Co. Ltd. v Insamcor (Pty) Ltd* 1985(1) SA 144 at 149. Boatile (in this case) does not even claim (like *Leloko Jonathan* who had been placed and acted as headman for 20 years) that he received a stipend from Government. We only have his word that he was ever placed as chief of

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Makhunoane by the Deputy District Secretary, Butha Buthe. Even if he had been, Thaabe could remove him from that position in the same way that *Lechesa Mathealira* removed *Leloko Jonathan*, notwithstanding the fact that Leloko Jonathan had been headman for twenty years and received a Government stipend. Boatile has produced no evidence to prove that even in 1977 he ever operated as Chief of Makhunoane for a portion of that year, because that is the year Thaabe took over from their father as Principal Chief at Makhunoane.

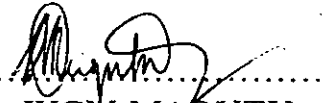
From what I have said above, it should be abundantly clear that applicant Boatile has not provided the court with any evidence, even if he had, he has formidable legal obstacles to overcome. The fact that he waited twenty-three years before bringing these proceedings while Thaabe was in possession of a right he claims, does not help his case. He must have been aware that he had no enforceable right to the Makhunoane chieftainship.

In other words, Boatile had no title to sue for the chieftainship of Makhunoane, because there is no separate office of Chief of Makhunoane nor has he been recognised as chief of Makhunoane by the King (acting on the advice of the Minister) and proclaimed as such in a Government Gazette for general information.

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5. **Order of court**

For the above-mentioned reasons, I have no choice but dismiss this application with costs.


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WCM MAQUTU
JUDGE

For applicant : Mr *Putsoane*
For respondent : Mr T *Hlaoli*