CIV/APN/360/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

CHIEF TŠEPO NKUEBE — APPLICANT

and

ATTORNEY GENERAL — RESPONDENT

For Applicant : Messers K. Mosito and S. Phafane

For Respondent : Mr. M. Mapetla

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 13th day of November 2000

I have already given my ruling in this matter on the 13th October 2000. The reasons therefore now follow.

This was an application for review (amongst others) following a disciplinary case against Applicant concerning charges of misconduct (in six counts) that were brought before Chiefs' Disciplinary Committee appointed for chiefs in terms of the laws administering chiefs in this country namely the Chieftainship Act No.22 of 1968 at Part VI. The Applicant is Principal Chief of Quthing.

The chief, as it was common cause, was summoned to appear before the said Committee on the 1st July 1999. It was common cause that there were summons, there were annexures showing that the said date was appointed for that hearing. There was correspondence between Chief Nkuebe's Attorneys and the Committee, central of which was asking for postponement because the chief wanted to be prepared. (See annexure "E") He wanted to be represented by Counsel. He also wanted to organize his papers and witnesses although it transpired (as he conceded) that the representation by Counsel was not permitted.

It did transpire that negotiations for a postponement were done by correspondence. It ended up in a hearing which was in default of appearance by the Applicant whereat he was suspended for a period of fourteen years. In the circumstances the Respondent contended that the Applicant, despite clear evidence that he received the said notices and was aware of the date of hearing, nonetheless elected to stay away from such hearing and did not attend as deliberate act of contempt.

Consequently and due to Applicant's dissatisfaction there was this application for review of the proceedings seeking to set aside the said proceedings which had suspended the Applicant from his position as Chief. In addition he sought to declare the suspension as null and void. And finally he sought to declare nomination of sixth Respondent as Acting Principal Chief of Quthing as null and void. Applicant complained of irregularity centering around the fact that the Committee proceeded in his absence despite a request for postponement through his attorneys and because he said he was not given an opportunity to be heard fairly. He said:

> "I aver that by failing to do so the committee denied me the benefit of *audi* principle."

Applicant said there was irregularity on account of the fact that he was not allowed to be represented, the requested postponement was not done, there was a ruling, and there was a decision against him in his absence. He applied that the suspension and other directives which followed it be declared null and void. That he ought to have been given a hearing or an adequate opportunity to state his case and an adequate chance to collect information and prepare. This he said he was denied.

Most of the fact are common cause as can be seen from the papers filed of record. This case before Disciplinary Committee involved a serious right of this Applicant. The proceedings from page 27 to 45 amply show. That he is a chief it is his right. That the matter was a serious matter can even be seen from the period of suspension and that the charges before the Disciplinary Committee which must have been of a serious kind. This has influenced my thinking and

given me a lot of worries as to what the proper attitude of the Committee should have been in response to the request for postponement by the Applicant.

I found that the Applicant may have been confident that he had good reason for the postponement and that may have been a genuine confidence that the Committee would be granting a postponement (by seven days) based on the ground that he had to prepare for his case and organise his witnesses.

In the said annexure "E" which was a letter to the Chairman of the Committee from Applicant attorneys it is said from the second paragraph thereto:

> "We are informed and realize that client was served with summons only on 25th June 1999 at 18 hours and that the matter is due for hearing on the 1st July 1999.
>
> We further observe that there are a number of charges and would need time to prepare defence.
>
> We request that the matter be kindly set for 8th July 1999 when we would had had adequate time to prepare defence and possible witnesses."

Applicant's Counsel contended that as long as the Committee did not respond to the request for a postponement contained in annexure "E" it mattered not whether the Applicant did not attend because it appeared that the Committee had made up its mind and was bent on proceedings whether Applicant appeared before it or not.

What made a fully informed approach on this aspect (of the letter) difficult was that the Respondents did not acknowledge receipt of the letter and consequently they did not fairly respond. One has to speculate. What made the matter even more complicated was a letter written by the Applicant's attorneys, a little later after, the hearing, that is on the 5th August 1999. See annexure "F". The second paragraph of the letter is more relevant but the first paragraph will give a useful background. The letter said:

> "Our office would like to put on record that we did on the 26th June 1999 issue to yourself a letter referenced DM/IM/TQSN - 2733 in which we sought postponement that the matter should proceed on the 8th July 1999 to enable client to prepare on subsequent follow up, we met Mr. Lepota who informed our Mr. Metlae telephonically that the letter had been ignored and the proceedings (would) continue as scheduled. Our said Mr. Metlae paid a physical call at the premises and Mr. Lepota confirmed his telephone message." (My underlining)

Apart from the fact that the letter was self serving it made it even more difficult when in the opposing affidavit Respondents' deponents made no attempt to gainsay anything contained in the letter.

Aspects of the letter annexure "F" may have been vague e.g. as to when the follow up made. But it would have been useful if a response had come out from the Respondents in a much more specific way. This would have helped to restrict the number of all possible meanings, interpretation or inferences to the

letter. One of the inferences being that the Committee would have been unmoved, on any account, to grant a postponement whether the Applicant attended or not. A response, if it had come out, would possibly indicate why a favourable and liberal interpretation was not deserved by the Applicant in this case where a serious right and status of the Applicant was concerned.

The other possible meaning would be that the expectation by the Applicant of fair play and a common sense approach would be misplaced and there was no denial of a fair hearing or opportunity as such. If the letter was responded to it would have advised of the Committees attitude on the alleged request for an opportunity to prepare, and for summoning of witnesses by the Applicant, which reason is in most circumstances normally a weighty reason.

Applicant had already conceded that the reason of seeking legal representation was misplaced. I however found that he had no reason to anticipate that the requested postponement would automatically be granted without his appearing before the Committee and without that Counsel of his making a better attempt than writing to the Committee and abandoning the negotiations along the way.

This case may be one of the classical cases where Counsel will go a long way to convince a litigant that he has certain rights (for instance to a postponement) that he does not have on the mere asking and actually thereby lead a litigant to contempt. And this is an everyday occurrence in this country

that ordinary people are misled into believing that they have rights that they do not have.

The Applicant may have been led into believing that it was not necessary for him to attend once his attorney got into that correspondence with the secretary of the Committee. And I definitely found that the absence of the Applicant before the Committee would ordinarily amount to contempt whether or not he may have had the confidence that his case would be postponed because there were those threatening letterheads from his attorney. Because of the seriousness of the case itself I however also found that the Committee was too strict and inflexible in refusing a postponement and again too impatient.

Despite that the Applicant may have appeared to be in contempt I concluded that the Committee adopted a rigidly judicial attitude. I say this is the light of firstly the seriousness of the charges against the Applicant and notwithstanding that the Committee may have felt that the attitude of the Applicant was negative. The first factor was the one which should have exercised the Committee's mind towards a less rigorous stance. This case of SEKAI HOLLAND AND ELEVEN OTHERS v MINISTER OF PUBLIC SERVICE LABOUR AND SOCIAL WELFARE SC 15/97, ZLR(8) of Zimbabwe (quoted to me by Mr. Mosito) Gubbay CJ says at page 5:

> "Next to consider is what constitutes a "fair hearing" procedural fairness is of course an ambiguous concept. It varies according to context. Its breath must be determined from the specific nature of

the proceedings or inquiry in question. This emerges clearly from the oft quoted remarks of Tucker LJ in RUSSEL v DUKE OF NORFOLK (1949)I All ER 109 (CA) at 118E:

"The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth." (My underlining)

All the issues in the above quotation are pertinent I was however particularly interested in the quotation from RUSSEL v DUKE OF NORFOLK where it speaks about the subject matter of the dispute. Coming to the instant matter the subject of the disciplinary case concerned a serious question of the right and status of the Applicant. Hence a much more careful approach should have been adopted towards first resolving whether the case ought to proceed or not.

This immensely informative Zimbabwean case of SEKAI HOLLAND continued to state in its judgment at page 5:

"At the very least there are three fundamental requirements of natural justice to which a person directly affected by an impending inquiry is entitled: The first is the right to have notice of the charge or complaint. The second is the right to be heard - to be given the opportunity to adequately state a case to answer that charge. And the third mentioned expressingly in S. 18(a) is the right to impartial hearing ...." (My underlining)

Then that is why one would be concerned about the facility with which the

Committee resolved to proceed by default.

There was another reason why the Committee should have been patient. It was this background of the overtures from Applicant's attorneys. Like any other attorneys they write in that uppish style that may perhaps be perceived as arrogance. But that was not the reason for the Committee to have been impatient and to have been too strict about the postponement. This use of language and jargon by lawyers is merely a question of style and habit. I would have (as I suspected the Committee also did) felt that the attitude of the Applicant was contemptuous. But I should nevertheless have been reluctant to proceed by default in the circumstances. I am saying despite the attitude of the Applicant which was apparently interpreted as unwilling and unco-operative.

The Committee should have appointed yet another convenient date, and a reasonable date despite the absence of the Applicant. And indeed the Applicant has spoken of a number of days for which he asked for a grace period. If such postponement was granted there should not only have been justice being seen to be done but there would have been a grant of an opportunity to Applicant to adequately state a case in answer to those charge or complaints. The latter is one of the three fundamental requirements of natural justice. In the circumstances the Applicant speaks of a need to be given an opportunity to be heard. I allowed the application because I made a finding that the Applicant was denied such an opportunity.

I said that the case must be reinstated and a convenient date be appointed. I do not see that there would be any prejudice. I understand that the Applicant remains on a holding suspension until the case is tried. This means that in the meantime the Sixth Respondent remains as Acting Chief as his appointment has fairly been made against the back round pending trial of the Applicant. I considered it wasteful to investigate and discuss whether the appointment of the Sixth Respondent was irregular. There had to be such an appointment in the meantime.

As I have said my suspicion was that Applicant was led into this contempt. He was led into contempt not to attend because he should himself and in person have come before the Committee and sought postponement before the Committee. He has to pay the costs of the application on an attorney and client scale. His inability to attend the Committee says all about the kind of costs that I award because I say this was in the nature of contempt. He must consider himself lucky.

T. MONAPATHI
JUDGE