CIV/APN/56/90
IN THE HIGH COURT OF LESOTHO

In the matter between :

POMELA MPO APPLICANT
and
NAPO MOCHEKOANE FIRST RESPONDENT
CHIEF OF QEME (HA MANTSEBO AND HATABUTLE) SECOND RESPONDENT
PRINCIPAL CHIEF OF MATSIENG THIRD RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 6th day of September 2000.

Chieftainship rights were contested over an area in Qeme ward of Matsieng in Maseru district. The dispute came by way of an Ex park application in which the Applicant sought relief couched in the following terms: That: "A Rule Nisi be issued returnable in or a date and time to be determined by the above Honourable Court calling upon the Respondents to show cause why:

a) First Respondent shall not be restrained from holding himself out to the general public as the customary headman or Chief of Ntsokotsane and Ngopekhubelu or Qeme ha Mochekoane.
b) First Respondent shall not be restrained from cutting, thatching grass, declaring grazing areas as reserved and exercising Chieftainship rights over the areas of Ntsokotsane, Motebong and Ngopekhubelu.
c) An order declaring that in the eyes of the law there is no headmanship of Ntsokotsane and Ngopekhubelu or Qeme Ha Mochekoane.
d) That the Court dispense with the ordinary rules requiring prior service of the application.
e) First Respondent shall not be directed to pay the costs of this application.
f) Second and Third Respondents should not be directed to pay costs of this application in the event of their opposing this application.

2) That prayers l(a), (b) and (c) should operate as an interim interdict pending the finalization of this application.

The Applicant had filed a founding affidavit with some five annexures and translations which together made that part of the record quite bulky to start with. Applicant was supported by one Matekane Mpo to whose affidavits was attached two further annexures. The First Respondent reacted by way of an eleven page

answering affidavit. This was supported by an affidavit of Moramang Seeiso and that of Mokhitli Maseejane and Mathe Maine. These including annexures ran to about thirty four pages of record which made it a bit frightening at a glance. The answers resulted in the replying affidavit of one Matekane Mpo. The other Respondents had not opposed and would presumably abide by the Court's judgment.

It was recorded that the First Respondent had since died and his Mochekoane Mochekoane had been substituted. The reference to the name of the original Respondent would only therefore be for convenience where necessary. The First Respondent has described himself as "Chief of the area known as Ha Mochekoane which covers the areas of Ngopekhubelu, Ntsokotsane and Motebong."

The dispute had a long history. This was even shown by this myriad annexures consisting of letters, copies of judgments and decisions over boundaries. Sometimes these only served to confuse issues but were often useful to gauge probabilities. The motives for collecting some of these annexures (except as historical or literary trophies) must necessary be unclear and indeed vary. It is not unknown of incidents where a litigant is seen to have kept and confidently produce a document which only served to bolster the case of his opponent. The other unsatisfactory feature will often be where no basis was made or where no

circumstances are stated for wanting to persuade the Court to rely on the document or copy of a judgment. In other cases the facts are obscure and parties bear little relationship (as predecessors or successors-in-title) to the parties before Court.

I thought a reference to the submission made by Mr. Tau for Respondent would partly show what the issue would be. Counsel said firstly that while authorities abound that a customary headman or chief need not necessarily be gazetted or be published in a government newspaper the recognition of such a headman in law or by law which the Chieftainship Act No. 22 speaks about, is a question of fact to be determined from all the circumstances. That therefore the Court had to come to a conclusion that the Respondent was a chief or headman.

Secondly, as Counsel submitted, it was fatal to the Applicant's case, that nowhere in the proceedings did he describe his boundaries so as to distinguish his boundaries as against those of the Chief of Ha Mantsebo and other chiefs and to that of the areas of Ntsokotsane, Ngopekhubelu, Motebong and Lehlakeng. This he ought to have done in order to give a meaningful demonstration to his assertion that the area of Qeme Ha Mpo, as gazetted in the High Commission Notice Number 26 of 1964 and two other previous publications was his own area.

Thirdly, that the onus of proof was on the Applicant to make a detailed

recitation of his boundary, the failure of which can only mean that there was no proof, that the disputed areas were within the Applicant's area. The inference would be that even if Applicant is gazetted chief he seeks to exercise rights over areas outside his jurisdiction. And that the Respondent must have been proved to be the rightful authority over the disputed

areas. Counsel contended that the above submissions would be a basis for an application for absolution from the instance or dismissal of the application.

Again on the need to clarify these issues the Applicant said even if on the papers before Court the probabilities would indicate that as early as the year 1957 there was already a place called Ha Mochekoane the crucial question remained to be: Has the Respondent been holding office of chief and has he ever been legally authorized to exercise the powers and perform the duties of a chief?

Applicant said he was a gazetted headman of Qeme Ha Mpo. Matekane Mpo had been administering the area since 1986 on behalf of the Applicant when the Applicant was employed in South Africa. Even before then the said Matekane had been the administrator of the Applicant's said areas since 1956 during the headmanship of Mpo Mpo (Applicant's predecessor-in-title). This was confirmed by the said affidavit of Matekane Mpo. This was obviously denied by the First Respondent who in turn said he was confirmed as chief on the 9th November 1968

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following the death of his father. For this he annexed document "NMA" as a showing of his appointment before the chief of Matsieng on the 9th November 1968 as chief of Ha Mochekoane. This appointment was done as alleged by Chief M. Seeiso who was assisted by Chief Mokone Tsitso and Chief Jobo Nthoana.

Matekane Mpo deponed further to say that the father of Respondent was Mochekoane Molise who had been a tax payer of Qeme Ha Mpo. He had a tax registration number B63/109. He had never been a headman in the area. While the inference would be that the Respondent's father was the Applicant's subject the Respondent made no special effort to controvert the basis except to make a bare denial.

What was an important part of the history of the matter and adding to probabilities was that it was only beginning in 1959 and onwards that problems began between the litigants. It was when the late Chief Thoko Griffiths as Applicant contended was the first to declare (claim) that Respondent was a headman of disputed areas.

Respondent put forward an annexure "MMB" (of 2nd May 1957) primarily to show that there had been an area of Ha Mochekoane in existence before 1959, that is before Chief Thoko Griffiths came into the picture. This annexure "MBA"

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which is a boundary dispute between Chief Stephen Selonyane and Chief Mpo Mpo truly made a number of reference about the Respondent. For example at page 1 it is said:

> "..... this boundary ..... is the one dividing himself and Chief Mochekoane Molise not Mpo Mpo."

Secondly, at page 2 is said:

> ".....the reason for the boundary was when Mochekoane Molise had allocated.....a site on the north of the river Ntsokotsane."

Thirdly, again at page 3:

> "..... these areas which were under Selonyane and Mochekoane

And furthermore at page 4:

> ".....the plaintiff says that the forest on the west is his, while on the east is Mochekoane's."

And fifthly and lastly it was said on page 7:

> "..... we get the evidence that Mochekoane Molise had his own home, the boundary be made between Stephen Selonyane and Mochekoane Molise."

There could not be more of these references. But the pertinent point here is that in no way and in this fashion could we say that a decision between the two chiefs would be in favour of or argued for the Respondent. Hence that question about the real

benefit of these myriad judgments such as this one. The question that remained at this stage was if probabilities were in favour of a place existing which was known as Mochekoane would it establish that the Respondent was a chief. Respondent however spoke of "NMB" as indicating that as far back as 1957 there was and area known as Ha Mochekoane about which the annexure referred and which refers the Respondent's grandfather Chief Mochekoane Molise. Respondent added that the dispute which the annexure referred to actually started in 1947.

The Respondent was alleged to have brought an administrative claim (dispute on land) against the Applicant in which he contended he was a chief. In his paragraph 4.4 Matekane Mpo states as follows:

> "The Acting Chief of Matsieng of the day dismissed this claim because the Chief Thoko Griffiths who made this arrangement could not in law make a chief. As Chief Mpo Mpo had not been proclaimed in a gazette, he had no title to sue". (My underlining)

See copy of the said ruling marked annexure 'A' Indeed that was what the decision stated, namely that:

> "The Court in this case finds Chief Napo Molise as a Chief put by Chief Daniel Thoko Griffith, but not gazetted. In that case it finds that he does not have a right to claim against Chief Mpo Mpo who is gazetted." (My underlining)

The Respondent Molise (in paragraph 4.4) made a remarkable denial that nowhere does annexure "A" state that Chief Thoko Griffith made him chief of Ha Mochekoane and added:

> ".....I deny the averment made that I am not a chief simply because I have not been gazetted as required by the Chieftainship Act 1968 as amended."

It became clear that according to the Respondent if he was proved to be a rightful chief it was immaterial that he had not been gazetted in terms of that 1968 law or any other law. That meant as he contended that that was not a strict requirement.

The Applicant went on (paragraph 5 of Matekane Mpo) to say that in 1969 the Acting Principal Chief of Matsieng purported to create an area of jurisdiction for Respondent "out of the area of Qeme Ha Mpo." This was shown by annexure "B". An investigation was made at the office of the Acting Principal Chief of Matsieng to seek to discover the circumstances of the issuance of the annexure and

> ".....Nobody at the office of the Principal Chief acknowledged the said document purporting to make a boundary as genuine." The document was never recognized as genuine by anybody as he went on further to say. The deponent underscored the fact that attention was drawn to the fact that no boundary would have been made in the absence of Chief Mpo and Chief Maama Thaabe as chiefs who would be affected and whose areas would be put under the

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new chief. This failure to call the concerned chief indicated to the Applicant that such attempts or actions were disreputable were not beyond the Respondent. To the above paragraph 5 of Matekane Mpo the Respondent was only able to reply as follows without actually acknowledging the annexure "A". He denied that the document purported to create an area of the Respondent's jurisdiction out of the area of Qeme Ha Mpo in that, as he averred, his area has been in existence before 1969. Again he referred to annexure "MMB". And that furthermore his area does not even share a boundary with Applicant's area and furthermore that the Respondent's area was never part of Applicant's area. He did not know that the circumstances of the annexure "B" were investigated. He further denied that the boundary suggested in annexure "B" would have the effect of encroaching on the area of the Applicant and another chief. On the suggestion that from 1969 to 1989

the Principal Chief had not interfered and that".....we treated Napo Mochekoane as an ordinary subject." Respondent denied this and made reference to the supporting affidavit of Chief Moramang Seeiso.

Chief Moramang Seeiso was Acting Principal Chief of Matsieng between 1968 and 1975. Then he was responsible for the ward of Qeme in which is found areas of Ha Mochekoane and Ha Mpo "which form the dispute in the matter." He

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says in paragraph 3 of his supporting affidavit:

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I confirm that it was I who confirmed Napo Mochekoane as chief of Ha Mochekoane in 1968 and I confirm annexure "A" as being true and correct and reflected the proceedings of the day on which I confirmed Napo Mochekoane as chief of Ha Mochekoane I aver that this confirmation came about as Napo Mochekoane had inherited the chieftainship of the area from his late father Mochekoane Molise and that to my knowledge the area of Mochekoane had been in existence well before 1957."

Chief Moramang Seeiso went further to say that "during or about 1968" he called a pitso of the neighbouring chiefs which included Chief Mpo and Chief Selonyane. The latter two had been present thereat. As he said in paragraph 4 of his affidavit:

> "The occasion for the pitso was to confirm the boundary of Ha Mochekoane which I duly did in the presence of the chiefs of all surrounding areas including the presence of Mpo Mpo himself."

No circumstances were suggested at all as to why the chief called such a momentous pitso. Had there been a dispute? Between who was the dispute? A statement of the circumstances would have been useful inasmuch as the chief alleged knows that the area has been in existence well before 1957. One would have thought that the chief in his affidavit would have referred to a record of some proceedings or referred to 12 annexure "B" (page 16) if it was one of those which could have been relevant or could support the deponent.

Chief Moramang Seeiso made a revealing statement which harked back to that irksome question about what the circumstances were for his having called a pitso "to confirm a boundary." This to be stated together with the fact that this ignores the provision of the Chieftainship Act Section 5 (8) (a) and (10) which provides procedure for delimitation of boundaries. The section speaks of "a dispute or uncertainty." Hence the view that the circumstances that gave rise to Chief Moramang Seeiso's deciding or confirming the boundary were pertinent. This was coupled with the difficulty or lack of particularity as to when exactly the pitso was called. The Chief went on to say:

> " I further ordered that any chief who had any dispute concerning the boundary should appeal to the Ministry of Interior for the matter to be decided according to law. I further specifically ordered that any chief who had any dispute concerning the boundary should appeal to the Ministry concerned for the matter to be decided according to law. Until 1975 I when ceased to be Assistant Chief of Matsieng no such appeal had been lodged with the Ministry of Interior. I submit therefore that Mpo Mpo had accepted the boundary as confirmed by me and had de facto accepted the existence of the area of Ha

> Mochekoane." (My underlining)

Besides the question as to what the circumstances led Chief Moramang Seeiso to go about the exercise of confirming a boundary the other question would be as what powers did he have to do so.

The Applicant had confirmed that Annexure "B" had been ignored by the Chief of Matsieng in 1969. However the chief who was acting in 1989 must have however recognized Annexure

"B" as a genuine document and this must have given rise to the claim by the First Respondent and the offence committed by him which are subject of this application. These offences could only have been a result of or arose from an exercise of irregular powers which Respondent felt be possessed over Ngopekhubelu, Ntsokotsane and Ha Mochekoane areas.

It has to be repeated that the Respondent's defence has always been that he was confirmed as a chief as he has referred to annexure "NMA" and "NMB". This were the same exhibits that were used in case number CC 197/88 of Matala Local Court which the Applicant attached as annexure "D" (at pages 21-25 and translation at pages 26-29). I noted that what emanated from that judgment were the following: Firstly the five defendants who were all of Qeme Ha Mpo regarded the place where they had cut thatching grass as belonging to Ha Mpo. Although the Plaintiff Mochekoane (Respondent) regarded himself as looking after the place

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(molisa) this could well mean that he regarded himself as a headman or a bugle. But if he used the word "molisa" the connotation is that of someone who looks after the place on behalf of someone else. Secondly it is to be noted on page 23 that the effect of annexure "NMA" was to make only a frontier (mooloane) for Respondent, Despite that the Court still recorded or concluded that a great deal of lack of clarity about the plaintiffs (Respondent) area. This was made more prominent by the Court's finding that it could not believe that the Respondent's area could be on the cast of Ntsokotsane river which was where the area of the Applicant was to be found. That is why the Court remarked that:

> "However it is not clear how Chief Napo Mochekoane can share a common boundary with Chief Selonyane which is a stream and yet on the east he share a boundary with Chief Mpo?"

The Court in the said local court case however treated the thatching grass as belonging to chief of Qeme who should have brought a criminal case against Defendants. In addition the Court felt that the boundary of this Applicant east of Ntsokotsane river was not clear. This did not disregard the finding that on the west (having found that on the Chief Selonyane shared a boundary with Chief Mpo) it is Chief Selonyane not the Respondent. It cannot be interpreted in the circumstances of that case that the Court's finding that on the boundary of Chief Mpo east of Ntsokotsane river was not clear. Meaning that it did not recognize the Respondent's claim to any area. The Court however ended up concluding that

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responsible chiefs ought to clarify the question of boundaries to pre-empt unending litigation. Applicant submitted that consequently annexure "NMA" and "NMB" would not carry the Respondent's defence anywhere since it was those documents which the local court held cheap and set no value on.

The annexure "NMA" is referred to in the supporting affidavit (to the Respondent) of Mokhitli Masejane. The deponent said he has lived all his life at the area known as Ha Mochekoane. He said the Respondent has since the years of the late sixties been chief of that area. He had been present when the Respondent was confirmed by the Chief of Matsieng. It was over the area of Ha Mochekoane which to his knowledge was never part of the land administered by the Applicant. He said that during or around 1941 the area of Ha

Mochekoane was administered by one Lekata Ramoseli on behalf of Likoata Molise who was the father of the Respondent.

Mokhitli Masejane further spoke about an action during or about 1941 against one Mosoeunyane for felling trees at Ha Mochekoane that was referred to in annexure "MMA 1". This case was by "Suoane the messenger of the Paramount Chief of contempt of the judgment of the Paramount Chief by Mosoeunyane of Qeme Ha 'Mantsebo." Mosoeunyane had felled trees. He was found guilty. I found the judgment not helpful in that it does not specifically speak of the area where the trees were felled as those of the area of the Respondent. Neither does it

16 speak of the offence by Mosoeunyane as an offence against the chiefly authority of the Respondent. What it did suggest, at best, was that one of the witnesses who were the chiefs messengers was Lejone of Mochekoane. Others were Suoane and Khoahla. Another scant reference was probably to the Respondent's father Likoata where the judgment said:

> "..... you Mosoeunyane and Lekata you should not touch anything until Likoata goes to his home and not before I meet Lekata. That is my place as Paramount Chief according to the Paramount Chiefs Proclamation No. 2/1 of the 23rd September 1941 which provided that the court shall punish anyone she is found felling trees,....."

It still did not appear from above that there was any indication to be found that the area concerned was that of the Respondent. Still even Maine Mathe, who said he was acting Chief of Ha Mantsebo, and has known the area of Ha Mochekoane to be a separate area from Ha Mpo in all his life, did not say the judgment confirmed that the area was administered by Respondent or his predecessors-in-title. This was the easiest thing to have said. This underlined a perpetual situation wherein the First Respondent was either not a party to proceedings or he was said to have had no title Mokhitli Masejane later spoke about a dispute that no one had spoken about including Chief Moramang Seeiso. I supposed that any dispute touching on the

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rival authorities of the parties would be a critical factor in weighing probabilities. In his own words he said:

> ".....I was there when Chief Moramang who was the Chief of Matsieng came to Ha Mochekoane to settle a dispute between Chief Mpo and Chief Mochekoane although I do not recall the exact date." (My emphasis)

He continued in paragraph 4 of the affidavit on page 70 to say that those present were chiefs from other surrounding areas such as the Chief of Ha Selonyane who shared a boundary with Chief Mochekoane. Then the boundary was confirmed as the deponent said. Chief Moramang having confirmed the boundary then instructed anyone not satisfied to challenge the boundary according to proper legal channels. Such a challenge had never been done. This confirmation of a boundary could be in connection with what Chief Moramang said he did. I have earlier remarked that Chief Moramang had not spoken about that dispute nor had he stated the circumstances leading thereto. Hence no light was shed about that confirmation of his.

Mokhitli Masejane said he confirmed and he knew that the Applicant was gazetted and that he had for a number of years been exercising chieftainship rights over the area of Ha Mochekoane. He said the Applicant unlawfully interfered (by exercising those rights) on the ground that Respondent was not gazetted. The Court

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was not able to appreciate this statement by the First Respondent which perhaps needed to be explained better. It was how the Applicant would have been able to instruct his people to graze their animals and fell trees in the area of Mochekoane that ".....did not share any boundary with the area of Ha Mpo....." but shares boundaries with the areas of Ha Selonyane the area of Chieftainess 'Masekhobe Letsie and the area of Thaabe Letsie. This the Applicant could not do unless the Applicant ran over the areas of one or more of these chiefs thus overreaching into the First Respondent's as it were.

I thought this deponent Masejane Mokhitli acknowledged and confirmed that Applicant has as a fact been exercising chieftainship rights over Ha Mochekoane which has about one hundred (100) people. The deponent felt that this unlawful exercise of chieftainship rights by the Applicant was the cause of confusion. I found that this admission, that the Applicant has over this years exercised chieftainship rights over Ha Mochekoane, not only fatal but a useful answer to the question whether the First Respondent was anything more than a mere ungazetted customary headman at best.

The other argument by the First Respondent was that the Applicant had to prove that "there is no customary headman over the area." On probabilities it does not appear that there were no people who regarded First Respondent as customary

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headman. However what is important is whether he exercised chiefly rights according to law. That First Respondent had purportedly had proper government receipt books (see pages 67-68 of the record) is not inconsistent with Applicant having exercised chiefly rights over Ha Mochekoane which has been said to have been administered by Applicant by Mokhidi Masejane. It could mean that First Respondent was by possession of those receipts and impounding animals thereby taking the law into his own hands. Furthermore it could also mean that he was doing those things on behalf of someone who had chiefly rights. This was more arguable.

The Second Respondent was supported by the affidavit of Maine Mathe who was born in 1928. He said he was acting Chief of Ha Mantsebo since 1989. He said he has throughout his life always known the area of Ha Mochekoane as separate one from Ha Mpo. The former area has always had its headman all along and not under the jurisdiction of Ha Mpo. It has been under the chieftainship of Ha Mantsebo. He said he always supported First Respondent in the exercise of his chieftainship rights.

Maine Mathe referred to that dispute which I have already discussed which occurred which was of contempt of court of the Paramount Chiefs Proclamation about unlawful felling of trees. This as I have held did not clarify the position as I

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have already said. This even the above deponent was unable to make better. It does not appear that the First Respondent nor his predecessors-in-title were said to have specifically exercised any chiefly rights in the strict sense. That is why the Court's attention was brought to the statement found at page 74 of the record which as submitted by the Applicant was unwittingly made by the deponent to wit: "In 1948 certain animals which I was herding were impounded at Ha Mochekoane and I had to pay a fine at Ha Mantsebo."

Hence, as Applicant submitted, a fine for animals impounded at Ha Mochekoane would not be paid at Qeme Ha Mantsebo if Ha Mochekoane had a chief or headman recognized by law. It was also said that Maine Mathe's last statement that First Respondent was directed to return moneys received as levies for impounded animals :

> "Because he had not issued lawful receipts not because he had acted unlawfully in impounding the animals" would not carry the latter's case any further. It would have been of interest to know if having not used lawful receipts First Respondent had had lawful ones in stock which would enable a lawful impounding by "a chief or gazetted headman."

Having conceded that there has always been a place called Ha Mochekoane as early as 1957 the question that remain crucial was whether the First Respondent has held office of Chief and has been authorized legally to exercise the powers and perform the duties of a chief or lawful headman. As said hereinbefore the First

Respondent has spoken about the Applicant not having to prove his boundary as against those of the First Respondent. Should he have done so?

Lastly, in his additional submissions First Respondent spoke of the Applicant having to discharge the onus that First Respondent was not a customary headman. I have commented a length about things that indicate that the First Respondent did not appear demonstrably to have exercised any chiefly functions. I took the view that the except that recognition that he was chief of Ha Mochekoane was in all probability a kind of a hidden claim of right as between Applicant and Second Respondent. This Court neither saw any support for the First Respondent even where issues of strict law were concerned as the following comment shows.

The Respondent cannot be said to be holding office of chief unless he has been gazetted as such which is contemplated in the provisions to sections 5(1) 5(14) of the Chieftainship Act No. 22, 1968. See also Chieftainship (Amendment) Act No. 12 of 1984 Sections 2(1) (a) (b) and (c). These sections speak of recognition and public notice which show that one is such a chief, only when having been approved by the King acting in accordance with the advice of the Minister. That the First Respondent holds himself as a customary headman is as much unredeemed, inasmuch as his father was himself neither a gazetted chief or headman. The situation would in that vein be contrasted with that in MAQETOANE v

MINISTER OF INTERIOR AND OTHERS LAC (1985-1989) 71. In the latter case it was where the Appellant had had his name omitted from a later list of chiefs when his name had

appeared in the previous one. He was consequently declared as an official headman who could not have been removed by the omission in the gazette.

Incidentally in this case of MAQETOANE reference was made to the case of JONATHAN v MATHEALIRA 1977 LLR 314 (HC) at page 78. In the latter case which was also referred to this Court in Counsels submissions the applicant sought an order declaring him to be the ungazetted headman of Tsikoane village. The applicant had had no claim to that office either by succession or recognition in a Gazette. In the instant case although the First Respondent relies on the right of succession which he says he had. This Court has found that there is no such chiefly jurisdiction of Ha Mochekoane to be found. I need not overemphasize that requirement of a notice in a Gazette which the Chieftainship Act provides as a procedural requirement.

In that case of MAQETOANE there is that reference at page 7 to MOLAPO v TEKETSI 1971-1973 LLR, 235 where it is reported that Jacobs CJ held that the Courts did not have power to recognize an office of chief not already established and gazetted. I have already decided and held that one cannot safely speak of an office

of chief at Ha Mochekoane. The question of gazettement is again emphasized in the same way as where in JONATHAN'S case (supra) at 317 Cotran CJ disapproved of:

> ".....the incredible proposition that this High Court can, contrary to the express provision of the written law and all known judicial precedents, declare him an ungazetted headman."

It is this kind of unacceptable recognition that the First Respondent seems to hanker after as the main substance if not the whole defence in his case.

Why the issue of locus standi has always featured against the First Respondent it was in an almost universal perception and yet valid appreciation of the position of an ungazetted headman. Although it can be hereditary it remains that of person named by a superior chief

> " ..... in a particular village within his boundaries to look after its affairs and help out..... But all the acts he does are performed in the name and on behalf of his chief and he has no locus standi in his own right." (My underlining)

The tenuousness of the First Respondent's position pervades the history of this matter. Perhaps if the Second Respondent had stood out to say that the First Respondent was his headman it could have made the game a little balanced. But it would still have had the weakness on the part of the First Respondent that he did

not have his own area (which truth he shies away from) and that he appears to be the person of the Second Respondent. If the Second Respondent admitted it, it would unwittingly bring him for a direct challenge from the Applicant.

A direct challenge appears to have happened before in CHIEF MPO MPO v CHIEF DANIEL THOKO GRIFFITH 1967-70 LLR 261 concerning a boundary dispute over an area of an unproclaimed headman under the predecessor-in-title of the Second Respondent. This challenge to the Second Respondent would include having to answer whether he himself has ever administered the areas in contention. The case of JONATHAN (supra) also made a rather trenchant holding that the institution of a headman is an incidence of that of chieftainship and of appointment of a headman by a chief as

> "An appointment determined at will that determines its authority and validity not from the law relating to the public service or by contract with another by some formality but from the incidence of the chieftainship."

That perhaps would explain, by way of giving it some dignity, the confirmation by the Third Respondent of the Respondent. It cannot mean anything more than that. It cannot mean that there was a chiefly jurisdiction of Ha Mochekoane.

The case of MOTSARAPANE v MOTSARAPANE 1979 LLR 112 at 112,

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115-119 endorses an arrangement between a chief and ungazetted headman as being:

> " For the most part the position of an ungazetted chief is a "placing" which is an "internal" or a "friendly" or family arrangement between the individual and the senior chief. This arrangement must be confirmed to and will only he effective in respect of the area over which the senior chief of the area has a recognized and disputed boundary." (My emphasis) (See HEADNOTE)

To repeat the arrangement is over an area of a senior chief. This means that the junior chief or headman cannot be said to have his own area as the First Respondent seems to be most unadvisedly claiming. Whether the area belongs to that senior chief will also be a matter of proof. In the instant matter the situation is deliberately being complicated and does not redound in favour of the one who pretends to be senior chief where the senior chief (the Second Respondent) would appear to give credence to a strong suspicion that he is fighting by proxy. The suspicion would further be that the senior chief does not believe in the strength of his case because the boundary is undisputed.

I found it difficult to accept that one could safely bring into issue the question of uncertainty or dispute concerning boundaries where I have effectively found that firstly there was no chiefly jurisdiction nor an area of Ha Mochekoane. Within the

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interpretation already given by judicial precedent of an ungazetted headman then, even if on a dispute or uncertain concerning a boundary existed, it cannot be a matter where the First Respondent, who has no boundary, would complain of there having not been a determination or defining of boundaries or need for one in terms of section 5 (8) (9) (10) i.e. appointment of an ad hoc committee to investigate the boundary. The First Respondent has no boundary and he has no standing. His superior chief has such a standing. Unfortunately he has for his own

reasons not come out to say that the area called Ha Mochekoane is his own area. He is the Chief who can have a boundary.

I did not see how the authority of LEHLOKA MOFOKA v LINEO LIHANELA C of A (CIV) No.6 of 1988 could be held to be support for First Respondent even if it may have decided that whether a person is a headman or not is a question of fact to be determined from all circumstances as First Respondent as had been submitted. In that case two gazetted headmen were disputing a boundary in the circumstances in which there was such a boundary which had to be decided. This presupposed that the parties both had chiefly authorities and jurisdictions. Moreover the Court decision rested on the question of the jurisdiction of the High Court and whether the matter could be resolved on the papers where the issues were complicated, unclear or ought to have been referred to oral evidence.

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It is clear in the circumstances of this case that this application was allowed with costs.

T. MONAPATHI
JUDGE