

IN THE HIGH COURT OF LESOTHO

In the matter between :

CHIEF SELEBELI TEFONYANE

APPLICANT

VS

CHIEF BATHO BATHO & 3 OTHERS

RESPONDENTS

JUDGEMENT

Delivered by the Honourable Mrs Justice Guni

on the 9TH day of August 2001

The applicant herein is Chief SELEBELI TEFONYANE. He is the chief of NOKONG. The office of the chief of NOKONG is directly responsible under KUENENG and MAPOTENG. -[SEE ANNEXTURE "ST1" GOVERNMENT NOTICE NO 26 OF 1964]

The applicant inherited the title or right to succeed to the office of the chief of Nokong from his father chief SELLO who also succeeded his own father chief TEFONYANE. The applicant was confirmed as the successor to the office of the chief of NOKONG before the Principal Chief of the area in 1962.

The applicant was a miner in the Republic of South Africa. After his succession to the office of the Chief of NOKONG, he acted in that office through his uncles while he was away in the Republic of South Africa.

Although he is now present in LESOTHO, due to his ill health, his wife is the acting chieftainess in that office of the chief of NOKONG. He does not specify the exact period during which he personally occupied that office of the chief of NOKONG. It is not clear if at all he is familiar with the functions and status of his office.

He claims that he has been treated as and paid for his services as the headman under the chief of NTSIRELE. His observations, which he made when he perused the official document which has the list of chiefs and their offices, are that his office of the chief of NOKONG is of equal status as that of the chief of NTSIRELE.(REFER TO ANNEXTURE "ST 1")

The discovery that the applicant's office of the chief of Nokong is of equal status as that of the chief of Ntsirele, was made by the acting chieftainess 'M'ANTSEKE TEFONYANE. [See Annexure 'TM1' and her supporting affidavit]. The publication for general information, of the names of headman and chiefs of Berea and their areas of Jurisdiction, was made on 11th February 1964. In this Government Notice, although the name of the office of the chief of NOKONG appears, the name of the chief has been omitted.

It might be because of this omission of the name of the chief who occupied the office of the chief of NOKONG, which caused the applicant to continue labouring under the false impression that his office is that of a headman under the chief of NTS'IRELE. Certainly, those who oppose this application rely on this omission. There is no evidence that show this court that this applicant is in fact a headman and not a chief. The respondents apart from relying on their ignorance as to the facts stated by this applicant have produced no evidence to contradict this applicant's assertions regarding his position as the chief of NOKONG.

The case of the two respondents who oppose this application (i.e. 1st respondent and 2nd respondent) seems to be an attempt to take advantage of the omission of the publication of the name of the applicant in that Government Notice. It is their argument that the office of the chief of NOKONG is vacant.

The name of the occupier of the said office has not been published. In 1964 when the said list of names of headmen and chiefs of BERE A and their areas of Jurisdiction was published, the applicant herein was already the successor in title and the holder of the position of the chief of NOKONG. Although he may have been acting through one of his uncles, the office of the chief of NOKONG was in fact occupied by him. There was no vacancy which the Area Chief, the Principal Chief of Kueneng and Mapoteng - 2nd respondent herein or the Chief of NTS'IRELE - the 1st respondent herein, could fill in whichever way she or he pleases.

How and why the applicant's name, despite the inclusion in the said publication of his area of jurisdiction and his office, came to be omitted, is a mystery. There seems to be a general view that the omission to publish the

name of the chief of the area while the area was mentioned as distinct and independent chieftainship, was a mistake. The error of omission was made inadvertently. There is no one who has expressed any view to the contrary. More particularly, when the averments by the applicant that he was in fact, the occupant of that position since 1962 when he succeeded his late father chief Sello Tefonyane.

After the error of the omission of the name of the applicant was discovered, efforts were made administratively to try to rectify it. The cooperation of the Principal Chief of the area was needed for the rectification to be effected. It appears the Principal Chief, who is the 2nd respondent herein, was uncooperative. In terms of the law, the Principal Chief is required to forward the name of the successor to the office of the chief for the publication for general information. She has given no good explanation for her failure to forward the applicant's name for the publication. Her failure to comply or reply to the letter written to her by the District Secretary forced this applicant to approach this court to intervene. The applicant is seeking the order in the following terms:-

(a) Directing the first respondent to stop forthwith from administering the area of Nokong and treating Applicant as his headman

(b) Directing the second respondent to forward Applicant's name to the third respondent for necessary publication in the gazette as the Chief of Nokong.

(c) Directing the third respondent to regularise Applicant's emoluments with arrears from date of assumption of office to date of regularisation.

(d) Directing the respondents to pay costs of this application.

(e) Granting Applicant any further and/or alternative relief

The Applicant has sued the four respondents to perform their legal duties in accordance with the legal requirements, in his case. All the four respondents have the specific functions to perform under the direction or the supervision of the Department of Home Affairs. Normally in cases of this nature the Department of Home Affairs, through the office of the Attorney General, represents the parties in litigation, particularly the department of the Chieftainship Affairs. The Department of Chieftainship Affairs is the interested party in this matter or it should be such interested party as the office that administer the legislation that governs the Chieftainship Affairs. Strangely enough the Department of Chieftainship Affairs and the Attorney General have not filed any opposing papers. It therefore follows that they have no interest which might be adversely affected by the decision of this court granting or

dismissing this application.

There are not many issues in this matter. It is in the common cause that there are two Chief Offices which seems to merge contrary to the law governing such offices. 1st respondent is chief Batho-Batho Chief of Ntsirele. The chief's office which is separate and different from that of the Chief of Nokong. [See Annexure ST 1 - Lesotho Government Notice of 11th February 1964.]

1st Respondent does not claim to be entitled to hold the position of the Chief of Nokong. He does not say when and how he became the Chief of Nokong. 1st and 2nd respondents appear to be pleading ignorance as their defence to the claims made against them by the applicant. They do not know that the applicant is the chief of Nokong. They also do not suggest who the chief of Nokong is. They have therefore, in their ignorance, no leg to stand on, in order to support their denial that the applicant is not the chief of Nokong. The law, with regard, to who is the "Chief" was succinctly interpreted by MAHOMED JA, as he then was, in the case of LEHLOLA MOFOKA v. LINEO LIHANELA, C of A (CIV) no 6 of 1988.

“A person who is a “Chief” as defined in section 2(1) of Chieftainship (Amendment) Act, 1984, does not cease to be a chief merely because his name has not been gazetted. This is evident from section 14(3) and there is nothing in the definition of a “Chief” in section 2(1) which makes publication in the gazette a legal requirement for the status of the Chief.” (My underlining)

In short, the above quotation, shows that the status of a chief is a question of fact which must be established with evidence. The publication of the office and the name of the Chief is purely for general information. It does not under any circumstances create a chief. JONATHANE v. MATHEALIRA.

The omission of the applicant’s name in that Notice which gives the respondents the impression that the said chief’s office is vacant, has but been just a handicap to the applicant for proper remuneration if the chiefs are paid more than headmen as the applicant had been paid as the headman. The respondent seemed to have been engaged in making surreptitious moves with the purpose of carving a portion or taking over the whole area of jurisdiction of the chief of Nokong - (See Annexrure “BB1”, “BB2” issued out under the hand

of the 2nd respondent for the benefit of the 1st respondent.) These moves are being resisted by the applicant herein. The Chieftainship Act provides for proper, lawful and open succession to the office of the Chief. There is no provision for surreptitious take over. The respondent cannot as they please merge or take over any portion of any Chieftainship area which is under the jurisdiction of another chief. MIKHANE MAQETOANE and MINISTER OF INTERIOR and three others C of A (CIV) No 3 of 1984. In Maqetoane's case the restructuring of the ward, its hierarchy and areas caused the error of leaving out both the area and the name of Chief Maqetoane. The omission of the name and area of chief Maqetoane may have been deliberate or inadvertent. There was controversy as to the reasons for the omission. Even assuming, without accepting, that the omission was deliberate, in terms of the law, the party whose name has been omitted was entitled to be informed and to make representations to resist the intended removal of his or her name. The applicant was not informed of the removal of his name in Maqetoane's case. That failure to inform him entitled him to the restoration of the name of his office and the area of his jurisdiction. In our present case the name of the area of Nokong has been published. That fact, of the inclusion of the name of the area of his

chieftainship of NOKONG, as a distinct and independent chieftainship from that of NTSIRELE, supports the general view that the omission was an error. The area of NTSIRELE and the name of the chief of the area are included in the Notice as separate and different. There are no boundary disputes. Clearly the 1st respondent must be the successor to the office of the chief of NTSIRELE because the occupant of the office of the chief at the time of the publication [Notice No 26 of 1964] was MAHLOMOLA PEETE, not the 2nd respondent.

The respondents have not raised a question of delay. In his head of argument, the late advocate Mafantiri (Bless his soul), who represented this applicant felt it appropriate to deal with that question even though the respondent do not feel that any of them would be prejudiced on that ground in anyway by the granting of this application.

The grounds upon which the court can excuse delay are numerous. WOLGROLERS AFSLAERS(EDMS)BPK v. MUNISIPALITEIT VAN KAAPSTAD 1978 (1) SA 13. The ground of greater significance, is whether there is a party who will be prejudiced by the granting of the application as it

stands. *MAQETOANE v. MINISTER OF INTERIOR(SUPRA)*. There is no evidence that anyone is going to suffer actual or potential prejudice by the granting of this application.

The fact that the applicant was at all material time the occupier of that office of Chief of Nokong but was treated and paid as a headman was a prejudice he suffered all along. The granting of the application will rectify the position. The respondent are not losing anything either. The 2nd respondent's procrastinations to forward the applicant's name for gazettelement was not benefiting her in any way.

Furthermore, since the applicant acted through his uncles and now through his wife his absence may have also contributed to the delay to discover the error.

For these reasons the application must succeed. It is granted with costs.



K.J. GUNI

JUDGE

FOR APPLICANT - MR MAFANTIRI

FOR RESPONDENTS - MR MONYAKO