C OF A (CIV) No.22 of 2004

IN THE COURT OF APPEAL OF LESOTHO

In the matter between

MAHABANKA MOHALE **APPELLANT**

and

'MAKHOLU LEUTA MAHAO
RESPONDENT

CORAM : **STEYN, P,**
RAMODIBEDI, J.A.,
MELUNSKY, J.A.

HEARD : **7 April 2005**

DELIVERED: **20 April 2005**

SUMMARY

Boundary dispute – Paramount Chief's powers – Proclamation No.61 of 1938 – Leave to appeal – Section 17 of the Court of Appeal Act No.10 of 1978 – Principles in issuing a certificate for leave to appeal laid down – Need to define point of law.

In 1998, the Appellant's predecessor in title sued the Respondent's predecessor in title for a certain area falling within the demarcation of the Paramount Chief dated 27 May 1941. The demarcation in question was in favour of the Respondent's predecessor in title. The claim was dismissed by the Central Court, the Judicial Commissioner's Court and the High Court respectively – Hence the Appeal against the High Court's decision. Appeal dismissed with costs on the ground that the Paramount Chief's decision was valid and had never been changed.

JUDGMENT

RAMODIBEDI, J.A.

1] Seldom has a boundary dispute engaged the attention of both administrative courts as well as courts of law over such a long period of time, spanning more than six decades, as the instant matter has. It all began 64 years ago on 27 May 1941 to be precise, when the Paramount Chief determined a boundary between the Appellant's predecessor in title, Tebelo Sebili, and the Respondent's predecessor in title, Tumo Qamako, at a place referred to as Thabana Morena Mountain. As is often the case in disputes of this nature in this country, the parties call the disputed area by different names. The Appellant calls it Ha Sebili while the Respondent calls it Linotsing Ha Leuta. Be that as it may, it is common cause that the Paramount Chief's decision in question was in favour of the Respondent's predecessor in title in that it confined the Appellant's predecessor in title to the South of the mountain thus effectively excluding him from the disputed area in the North of the mountain which in turn comprises the villages Meqecheng to Lebung. This area in the North of the mountain was thus allocated to the Respondent's predecessor in title.

2] In 1987, which was a period of 46 years after the demarcation of the

Paramount Chief in favour of the Respondent, the Appellant sued the latter before Ramokoatsi Central Court for the disputed area. The claim was dismissed on the ground that the Paramount Chief's demarcation of 1941 had been made lawfully and had never been changed. The Appellant's further appeals to the Judicial Commissioner's Court and the High Court respectively failed for the same reason.

3] It may be observed at this stage that in dismissing the Appellant's appeal, Moiloa AJ in the Court below was of the view that in these circumstances the claim had "prescribed after the lapse of 30 years since May 1941." It is not necessary to determine the validity of this proposition as the learned Acting Judge did in fact determine the matter on another ground. Moreover, there was not, it seems to me, a full investigation of the issues relating to prescription in the trial court. It shall suffice merely to record that the Appellant has appealed to this Court with leave of the learned Judge *a quo* on the following grounds:-

> "1. The Honourable Court *a quo* erred and misdirected itself in holding that the Appellant's claim had prescribed.
> 2. The Honourable Court *a quo* erred and misdirected itself in holding that the boundary demarcation made on 27th May, 1941 was done by the proper authority.
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> 3. The Honourable Court *a quo* erred in holding that the 1941 demarcation was made pursuant to an existing boundary dispute between **Tebelo Sebili** and **Tumo Qamako.** A boundary dispute can only exist between a chief and another and not between a chief and a person who is not a chief.

4. The Honourable Court *a quo* erred in upholding the 1941 demarcation that directed people to remove from the area they inhabited for generations when such demarcation was invalid."

4] Now, Section 17 of the Court of Appeal Act No.10 of 1978 ("the Act") provides for the right of appeal in civil cases in the following terms:-

"17. Any person aggrieved by any judgement of the High Court in its civil appellate jurisdiction may appeal to the Court with the leave of the Court or upon the certificate of the Judge who heard the appeal on any ground of appeal which involves a question of law but not on a question of fact."

The plain meaning of this section is that any person who intends to appeal against the judgment of the High Court in its civil appellate jurisdiction, as here, must first seek and obtain the leave of the High Court or of this Court. Furthermore, leave may be sought only on a question of law. See Lesotho Union of Bank Employees, in re Moliko v Standard Bank Ltd 1985-89 LAC 86 at 87, Letsoela and Another v Letsoela 1980-84 LAC 275 at 276.

5] The learned Judge *a quo's* certificate for leave to appeal to this Court reads:-

"**JUDGE'S CERTIFICATE**

WHEREAS the appeal of the abovenamed appellant from the Judicial Commissioner's Court was dismissed by me in the High Court of Lesotho on the 23RD day of August,

2004. I do hereby certify that this is a fit case for an appeal on the grounds set out in the annexure hereto."

There can be no doubt in my mind that, subject to what follows hereunder, the Appellants' grounds of appeal as fully set out in paragraph [3] above raise points of fact in addition to questions of law.

6] As guidance in future, therefore, it is now necessary to lay down the following principles:-

(1) Practitioners who apply for leave to appeal and judges of the court granting leave should ensure that the provisions of section 17 of the Act and the Rules of Court are strictly observed.

(2) The application for leave to appeal should specify the grounds on which leave is sought.

(3) The judge granting leave should clearly define the points of law on which leave is granted in compliance with the Rules.

(4) When leave is granted, the certificate of the judge and the grounds of appeal should then be delivered by the applicant.

7] In a well presented argument, Mr Mohau for the Appellant tried

manfully to persuade this Court that the Appellant's grounds of appeal raise a point of law. Apart from the question of prescription, he relied heavily on ground No.2 and sought to develop it principally with reference to Section 3(1) of Proclamation No.61 of 1938 ("the Proclamation"). In a nutshell, it was his submission that of all the powers conferred on the Paramount Chief under the Proclamation, none related to delineation of boundaries between chiefs.

8] Section 3(1) of the Proclamation reads as follows:-

"3.(1) the High Commissioner may, after consultation with the Paramount Chief, by Notice in the Gazette, declare any Chief, Sub-Chief or Headman to be Chief, Sub-Chief or Headman for any specified area or arears, and may direct that any such Chief, Sub-Chief or Headman shall exercise only such powers as are delegated to him by another specified Chief, Sub-Chief or Headman with the consent of the Paramount Chief."

9] It requires to be noted at the outset that there is no specific section in the Proclamation expressly dealing with demarcation of boundaries as such. Mr Mohau submitted nevertheless that it is implied in Section 3 that the power to demarcate boundaries vested in the High Commissioner alone. In my view this proposition is unsound. I consider that the correct approach is to read the Proclamation as a whole in the light of the history of this country.

In this regard, it will be recalled that the Paramount Chief in question was in fact the successor in title of the Founder of the Basotho Nation himself, Moshoeshoe I. It is undisputed that as the absolute Ruler of the Basotho Nation, Moshoeshoe I had power to demarcate boundaries in this country. The question that arises therefore is whether the Proclamation in question deprived him of this power either expressly or impliedly.

10] Since, as I have pointed out in the preceding paragraph, there is no express provision in the Proclamation dealing with demarcation of boundaries, it is necessary to have regard to sections 4 and 8 (1) (m) (u) and (v) of the Proclamation. In doing so, one naturally starts from the premise that it is a cardinal principle of interpretation to construe a statute in conformity with the common law rather than against it except where the intention of the Legislature is clearly to alter the common law itself. See Dhanabakium v Subramanian & Another 1943 AD 160 at 167. Indeed the presumption is that the Legislature does not intend to alter the existing common law more than is necessary.

11] Section 4 of the Proclamation provides as follows:-

" 4. It shall be the duty of the Paramount Chief and every Chief, Sub-Chief and Headman to perform the obligations by this Proclamation imposed, and generally to maintain order and good government among the natives residing or being in the area over which his authority extends; and for the fulfilment of this duty he shall have and exercise over such natives, the powers by this Proclamation conferred in addition to such powers as may be vested in him by virtue of any law or native custom for the time being in force." (Emphasis supplied).

There can be no doubt in my mind that the underlined words are in effect a saving clause meant *inter alia* to preserve the customary law powers of the Paramount Chief to demarcate boundaries. This was no doubt in conformity with the British policy of indirect rule since 1868 when this country became a British Protectorate. The British policy in this regard was such that the Basotho were largely left under the administration of their Chiefs, more especially in land management.

12] Section 8 (1) (m) (u) and (v) of the Proclamation in turn reads as follows:-

> "8. (1) Provided that such orders do not conflict with any law for the time being in force in the Territory, the Paramount Chief may issue orders to be obeyed by natives within the area of his jurisdiction
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> (m) prohibiting, restricting or regulating the migration of natives from or to any particular area or arears under his jurisdiction;
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(u) prohibiting, restricting, regulating or requiring to be done any matter or thing which the Paramount Chief, by virtue of any native law or custom for the time being in force and not repugnant to morality or justice, has power to prohibit, restrict, regulate or require to be done; and

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(v) for any other purpose, whether similar to those hereinbefore enumerated or not, which may, by Notice in the Gazette, be specially sanctioned by the High Commissioner." (Emphasis added).

Once again, I am of the view that the underlined words in Subsections 8 (1) (m) and (u) above were intended to save the customary law power of the Paramount Chief to regulate boundaries in this country.

At any rate, and in so far as Section 8 (1) (v) is concerned, it is common cause between the parties that the Paramount Chief's demarcation in question was in fact confirmed by the High Commissioner by Gazette No. 4339 dated 30 December 1964. This gazette is apparently not available. Its purport was however referred to in evidence by the Appellant's own representative Tebelo Mohale who testified as follows under cross-examination:-

"20. I do not deny that the boundaries made by Makafane (the Paramount Chief's representative) were confirmed by Gazette No. 4339 dated 30.12.1964."

Moreover, as appears from para [23] *infra,* the evidence disclosed that as a matter of customary law, it was the Paramount Chief who had the power to allocate land and demarcate boundaries. It is not open to the Appellant to challenge this evidence on appeal to this Court. Whilst the meaning and import of customary law is a matter of law, the evidence adduced to

establish what the law is, is a matter of fact and cannot be open to challenge before us in terms of section 17 of the Act.

13] It is a striking feature of the Appellant's case that the challenge to the Paramount Chief's power to demarcate boundaries was made for the first time on appeal before the High Court. Save for an abortive attempt in 1962 when the Appellant was held to have sued the wrong party, at no other time during a period of 63 years, as I observe, was such a challenge raised. More importantly, it was not raised during the pleadings at the trial.

14] Now, almost a century ago in Cole v Government of the Union of S.A. 1910 AD 263 at 273 Innes J (as he then was) expressed himself as follows:-

"But where a new law point involves the decision of questions of fact, the evidence with regard to which has not been exhausted, or where it is possible that if the point had been taken earlier it might have been met by the production of further evidence, then a Court of Appeal will not allow the point to prevail. Because it would be manifestly unfair to the other litigant to do so."

This approach was approved by the Full Bench in Union Government v Harkins 1944 AD 556 at 560 as well as this Court in Vincent Moeketse Malebo v Attorney General C of A (CIV) No.5 of 2003 (unreported).

On this approach therefore, I am of the view, based on the facts, that it is possible that if the "point of law" now advanced by the Appellant had been taken earlier at the trial it might have been met by the production of further evidence. It is thus necessary to refer briefly to the facts.

15] The full facts of the case have been comprehensively set out in the judgement of the court a quo and it is thus strictly unnecessary to recite them except in so far as is necessary for the determination of this case. These have largely to do with the chronology of major relevant events leading to this appeal. They are indeed common cause, as even the Appellant's own witnesses could not dispute them at the trial.

16] On 27 May 1941, as previously mentioned, the Paramount Chief allocated the disputed area North of the mountain through the messengers Makafane Lehloenya Jobo Nthoana, Lejone Tlali, Chief Tsibane Ramarothole, Letsatsi Maoela and the Deputy Administrator of Mafeteng referred to by the witnesses as Mari but whose true name was apparently Murray.

17] On 24 March 1962, the Appellant's predecessor in title, Tebelo Sebili, "sued" the Respondent for the same boundary before the committee of the

College of Chiefs in CC13/1961. The committee comprised the following members:- Mopeli Jonathan Molapo (Chairman), Chief Seeiso Mokotoko, Chief Luis Sechaba Moletsane and Suping Lehloenya as Secretary. Not only did the Appellant's predecessor in title lose the dispute but he was also ordered to "respect" the decision of the Paramount Chief dated 27 May 1941 which still stood unaltered.

18] On 30 December 1964, the disputed boundary was duly published by the High Commissioner in Government Gazette No.3449, Legal Notice 137 of the same year.

19] On 14 December 1972, a delegation from the Ministry of Interior was dispatched to execute the Paramount Chief's decision of 27 May 1941. The delegation consisted of Majakathata Phamotse, Chief Tjama Makimane on behalf of the Principal Chief of Likhoele, Bereng Matseletsele, Matheantsi Maputsoe and Mphanya Lehloenya who represented the Chief of Thabana Morena. The Appellant's predecessor in title was again ordered to respect the Paramount Chief's decision in question.

20] Similarly, On 16 December 1983, the Principal Chief of Likhoele made a decision that the Appellant's predecessor in tittle, namely Chieftainess Mankhahle at that stage, should "respect" the order of the Paramount Chief dated 27 May 1941.

21] It is evident from the aforegoing chronology of events that the Appellant's predecessors in title have never challenged the Paramount Chief's decision of 27 May 1941 allocating the disputed area to the Respondent. As previously indicated for that matter, neither the Appellant nor his predecessors in title have ever challenged the authority of the Paramount Chief to make the decision in question.

22] It is further evident from his second ground of appeal that the Appellant is seeking to rely, on appeal, on an unpleaded claim that the Paramount Chief had no authority in the matter. Put differently, the Appellant is now seeking to make a new case on appeal which he did not advance before the trial court.

23] For the avoidance of doubt, the record reveals that at the trial before

Ramokoatsi Central Court, the Appellant's predecessor in title who was plaintiff thereat pleaded her claim as she was obliged to by Basotho Courts (Practice and Procedure) Legal Notice 21 of 1961 Rules in the following terms:-

" I dispute my area, which was wrongly taken from me. Because there was no dispute for these (sic) area. It was taken by Makafane Lehloenya and allocated it to Tumo Qamako the defendant's father." She then "place[d]" Tebelo Mohale to conduct her case. Not once did the latter seek to challenge the authority of the Paramount Chief to make the decision in question. On the contrary, he specifically directed his challenge at Makafane Lehloenya in cross-examination. Moreover, he is recorded on page 6 of the record as having given the following material answers in that regard:-

> "5. The boundaries were made by Chief Makafane Lehloenya.
> 6. Makafane was the messenger of the Paramount Chief.
> 7. Makafane was not directed by the Paramount Chief.
> 8. A letter from the Paramount Chief should be there if he was ordered/directed by him."

The following answers by Teboho Mohale under cross-examination prove clearly, in my view, that the Appellant simply regarded the Paramount Chief's decision as Makafane's decision as the learned Acting Judge

correctly observed:-

"11. The decision made by Chief Makafane was not respected. Because even now it is still in dispute.
12. The decision says between Chief Teboho Sebili and Tumo Qamako, Chief Tebelo should live on the South of this area and Tumo Qamako live on the North.
13. There were no Land markings or a stone.
14. I believe Thabana-morena is a mountain, which was mentioned that the other live on the North of it. And the other one on the East of it.
15. Makafane did know and made the boundaries.
16. The Paramount Chief has the power to demarcate boundaries through Interior.
17. The Paramount Chief has not set the boundaries.
18. I do not deny that the paramount chief set the boundaries in 1952.
19. I do not deny that he did not make the decision.
20. I do not deny because I was not there.
I do not deny that the boundaries made by Makafane were confirmed by Gazette No 4339 dated 30.12.1964.
22 22. A gazette is the Law.
23. Even though this boundary was gazetted it is not legal. This boundary
22 is not Legal even though it was gazetted.
24. I do not deny that the messenger (sic) of this court, Chief of Likhoele and Chief of Thabana-morena accomplished that judgement.
25. I do not deny that Chief of Likhoele and district secretary accomplished this judgment.
26. Makafane's order said Tebelo his power is on the North, while the defendant in on the South."

Tebelo Mohale's answers from the court's questions continued in the same vein:-

"1. Chief Makafane's decision took part of Chief Tebelo Sebili's area.
2. This is the first time that the plaintiff dispute this area.
3. I believe that Makafane personally make this gift (the boundary decision in question) and he was not wearing the Paramount Chiefs (sic) hat."

24] It is important to bear in mind then that in so far as the authority of the Paramount Chief is concerned, Tebello Mohale is recorded as having said the following under cross-examination:-

> "16. The Paramount Chief has the power to demarcate boundaries through interior."

Indeed this view was supported by Appellant's witness Samuel Mokone who testified as follows under cross examination:-

> "14. The Paramount Chief is the one who has the right to allocated land"

It was no doubt precisely for that reason that the Paramount Chief's messengers included one Murray who, as will be recalled, was the Deputy Administrator of Mafeteng. This in my view, is support for the proposition that the High Commissioner was involved in the demarcation in question.

25] That the Appellant is precluded from now challenging the authority of the Paramount Chief is clear from such cases as Frasers Lesotho Limited v Hata-Butle (Pty) Ltd 1999 – 2000 LLR& LB 65 (LAC) at 68, Malerotholi Josephine Sekhonyana & Another v Standard Bank of Lesotho Ltd 1999 – 2000 LLR & LB 416 (LAC) at 420 – 421, The National Executive

Committee of the Lesotho National Olympic Committee v Paul Motlatsi Morolong C of A (CIV) No. 26 of 2001 (unreported).

26] The main principle stressed by these authorities is that it is in particular wrong to direct the attention of the other party to one issue and then attempt to canvass another. In my view, it is particularly wrong to do so for the first time on appeal as this case illustrates.

27] It remains then to say that, as a matter of policy, it would be wrong for this Court to allow the Appellant to effectively open a can of worms, so to speak, after 64 years since the Paramount Chief's decision in question. Although each case must admittedly depend on its own facts, this would in my view most probably lead to confusion and uncertainties over similar boundaries throughout the country with disastrous results. It would undermine law and order and to prevent all of these is the fundamental function of this Court. The Appellant's inordinate delay in challenging the Paramount Chief's decision in these circumstances was rightly held to adversely affect any rights he might have had.

The point of law on which the Appellant was granted leave to appeal cannot therefore be upheld and the appeal should be dismissed.

28] In the result, the appeal is accordingly dismissed with costs.

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M.M. RAMODIBEDI

JUSTICE OF APPEAL

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I concur : J.H. STEYN

PRESIDENT

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I concur : L. MELUNSKY

JUSTICE OF APPEAL

Delivered at Maseru, this 20th day of April 2005.

FOR APPELLANT : MR K.K. MOHAU
FOR RESPONDENT : MISS L.V. MOCHABA (ASSISTED BY MR S.T. MOSHOESHOE)