IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) No. 38 of 2005

In the matter between

THE PRINCIPAL SECRETARY MINISTRY OF LOCAL GOVERNMENT	FIRST APPELLANT
MINISTRY OF FINANCE	SECOND APPELLANT
and	
TSEPO SEMPE QEFATE NKUEBE	FIRST RESPONDENT
MOFUMAHALI MONICA MALESHOBORO NKUEBE	SECOND RESPONDENT
SEABATA MOKHANTSO	THIRD RESPONDENT
KHOSITSILE NKUEBE	FOURTH RESPONDENT

Held at Maseru

CORAM: **RAMODIBEDI, JA**
PLEWMAN, JA
GAUNTLETT, JA

HEARD: **31 MARCH 2006**

DELIVERED: **11 APRIL 2006**

Summary

Declaration of rights – Applicant designating a person outside the line of succession to act in his place as a Chief during his absence – Chieftainship Act No.22 of 1968 – Interpretation – Sections 5 (1), 5 (5), 5 (7), 13 (4) (c), (5) and (7) of the Chieftainship Act as amended.

JUDGMENT

RAMODIBEDI, JA

[1] It is not inappropriate to observe at the outset that the First Respondent has been engaged in a running battle with the Ministry of Local Government (formerly Home Affairs or Interior) over Chieftainship issues with varying degrees of success and failure for either party. The following cases come to mind. Nkoebe v Minister of the Interior and Chieftainship Affairs and Another 1985 – 1989 LAC 313; Chief Tsepo Qefate Nkuebe v Attorney General and Others C of A (CIV) No. 37/2000.

[2] The point of dispute in this case is a short one: does a Chief within the meaning of the Chieftainship Act 1968 ("the Act") have the liberty to designate any person outside the

line of succession to act in his place during his absence? First Respondent, on one hand, contends that he may lawfully do so and that the Act neither prohibits this nor does it make the pedigree of an "intended incumbent" an issue. The Appellants, on the other hand, contend for a different proposition, namely, that a person designated to act as Chief during the absence of the incumbent Chief must himself be the person who has the first right to succeed to the office. The court *a quo* (**Maqutu J**) upheld the First Respondent's contention and rejected that of the Appellants. The Appellants are challenging on appeal before us the correctness of that decision.

[3] The salient facts are fairly simple and indeed common cause. They may shortly be stated in this way. The First Respondent is the substantive Principal Chief of Quthing. He is also the substantive Chief of Sebapala and a member of Senate. Sometime in 2002 (the exact date is not given), the First Respondent nominated the Second Respondent to act in his place whilst he was away attending Senate matters.

[4] On 3 June 2002, the First Respondent also nominated the

Third Respondent to act in his place as Chief of Sebapala. The latter, however, terminated his appointment on 31 May 2004. It is not in dispute that the reason for his resignation was that the First and Second Respondents respectively failed to pay him any salary for his services as Chief of Sebapala.

[5] On 31 May 2004, and following the Third Respondent's termination of his nomination, the First Respondent nominated the Fourth Respondent to act in his place as Chief of Sebapala.

[6] Meanwhile, it is convenient to record that in a strongly worded letter, annexure "QN1", dated 17 March 2003, the District Secretary – Quthing "warned" the First Respondent to refrain from overlooking his own eldest son, namely, Hlabathe. The First Respondent was further "advised" to "remove" the Second to Third Respondents from their respective offices "since the Ministry will never pay them."

It is convenient to reproduce the letter in question. It reads:-

> "The Office of District Secretary
> P.O. Box 51
> QUTHING
>
> 17th March 2003.

THE PRINCIPAL CHIEF
QUTHING

Greetings to you Chief

SUCCESSOR TO QUTHING PRINCIPAL CHIEF DURING HIS LIFETIME

I am directed by the Ministry of Local Government to make you aware that in your case which was decided on the 12/04/2001 you were complaining about the decision of the Chief's Disciplinary Committee and that it should be clear that Hlabathe's paternity was not in issue.

I wish to make you aware further that the case in which Hlabathe's paternity was in issue was CIV/APN/269/2000 and in that case the High Court found that Hlabathe was indeed your eldest son.

I am warning you that anything contrary to the judgment will be taken as contempt of Court.

I want to let you know further that Mmaleshoboro Monica 'Neko Nkuebe is not chieftainess in the Sebapala office nor in the office of Principal chief. In the same way Seabata Mokhants'o is not welcomed to act in the Sebapala office since he does not appear in the Nkuebe family tree and I accordingly advice you to remove those people immediately since the Ministry will never pay them allowances.

I advise you to head (sic) to the order given to you by the Principal Secretary to the Ministry of Local Government through his letter dated 31 October 2002 that you should appoint a rightful person to act and failure to comply will be held contemptuous against you.

Take a look at a family letter dated 27th August 2002 and Hlabathe's letter dated 11th September 2002.

In the interest of good service delivery and good governance your immediate action will be highly appreciated.

Humbly,

P. MPOBOLE
DISTRICT SECRETARY – QUTHING

COPY: PRINCIPAL SECRETARY LOCAL GOVERNMENT
PRIVATE SECRETARY TO HIS MAJESTY
CABINET OFFICE
POLICE – QUTHING
NSS – QUTHING."

[7] It is the case for the Respondents that the letter, annexure "QN1" "precipitated" the proceedings in the court below. In this regard it is necessary to refer to paragraph 13 of the founding affidavit of the First Respondent:-

"The 2nd and 4th Applicants as well as myself seek to interdict 1st Respondent from interfering with appointments now of 2nd and 4th Applicants. It is my submission that the 1st Respondent is likely to interfere with these appointment of 3rd Applicant whose appointment was the subject of Annexure QN1.

It is worthy of mention that Annexure QN1 came when CIV/APN/488/02 instituted by 2nd Applicant for payment and declaratory order in the same matter

is pending before Court. The 3rd applicant merely seeks that his appointment be declared lawful from 3rd of June 2002 whilst it lasted until 31st May, 2004. I have already mentioned that 3rd Respondent left his acting position on 31st May, 2004, after receipt of Annexure QN1."

[8] The starting point in determining the principal issue raised in paragraph [2] above is no doubt the Act itself.

[9] In relevant parts, sub-sections 5(1), 5(5), 5(6) and 5(7) provide as follows:-

> "(5)[(1) No person is a chief unless he lawfully holds an office of chief acknowledged by Order No.26 of 1970, or unless his succession to an office of chief has been approved by the King acting in accordance with the advice of the Minister.]
>
> (2) ……
>
> (3) ……
>
> (4) ……
>
> (5) A Chief is always and at all times obliged to attend to the exercise of the powers and the performance of the duties of the office that he holds, and accordingly he shall not leave the area of his authority except as provided in this Act, and then only if proper arrangements have been made for the exercise of the powers and the performance of those duties in his absence."

[10] Sub-sections 5 (6) and (7) in turn provide:-

> "(6) It is the duty of every Chief intending to be absent from the area of authority of his Principal or Ward Chief from whatever purpose to notify the Chief immediately senior to him in writing of his intended absence and the place to be visited by him, and to inform that Chief of the name of the person who is authorised in accordance with the provisions of section 13 to exercise the powers and perform the duties of his office during his absence. For so long as an authorisation is in force under this subsection, the person so authorised may exercise the powers and perform the functions of the office of the Chief while he is absent.
>
> (7) Whenever a Principal or Ward Chief leaves his area of authority for whatever purpose it is his duty to inform the Minister of the name of the person who is authorised in accordance with the provisions of section 13 to exercise the powers and perform the duties of his office during his absence. For so long as an authorisation is in force under this subsection, the person so authorised may exercise the powers and perform the functions of the office of the Principal or Ward Chief while he is absent."

[11] It is plain from these provisions that a person designated to act in the place of an absent Chief must be a person envisaged by the Act and more particularly, subsections 13 (4) (c), (5) and (7) thereof as amended by section 3 of the

chieftainship (Amended) Act No.7 of 1974. It is to those subsections that one turns.

[12] Section 13 as amended reads in relevant parts as follows:-

> "(4) Subject to the provisions of section 5, the person who has the first right to succeed to an office of the Chief (or failing him, one of the persons, in order of prior right, who have the right to succeed to that office) exercises the powers and performs the duties of that office in the following circumstances:-
>
> (a) when the holder of that office is exercising the functions of the office of King as Regent or otherwise during the absence or illness of the King;
>
> (b) while the holder of that office is deprived under the provisions of this Act of the right to exercise the powers and perform the duties of that office;
>
> (c) when the holder of that office (and any person who has been designated as having a prior right to succeed to that office) is unable by reason of absence from the place to which that office relates, or by reason of infirmity of body or of mental incapacity, [or by reason of his being detained in prison,] to exercise the powers and perform the duties of that office;
>
> (d) when, for any reason not specified in the preceding paragraphs, it is not possible for any person to succeed effectively to that office.

(5) Subject to the provisions of section 5, the holder of an office of Chief may either generally or from time to time as occasion may arise, and subject to authorisation under the provisions of section 5 and to such conditions and limitations as he may impose, designate the person who is to exercise any of the powers and perform any of the duties of that office; and the person so designated may subject to the provisions of section 5, exercise those powers and perform those duties, subject to those conditions and limitations.

(6) ……..

(7) No person shall exercise the powers or perform the duties of an office of Chief in terms of this section unless and until the King acting in accordance with the advice of the Minister has approved of such person."

[13] Now, the words "subject to" were treated to a full and comprehensive interpretation, in my view, in S v Marwane 1982 (3) SA 717 (A), per Miller JA. The essence of these words is simply to establish what is dominant and what is subordinate or subservient in a provision. Indeed, I am happy to say that I am mainly attracted by the following remarks of the learned Judge at page 747 of his judgment: -

"that to which a provision is "subject", is dominant – in case of conflict it prevails over that which is subject to it."

[14] On this construction, therefore, the words "subject to" contained in subsections 13 (4) and (5) of the Act are intended to establish section 5 as being dominant while these subsections are subordinate or subservient to it. In simple terms, this means that these subsections may only be followed to the extent that they are in harmony with section 5. In case of conflict between section 5 and these subsections, section 5 prevails as a dominant provision. On the other hand, when there is no conflict, the phrase "subject to", in the words of Megarry J in C and J Clark v Inland Revenue Commissioners [1973] 2 All ER 513 at 530, "does nothing". The subsections must be given effect to.

[15] It is important to bear in mind that subsection 5 (7) as fully reproduced in paragraph [10] above, does not in my view empower a Principal Chief to designate any person outside the line of succession to act as Chief in his absence. On the contrary, the subsection obliges him in clear and unequivocal terms to designate a person "who is authorised in accordance with the provisions of section 13 to exercise

the powers and perform the duties of his office during his absence". Therein lies the test.

[16] It follows from the foregoing, in my view, that section 13 is decisive in the determination of this matter. As will be recalled from subsection (4) thereof, this section lays down in plain language the order of succession as a prerequisite for the exercise of the powers and duties of the office of Chief. Put in the words of the subsection, and in the context of the Act as a whole, only the person who has the first right to succeed to an office of Chief, failing which one of the persons in order of prior right who have the right to succeed to that office, may exercise the powers and perform the duties of that office.

Indeed this Court in Mathesele Maseribane v Chief Qefate Tsepo Nkuebe C of A (CIV) No.11 of 1987 duly interpreted section 13 as laying down a strict order of succession. It is interesting to note that the respondent in that case was none other than the present First Respondent.

[17] It is not in dispute for that matter that the First Respondent's son, Hlabathe, has the first right to succeed to the office of the Principal Chief of Quthing as well as the office of Chief of Sebapala.

[18] Before closing this judgment there is one final comment that requires to be made in connection with the use of the word "absent" in the Act. Is the word confined to chiefs

who are outside the country only? The learned Judge *a quo* appeared to hold this view when he said the following in his judgment:-

> "the case before me is entirely different, it's a case of a person who is still within the country and from time to time goes to Senate. A chief whether it is a Principal Chief or whatever who comes to Parliament or to Senate to attend sessions of Senate is still in the country. He can go to his area from time to time to deal with issues and even issues can be referred to him by the person who has been appointed by him to act for him in his absence. This to me is the difference, for that reason I find the interpretation of applicant given to section 5 sub-section 5 and 7 is the more reasonable one than the one that has been given to this Section by the respondents."

[19] With respect to the learned Judge, the interpretation he attaches to the word "absent" in the context of the Act is untenable. Such an interpretation would, in my view, produce potential injustice in this country and as such cannot be sustained. To confine the word "absent" to a Chief who is outside the country only is in my view too restrictive and cannot have been within the contemplation of the Legislature. Indeed one might wonder how many chiefs were actually "absent" from the country in 1968

when the Act was promulgated? I conclude therefore that the word "absent" in the context of the Act simply means being away from the Chief's area of jurisdiction or office.

[20] For the reasons which I have given, I conclude that the question as formulated in paragraph [2] above should be answered in the negative. See also Chieftainess Maqajela Lebona v Maphohloane Lebona & Others 1995 – 96 LLR & LB 146 (LAC) at 148.

[21] It follows in my judgment that the appeal must succeed. It is accordingly upheld with costs. The order of the court *a quo* is set aside and replaced with the following:-

"The application is dismissed with costs."

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M. M. RAMODIBEDI
JUSTICE OF APPEAL

I agree: _____

C. PLEWMAN
JUSTICE OF APPEAL

I agree: _____

J. J. GAUNTLETT
JUSTICE OF APPEAL

For Appellants: Mr R. Motsieloa

For Respondents: Miss L.V. Mochaba