C OF A (CIV) NO.8 OF 2006

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

LEFA POKO APPELLANT

and

MOTŠEARE LEROTHOLI FIRST RESPONDENT
PRINCIPAL CHIEF OF HA RATŠOLELI (QACHA'S NEK) SECOND RESPONDENT
WARD CHIEF OF MASHAI, THABA-TSEKA THIRD RESPONDENT
MINISTER OF LOCAL GOVERNMENT FOURTH RESPONDENT
ATTORNEY GENERAL FIFTH RESPONDENT

CORAM:

RAMODIBEDI, JA
MELUNSKY, JA
MOILOA, AJ

SUMMARY

Chieftainship – Chieftainship Act No.22 of 1968 – Section 3 of the Chieftainship Act (Amendment) Act No.12 of 1984 – Civil Procedure –

Appellant seeking to be declared Chief of a gazetted area – Exception.

JUDGMENT

RAMODIBEDI, JA

[1] Incredibly, this appeal concerns alleged chieftainship rights which were evidently lost some seventy years ago to date. It is sadly a typical example of frivolous and vexatious claims that continue to clog the courts to the detriment of more deserving cases as well as delaying the administration of justice in this country.

[2] This matter commenced in the High Court as an action in terms of which the appellant claimed the following relief against the respondents:-

"1. Declaring that plaintiff is the person entitled to become chief of Ha Poko.

2. *Declaring that the 1st defendant is not entitled to succeed to the chieftainship of Ha Poko.*

3. *Declaring the purported placing of the 1st defendant by the 2nd defendant as chief of Ha Poko to be null and void and of no force and effect.*

4. *Interdicting the 4th defendant and/or all officers*

subordinate to him from processing any document aimed at gazetting the 1st defendant over the chieftainship of Ha Poko.

5. *Directing the 2nd defendant to process the recommendation relating to plaintiff in accordance with law aimed at facilitating plaintiff's securing of his entitlement as chief of Ha Poko through gazettement.*

6. *Directing the defendants to pay costs of this application jointly and severally, the one paying the other being absolved. In that event the 2nd to 5th defendants paying only in opposition to this action."*

[3] The respondents excepted to the appellant's declaration on the ground that it disclosed no cause of action. The exception was upheld by the High Court (Maqutu J) with costs. The appellant has appealed against that decision.

[4] In relevant parts, the material allegations in appellant's declaration read as follows:-

"- 6 -

6.1 *To the extent necessary and relevant to this action, it is significant to outline that the circumstances that led to the institution of this trial hinge upon the chieftainship of Ha Poko which is the subject of dispute in this matter.*

6.2 *Prior to 1936, the chieftainship of Ha Poko under the wardship of Mashai was held by the late Chief Poko Poko.*

6.3 *In 1936, one JONATHAN WHITE LEROTHOLI was*

superimposed upon chief Poko Poko in as much as the said Jonathan Lerotholi was born of the Lerotholi family. When Jonathan Lerotholi arrived at Ha Poko he found chief Poko Poko who was already chief of that place, and because chief Poko Poko was not of the Lerotholi Family, chief Jonathan White Lerotholi was superimposed illegally upon Chief Poko Poko.

6.4 *Chief Poko Poko had three sons they were Sechu Poko, Thakhube Poko and Masilo Poko. The said Sechu Poko is still alive but he is senile. He has no children. The said Thakhube Poko did beget two sons who are Lefa Poko (Present plaintiff), Motlatsi Poko (who has just past away, may his soul rest in peace). The said Thakhube has since passed away.*

6.5 *Masilo Poko begot two sons: namely, Seabata Poko and Fihlang Poko.*

6.6 *It is significant therefore to point out that as since (sic) stand now the head of Poko family is now the plaintiff before this court.*

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The late Morena Moshoeshoe I, begot amongst his sons Letsie I whose real name was Mohato. Mohato begot Lerotholi. Lerotholi had several wives one of whom gave birth to a person called Jonathan White Lerotholi.

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In 1936 the said Jonathan White Lerotholi was superimposed upon chief Poko Poko's chieftainship simply because the said Jonathan White Lerotholi was the son of Lerotholi who was in turn the grandson of chief Moshoeshoe I. That superimposition was unlawful in as much as the said Jonathan White Lerotholi, was not entitled to take over the chieftainship of Ha Poko in as much as it belonged to the Poko family and was still in the hands of the late chief Poko Poko."

[5] In paragraph 9 of his declaration the appellant proceeds to show that Jonathan White Lerotholi was succeeded by his wife Mpesa Lerotholi who subsequently died in 1978 and was in turn succeeded by Salae Lerotholi. The latter passed away in 1999.

[6] The appellant further alleges in paragraph 11 of his declaration that he found out that the first respondent was "placed" or "introduced to the public as new chief of the area" on 28 February 2003.

[7] In paragraph 12, the appellant makes the allegation that he is entitled to succeed to the chieftainship of Ha Poko and that he was so nominated by the Poko family.

[8] It is further alleged in paragraph 14 of the appellant's declaration that neither Jonathan White Lerotholi, Mpesa Lerotholi, Salae Lerotholi nor the first respondent, Motšeare Lerotholi, were entitled to succeed to the Chieftainship of Ha Poko.

[9] It is necessary at this stage to record that the respondents filed a request for further particulars to the appellant's

declaration. Three questions and the appellant's responses thereto are crucial for the determination of this matter.

1) In paragraph 2 of the request for further particulars, the appellant was asked whether the alleged chieftainship of Ha Poko was on gazettement. In paragraph 2 of his "Further Particulars" the appellant confirmed that this was indeed so and that the area in question is gazetted under the name of Tebohong. I shall return to this aspect in paragraph [17] below.

2) To the question whether the late Chief Poko Poko was himself gazetted or not the appellant's response in paragraph 2 of his "Further Particulars" was simply that "[h]e was not gazetted." As is apparent from paragraph [10] below, the respondent's exception pertinently challenges this situation, namely, that the "appellant cannot be declared as chief of ungazetted area…."

   Significantly, there are no allegations to show that the appellant or his predecessors exercised chieftainship rights after 1936 or that they were recognized as hereditary chiefs.

3) Asked about whether the first respondent's "installation" which he sought to challenge was intended for Ha Poko only or for Tebohong the appellant significantly replied in paragraph 6 of his "Further Particulars" that "[t]he names Ha Poko and Tebohong refer to one and the same place."

[10] As pointed out earlier, the respondents raised an exception to appellant's declaration on the ground that it disclosed no

cause of action. The exception was in these terms:-

> *"KINDLY TAKE NOTICE THAT the defendants except to the plaintiff's Declaration as showing no cause of action against defendants on the following grounds:-*
>
> *-2-*
>
> *2.1 The plaintiff's declaration neglects and/or fails to connect the 1st defendant's chieftainship of Tebohong and the so-called Ha-Poko. 1st Defendant is the chief of Tebohong not a chief of Ha Poko. In terms of the law, Ha Poko is not one of the gazatted areas whilst Tebohong is.*
>
> 2.2 *Further, the plaintiff's allegation that Ha Poko falls directly under Ward chief of Mashai is not true in that the said Ha Poko falls under the Headman of Tebohong and Ward Chief of Mashai. Ha Poko is a village under Headman of Tebohong who is the 1st defendant.*
>
> ***WHEREFORE** plaintiff cannot be declared, as chief of ungazetted area and the position now is that the gazetted areas are enough and new areas cannot be gazetted including Ha Poko. The procedure to the (sic) succeed to the chieftainship is through succession in terms of chieftainship law."*

[11] Admittedly, this was clearly a less than perfect exception. To put it bluntly, it was poorly drafted. As I read it, the drafter was simply not alive to the basic principle that for the purposes of an exception the allegations contained in the declaration or plea, whatever the case may be, are taken as correct. No facts outside the attacked pleading itself may be adduced to bolster the exception.

[12] Although admittedly poorly drafted, a closer look at the exception shows, in my view, that it does not amount to a nullity. Read as a whole and in the context of the law relating to chieftainship in this country, it is reasonably possible to infer, in my view, that the respondents' real ground of objection in their exception is that the creation of the office of a chief is not a matter for the courts but for the administration. This, I should add, is precisely how the learned Judge a quo understood the exception. In my view he was justified in so doing in the particular circumstances of this case.

[13] Before determining whether the appellant's declaration established a cause of action, it is necessary to stress that the main purpose of an exception is to dispose of the case in an expeditious manner thereby avoiding the leading of unnecessary evidence at the trial. In this regard it is useful to recall the salutary remarks of Innes JA**,** as he then was, made some ninety two years ago, in Salzmann v Holmes 1914 AD 152 at 156. The learned Judge of Appeal said this:-

"An exception goes to the root of the entire claim or defence, as the case may be."

It is precisely, for that reason that a court dealing with an exception is enjoined to determine first whether there is a point of law to be decided which will dispose of the case in whole or in part. See Kahn v Stuart 1942 CPD 386 at 392.

[14] Now, reverting to the appellant's declaration as fully set out above, it will be noted that he sets out his alleged cause of action as having arisen as long ago as 1936, a period spanning seventy years to date. He alleges that the late chief Jonathan White Lerotholi was "superimposed upon Chief Poko Poko's chieftainship." Similarly, he complains that the successors in title to the late Chief Jonathan White Lerotholi have also been "superimposed" upon him.

[15] As pointed out earlier, however, the appellant's declaration makes a fatal omission in my view. There is no allegation to show that since 1936 the appellant's predecessors ever exercised chieftainship rights in the area in question. Nor is there an allegation that they were recognized as hereditary chiefs. I should add that the same omission is made in respect of the appellant himself. There is not a shred of an allegation that he is recognized as a hereditary chief. It seems to me, therefore, that this omission sets the appellant's case apart from such cases as Maqetoane v Minister of the Interior

and Others 1985-1989 LAC 71; Ministry of Home Affairs and Local Government and Others vs Mateka Sakoane C of A (Civ) No.13 of 2001 (unreported).

[16] Now, it requires to be stressed that, as a matter of law, the creation of an office of chief is a matter for the administration and not the courts. Before 1938, that function belonged exclusively to the paramount Chief. Patrick Duncan: Sotho Laws and Customs records at page 49:-

> *"Although the courts dealt with disputes arising out of chieftainship already established, the actual establishing of them has always been done by the paramount chiefs as an administrative act. With the right to establish has also gone the right to alter."*

In terms of section 3 (1) of Proclamation No.61 of 1938, the power to declare a chief or headman for any specified area or arears was conferred on the High Commissioner, after consultation with the Paramount Chief. That section provided 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."*

Similarly, section 3 (2) empowered the High Commissioner, after consultation with the Paramount Chief, to revoke or

vary any declaration made by him under sub-section (3) (1) and to order that "any person recognized as Chief, Sub-Chief and Headman shall cease to be so recognized."

[17] It is strictly unnecessary to trace all the legislative provisions relating to chieftainship after 1938. Such an exercise was laboriously undertaken by this Court in Maqetoane's case (supra). It shall suffice merely to say that the current legislation regulating chieftainship in this country is the Chieftainship Act No.22 of 1968. Of particular relevance to this case is section 3 of the Chieftainship (Amendment) Act No.12 of 1984 which repealed section 5 of the principal Act and now provides as follows:-

> *"No person is a Chief unless –*
>
> a) *he holds an office of Chief acknowledged by the offices of Chief Order 1970;*
>
> b) *his succession to an office of a Chief has been approved by the King acting in accordance with the advice of the Minister; or*
>
> c) *he has a hereditary right to the office of Chief under customary law, and his succession to an office of Chief has been approved by the King acting in accordance with the advice of the Minister".*

[18] As pointed out in paragraph [9] above, it is pertinent to observe that the appellant's declaration has failed to bring

him within the provisions of the Chieftainship Act. Furthermore, by conceding that the names Ha Poko and Tebohong refer to one and the same place as well as confirming that this area is in fact gazetted under the latter name, it is apparent that the appellant wants the courts to declare him Chief of an area which is already gazetted. That as I say, is a matter for the administration and not the courts. Indeed Gazette No.171 of 1939 shows that this area was gazetted under Chief John White Lerotholi. In terms of Gazette No.175 of 1950, the same area was gazetted under chieftainess Mpesa White Lerotholi. Again in 1964 the area was gazetted under the same chieftainess in terms of Gazette No.24 of 1964.

[19] In the light of the aforegoing considerations I have come to the conclusion that the learned Judge a quo was justified in upholding the respondents' exception on the ground that the declaration disclosed no cause of action. I should, however, regrettably point out that it was not proper for the learned Judge a quo to decide the matter on a further point, namely, prescription. This is so because prescription is ordinarily a matter for a plea and it should be pleaded specifically. This was not done and the respondents did not rely on

prescription. See Mahabanka Mohale v 'Makholu Leuta Mahao C of A (Civ) No.22 of 2004.

[20] The result is that the appeal is dismissed with costs.

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M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree : _____
L. MELUNSKY
JUSTICE OF APPEAL

I agree : _____
J.T.M. MOILOA
ACTING JUDGE

Delivered at Maseru this 20th day of October 2006.

For Appellant : **Mr T. Maieane**

For First Respondent : **No appearance**

For Second to Fifth Respondents : **Miss T. Hlakane**