IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) N0.15/09

In the matter between:-

MINISTER OF LOCAL GOVERNMENT **FIRST APPELLANT**

ATTORNEY GENERAL **SECOND APPELLANT**

And

'MAMUALLE MOSHOESHOE **RESPONDENT**

CORAM : RAMODIBEDI, P
MELUNSKY, JA
SCOTT, JA

HEARD : 15 OCTOBER 2009

DELIVERED : 23 OCTOBER 2009

SUMMARY

Chieftainship - Sections 5, 11 and 13 of the Chieftainship Act 1968 considered - Distinction drawn between succession to a vacant office of Chief and an acting appointment in the absence of the incumbent Chief - Purported nomination of the respondent as acting Chieftainess outside the line of succession - The respondent claiming payment of salary on the ground that she was not given an opportunity of being heard before termination of her salary - Held that the audi alteram partem rule has no application in the matter - Accordingly appeal upheld with costs.

JUDGMENT

RAMODIBEDI, P

[1] This appeal sadly illustrates the extent to which the provisions of the Chieftainship Act 1968 ("the Act") are often misunderstood both by some judges and litigants respectively. Very often the

fundamental distinction between s11 (on succession to the office of Chief) and s13 (on acting appointments) is either blurred or lost sight of, as has happened here.

[2] The respondent, as applicant, launched an application on notice of motion against the appellants in the High Court seeking relief to the following effect:-

(1) Directing and ordering the first appellant to release or cause to be released to the respondent her salary with effect from February 2007 to date.

(2) Restraining the first appellant from withholding and/or interfering in any manner whatsoever with the respondent's salary without due process of law.

(3) Declaring the respondent's removal by the first appellant as Acting Chieftainess of Likueneng unlawful, null and void and of no legal force and effect.

(4) Directing the appellants to pay costs.

[3] The High Court (Chaka-Makhooane J) granted the application as prayed. The appellants have appealed to this Court, challenging the correctness of the learned Judge a quo's judgment.

[4] The relevant background facts lie in a narrow compass. The respondent is the widow of the late Chief Moshoeshoe who was the Principal Chief of Likueneng in Mohale's Hoek district. Chief Moshoeshoe was succeeded by his son 'Mualle Moshoesoe ("Chief 'Mualle"). In 1998 Chief 'Mualle was appointed as a member of Senate. He then nominated his mother, the respondent, as Acting Chieftainess of Likueneng in his absence

while attending Senate. It is not disputed that the respondent acted as Chieftainess for nine (9) years.

[5] It is convenient at the outset to address a glaring flaw in the respondent's case. In paragraph 6 of her founding affidavit she alleged that when Chief 'Mualle was appointed as a member of Senate, the office of the Principal Chief of Likueneng became "vacant." Hence it was argued on her behalf that she succeeded to the office in terms of s11 of the Act. Regrettably, the learned Judge a quo upheld this submission and thus fell into error. In paragraph [4] of her judgment she held in so many words that "clearly this is a case that should correctly be governed by section 11." In a nutshell, she held that the

respondent had succeeded Chief 'Mualle and that, therefore, she could only be "removed" from office in terms of s11.

[6] Now, in relevant parts, s11 of the Act provides as follows:-

> *"11. (1) The person (or persons, in order of prior right) entitled to succeed to an office of Chief may at any time be nominated by that Chief during his lifetime (or by his family if he is deceased or if he is unable, by reason of infirmity of body or mental incapacity or other grave cause, to make such a nomination) by means of a public announcement of the nomination of that person (or those persons, in order of prior right) by that Chief or by a senior member of his family if he is unable as aforesaid to make that nomination. The public announcement shall be made at a pitso representative of all Chiefs and other persons in respect of whom the person (or any one of the persons) nominated would, if he succeeded to the office of Chief, exercise the powers and perform the duties of that office.*
>
> *(2) If the nomination of a person has been duly announced in pursuance of the provisions of subsection (1), and any other person claims that the person nominated is incapable*

of succeeding, or that some other person who is capable of succeeding should have been so nominated instead of the person who was nominated, the person so claiming may apply to a court of competent jurisdiction to have the nomination set aside or varied accordingly."

[7] Subsection 11(1) makes it plain that the section applies to a person who is entitled to succeed to an office of Chief. Indeed, this section falls under Part III of the Act which is on **"SUCCESSION TO THE OFFICE OF CHIEF."**

[8] The present matter, on the contrary, falls squarely under part IV subsection 13 (2) (c) of the Act. This part of the Act is on **"TENURE OF OFFICE OF CHIEF AND EXERCISE OF FUNCTIONS DURING MINORITY, INCAPACITY ETC."**

Subsection 13 (2) (c) reads as follows:-

"*(2) Subject to the provisions of section 5, the person who has the first right to succeed to an office of 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) ...

(b) ...

(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."

[9] Section 5 as amended by s3 of the Chieftainship (Amendment) Act 1984 in turn provides as follows in relevant parts:-

"*(1) 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."

.

.

.

(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."

It is plain, as it seems to me, that the Legislature in its wisdom separated succession to a vacant office of Chief from an acting position in the absence of the incumbent Chief. With respect, the learned Judge a quo failed to make this fundamental

distinction which is clearly highlighted by sections 11 and 13 of the Act in plain and unambiguous language. Similarly, she wrongly relied on **Mathealira v Molapo** 1995 - 1999 **LAC** 340. The dispute in that case concerned succession to a vacant office of Chief, the office holder having died. Hence the case fell squarely within s11(2) of the Act. A similar situation arose in **Rakhoboso v Rakhoboso** 1995 - 1999 **LAC** 331. As can be seen, these two cases are clearly distinguishable from the instant matter. Here the office of Chief is not vacant. It is, therefore, not a case of succession.

[11] The correct starting point in resolving the present dispute is no doubt a letter, annexure "AG2", written by Chief 'Mualle on 27

April 2007. The letter was addressed to the District Administrator, Mohale's Hoek. It reads as follows:-

"District Administrator
BOX 1
MOHALE'S HOEK

SIR,

REGENT TO THE CHIEF OF LIKOENENG - CHIEFTAINESS - 'MAMUALLE MOSHOESHOE

I hereby present 'MAMUALLE S.G. MOSHOESHOE as the acting Chief in the Office of Chief of Likoeneng whilst I am in Maseru in the House of Senate.

Chieftainess 'MAMUALLE S.G. MOSHOESHOE began acting in my office when the Parliament opened at the beginning of March 2007 to date.

As a result Sir, I request that Chieftainess MAMUALLE be given her monthly salary from March 2007.

I will appreciate your action in this issue.

Peace

Me; Mualle Moshoeshoe
CHIEF OF LIKOENENG

Copy: PS Ministry of Local Government MASERU."

[12] There cannot be the slightest doubt in my mind that annexure "AG2" represented a clear attempt by Chief 'Mualle to grant a fresh mandate to the respondent to act as Chieftainess in his absence. Such mandate was expressly to begin "when the Parliament opened at the beginning of March 2007 to date."

If proof be needed that the respondent was not "removed" from office as she erroneously claimed, annexure "AG2" provides the clearest proof in that regard. The correct position is that she was not removed. On the contrary, she needed a fresh mandate when Chief 'Mualle attended the new Parliament in March 2007. This is especially the case when one has regard to the uncontroverted averment of Molai Lepota in paragraph 9

of his opposing affidavit that Chief 'Mualle resumed his duties as Chief of Likueneng in November 2007 when Parliament "closed." It remains then to determine whether the proposed nomination succeeded.

[13] By letter, annexure "MM2", dated 11 May 2007, the District Administrator, Mohale's Hoek minced no words in rejecting the proposed nomination of the respondent out of hand. The letter reads as follows:-

"Chief of Likueneng
Likueneng

Chief,

I greet you Chief

RE:- REGENT TO THE CHIEFTAINSHIP OF LIKUENENG

In accordance with the above reference, this office has received your letter ***LIK/CH/2*** *dated 27/04/2007which introduces* ***Chieftainess***

'Mamualle S. G. Moshoeshoe *as the regent starting from the 1st* ***March*** *2007 when [****Senate****] re-opens and that she should be paid from that time.*

My chief, with due respect this office advises you that it will not be able to pass ***Chieftainess 'Mamualle S.G. Moshoeshoe****'s name since her introduction as the regent is against the Chieftainship* ***Act No****. 22* ***of*** *1968,* ***section*** *13 (1) (2).*

This section is clear my chief that when the office of chief becomes vacant either because the chief is a minor, or he is unable due to ill health or other reasons, appointment of regent should be done based [on] who is entitled to succeed when the chief dies. Under these reasons chief, this office advises you, that the presence of ***Chieftainess 'Mamualle S.G. Moshoeshoe*** *in your office is against the law as such she will not be paid.*

I,

S.T. MASIA
DISTRICT ADMINISTRATOR
MOHALE'S HOEK

CC: DIRECTOR OF CHIEFTAINESS
CHIEFTAINESS 'MAMUALLE S.G. MOSHOESHOE."

[14] It is crucial to observe that annexure "MM2" was actually copied to the respondent herself. As can be seen from this annexure, not only did the District Administrator reject the respondent's

nomination but he also specifically drew her attention to s13 (1) (2) of the Act. She was thus sufficiently forewarned. It is, therefore, incomprehensible to me why she persisted in relying on the wrong section, namely, s11 of the Act.

[15] There is, in my view, a further insurmountable hurdle to the respondent's case. As this Court held in **The Principal Secretary For The Ministry of Local Government and Another v Nkuebe And Others** 2005 - 2006 **LAC** 392, S 5(7) of the Act does not empower a Principal Chief to designate any person outside the line of succession to act as Chief in his absence. On the contrary, he is obliged under this subsection to designate a person "who is authorised in accordance with the provisions of section 13 to exercise the powers and to

perform the duties of his office during his absence." Quite clearly, the respondent is not such a person. She does not have the first right to succeed Chief 'Mualle as laid down in s13 (2) of the Act. In fairness to him, Adv. Shale, who led the submissions on the respondent's behalf, very fairly and properly conceded the point.

[16] Furthermore, it is self - evident from the provisions of s 13 (5) of the Act that the purported nomination of the respondent fell short of entitling her to exercise the powers or perform the duties of an office of Chief. This is so because the nomination in question had admittedly not been approved by the King. This subsection provides as follows:-

> *"(5) 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."*

[17] Faced with these difficulties Adv. Shale argued that the respondent was not treated fairly in that she was not given an opportunity of being heard before her salary was terminated. The short answer to this submission is that the *audi alteram partem* rule has no application in this case. This is so because the functionary has no discretion to act contrary to the law. The appellants cannot be forced to pay out illegally. It has long been the law that, as a matter of fundamental principle, the court cannot compel a party to do that which a statute prohibits or does not permit. See, for example, **Hoisain v Town Clerk**,

Wynberg 1916 **AD** 236; **Schierhout v Minister of Justice** 1926 **AD** 99.

[18] In *casu*, the prohibition laid down in s 13 (5) is couched in peremptory terms. It is absolute prohibition. Similarly, this consideration disposes of Adv. Shale's further submission that the respondent had a legitimate expectation to be heard. This submission was predicated on the fact that the respondent had enjoyed payment of salary for nine (9) years previously. As was pointed out to counsel during the course of the submissions, however, this was an illegitimate expectation in the circumstances. An illegality committed in the past cannot, in my view, be taken as a basis for continuing it in the future.

With respect, Innes CJ put the point succinctly in **Schierhout v Minister of Justice** (supra) at P109 in these terms:-

> *"….what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done — and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act."*

[19] It follows from these considerations that the point on legitimate expectation must also fail in the circumstances.

[20] Having regard to the foregoing considerations, I have come to the inescapable conclusion that the appeal should succeed. It is accordingly upheld with costs.

_____

M.M. RAMODIBEDI

PRESIDENT OF THE COURT OF APPEAL

I agree: _____

L.S. MELUNSKY

JUSTICE OF APPEAL

I agree: _____

D.G. SCOTT

JUSTICE OF APPEAL

For Appellants	:	Adv. L. Mokhehle
For Respondent	:	Adv. S. Phafane KC
		(with him Adv. S. Shale)