IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 03/2017

CIV/APN/384/16

In the matter between:

NTSUKUNYANE KHETSI **APPELLANT**

And

MPHUTLANE MATSOSA **RESPONDENT**

CORAM : DR. K. E. MOSITO P.
S.N.PEETE AJA
M. CHINHENGO AJA

HEARD : 28 November 2018

DELIVERED : 07 December 2018

SUMMARY

Chieftainship -– Boundary dispute – Such matter for administration not the courts – Need to locate a chief within categories of chief provided for in the Chieftainship Act No.22 of 1968 - Section 3 of the Chieftainship Act (Amendment) Act No.12 of 1984 - Matter remitted for determination of specified issues.

JUDGMENT

DR. K. E. MOSITO P

THE FACTUAL BACKGROUND

[1] This is an appeal against the decision of the High Court (Nomncongo J). The material averments are that, the respondent is a male Mosotho adult of Lesobeng Ha Mats'osa, in the Thaba Tseka district. The Appellant is a male Mosotho adult and a gazetted headman of Lesobeng Ha Khetsi, in the Thaba Tseka district. Since 1964, there have been disputes between the parties and/or their predecessors over the exercise of chiefly powers concerning the area of Ha Mats'osa.

[2] The respondent complains that he controls an area called Lesobeng of Ha Mats'osa as legal headman and that the Appellant is trespassing upon it. He is seeking interdictory reliefs against the appellant whom he accuses of trespassing over his area of jurisdiction.

[3] However, Mr. Sekonyela (with whom appeared Adv T. Phororo) argued that once the respondent concedes that there is no boundary between the parties he has no cause of action, because the fixing of boundaries is an administrative act and cannot be performed by the courts.[1]

THE ISSUE

[4] The crux of the matter is whether there is a boundary (Lesela-Tsela) between the areas of jurisdiction controlled by each of the parties. Depending on the answer, the question is whether this

[1] s.5(8) - (13) of the Chieftainship Act 22 of 1968.

Court should interdict the appellant from trespassing unto the area controlled by the respondent.

THE LAW

[5] It is common cause that although the courts do not determine boundaries, they may decide whether there has been a trespass (See **Moshoeshoe v. Motloheloa.**[2]

[6] It shall suffice merely to say that the current legislation regulating chieftainship in this country is the Chieftainship Act.[3] Of particular relevance to this case is section 3 of the Chieftainship (Amendment) Act No.12 of 1984 which repealed section 5 of the principal Act and now provides as follows:-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 –

1. *he holds an office of Chief acknowledged by the offices of Chief Order 1970;*

2. *his succession to an office of a Chief has been approved by the King acting in accordance with the advice of the Minister; or*

3. *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".*

EVALUATION OF THE APPEAL

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[2] *Moshoeshoe v. Motloheloa 1926-1953 HC LR 220 at 221; Ramakoro v Peete C. of A. (CIV) No. 4 of 1981.*

[3] Chieftainship Act No.22 of 1968.

[7] As this Court pointed out in ***Ramakoro v Peete.***[4] it is well established that it is not for the courts to determine boundaries. But this does not necessarily lead on to Mr. Sekonyela's contention that respondent would have no *locus standi* to challenge a gazetted trespasser over the area the respondent controls. In my view, the very fact that the **Chieftainship Act** contains a machinery for resolving boundary disputes shows that there may be chiefs whose boundaries are in a state of uncertainty. It may mean that such boundaries may need definition. However, that is a matter for administration and not the courts.

[8] This case is concerned with a boundary dispute, in which case the respondent's procedure may have been ill-chosen. However, as pointed out in ***Ramakoro v Peete.***[5] To suggest that such persons have no right at all to take action against trespassers seems farfetched. The exact location of their boundaries may possibly not come into issue. On the respondent's pleadings, he falls into that class. He alleges that he is a "legal headman" (whatever that means) over the area of Lesobeng Ha Mats'osa. 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 respondent's case apart from such cases as ***Maqetoane v Minister of the Interior and Others; Ministry of Home Affairs and Local Government and Others vs Mateka Sakoane***.[6]

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[4] *Ramakoro v Peete C. of A. (CIV) No. 4 of 1981 .*

[5] *Ramakoro v Peete C. of A. (CIV) No. 4 of 1981 .*

[6] 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).

[9] This case seems not to have been understood in the court a quo as the most fundamental issues were not interrogated. The following questions ought to have been determined by the court a quo in order to be able to decide whether to give the interdictory reliefs sought, namely: was the respondent proclaimed chief of Ha Mats'osa after he had been placed; where exactly is Ha Mats'osa in relation to Lesobeng Ha Khetsi; would the respondent supply a sketch plan indicating where these two last-mentioned areas are situated; where exactly is the boundary that is "Lesela-tsela" between the parties; and would the respondent indicate in the last-mentioned sketch plan the boundary between the parties. Only then would the court a quo been able to determine the reliefs sought.

[10] Had these issues been investigated through *viva voce* evidence, the case would have been correctly determined. The court a quo contented itself with saying that respondent was "a chief of some sort" without determining that sort. As this Court pointed out in **Poko *v Lerotholi and Others***[7], 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.*"

[7] Poko v Lerotholi and Others C OF A (CIV) NO.8 OF 2006.

[11] 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 areas 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."*

[12] 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." 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).

[13] The respondent must be determined to fall into either the one or other of the categories of chief provided for in the **Chieftainship Act**. Had the above issues been determined, an appropriate decision would have been arrived at by the court a quo.

[14] From this conclusion at this stage of the case it does not follow that it may not be essential that an administrative definition of the boundaries should not be made before the case can proceed to trial.

COURT ORDER

[15] It is obvious from the above discussions that

(a) The appeal succeeds.

(b) Regard being had to the public importance of this matter, the matter is remitted to order to the court below for investigation of the issues pointed out in paragraph [9] above by a different judge.

(c) Costs to be costs in the cause.

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DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

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S.N.PEETE
JUSTICE OF APPEAL

I agree:

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M. CHINHENGO
ACTING JUSTICE OF APPEAL

For the Appellant : Advocates B. Sekonyela and T. Phororo

For Respondents : Advocate SS. T'sabeha

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