

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C OF A (CIV)
42/2021
CIV A/43/2018
CIV T/LRB/56/2018**

In the matter between -

**JOEL LECHESA
MATHEALIRA**

APPELLANT

and

**PONTSO SEOEHLA MATHEALIRA
MINISTRY OF LOCAL GOVERNMENT
AND CHIEFTAINSHIP
RESPONDENT**

1ST RESPONDENT

2ND

**ATTORNEY GENERAL
RESPONDENT**

3RD

CORAM:

**K E MOSITO P
J VAN DER WESTHUIZEN, AJA
N T MTSHIYA, AJA**

HEARD: 13 APRIL 2022

DELIVERED: 13 MAY 2022

SUMMARY

Practice - Appeal - Rule 52 of the High Court Rules 1980 - The appeal should have been set down within four weeks - appeal is dismissed with costs.

JUDGMENT

J VAN DER WESTHUIZEN, AJA

Introduction

[1] This battle for the Principal Chieftainship of Tsikoane, Peke and Kolbere, between the son of the deceased Principal Chief and the son's sister-in-law, has come quite some way. The present appeal is against a judgment of the High Court, by Moahloli J, delivered on 20 February 2020.

[2] The central issue is: Is the Magistrate's Court, as a subordinate court and creature of statute, competent to review and set aside the appointment of a Principal Chief by His Majesty the King (the King); on the advice of the Minister of Local Government and Chieftainship (the Minister); in pursuance of the Chieftainship Act 22 of 1968 (the Chieftainship Act); when the appointment has been published by way of a notice in the *Government Gazette* (the *Gazette*)?

Condonation

[3] The appellant's heads of argument were submitted late, in early April. Condonation was applied for and acceptable

reasons furnished. The respondents' heads reached this Court virtually at the time of the hearing of the appeal. Condonation was applied for, the main reason for the lateness being the fact that the respondent's previous counsel had been appointed as an acting judge, which necessitated urgent alternative arrangements. Condonation is granted in both cases.

Facts

[4] For the purposes of this summary of facts, I adopt the High Court's references to the names of the relevant persons. Morena Lechesa Jonathan Mathealira (Morena Lechesa), the Principal Chief of the above-mentioned areas, passed away in December 2006. He had two sons from his only marriage.

[5] The first born son, Seoehla Lechesa Mathealira , was married to Pontso Seoehla Mathealira ('M'e Pontso), the first respondent in this matter. The couple had no sons.

[6] Before his death, Morena Lechesa nominated his daughter in law, 'M'e Pontso, as his successor as Principal Chief. At a meeting on 26 January 2006 72 Chiefs and Headmen of Tsikoane concurred with his nomination. Thereafter the King, on the advice of the Minister, approved of her succession to the office. This was published in the *Gazette* of 16 June 2006.

[7] Morena Lechesa had a second son, namely Joel Lechesa Mathealira (Ntate Joel). He claims to be the rightful successor of his father to the office of Principal Chief.

Litigation history

[8] In May 2018 Ntate Joel instituted action in the Leriba Magistrate's Court. He asked the Court to set aside the notice in the *Gazette*; declare the appointment of 'M'e Pontso null and void; and an order directing the Minister to advise the King to appoint him – Ntate Joel – as Principal Chief.

[9] On 21 December 2018 Magistrate TR Bale granted the relief sought, with costs on the punitive scale of attorney and own client. (The record of proceedings before this Court contains what appears to be an unsigned draft judgment, as well as a judgment signed by Magistrate Bale.}).

[10] From the High Court judgment - with reference to the record - it appears that Ntate Joel had also obtained an interim order, issued by Guni J in the High Court, on 7 September 2006 (under number CIV/APN/373/06), to restrain the Minister from proceeding with the appointment of 'M'e Pontso. It seems like Ntate Joel did not proceed with that case.

[11] 'M'e Pontso appealed to the High Court against the Magistrate's decision. She argued that the Magistrate's Court, as a subordinate court and creature of statute, did not have the power to make the order it did.

[12] The High Court referred extensively to section 10 of the Chieftainship Act. In its judgment it is mentioned that the procedure in subsection (7) had been followed. The clause states:

“No succession to an office of Chie ... shall have any effect unless and until the King acting in accordance with the advice of the Minister has approved thereof”.

Morena Lechesa nominated 'M'e Pontso. The meeting of local Chiefs supported the nomination. The King duly gazetted the appointment. The High Court furthermore relied on *Makoae Masupha v Molefi Libe Masupha* (Cof A (CIV) No 41/2013, delivered on 29/4/2016}, which stated that as long as the approval by the King of the succession is not set aside on review, it stands and may not be ignored, even if it is considered to be wrong. So, who may set it aside on review?

[13] Ntate Joel's submission, that 'M'e Pontso's appointment had indeed been correctly set aside by the Magistrate's Court, was rejected by the High Court. A challenge such as the one by Ntate Joel can only be entertained by the High Court. In terms of Rule 50 of the High Court Rules, read together with section 119(1) of the Constitution of Lesotho, the High Court has the power to review and set aside proceedings and decisions of, amongst others, any person performing a judicial, quasi-judicial, or public administrative function under any law. This applies to the King's function in this case, according to the High Court.

This Court

[14] Ntate Joel appealed to this Court against the decision of the High Court. He submits, firstly, that 'M'e Pontso's appeal to the High Court against the decision of the Magistrate's Court lapsed. There was thus no proper appeal before the High Court. Secondly, he argues that the High Court erred in finding that the Magistrate's Court did not have the power to review and set aside the appointment of 'M'e Pontso. In addition, he explains

why he is the lawful successor to the Chieftainship of his father. In view of the High Court's finding that the Magistrate's Court was not competent to entertain the matter, it did not investigate the last-mentioned aspect. This Court also does not do so.

Did the appeal lapse?

[15] On behalf of the appellant it was argued the respondent in this Court ('M'e Pontso), as the appellant in the High Court, had failed to adhere to the timelines set by Rule 52 of the High Court Rules. The Magistrate's ruling was handed down on 21 December 2018. On 27 December 2018 she noted an appeal, together with grounds of appeal. On 23 January 2019 she served the respondent with the record of proceedings, together with supplementary grounds of appeal. Then, "reluctantly" according to counsel, she approached the Registrar together with the respondent on 7 February 2019. The appeal should have been set down within four weeks. She did not do so and her appeal lapsed. The High Court should not have heard the appeal.

[16] The appellant points out that the question whether the appeal before the High Court had lapsed is not addressed in that Court's judgment. Therefore, his counsel argued, this matter must be remitted back to the High Court to determine whether the appeal had lapsed.

[17] Counsel for the respondent in this Court submitted that the High Court appeal had to be set down in accordance with Rule 52(1)(a):

“When an appeal has been noted from a judgment or an order of a subordinate Court the Appellant may within four weeks after noting the appeal apply in writing to the Registrar for a date of hearing.”

Subrule (c) states:

“If the Appellant fails to apply for a date of hearing within four weeks ... the Respondent may at any time before the expiration of two months from the date of noting of appeal set down the appeal for hearing”

And, subrule (d) states:

“If neither party applies for a date of hearing ... the appeal shall be deemed to have lapsed.”

[18] The last-mentioned clearly did not happen. The Registrar was indeed approached by the respondent and the appellant within two months to obtain a hearing date.

[19] Furthermore, in terms of Rule 30 any party may approach the court to set aside an inappropriate step or proceedings. This, the appellant did not do.

[20] The respondent is correct. The appeal in the High Court did not lapse.

Was the Magistrate’s Court competent to decide the matter?

[21] Counsel for the appellant submitted that section 2(1)(a) of the High Court Act 5 of 1978 gives unlimited jurisdiction to the High Court, but that its jurisdiction regarding matters of

chieftainship and succession is limited by section 6 of the same Act. This section states: “*No civil cause or action within the jurisdiction of a subordinate court ... shall be instituted in or removed into a High Court*”, save with the participation of a judge. This clause does, however, not explain what is within the jurisdiction of a subordinate court. In any event, this appeal is not about the jurisdiction of the High Court though, but about that of the Magistrate’s Court.

[22] The submissions on behalf of the appellant focused on authority for the proposition that matters of chieftainship and succession thereto are not excluded from the jurisdiction of the Magistrate’s Court. Section 29 of the Subordinate Court Order of 1988 provides a list of matters beyond the jurisdiction of the Magistrate’s Court. Chieftainship matters are not mentioned there. The appellant relied on *Nko v Nko* (C of A (CIV) No 14/91) to show that matters of succession and chieftainship are not excluded by section 29. In his written heads of argument counsel for the appellant criticizes the High Court for not following this decision, to which it “made reference with approval”. The High Court expressed no approval. Indeed it stated its disapproval.

[23] The problem with the appellant’s argument is that the question is not whether chieftainship and succession matters are beyond the jurisdiction of the Magistrate’s Court. It may well be that a Magistrate may set aside the nomination of a chief. The High Court judgment mentions that section 11(2) provides for that possibility.

[24] This Court does not have to decide that question in the present matter. We are not dealing with a nomination. The relevant question here is whether the Magistrate's Court may review and set aside a properly gazetted decision of the King. This is what the High Court judgment focusses on, with reference to Rule 50 and the Constitution.

[25] Appellant's counsel argued that this Court's decision in *Molapo v Molapo* (C of A (CIV) 617/219) that a Magistrate may not review a gazetted issue is "a blanket approach". It cannot apply to all gazette issues, especially those relating to chieftainship and succession. The argument is neither clear, nor convincing.

[26] The appellant has not persuaded me that the High Court erred in concluding that the Magistrate's Court does not have competent jurisdiction to review and set aside the decision of the King, published in the *Gazette*. I would be surprised if a subordinate court indeed had that power.

Conclusion

[27] The respondent's appeal before the High Court did not lapse; and the High Court did not err with regard to the Magistrate's jurisdiction. The appeal must fail.

[28] There is no reason why costs should not follow the result.

Order

[29] The appeal is dismissed with costs.



**J VAN DER WESTHUIZEN
ACTING JUDGE OF APPEAL**

I agree:



**K E MOSITO
PRESIDENT OF THE COURT OF APPEAL**

I agree:



**NT MTSHIYA
ACTING JUDGE OF APPEAL**

FOR THE APPELLANT: ADV CL LETOMPA

FOR THE RESPONDENT: ADV MG MAKARA

