LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV)19/2024**

In the matter between

TS'OLOANE MOFOKA **APPELLANT**

AND

TS'EPANG RAMOHAJANE **1ST RESPONDENT**
MOKHOPHELI RAMOHAJANE **2ND RESPONDENT**
NAHA RAMOHAJANE **3RD RESPONDENT**

CORAM **:** DAMASEB AJA
MOSITO P
SAKOANE CJ

HEARD **:** 9 OCTOBER 2024
DELIVERED **:** 1 NOVEMBER 2024

SUMMARY:

When leave is granted in terms of sec 17 of the Court of Appeal Act, 1978, the certificate of the judge and the grounds of appeal should be delivered by the applicant on appeal – Where a judge's certificate has been issued the parties are bound by the certificate – On appeal this Court answered the questions of law raised in the judge's certificate as: (a) Sec 2(1) of the Chieftainship Act 1986, properly interpreted excludes bugleship; (b) Bugleship is not hereditary; and (c) Gazettement is not a requirement for recognition of a bugle.

JUDGMENT

DAMASEB, AJA.

Introduction

[1] In 2016, the 1st – 3rd respondents to this appeal (respondents) issued summons against the initial appellant (Kuena Mofoka) in the Maseru Magistrates Court[1] - asserting that Kuena Mofoka had unlawfully usurped the right of chieftainship of Ha-Ramohajane.

[2] The respondents anchored their right to succeed to the Chieftainship of Ha-Ramohajane in their late great-grandfather, Chief Lehlafi Ramohajane who, it is common cause, was officially

[1] Pursuant is section 17 (i) (*e*) of the subordinate courts Acts 9 of 1988, read with section 11(2) of the Chieftainship Act 22 of 1968.

recognized and gazetted as Chief of the area. Upon his death, Chief Lehlafi was succeeded by his son, Chief Mokhopholi, who was subsequently succeeded by his son Chief Liketso.

[3] Liketso was married to Chieftainess 'Makojana and the two had no male issue. When Liketso died, Chieftainess 'Makojana 'delegated' her powers as 'Headman' to Mr Ts'ita Mofoka (Ts'ita). Upon the death of Ts'ita, his son, Kuena Mofoka, *de facto* assumed the office of headman of Ha-Ramohajane.

[4] It is Ts'ita's assumption of the office of headman and subsequent succession of him by Kuena Mofoka (Kuena) that led to the litigation between the respondents and Kuena.

[5] The particulars alleged that 'the exercise of powers of headmanship by [Kuena] is contrary to the Chieftainship Act 22 of 1968 because [Kuena] does not feature in the lineage of the [late] Chief Lehlafi Ramohajane and [Kuena is] hence not qualified to succeed to the office of headmanship [of Ha-Ramohajane]'.

[6] The respondents alleged that they are in descending order the rightful heirs to succeed to the office of headmanship of Ha-Ramohajane by virtue of being direct descendants of Chief Lehlafi. They alleged further that Kuena was not entitled to succeed nor to occupy the office of headmanship of Ha- Ramohajane as he is not a member of the Ramohajane family.

[7] The respondents sought the following relief:

> *'1. 1st DEFENDANT is not entitled to succeed to the area headmanship of HA-RAMOHAJANE in the district of MASERU.*
>
> *2. 1st, 2nd and 3rd PLAINTIFFS are each entitled to succeed in order of prior right and in their descending order to the headmanship of HA-RAMOHAJANE in the district of MASERU.*
>
> *3. Any further and or alternative order that the order may deem fit.*
>
> *4. Costs of suit in the event of opposition thereof.'*

The opposition

[8] Kuena opposed the summons and filed a plea. He maintained that the Mofoka and Ramohajane families are one family and that it was lawful for Ts'ita to pass "all powers of headmanship" to him. It is alleged that at the time, Kuena was "the only person in line of seniority in the family and qualified to succeed the powers of headmanship".

[9] Kuena pleased that "it is more than thirty years since" he was officially, lawfully and procedurally recognized and gazetted as Chief of Ha- Ramohajane without any 'complaint' by anybody. He disputed

the respondents' right to succeed to the office of headman through either the Mofoka or Ramohajane families.

[10] Kuena further asserted that 'Makojana lawfully delegated the powers to Tsi'tsa when she did.

The trial

[11] The parties proceeded to trial on a single issue as defined in their pre-trial minute as follows:

> *"111. Who has the right to succeed to the Chieftainship of Ha-Ramohajane factually".*

[12] Oral evidence was led, and each party called witnesses and cross-examined the witnesses of the other side. At the end of the trial, the learned Magistrate gave an order (without reasons) in the following terms:

> *"(a) The 1ST DEFENDANT is not entitled to succeed to the area headmanship of Ha-Ramohajane in the district of Maseru,*
>
> *The 3RD PLAINTIFF is the rightful person to succeed to the - headmanship of Ha-Ramohajane in the district of Maseru.*
>
> *(c) No order as to costs."*

[13] Aggrieved by that order, Kuena appealed to the High Court, relying on the following grounds of appeal:

> *'1. The learned magistrate erred and misdirected himself in holding that the appellant was not entitled to succeed to the chieftainship/headmanship of the area of Ha Ramohajane in the district of Maseru in as much as:*
>
> *1.1 he ignored evidence, which was not in dispute, to the effect that the appellant succeeded his father who had been the area chief/headman of the area since the 1950s after he had been installed as such;*
>
> *1.2 he ignored evidence to the effect that exhibit "B", being a judgement of the Judicial Commissioner's Court dated 7 April 1972, put beyond doubt the rights of the appellant's father and in particular emphasized that the grandfather of the respondents was not entitled to claim the chiefly rights of Ts'ita Mofoka, who had been appointed as a bugle;*
>
> *1.3 the learned magistrate ignored evidence to the effect that the appellant succeeded his father who was entitled to exercise chiefly rights to the area of Ha Ramohajane and therefore that the appellant was entitled to succeed his father in circumstances where his father's rights to exercise the powers of a chief/headman had not been disturbed for a period spanning for more than fifty (50) years.*

2. The learned magistrate erred and misdirected himself in holding that the third respondent is the rightful person to succeed to the headmanship/chieftainship of Ha Ramohajane in the district of Maseru in as much as:

2.1 he should have held, in view of the welter of evidence before him, that the respondents either individually or as a collective are not entitled to claim the chiefly rights of Ha Ramohajane by failing to discharge the onus of proof that rested on them;

2.2 he should have believed and accepted the evidence of the appellant that he was entitled to succeed to the chiefly rights of his late father who had exercised such rights until his death.

3. The learned magistrate erred and misdirected himself in not dismissing the respondents' claim with costs in light of evidence tendered by both parties.'

The High Court

[14] The appeal was heard by Banyane J who delivered judgment on 3rd November 2022. The following grounds of appeal were ventilated before Banyane J:

"1. The learned magistrate erred and misdirected himself in not dismissing the respondents' claim with costs in light of evidence tendered by both parties. The learned magistrate erred and

misdirected himself in holding that the appellant was not entitled to succeed to the chieftainship/headmanship of the area of Ha Ramohajane in the district of Maseru in as much as:

1.1 he ignored evidence, which was not in dispute, to the effect that the appellant succeeded his father who had been the area chief/headman of the area since the 1950s after he had been installed as such;

1.2 he ignored evidence to the effect that exhibit "B", being a judgement of the Judicial Commissioner's Court dated 7 April 1972, put beyond doubt the rights of the appellant's father and in particular emphasized that the grandfather of the respondents was not entitled to claim the chiefly rights of T'sita Mofoka, who had been appointed as a bugle;

1.3 the learned magistrate ignored evidence to the effect that the appellant succeeded his father who was entitled to exercise chiefly rights to the area of Ha Ramohajane and therefore that the appellant was entitled to succeed his father in circumstances where his father's rights toexercise the powers of a chief/headman had not been disturbed for a period spanning for more than fifty (50) years.

2. The learned magistrate erred and misdirected himself in holding that the third respondent is the rightful person to succeed to the headmanship/chieftainship of Ha Ramohajane in the district of Maseru in as much as:

2.1 he should have held, in view of the welter of evidence before him, that the respondents either individually or as a collective are not entitled to claim the chiefly rights of Ha Ramohajane by failing to discharge theonus of proof that rested on them;

2.2 he should have believed and accepted the evidence of the appellant that he was entitled to succeed to the chiefly rights of his late father who had exercised such rights until his death

3. The learned magistrate erred and misdirected himself in not dismissing the respondents' claim with costs in light of evidence tendered by both parties."

[15] The appellant Kuena argued that the Magistrate ignored the uncontested evidence that his father had been installed as chief in 1950 and that a Judicial Commissioner's judgment in 1972 had affirmed his father's right to administer the area.

[16] The appellant argued that the 1972 judgment settled the issue of headmanship, and it could not be reopened, making the respondents bound by it.

[17] The appellant also contended that the respondents' claims were invalid because their grandfather, Lehlafi, was not included in the 1950 and 1964 government gazettes, which listed recognized chiefs and headmen.

[18] According to the appellant, in the alternative, that the respondents had waived their rights by remaining passive since 2001, when he was nominated as chief.

Respondents' counter arguments

[19] The respondents opposed the appeal, asserting that the delegation of headmanship duties by 'Mokojang to Ts'ita Mofoka was unlawful since Ts'ita did not belong to the Ramohajane family. They also maintained that Kuena's father was not a headman but a bugle, (a chief's spokesperson) without hereditary title, which meant the appellant could not inherit any right to headmanship.

[20] They also contended that the absence of their ancestor's name in the 1950 and 1964 gazettes was not conclusive proof that he was not the headman, as omissions in the gazettes were common due to administrative errors.

[21] According to the respondents, the appellant had misinterpreted the 1972 judgment, which did not settle the issue of who had the rightful claim to the headmanship.

Key legal issues considered by the court a quo

[22] The court a quo referred to the definition of "chief" under the Chieftainship Act No. 22 of 1968, as amended by the Chieftainship (Amendment) Act No. 12 of 1984. It concluded that the term includes ward chiefs, headmen, and other hereditary chiefs whose offices are recognized by customary law. The court noted that a bugle is not equivalent to a headman or chief but is merely a representative or spokesperson for the chief. This position is non-hereditary, meaning the appellant could not inherit it from his father.

[23] The court relied on the book *Sotho Laws and Custom* by Patrick Duncan to support its conclusion that a bugle's position is akin to that of a servant of the chief and is not passed down through the family.

[24] Next, the court considered the effect of the 1972 Judicial Commissioner's judgment said by the appellant to have affirmed Ts'ita with ultimate chieftainship authority over Ha- Ramahojana. The court a quo held that contrary to the appellant's assertion to to the contrary, the judgment did not conclusively settle the hereditary rights to the headmanship of Ha Ramohajane, and it did not affirm Ts'ita's claim to the headmanship.

[25] As regards the non-gazettement, the court found that the non-gazettement of Lehlafi and other family members in the 1950 and 1964 gazettes did not disqualify the respondents from headmanship.

Referring to earlier case law, the court explained that non-inclusion in the gazette did not mean that an individual was not a legitimate headman, especially when administrative errors were common. The 1939 gazette, which recognized Lehlafi as headman, was sufficient proof of his legitimate position.

[26] The court *a quo* rejected the appellant's argument that the respondents had waived their rights to contest the headmanship by remaining passive. It found that there was continuous contestation over the issue. Evidence showed that as early as 2000, the respondents had lodged complaints about the appellant's father's exercise of headmanship functions. Moreover, the delay in contesting the issue was explained by the death of one of the respondents' fathers and the ill health of a key family member.

[27] Banyane J concluded that the respondents, as descendants of Lehlafi Ramohajane, had the rightful claim to the headmanship of Ha- Ramohajane (Ts'ita). The learned judge held that the appellant's father had only served as a bugle, which is a non-hereditary role and that for that reason the appellant could not through his late father claim headmanship over Ha-Ramahajane. In the court a quo's view, the Judicial Commissioner's 1972 judgment was not *res judicata* as it did not resolve the issue of hereditary succession but merely affirmed the appellant's father's position as a bugle.

[28] Banyane J accordingly dismissed the appeal, and declared the respondents to have the prior right to the headmanship of Ha-Ramohajane, pending approval by the King in accordance with the Chieftainship Act (Amendment Act 1984). The court also ordered the appellant to pay the costs of the appeal.

Kuena's substitution and the appeal

[29] It appears that Kuena died after the judgment was delivered and was therefore (with the leave of the court *a quo*) replaced by his son, Tśoloane, on whose behalf, on 12th September 2023, a notice of appeal and grounds were filed of record. The appeal was therefore prosecuted by Tśoloane.

[30] Since Banyane J sat on appeal against a judgment of a magistrate, the appeal to this Court implicated s 17 of the Court of Appeal Act 1978 which states:

> *"Any person aggrieved by any judgment of the High Court in its civil appellate jurisdiction may appeal to the court with the lave of the court or upon the certificate of the Jude who heard the appeal on any ground of appeal which involves a question of law but not a question of fact".*

[31] On 20 February 2024, Banyane J issued a certificate as follows:

"WHEREAS the appeal of the above-named Appellant from the Subordinate Court at Maseru was dismissed by me in the High Court on the 3rd day of November 2022, I hereby certify that the case is a fit case for an appeal on the questions of law set out hereto;

1. *Whether section 2(1) of the Chieftainship Act 1968, properly interpreted, excludes or includes bugleship;*

2. *Whether bugleship is hereditary;*

3. *Depending on the answer above (2), whether Gazettement is requirement for recognition of a bugle.*

DATED AT MASERU ON THIS 20TH DAY OF FEBRUARY 2024."

[32] The obligations cast on an appellant once a judge's certificate has been issued, are set out in the Court of Appeal Rules, 2006, in particular Rule 4 as follows:

"Notice of appeal

4. (1) In every matter in which there is a right of appeal to the Court, the applicant shall, within six weeks of the date of the delivery of the judgment in the High Court, file a notice of appeal and such notice shall, as near as may be, be in accordance with Criminal Form I or Civil Form I, as set out in the First Schedule.

. . .

(3) Where a Judge of the High Court has given leave to appeal in terms of the Act, the delivery of the certificate of the Judge granting such leave together with the grounds of appeal annexed thereto shall be a sufficient notice of appeal and the certificate of the Judge of the High Court shall be in accordance with Criminal Form 2 or Civil Form 2 as set out in the First Schedule.

(4) The notice of appeal shall-

(a) state whether the whole or part of the judgment or order is appealed against. If a part only of the judgement or order is being appealed against, the notice of appeal shall state which part; and-

(b) set forth concisely and clearly the grounds of objection to the judgment or order and such grounds shall set forth in separate numbered paragraphs the findings of fact and conclusions of law to which the appellant objects and shall also state the particular respects in which the variation of the judgment or order is sought.

It common cause that the only notice and grounds of appeal before this court are those filed in September 2023. No Fresh notice of appeal and grounds which advises the judge's certificate have been filed."

[33] This Court (Ramodibedi P) has laid down that:

'*As guidance in future … it is … necessary to lay down the following principles:-*

1. *Practitioners who apply for leave to appeal and judges of the court granting leave should ensure that the provisions of section 17 of the Act and the Rules of Court are strictly observed.*

2. *The application for leave to appeal should specify the grounds on which leave is sought.*

3. *The judge granting leave should clearly define the points of law on which leave is granted in compliance with the Rules.*

4. *When leave is granted, the certificate of the judge and the grounds of appeal should then be delivered by the applicant.*'[2]

[34] It is common cause that the only notice and grounds of appeal before this Court are those filed in September 2023. No fresh notice of appeal and grounds of appeal which addresses the judge's certificate have been filed. During oral argument Mr Letsika for the appellant suggested that the learned judge *a quo* directed the appellant not to file any further documents but to only rely on the judge's certificate. That is not the correct position in law.

[35] Sub-rule (3) is clear and for good reason: grounds of appeal filed to seek the judge's certificate are intended to persuade the judge at

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[2] *Mohale v Mahao* (C of A (CIV) No. 22 of 2004) [2005] LSCA 10 (20 April 2005) at para 6; *Khechane v Semonkong Urban Council* (C of A (CIV) 36 of 2022) [2022] LSCA 45 (11 November 2022) at paras 5 and 6.

first instance to grant the certificate on the terms proposed. Once the judge has granted the certificate and narrows the grounds of law (as happened here) those are the grounds that should find their way to this Court and be the basis for the heads of argument to be filed in due course.

[36] As it happens, Mr Letsika's heads of argument are a rehash of the appeal grounds that were pursued before Banyane J.

Disposal

[37] The appellant is bound by the judge's certificate. He cannot raise on appeal issues not included in that certificate. More importantly, it is not open to him to challenge findings of fact made by the court *a quo* in its appellate jurisdiction in so far as they have not been certified by the judge *a quo* as matters of law. It is not open to the appellant to attack in this Court the lower courts' analysis of the evidence. Section 17, it has been held relieves this Court of the burden of deciding factual issues in circumstances where the lower courts have already done so.[3]

[38] As I have demonstrated in the analysis of Banyane J's judgment *a quo*, that court dealt with and determined factual and related disputes (*res judicata*; waiver; whether Ts'ita was a bugle) that were ventilated in the Magistrate's court and, in so far as they were

[3] Per Ramodobedi P in *Mokete v Tsietsi* C of A (CIV) No. 55/2011 at para [17].

outcome-determinative, decided those disputes against the appellant.

[39] In the manner the questions in the judge's certificate are framed, the underlying factual finding by the court *a quo* is that Ts'ita was a bugle as opposed to a chief or headman. As Banyane J held *'it is clear that the appellant's father was only a bugle, a position that cannot be inherited. It was suggested to PW1 during cross-examination that 'Makojang asked the appellant's father Ts'ita Mofoka to assist her with chieftainship functions. This she did by asking for Chief Malireko permission. This further confirms that the appellant's father's position was never of a chief or headman. It follows that he appellant cannot therefore claim to inherit a right that is not hereditary*'.

[40] Section 2(1) of the Chieftainship Act 22 of 1968 as amended by the Chieftainship (Amendment) Act 12 of 1984 defines a chief to include:

> *'A principal chief, a ward chief, a headman and any chief whose –*
>
> *(a) Office is acknowledged by Order 26 of 1970,*
>
> *(b) Succession to an office of chief has been approved by the King acting in accordance with the advice of the Minister; or*
>
> *(c) Hereditary right to the office of a chief is recognised under customary law and his succession to an office of chief has been approved by the king in accordance with the advice of the Minister'.*

[41] At para [21] of her judgment Banyane J wrote:

> *"[21] Patrick Duncan in his book, Sotho Laws and Custom states that there are various grades of headmanship. He says at the top is a gazetted headman (often ruling several villages), termed Ramotse (father of the village) and this position is as heredity as that of any chief. Secondly, there is the substantial headman with small area, not in the gazette. Thirdly there is the headman over whom a chief has been placed. Lastly there is a village head called variously as "hlooho ea motse" (head of the village), phala (bugle or speaking tube through whom the chief speaks to the people) or Ramotsana (small headman). He states at p55 that bugleship is not hereditary and that a bugle is a servant of the superior headman or chief and he can be dismissed at any time. He refers to the case of Khati v Jonathan JC 149/51 as a case in which the distinction between a village head and headman was made and whether either is hereditary. In Leihlo v Lenono (1976) LLR 171, Mofokeng J stated the position as follows;*
>
> > *"a phala is nothing else but a village head. This position, moreover, is not hereditary. A phala is a servant of the superior headman and he can be dismissed at any time."*

[42] Banyane J went on to hold, correctly so, that under customary law, a bugle being a 'speaking tube through whom the chief speaks to the people' is a non-hereditary position; that it is a servant of the superior headman or chief who can be dismissed at any time. During oral argument, Mr Letsika conceded that this is an accurate statement of the status of bugle under customary law.

[43] Once it is accepted that a bugle serves at the pleasure of the chief or headman and enjoys no tenure, it follows that the position is not hereditary.

[44] Mr Letsika conceded that the questions posed in the judge's certificate must be decided against his client. For all the reasons that I have set out above, that concession is properly made.

Order

[45] In the result:

1. The answers to the questions posed in the judge's certificate are:

   'Question 1: Properly interpreted, s 2(1) of the Chieftainship Act 1968 excludes bugleship.
   Question 2: Bugleship is not hereditary.
   Question 3: Gazettement is not a requirement for recognition of a bugle.'

2. The appeal is dismissed with costs.

P.T. DAMASEB

ACTING JUSTICE OF APPEAL

I agree:

K.E. MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree:

S.P. SAKOANE

CHIEF JUSTICE

FOR THE APPELLANT: MR. Q. LETSIKA KC

FOR THE RESPONDENT: MR. P.J LEBAKENG