

IN THE HIGH COURT OF LESOTHO

In the matter between:

MONAHENG KOALI RAPHOBOSO

Applicant

and

THE PRINCIPAL CHIEF OF MATSIENG
SIMON RAKHOBOSO
THE MINISTER OF HOME AFFAIRS
THE ATTORNEY GENERAL

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

J U D G M E N T

Delivered by the Honourable Chief Justice Mr Justice
J.L. Kheola on the 21st day of October, 1996

This is an application for an order in the following terms:

1. Declaring Applicant as the lawful headman of Mafikalisiu Ha Rakhoboso otherwise known as Ha Nkaka;
2. Declaring as unlawful 1st Respondent's purported appointment of 2nd Respondent as headman of Mafikalisiu;
3. Declaring as unlawful the withholding of Applicant's remuneration by 3rd Respondent's officers;

4. Interdicting 2nd Respondent from holding himself out as headman of Mafikalisiu;
5. Interdicting 1st Respondent from recognising 2nd Respondent instead of Applicant as headman of Mafikalisiu;
6. Directing 1st Respondent to restore to Applicant his official stamp and official stationery;
7. Directing Respondents to pay costs hereof;
8. Granting Applicant such further and or alternative relief as this Honourable Court deems fit.

On the 24th day of January, 1983 the plaintiff was declared as an acting Headman of Mafikalisiu ha Rakhoboso. This was done in terms of section 13(7) of the Chieftainship Act 1968, and with the approval of Chieftainess Alina Nkaka who was headman of the area in question. She alleged that because of old age and ill health she was no longer capable of carrying out her duties properly.

It will be important to give a short family tree of Rakhoboso family in so far as it is relevant to this case. Mabusetsa had three sons:

1. Macoffeng was the eldest son. He had no male issue. When he died his wife, Alina Nkaka succeeded him.
2. Koali was the second son. He had two sons and the plaintiff was the second son. His elder brother became a chief in another area which falls under the Principal Chief of Tajane. He is not involved in this dispute.
3. The plaintiff is the third son of the late Mabusetsa.

It is clear from the Rakhoboso family tree that when Chieftainess Alina Nkaka died without a male issue, Koali who is the younger brother of Chieftainess's husband had to succeed her in terms of section 10(3) of the Chieftainship Act 1968 which provides:

"(3) If when an office of Chief becomes vacant there is no person who succeeds under the preceding subsection, the first-born or only son of the marriage of the Chief that took place next in order of time succeeds to that office, and so, in descending order of the seniority of marriages according to the customary law, that person succeeds to the office who is the first-born or only son of

the senior marriage of the Chief or of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection."

It seems that when Chieftainess Alina passed away Koali had already died before her leaving two sons, one of whom was the second respondent. I have gleaned these facts from Annexure "SR2" which is a copy of judgment of Matsieng Central Court. If those facts are correct the law is very clear that when Chieftainess Alina died, the sons of Koali were the ones who had to succeed in her office of Chief. The applicant, as the third son of Macoffeng did not feature anywhere in the line of succession. Be that as it may the applicant is not basing his case on section 10(3) of the Chieftainship Act 1968 (the Act). He is basing his claim on section 11(2) of the Act.

The problem which the applicant is facing is that he was appointed ~~as~~ acting headman of Mafikalisiu ha Rakhoboso and not as a **substantive** holder of that post. The acting appointment is a very precarious position which can be revoked at any time even without giving any reason. Section 13(7) and (8) of the Act read as follows:

"(7) 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.

- (8) The King acting in accordance with the advice of the Minister may at any time withdraw such approval without assigning any reason therefor.

Mr Mohau, counsel for the applicant submitted that the issue for the determination of this Court is whether the act of removing applicant from the office of headman was a quasi-judicial decision thus requiring the giving of hearing, or a purely administrative decision. He submitted that the appointment of the applicant to the office of headman of Mafikalisiu in 1983 conferred a certain status as well as rights on him; and his removal therefrom definitely carries diminution in status and removal of those rights. He concluded that removal of the applicant from the office of headman was a quasi-judicial decision which required that the applicant be given a hearing before it was taken.

Mr. Mohau, referred to **Ngubane v. Minister of education and Culture, Ulundi, and another** 1985 (3) S.A. 160 (D & C.L.D) whose headnote reads as follows:

"The applicant, a teacher, was employed as a rector of a college of education, having been appointed to such post under the

provisions of the KwaZulu Education Act 7 of 1978. He was informed by second respondent that a charge of misconduct had been made against him and that he was being relieved of his post and transferred to a post as principal of a school pending determination of the enquiry against him. The applicant claimed that the latter post was inferior in status to that of rector and that the decision to transfer him had been taken without affording him a hearing. In an application to set aside this decision, the Court was of the view that the question to be determined was whether s. 19 of the Act, which governed the power to transfer teachers, required the official who took the decision to apply the **audi alterma partem** rule.

Held, that, in deciding whether to transfer the applicant, the official concerned would have to enquire into and consider various facts and circumstances which affected the applicant's rights and such decision was a **quasi-judicial** one.

Held, further, that in the absence of any indication to the contrary, the **audi alteram partem** rule was therefore presumed to apply.

Held, accordingly, as the applicant had not

been given a hearing of any kind, that the decision had not been validly made and had to be set aside."

The present case can be distinguished from **Ngubane's case**, in that Ngubane was appointed as a rector of a college of education on permanent conditions. He was holding a substantive post in the Ministry of Education of Kwazulu. The statute under which he was being transferred provided that if the transfer involved reduction of his salary, his consent had to be obtained. It turned out that reduction of his salary was not involved. The only issue was whether he had to be given a hearing before he was transferred in terms of the principles of natural justice, especially the **audi alteram partem** rule.

In the present case the law under which the applicant was removed from the acting appointment as a headman provides that the King may at any time withdraw such approval without assigning any reason therefor. It seems to me that in taking that decision he is not expected to apply the **audi alteram partem** rule.

The question of a legitimate expectation to be given a hearing before the alteration of his status, does not arise because the law under which the applicant was appointed clearly indicated that his position could be terminated at any time at the whim of the King.

In the result the application is dismissed with costs.


J.L. KHEOLA
CHIEF JUSTICE

21st October, 1996.

For Applicant - Mr. Mohau
For Respondent - Mr. Mafantiri