CIV/APN/293/97

IN THE HIGH COURT OF LESOTHO

In the matter between

LIBE MOIMA	**Applicant**
and	
THE MINISTER OF INTERIOR	**1st Respondent**
ATTORNEY-GENERAL	**2nd Respondent**
DISTRICT SECRETARY	**3rd Respondent**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

on 23rd day of September 1997.

The Applicant has applied for relief on an urgent basis in the following terms:-

"1.

That a rule nisi be and is hereby issued calling upon the respondents

to show cause if any, why?

(a) First and third respondents shall not release to applicant his salary cheque for July, 1997.

(b) First and third respondents shall not be restrained and interdicted from withholding applicant's salary without due process of the law as long as applicant performs chiefly duties at Ha Moima and Ha Khojane and pending judicial determination of who is the rightful person to hold the office of chief of Ha Moima and Ha Khojane.

© ~~Respondents shall not be directed to pay costs hereof~~

(d) Applicant shall not be granted further and/or alternative relief.

2.

That prayer 1(a) operate with immediate effect."

On the 20th August 1997 when the matter came before me ex parte I duly granted the Rule Nisi sought but specifically declined to order prayer 1(a) to operate with immediate effect without having given the respondents notice and an opportunity to be heard. Thus I insisted that the latter be served with the papers in the matter. This was done.

After two postponements the matter which is opposed was finally argued before me on the 11th September 1997 and after hearing argument from both sides

I duly confirmed the Rule and granted the application with costs indicating that the reasons would follow. These are the reasons.

I turn straight away to the facts of the case and in that regard I should mention at the outset that it is indeed common cause that the Applicant has been acting chief of Ha Mapeshoane since 1989. He has been acting for the "substantive" holder of the office namely the late Chief Moima Moima.

It is further common cause that upon the death of the late Chief Moima Moima the Moima family nominated Hlasoa Moima who in turn appointed the Applicant to act in his absence. The Applicant avers that the reason why Hlasoa Moima appointed him to act in his absence is that the latter works in the Republic of South Africa

I observe that although the Applicant has not stated in his founding affidavit that Hlasoa Moima works in the mines in the Republic of South Africa the Respondents have sought to "deny that Hlasoa Moima works in the mines as he is living in the village of Ha Mapeshoane, and is not working in the South African mines." Well nobody said he did. I find it strange for the Respondents therefore to deny something that was not alleged at all. Regarding the allegation that Hlasoa Moima is still living in the village of Ha-Mapeshoane I should imagine that this must obviously be so. Nobody said he is living elsewhere other than that he is working in the Republic of South Africa. I am being left with a distinct impression that the Respondents were trying to raise imaginary points of dispute in the matter. I am satisfied however that there are no material or fundamental disputes of facts here.

Be that as it may I consider that what is important is that the Respondents

have specifically admitted that the Moima family actually nominated Hlasoa Moima who in turn appointed the Applicant to act as chief on his behalf.

It is further common cause that the Applicant has been receiving salary for his services as acting chief since 1989 until July 1997 when such salary was stopped or withheld from him resulting in the present proceedings. The Applicant puts the issue in the following words in paragraph 10 of his founding affidavit:-

"10.

I have been receiving a salary from the Ministry of Home Affairs channelled through the District Secretary Leribe for the ~~fulfilment of the chiefly duties at Ha Mapeshoane.~~"

The Respondents admit the contents of this paragraph in the following words appearing in paragraph 10 of the Answering Affidavit of Molai Lepota:-

"10.

Ad Para 10

The contents therein are admitted, the applicant was paid for the services that he rendered during that period until the end of June 1997 when his services came to an end."

I shall return later to the Respondents' allegation that Applicant's services came to an end in June 1997.

It is further common cause that there is case number CIV/APN/144/91 pending before this Honourable Court. That case involves a dispute over who should occupy the office of Ha Mapeshoane. The present Applicant features as the Applicant in that case and the present first two respondents have been cited as respondents together with the Principal Chief of Leribe and the Chief of Mahobong Chieftainess Makhethisa J.D. Molapo who is 5th Respondent thereat. As will appear later the latter sometimes uses the surname of Khethisa. More about her later.

It proves convenient to refer to the interim court order in the said case Number CIV/APN/144/91 which reads in part as follows:-

"It is ordered that:

(a) The decision of the 21st February 1992 upholding the recommendation of the Third Respondent that Fourth Respondent be gazetted Chief of Ha Moima and Ha Khojane in the area of Ha Mapeshoane is stayed pending the finalization of the main application.

(b) Respondents are directed to pay costs."

I should mention for completeness, that the Third and Fourth Respondents mentioned therein are Chieftainess Mamolapo B. Motšoene and Mahala K. Molapo respectively.

Now despite the fact that CIV/APN/144/91 is still pending as aforesaid the Respondents have nonetheless proceeded to support the claim by one Sekhonyana

Lebeoana Moima to the chieftainship of Ha Mapeshoane. No explanation has been furnished however why the latter has not joined as a party in these proceedings. Strangely the Respondents are content to fight the cause for him in his absence. As far as the Applicant is concerned I accept his explanation that he was not aware of Sekhonyana Lebeoana Moima's claim in the matter at the time he filed the present application. I attach due weight to the fact that it has not been proved that the Applicant actually received Annexture "B" which is a letter allegedly written by Chieftainess Makhethisa J.D. Khethisa addressed to the Applicant in the following words:-

> "Chief Libe Moima
> Acting in Chieftaincy of
> Ha Mapeshoane
>
> ISSUE: SUCCESSION CHIEFTAINCY OF HA MAPESHOANE
>
> According to the orders of court of Tsifalimali central court in which Sekhonyana won the case against you. In that all the rights of Lebeoana Moima. (sic) Be awarded to Sekhonyana Lebeoana Moima.
>
> I inform you that you should inform the people to come to the pitso in the office of chieftaincy of Mahobong on the 6-5-97 at 10.00 in the morning. Whereby Sekhonyana will be presented before the people.
>
> I again inform you that from the 1-7-97, Sekhonyana will be starting the chieftaincy work as chief of ha-Mapeshoane, and you will start to stop being chief of Mapeshoane on he (sic) 1-7-1997.
>
> I will thank you if you can be careful in executing this instruction
>
> Acting Chief of Mahobong, Thaba-Phatsoa & Bokong".

The attitude of the Respondents and the Applicant's superior chiefs namely

Chieftainess 'Mamolapo B. Motšoene and Chieftainess 'Makhethisa J.D. Khethisa is cause for concern. Firstly they obviously supported the installation of Mahala K. Molapo as Chief of Ha Mapeshoane. When this Court interdicted them pending finalisation of CIV/APN/144/91 they then switched sides and now seek to support the installation of Sekhonyana Lebeoana Moima as Chief of the same area. Could this perhaps be a classical case of running with the hare and hunting with the hounds? Whatever the case may be I have gained the impression that the Respondents will stop at nothing but clutch at straws if only to frustrate and stop the Applicant from acting as chief and getting the salary for his services.

As is apparent from the letter Annexture "B" the Respondents base their case on the proposition that Sekhonyana Lebeoana Moima has "won" the case against the Applicant and that "all the rights of Lebeoana Moima" were awarded to the said Sekhonyana Lebeoana Moima by Tsifalimali Central Court. It is thus necessary to determine whether this proposition is valid both factually and legally. I point to the following six (6) factors:-

1. In terms of the summons Annexture "LB1" to the Applicant's replying affidavit the claim leading to Tsifalimali Central Court judgment referred to in Annexture "B" was started by the said Sekhonyana Lebeoana Moima against the Applicant and others in Pitseng Local Court in CC 71/95 thereof. The claim in the summons specifically stated "in the case of rights in the family estate of deceased Lebeoana Moima." I consider therefore that this claim had nothing to do with chieftainship rights which are governed by the Chieftainship Act 1968. I am fortified in this view that I take by the following two factors:-

(a) The Pitseng Local Court judgment in CC 71/95 ended with

these words:

> ".....for these reasons I grant judgement for plaintiff, the rights of the late LEBEOANA belong to plaintiff, a site, fields and, garden according to EX B. Defendants should stop interferring (sic) with these rights. There is no order as to costs. This is the judgement."

It is clear therefore that the rights which were disputed and which were granted against Applicant were in respect of a site, fields and a garden. They did not include the chieftainship of Ha Mapeshoane.

(b) Pitseng Local Court had no jurisdiction to hear a case involving succession to Chieftainship. See Florinah Mantia Mapapali NKO V Lipane NKO 1991-92 LLR at page 7 in which Kotze JA delivering the unanimous decision of the Court of Appeal held that ".....no local and central court is possessed of jurisdiction to decide question of succession to chieftainship." I respectfully agree.

2. As I see it, the judgment of Tsifalimali Central Court in CC 64/96 being an appeal from the aforesaid CC 71/95 of Pitseng Local Court did not advance the case any further. All it did was to dismiss the appeal by the present Applicant and others and to confirm the judgment of Pitseng Local Court. It is true in terms of Annexture "A" to the Answering Affidavit of Molai Lepota the Central Court held that Sekhonyana Lebeoana Moima is the lawful heir of Lebeoana and that "all rights of the late Lebeoana belongs (sic) to the respondent" (namely Sekhonyana Lebeoana Moima). I consider however that the rights to which the Central Court referred were obviously the rights claimed in the summons Annexture

"LB1" namely rights in the family estate which as earlier stated were defined in the judgment of Pitseng Local Court as "a site, fields and garden."

3. In any event I consider that if the proceedings in both Pitseng Local Court and Tsifalimali Central Court were meant to deal with succession to chieftainship then they are clearly a nullity and of no force and effect for lack of jurisdiction as earlier stated. Nko v Nko (supra).

Accordingly I find that the Respondents' reliance on the judgments of Pitseng Local Court and Tsifalimali Central Court is misconceived. It is a non starter.

4. At any rate it is common cause that Applicant's elder brother Ngaka Mapeshoane has appealed against the Tsifalimali Central Court judgment. I consider therefore that the effect of such appeal would be to operate as an automatic stay of execution of the decision appealed from.

Miss Sesing for the Respondents has argued however that the automatic stay of execution can only be in respect of the Applicant's elder brother Ngaka Mapeshoane and not the Applicant himself. I cannot accept this argument. Seeing that the dispute involved in the decision appealed from concerned family estate I consider that if the Applicant's elder brother wins the dispute as the heir then there is no need for the Applicant to appeal personally. Put differently there cannot be two heirs in respect of one and the same estate.

5. Succession to the office of Chief is governed by Sections 10 and 11 of the Chieftainship Act 1968. As earlier stated the parties are on common ground that after the death of the office holder Moima Moima the office of Chief of Ha

Mapeshoane became vacant and a successor had to be found to succeed him in terms of Section 10 of the Act. Hence the Moima family duly nominated Hlasoa Moima as a successor apparently in terms of Section 11 of the Chieftainship Act which 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.

(3) Pending the disposal of the application by the court, or the abandonment or failure to prosecute the application, the nomination of a successor to that office of Chief shall, to the extent that an application under subsection (2) applies to it, have no effect unless a notice has been published under section 14 giving public notice of the name of the person nominated as holding that office of Chief, or unless otherwise ordered by the Court.

(4) The Court may hear and determine an application made by a person in pursuance of the provisions of subsection (2) and may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of giving effect to its judgment in the matter."

It is clear from this Section that as soon as the nomination of a person has been announced pursuant to subsection (1) any person who objects to the nomination on the ground that the person nominated is incapable of succeeding or that some other person should have been nominated must actually make the running himself and apply to a Court of competent jurisdiction to have the nomination set aside or varied accordingly. I accept as a matter of logic and common sense therefore that a nomination made pursuant to Section 11(1) of the Chieftainship Act 1968 stands unless and until an objector has actually filed an application to a Court of competent jurisdiction to have the nomination set aside.

It is not disputed that there has never been any application to have the nomination of Hlasoa Moima set aside or varied in terms of Section 11 of the

Chieftainship Act 1968. Accordingly I find that his nomination still remains in effect and that in turn his appointment of the Applicant to act as Chief on his behalf cannot be faulted. Since it is common cause that this was a public act in which the Principal Chief of Leribe was informed I accept that the presumption of validity expressed by the maxim omnia praesumutur rite esse acta applies to this case particularly so in view of the fact that the Applicant has openly fulfilled the functions of office of Chief of Ha Mapeshoane while admittedly receiving a salary since 1989.

6. I am satisfied that there is no admissible evidence on record to show that Applicant's appointment as acting chief of Ha Mapeshoane has ever been validly revoked. Until that has happened he must still be regarded as the lawful acting chief and nobody else can be appointed as chief for the same area unless such appointment is made by the current office holder namely Hlasoa Moima himself.

See Monaheng Rakhoboso v Simon Rakhoboso C of A (CIV) No. 37/96 in which Gauntlett AJA expressed the following remarks:

> "The result is that the subsequent purported appointment of the respondent as headman, without a valid revocation of the appointment of the appellant as acting headman, must itself be legally ineffective."

It is not seriously disputed that it was only at the end of July, 1997 when the Applicant went to Third Respondent's office to collect his cheque that he learned with "dismay" that his cheque had not been sent as it was stopped. The Applicant avers in paragraph 14 of his founding affidavit that he was "not told the basis of the

stoppage." I observe that the Respondents have not addressed this particular allegation issuably.

Which brings me to the pertinent question whether the Applicant was given notice and an opportunity to be heard before his salary was stopped. I have no doubt in my mind that the Applicant clearly had a legitimate expectation to be heard. The decision to stop his salary was obviously prejudicial to him.

In paragraph 15 of his founding affidavit the Applicant puts his complaint in the following terms:-

"15

> I wish to disclose to this Honourable Court that before the decision to stop payment to me was reached I was neither notified of the reasons for this nor consulted. I still remain in the dark as to why my cheque is being withheld. I could not have come to court earlier as I made several attempts to find out the true position."

In fairness to Miss Sesing for the Respondents she has conceded that the Applicant was not given an opportunity to be heard before the decision to stop his salary was made. I have looked at the papers closely and nowhere is it shown or even remotely alleged that Applicant was given hearing. The concession by Miss Sesing was therefore properly made in the circumstances.

Miss Sesing argues however that the Applicant was notified by Chieftainess 'Makhethisa J.D. Molapo that with effect from the 1st July 1997 Sekhonyana

Lebeoana Moima would "start exercising his headmanship powers." I have already held that Chieftainess 'Makhethisa J.D. Molapo's reliance on the judgments of Pitseng Local Court and Tsifalimali Central Court is a non starter. The so called notification is therefore null and void and of no force and effect. It does not even refer to Applicant's salary as such. In any event such notification would not remedy the glaring and admitted omission that the Applicant was not given an opportunity to be heard.

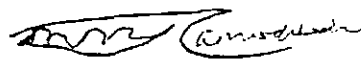
I should mention, for the avoidance of doubt, that a proper notice and hearing would not emanate from Chieftainess 'Makhethisa J.D. Molapo as the Respondents appear to think. The notice and hearing would come from those whose responsibility it has always been to pay the Applicant's salary. I apprehend that First Respondent is such a body.

The principle that no man is to be judged unheard is obviously no empty slogan. It is the very foundation of the rule of law and the audi alteram partem rule. Nor does it matter that the Applicant only holds a temporary office. He is, in the words of Gauntlett AJA in Rakhoboso v Rakhoboso (supra) "entitled to be treated fairly, and in particular, to have notice of the contemplated steps against him and an opportunity to be heard in that regard." None of these were accorded to him. In my judgment that is a traversity of justice.

In all the circumstances of the case therefore I have come to the conclusion that the non payment of Applicant's salary cannot be justisfied and that the Applicant has succeeded to make out a case for the relief sought.

Accordingly the Rule is confirmed and the application granted as prayed

interms of prayers 1(a) and (b) of the Notice of Motion with costs.



M.M. Ramodibedi

JUDGE

23rd day of September 1997.

For Applicant : Adv. Teele

For Respondents : Miss Sesing