

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/190/2016

In the matter between

TŠIU MAKHABANE MOPELI

APPLICANT

AND

**THE PRINCIPAL CHIEF OF MATSIENG
THE MINISTER OF LOCAL GOVERNMENT
AND CHIEFTAINSHIP
THE CHIEF OF THOTENG-EA-MOLI
THE ATTORNEY GENERAL**

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

4th RESPONDENT

CORAM: HON. J.T.M. MOILOA J.

DATE OF HEARING: 19 MARCH 2018

DATE OF JUDGMENT: 01 AUGUST 2018

ANNOTATIONS

1. Chieftainship Powers Proclamation No. 61 of 1938
2. Legal Notice No. 171 of 1939
3. Basutoland (Constitution) Order-in-Council 1959
4. Government Notice No.20 of 1964
5. Lesotho Constitution 1966
6. Lesotho Order No.1 of 1970
7. Lesotho Order No.2 of 1970
8. Lesotho Order No.26 of 1970
9. Lesotho Constitution 1993
10. Letsoela vs Chief of Kolojane 1995/99 LAC 280
11. Lieta vs Lieta 1985/89 LAC 260

[1] **DEFINITION OF DISPUTE**

Applicant occupies the Office of Headman of Phuthiatsana Ha Paki. This matter is before me by way of review. Applicant seeks an order reviewing and setting aside **Legal Notice number 20 of 1964** insofar as it purports to place the office of Applicant under 3rd Respondent (Chief of Thota-ea-Moli). This review by the court he asks after 52 years since the decision was made. He asks that the late review be condoned nevertheless. He does so after Lesotho adopted Lesotho Constitution 1966 on 4th October 1966.

Applicant also wants reviewed and set aside, the decision of First Respondent to no longer deal directly with administrative matters from the office of the Headman of Phuthiatsana Ha Paki.

- [2] The circumstances leading to present litigation are not unique from many other chieftainship disputes in the Kingdom in terms of having a long history. The history in brief is that Applicant succeeded his father Makhabane Paki Mopeli who passed away in 1961. Makhabane Paki Mopeli too had inherited the Headmanship from his father Paki Mopeli. Paki Mopeli was gazetted headman of Ha Paki through **Legal Notice 171 of 1939** under Principal Chief of Matsieng who is First Respondent in the matter. At that time the Office of Chief of Thota-Moli did not exist. All three incumbents had in practical terms been answerable to and dealing directly with the office of First Respondent. However, in the case of Applicant things took a different turn in 1964. Through Government Notice No.20 of 1964 the office of Headman of Phuthiatsana Ha Paki was made answerable to the newly created office of Chief of Thota-Moli Ha Taelo Lerotholi, following the recommendation of College of Chiefs to Paramount Chief of Basutoland. The Paramount Chief accepted such recommendation and in turn recommended the new hierarchy to the

British High Commissioner who in turn also accepted it and had published his decision in **Government Notice No.20 of 1964**. For some time from 1964 when **Government Notice No.20 of 1964** was published Applicant refused to accept its determination and continued to deal with office of Principal Chief of Matsieng. At various times Applicant was admonished for this but ignored the admonition and in defiance continued to deal with Matsieng. However since 2014 First Respondent has taken a tough stance concerning Applicant and refuses to deal with Applicant except only through the office of chief of Thota-Moli in terms of **Government Notice No. 20 of 1964**.

[3] **LEGAL NOTICE NUMBER 171 OF 1939**

It is common cause that this is the gazette which created the office of headman of Phuthiatsana Ha Paki. It was founded on Applicant's grandfather Paki Mopeli. In terms of that gazette the headman was directly responsible to the Principal Chief of Matsieng. It is also common cause that after the death of Paki, his son Makhabane Paki Mopeli succeeded him in the same office still responsible to the office of Principal Chief at Matsieng. In 1961, Makhabane Paki Mopeli died and his son (Applicant) succeeded him to the same office. Same as his predecessors Applicant carried on being (practically) responsible to the office of Principal Chief at Matsieng.

[4] **BASUTOLAND (CONSTITUTION) ORDER-IN-COUNCIL 103 OF 1959**

This Order-in Council is commonly referred to as "**1959 Constitution of Lesotho**". It was introduced on the 14th September 1959 and became fully operational on 5th March 1960. Our interest in relation to the inquiry before us is Section 73 and 74 thereof.

Section 73: Section 73(1) of this Constitution established an institution called “College of Chiefs.”

Section 74: Section 74(1) defined the powers and duties stipulated in 74(1) (d) and (f) that are relevant to our inquiry. They provide as follows:-

“74(1) (d) The definition or adjustment of boundaries of areas within which chiefs and Headmen exercise their powers and perform their duties:

(f) The review and amendment of the grading or classification of chiefs and Headmen

(g) The review and amendment of the lists of persons holding the appointment of Chief and Headman.”

Section 78: In terms of Section 78(1) any finding, decision or recommendation arising from any proceedings under the provisions of **Section 74(1)** once accepted by the Paramount Chief and recommended by him to the High Commissioner and accepted by the High Commissioner and published by the High Commissioner in the prescribed manner becomes final. The prescribed manner by which the High Commissioner’s decision is published for public knowledge is publication by notice in the Government Gazette. In the instant case the decision of the High Commissioner was published in the “Official Gazette Extraordinary” dated 11th February 1964 per **Government Notice 20 of 1964** following the work and recommendations of the College of Chiefs which in turn had been approved by the Paramount Chief and accepted by the High Commissioner. This Gazette established the office of Chief of Thota-ea-Moli Ha Taelo under Principal Chief of Matsieng. At the same time it reviewed the grading and classification of the office

of Chief to whom Headman Tšiu Makhabane Paki Mopeli was answerable. It placed Applicant under Chief of Thota-Moli Ha Taelo.

Section 80: In terms of Section 80, after expiry of 30 days, from the date on which any finding, decision or recommendation shall have been communicated to the parties and such decision has been made public (e.g. Gazette) such decision is final and binding.

Applicant is not challenging the right of High Commissioner to create “Office of Chief of Thota-ea-Moli Ha Taelo.” Applicant is merely challenging placement of office of “Headman of Phuthiatsana Ha Paki” under Office of Chief of Thota-ea-Moli. He wants to continue to be answerable to office of Principal Chief of Matsieng. That is the thrust of paragraphs 10 to 25 of the founding affidavit inclusive. No credible reason was advanced to me in the pleadings nor in argument why Applicant must be answerable directly to Principal Chief of Matsieng and not Chief of Thota-ea-Moli, except that it is how it used to be in the days of his grandfather and his father. In oral argument Mr. Teele, said it is a matter of status to Applicant. But I cannot see what status Applicant is talking about because he remains occupant of a junior office of “Headman” and not “Chief.” Moreover I find that this newly created hierarchy makes practical sense. At the head it is the office of Principal Chief of Matsieng superior to the office of Chief of Thota-ea-Moli. Then the office of headman of Phuthiatsana ha Paki is answerable to the office of Chief of Thota-ea-Moli. When I consider the geographical setting and boundaries of Ha Paki and Thota-ea-Moli it is involved. It is much easier and convenient for the community of Phuthiatsana Ha Paki to go to Thota-moli for services than it is for them to go all the way to Matsieng.

It indeed favours the interests of good administration the Applicant is made answerable to Third Respondent rather than First Respondent.

- [5] Applicant voiced his objection at the 1964 placings outlined in the preceding paragraph. The basis for his objection was that no procedures were followed in founding the office of Third Respondent and placing Chief Taelo as Chief of Thoteng-ea-Moli. The Principal Chief of Matsieng rejected and/or dismissed Applicant's objection saying among others that the placing of his office under that of Third Respondent had been done lawfully as it was confirmed by Motlotlehi Moshoeshe II, Paramount Chief of Basutoland at the time, following recommendation of the College of Chiefs. That was in September 1962. During February 1963 Applicant and others were before the District Officer for binding over proceedings in relation to the objection to the placement of the office of Third Respondent "over ours". Part of the judgment in those binding over proceedings before the District Officer J. A. R. Bromet reads "*the main trouble seems to be that the chiefs do not respect the Paramount Chief's final order in the gazette and do not realise that this order is in effect given also by the College of Chiefs although it has been explained to them that their only appeal is to the High Court....*". I pause here to mention that time (1963) District Officers exercised judicial powers as Magistrates. See **Section 4(1) (b) Proclamation 58/1938**. This dismissal of Applicant's objection by the District Officer was the second one after the same dismissal verdict was reached by the Acting Principal Chief of Matsieng. So, as long ago as 1963, Applicant knew that his remedy was by way of recourse to the High Court. Applicant did not. Instead he opted for obstinacy. Given the lapse of time it has taken Applicant to review the decision I refuse to grant him in condonation now.

- [6] Applicant took his complaint further to the College of Chiefs in July 1964. The standing committee of the College of Chiefs was faced with two issues. Firstly, the enquiry was whether Applicant's complaint against the placement of chieftainess 'Mabofihla Taelo Lerotholi was brought through the correct procedure Secondly, whether the committee still had jurisdiction in the matter since His Majesty Motlotlehi Moshoeshe II and the High Commissioner through **Legal Notice No. 20 of 1964** had already made their final decision that Chieftainess 'Mabofihla Taelo Griffith Lerotholi occupies the office of chief of Thota-ea-Moli under Principal Chief of Matsieng. The Standing Committee found that Applicant should have noted an appeal (*thapeli*) in terms of Section 28 of the Standing Order of the College of Chiefs Committee. They went further to indicate that even if that was to be done it would not have helped because the Paramount Chief had already exercised his powers made a recommendation to the High Commissioner which had been accepted by him and which decision had been published under **Legal Notice 20 of 1964** previously referred to. The Standing Committee found Applicant's complaint to be before the wrong forum as they did not have jurisdiction and recommended its dismissal.
- [7] Applicant did not take any other step after this recommendation. He did not take it up on review. His reasoning is that although he received the recommendation he never received any decision of the Paramount Chief in terms of **Section 78(2) of the Basutoland Constitution Order in Council 1959**. Pending that decision of the Paramount Chief he continued to administer his area and dealing directly with the office of Principal Chief of Matsieng. My reading of the provisions of **Sections 78(1), 78(2) and 79(1)** together inform me that nothing prevented

Applicant from having reviewed the proceedings as a party aggrieved by the recommendation of the Standing Committee. He had 30 days within which to apply to the High Court to have the matter reviewed on the grounds that the Standing Committee had acted without authority, in bad faith or had committed a serious irregularity. Nonetheless he avers in the present application that the gazette placing the Third Respondent over his office is null and void for failure to observe the procedure laid down and contrary to law and custom. Applicant refers to “PM9” for the procedure he refers to. “PM9” is circular number 43 of 1950 and deals with placing of chiefs and headmen. In terms of PM9 the following are the requirements as prescribed by the Resident Commissioner and the Paramount Chief in terms of **Government Circular No. 43 of 1950**.

- (a) That the placing is in the interest of good administration (my underlining) and that if the sub-division of an area is involved, the area is big enough to be subdivided.
- (b) The people over whom it is proposed to place such person are consulted and agree and
- (c) The person whom it is proposed to place is a suitable person

[8] This argument of Applicant is disingenuous and far-fetched as I shall demonstrate shortly. Firstly, a Government Circular is not a law. It cannot override legislative instruments (e.g. **High Commissioner’s Instrument 103/1959 and Government Notice 20/1964**). Nor could it supersede judicial decision of J.A.R Bromet in **CR 3/1964**. In my view Government Circular No. 43/1950 has no relevance and cannot dislodge the decision of Paramount Chief in 1961 made pursuant to the powers he had under the 1959 Constitution. Neither can it found a basis to review the final decision of the British High Commissioner to create **“Office of Chief of Thota-ea-Moli in 1964”**. It is a fact notorious to every

Mosotho in this country that the area of Headmanship of Ha Paki is adjacent to Thota-ea-Moli Ha Taelo Lerotholi. It must be accepted, in my considered opinion, that it is for the convenience of the public that lives in these areas that administrative offices are created. It is not for the personal pride and arrogance of the persons who serve in those office. I estimate that the distance from the office of Headman of Phuthiatsana to the office of Thota-ea-Moli is approximately 6 km at the most. In contrast my estimate of the distance from the office of Headman of Phuthiatsana Ha Paki to the Office of Principal Chief of Matsieng is at least 28 kilometre away. I do not accept that the convenience of the public living at Ha Paki is better served by referring them to Matsieng for services instead of Thota-ea-Moli Ha Taelo. On this ground Applicant has failed to satisfy me that the decision of both Motlotlehi and the British High Commissioner in 1961 and 1964 respectively is in breach of requirement (a) above.

- [9] In regard to requirement (b) above it is clear in my opinion that public living in Ha Paki and Thota-ea-Moli and Matsieng were consulted regarding the new placement and hierarchical arrangements relating to administrative services to the public in those areas. This is borne out by a number of documents attached to Applicant's own papers e.g. Annexure PM2, PM4, PM5, PM6, PM7 and PM8.
- [10] As regards suitability of Chief Taelo there is no suggestion even from Applicant himself that Chief Taelo Lerotholi was an unsuitable person to be placed as Chief of Thota-ea-Moli. I don't see how Motlotlehi breached any law in placing him as Chief of Thota-ea-Moli. Neither can I see any breach of any law by Motlotlehi in recommending to the High Commissioner that he be appointed Chief of Thota-ea-Moli. Nor can I

see any principle of law breached by the British High Commissioner in promulgating Government Notice No.20 of 1964 which Applicant asks the court to review and set aside. I refuse to do so.

[11] **CONSTITUTIONAL DEVELOPMENTS AND THEIR IMPACT ON THE OFFICES OF CHIEF**

11.1 CONSTITUTION OF LESOTHO 1966

Constitution of Lesotho came into being on 4th October 1966. As regards our inquiry in this judgment our interest is in regard to “Office of Chief” existing on the coming into operation of Lesotho Constitution, 1966 on 4th October 1966.

Section 88: In terms of Section 88(1) of Lesotho Constitution 1966 the 22 office of Principal Chief or Ward Chief and other offices of chief recognised under the law in force immediately before the commencement of this Constitution on 4th October 1966 were re-affirmed and established.

Section 70: In terms of Section 70(3) of the Lesotho Constitution 1966, Section 80 of the Constitution re-establishing offices of chief in existence on 4th October 1966 is especially entrenched in that it requires 2/3 of votes in each House of Parliament and approval at a referendum. In other words the “offices of chief” in existence at the coming into operation of Lesotho Constitution 1966 cannot be altered unless any such amendment to them meets the requirement of **Section 70 (3)** of that Constitution. It is common cause that there has not been an alteration of **Section 80 of the Lesotho Constitution 1966**. Accordingly Government Notice No.20 of 1964 establishing offices of chief in the Matsieng Ward remain intact. Applicant herein being headman of Phuthiatsana Ha Paki, under office of

chief of Thota-Moli Ha Taelo Lerotholi, cannot be altered in anyway other than if the law was altered consistent with the provision of Section 70.

11.2 CHIEFTAINSHIP ACT NO.26 OF 1968

This Act was enacted on 22nd July 1968, Section 2(1) (a) defines “Chief” as follows:-

““Chief” does not include the King but includes a Principal Chief, a Ward Chief and a Headman and any other Chief.”

An office of Chief in existence on 3rd October 1966 and acknowledged by the Constitution on 4th October 1966 was re-affirmed and established by Section 88 of that Constitution. The status of Applicant as Headman of Phuthiatsana Ha Paki answerable to the Area Chief of Thota-ea-Moli Ha Taelo Griffith Lerotholi on 4th October 1966 was re-affirmed and established as such by the Constitution in 1966.

11.3 LESOTHO ORDER NO.1 OF 1970

On 31 January 1970 Chief Jonathan effected a successful overthrow of Lesotho Government and installed his government by force of arms. See **Lesotho Order No.1** through which he suspended the **Lesotho Constitution 1966**. This Order provided that every legislative function performed under it “shall have the force of law. In **Section 3** thereof it provided that other laws other than the Lesotho Independence Order (i.e. Constitution of Lesotho 1966) that were in force in Lesotho before the coming into operation of Lesotho Oder No.1 shall continue to be of full force and effect. Accordingly **Government Notice 20 of 1964** remained

unaffected by overthrow of existing legal order prior to 31 January 1970.

11.4 OFFICES OF CHIEF ORDER OF NO.26 1970

This Order was enacted on 5th June 1970. It provided for offices of chief and for matter incidental to and connected with “Offices of Chief.” **Section 2** of this Order provided:

“(1) The twenty-two offices of Principal Chief and Ward Chief set out in the Schedule to this Order and other offices of Chief recognised under the law in force immediately before the commencement of the Lesotho Order 1970 are hereby acknowledged with effect from commencement of the Order.

(2) Every person who, on the 29th January 1970 hold any office referred to in subsection (i) shall be deemed, as from commencement of the Lesotho Order, 1970, to have held and to hold the corresponding office acknowledged by that subsection.

(3) Each Chief shall have such functions as are as may be conferred and such duties as are or may be imposed on him by any law in Lesotho.”

It is clear to me that up to the enactment of Order No.26 of 1970 the legal position and status of the office of Headman of Phuthiatsana Ha Paki remained as defined by Government Notice No.20 of 1964 which prescribes at the “Office of Headman of Phuthiatsana Ha Paki” is answerable to the “Office of Thota-ea-Moli Ha Taelo.” Thus, in my view, the Applicant continued to be locked in that position.

11.5 LESOTHO CONSTITUTION 1993

Lesotho Constitution 1993 came in the force on 2nd April 1993 returning Lesotho to constitutional rule and democracy.

Section 103: Section 103(1) of the Constitution, like its predecessor made provision for offices of chief. It provides as follows:-

“(1) The twenty-two offices of Principal Chief set out in Schedule 2 to this Constitution and other offices of Chief recognised under the law in force immediately before the commencement of this Constitution shall continue to exist.”

Thus the legal position and obligations of Applicant remained as defined in Government Notice No.20 of 1964 which made him answerable to the Chief of Thota-ea-Moli Ha Taelo Griffith Lerotholi.

- [12] According to both First and Third Respondents the 1964 gazette is valid. Reference is made to the dictates of practice and custom; that there would be sons of the paramount chiefs who on being gazetted as chiefs of certain areas headmen in that area would be under their control. In *casu* Chief Taelo Griffith Lerotholi was at that time the person from that family of Paramount Chief. He qualified and was a suitable person by virtue of being from the family of Paramount Chief. That placing indeed being in the interest of good administration as already stated above in this judgment. This both in terms of the geographical setting of the areas and convenience for the benefit of the public concerned. In that same Gazette Applicant’s office is one of those answerable to Third Respondent. As early as 17th September 1962 Applicant was admonished for his obstinate behaviour and reminded that His Majesty had already accepted the new arrangement that Headmanship of Phuthiatsana Ha Paki shall continue to be answerable to Office of Chief of Thota-ea-Moli Ha Taelo. All of these developments concerning the creation of Office of Chief of Thota-ea-Moli happened prior to coming into effect of the **Lesotho Constitution**

1966 with its attendant cementing of Offices of Chief and Headman as existed prior to 4th October 1966. See **Section 88 of that Constitution**. In my view those Offices of Chief as indicated above cannot be changed in any manner other than in compliance with **Section 70 (3) of that Constitution. Lesotho Order No. 1 of 1970 and Section 2 of Lesotho Order No. 26 of 1970** re-confirmed that position. So did **Section 103 of Lesotho Constitution 1993**. No law has been passed amending **Section 103(4)** in accordance with precepts of **Section 85** of the current Constitution. The Paramount Chief had already made a decision concerning this issue. The then Acting Principal Chief of Matsieng (Morena Reentseng Lerotholi) had indicated that the placing in question was lawful and confirmed by Motlotlehi Moshoeshe II. The College of Chiefs echoed the same sentiments. The position being reflected in the 1964 gazette is an administrative decision which Applicant never attempted to have reviewed by the Court until now. I am not persuaded at all that Government Notice No.20 of 1964 is invalid on the grounds that failed to follow procedures alleged by Applicant, or on any basis in law at all. I am not persuaded at all that I should condone Applicant's 52 years delay to bring his review application.

- [13] In my opinion on 2nd April 1993, as was the case on 31st January 1970 and as was the case on 4th October 1966, what was published in Government Notice 20 of 1964 reflected the recognised offices and how they relate to each other. The Offices of Chief in existence on 4th October 1966 have been acknowledged and recognised as such without change until now, and the manner in which they relate to each other administratively, has been acknowledged and recognised as such without change to this day.

Before leaving this 1964 gazette complaint I want to deal with the fact that this matter is before court decades after the cause of action arose. It has been repeatedly said in this Court and the Court of Appeal that disputes must reach finality as expeditiously as possible See **Letsoela vs Chief of Kolojane 1995/99 LAC 280, Lieta vs Lieta 1985/99 LAC 260**. There simply has to be an end to litigation. It is undesirable that a dispute which arose in 1960, if at all, should be dragged to 2016 simply because Applicant refuses to accept the finality of a decision made 52 years ago. I refuse Applicants prayer (f) for condonation being made this long after the fact for the reasons already articulated above in this judgment.

[12] **CONCLUSION**

In the circumstances I refuse to grant Applicant prayers (a) (b) (c) (d) (e) and (f) of his Notice of Motion. I dismiss them for the reasons set out above. I hold that office of Principal Chief of Matsieng is perfectly correct in law to refuse to deal directly with matters emanating from Applicant's area of jurisdiction. In fact Applicant has been repeatedly told to abide by precepts of Government Notice 20 of 1964. The office of Chief of Thota-ea-Moli is adjacent to the office of headman of Phuthiatsana Ha Paki. It is within walking distance in fact (approximately 6km). In contrast the Office of Principal Chief of Matsieng is several kilometres from that of Phuthiatsana Ha Paki (approximately 28 km away). I further hold that it makes perfect sense that the office of Headman of Phuthiatsana Ha Paki should be answerable to Area Chief of Thota-ea-Moli Ha Taelo Lerotholi bearing in mind the relative distances as well as the geographical location of the two offices in relation to each other as compared to compelling people of Ha Paki to go to Matsieng. I repeat that it is for the convenience of the public that the administrative hierarchy of the offices of chief is made and not for the

personal preferences of persons serving in the offices of chief that the administrative hierarchy is made. In the present matter it is not for the personal preference of Applicant that the office Headman of Phuthiatsana Ha Paki was made answerable to the Chief of Thota-ea-Moli Ha Taelo upon creation of that office in 1964.

J. T. M. MOILOA
JUDGE

FOR APPLICANT: ADV. M. TEELE KC (Instructed by T. Matooane and Co.)

FOR THE 3rd RESPONDENT: ADV. R. SETLOJOANE (Instructed by Mei & Mei Inc.)

FOR THE 1st, 2nd and 4th RESPONDENTS: ADV. M. J. NTOKO (Instructed by Attorney-General Chambers)