IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/94/18**

In the Matter Between:-

PRINCIPAL CHIEF OF TSIKOANE, PEKA AND KOLBERG **APPLICANT**

AND

MINISTRY OF LOCAL GOVERNMENT & CHIEFTAINSHIP **1ST RESPONDENT**

PRESIDENT OF SENATE **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

JUDGMENT

CORAM	**:**	**HON. M. MOKHESI AJ**
DATE OF HEARING	**:**	**23rd APRIL 2018**
DATE OF JUDGMENT	**:**	**18th MAY 2018**

CASE SUMMARY

Principal chief seeking review of the decision to suspend and curtail her chieftaincy powers for 15 years- Review only directed at the charges on the bases that they violated the provisions of section 16(5) of the chieftainship Act,1968, and that there had been splitting of charges and duplication of convictions-Held, although precision and particularity in drafting disciplinary charges is not the same as drafting criminal charges, but where the disciplinary committee is endowed with powers to impose a sanction with far-reaching consequences such as the present case, precision and particularity in drafting charges is required-Held further that there had been unnecessary splitting of charges and duplication convictions-Application granted with costs.

Annotations:

STATUTES:

Chieftainship Act No.22 of 1968

CASES:

Coetzee v Financial Planning Institute of South Africa and others 2015(3) SA 28 (SCA)

De Vos v Die Ringskommissie Van die Nak 1952(2) SA 83 (o)

Klein v Dainfern College and Another (3303304/04) [2005] ZAGPHC 102

Makoala v Makoala (C of A (civ) o4/09

R v Johannes 1925 TPD 782

S v Tantsi 1992(2) SACR 333(TK)

PER MOKHESI AJ

[1] The applicant is a Principal Chief of Tsikoane, Peka and Kolberg (Kolobere). In April 2014 she was hauled before the disciplinary committee which was convened in terms of section 16 of the **Chieftainship Act No. 22 of 1968** (hereinafter the "the Act"). She was charged with five counts of misconduct. A translated charge-sheet reads as follows:

"**Charge-Sheet**

Chieftainess Pontŝo Seoehla Mathealalira, the Principal Chief of Tsikoane, Peka and Kolberg who lives in the Leribe District, Tsikoane, Is hereby charged with contravention of section 17 of the Chieftainship Act No.22 of 1968 in that;

"Count 1:

Contravention of section 17 (h) of the Chieftainship Act. On or about the years 2007 and 2012 at or near to Tsikoane in the District of Leribe, the accused did misuse the powers or duties of the office by refusing to work with customary committee elected customarily and also prevented initiation rituals to be performed in your area of jurisdiction.By doing so you contravened section 17(h) of the chieftainship Act.

Count 2: Contravention of section 17(i) of Chieftainship Act.On or about 2007 to 2012 at or near Tsikoane in the district of Leribe the accused did behave in a manner that is prejudicial to the dignity, status and reputation of the office of the Chief by refusing to give service to members of the public and sending them away because they did not greet you in a manner known to you alone which is not prescribed by the Law. By doing so, you contrived (sic) section 17(i) of the chieftainship Act.

Alternatively

On or about the years 2007 and 2012at or near Tsikoane in the district of Leribe the said accused did abuse or misuse the powers of the office by sending off members of the public and refusing to give them service as they did not greet you in a manner known solely to you but which was not sanctioned by the law. By so doing you contravened section 17(h) of the Chieftainship Act.

Count 3: Contravention of section 17(h) of Chieftainship Act.On or about the years 2007 and 2012 at or near Tsikoane in the district of Leribe the accused did misuse or abuse the powers or duties of

the office by unlawfully refusing to grant grazing permits to livestock farmers who intended to transfer their livestock to the highlands. You also made others to illegally pay you sums of money which were used for your own benefit and were not paid into the Government coffers as the law prescribes. By doing so contravened section 17 (h) of the Chieftainship Act.

Count 4: Contravention of section 17(c) of the Chieftainship Act on or about the years 2007 and 2012 at or near Tsikoane in the district of Leribe you failed or refused to observe in relation to the powers and duties of that office, the principles, purposes and provisions of subsection 1 of section 6 in refusing to serve the people in the area of your authority and to promote their welfare and lawful duties of the office impartially, efficiently and quickly according to the law, in that your (sic) refused to serve them on the basis that they did not greet in a certain manner known solely by you but which is not sanctioned by law. Furthermore you failed or refused to grant grazing permits impartially and demanded monies which were not sanctioned or allowed by the law. Furthermore you failed to intervene to give effect to the decision of the Boundary Committee between areas of Hleoheng and Peka. By so doing contrived (sic) section 17(c) of Chieftainship Act.

Count 5: Contravention of section 17(h) of the Chieftainship Act.

On or about the years 2012 and 2013 at or near Tsikoane in the district of Leribe you failed or refused to carry lawful orders or directions of the Minister of Local Government, Chieftainship Affairs and Parliamentary Affairs, when he ordered that you should return all the monies that you had taken from livestock farmers illegally, to call a public gathering (Pitso) for the Chiefs of Hleoheng and Peka and the public with the aim of informing them about the decision of the Boundary Committee and to bring peace among them, to withdraw the decision to ban

initiation rituals in your jurisdiction and to withdraw your decision to grant grazing permits in January instead of October."

The hearing was concluded on the 7th March 2018. Having been found guilty on all counts, she was suspended and deprived of all her chieftainship powers for an effective period of fifteen years after the sentences were ordered to run consecutively. Consequent to being suspended, the applicant launched this application for relief in the following terms:-

"1. (a) Dispensing with the normal modes of service due to the urgency of the matter.

(b) Restraining and interdicting the Respondents from interfering with the Applicant in exercising her normal duties as the Principal Chief and Senator.

(c) Restraining and interdicting the Respondents from withholding applicant's remuneration as the Principal Chief and a Senator.

(d) Ordering the 1st Respondent to dispatch the record of the disciplinary proceedings held against Applicant to the High Court within fourteen (14) days of reviewing (sic) this notification.

(e) Reviewing and setting aside the disciplinary proceedings against Applicant.

(f) Granting applicant such further and, or alternative relief."

[2] This application is opposed. In his answering affidavit Mr. Moeti Lephoto who described himself as the Acting Principal Secretary in the Ministry of Local Government and Chieftainship Affairs, raised the so-called points in *limine, viz;*

(1) That the applicant should not have deposed to the affidavit as she was suspended as the Principal Chief, but rather one Mr Joel Mathealira who was appointed by the family to act

as the Principal Chief during the applicant's period of suspension.

(2) Non-joinder of Mr Joel Mathealira who was appointed by the Mathealira family to act as the Principal Chief during the applicant's suspension period.

[3] It has to be made clear that this review application is directed only at the charges and not at the proceedings which culminated in the applicant being suspended and deprived of her powers. The applicant raised two issues regarding the charges. She argued that all five charges were couched in vague terms and lacked particularity as the offences were alleged to have been committed between the years 2007 and 2012. This, in turn, she argued, made it difficult for her to prepare her defence, contrary to the provisions of section 16(5) (c) of the Chieftainship Act. Secondly, the applicant argued that there had been splitting of charges leading to duplicated convictions much to her prejudice.

[4] Sections 17 and 6(1) in terms of which the applicant was charged, provides in relevant parts:

> "17. A chief is guilty of a disciplinary offence and liable to the deprivation or the reprimand specified in section [18] if he –
>
> (a) ……
> (b) Fails or refuses to copy out a lawful order or direction of a Minister of the Government of Lesotho, or of a Chief or person exercising the powers and performing the duties of an office of chief having superior authority over that office.
> (c) Fails or refuses to observe in relation to the powers and duties of that office, the principles, purposes and provisions of subsection (1) of section 6;
> (d) …….

(e) …….
(f) ……..
(g) …….
(h) Misuses any of the powers or duties of that office;
(i) Behaves in any manner that is prejudicial to public safety or to public order, or to the dignity, status and reputation of that office or the office of chief generally;
(j) ……..."

Section 6 (1) provides:

> "It is the duty of every Chief to support, aid and maintain the King in His Government of Lesotho according to the Constitution and the other laws of Lesotho, and subject to their authority and direction, to serve the people in the area of his authority, to promote their welfare and lawful interests, to maintain public safety and public order among them, and to exercise all lawful powers and perform all lawful duties of his office impartially, efficiently and quickly according to law."

[5] *The Points in Limine.*

When the points in *limine* is raised, the court is enjoined to deal with it by determining whether the applicant's founding affidavit make out a *prima facie* case. Only the averments contained in the applicant's founding affidavit will be considered and treated as true for purposes of deciding the point in *limine* so raised(***Makoala v Makoala*** **(C of A (civ) 04/09) [2009] at para. 4**.

(1) *Applicant should not have deposed to an affidavit as she was suspended as the Principal Chief?*

As regards the first point in limine, *viz*, that the applicant should not have deposed to the affidavit as she was suspended as the Principal Chief of Tsikoane, Peka and Kolberg, this point should not have been raised as such as it does not necessarily entail the dismissal of this application. In fact

Counsel for the respondents seemed to have laboured under a misguided belief that suspending the incumbent of the office of the Principal Chief also suspends the status of such a person. Counsel for respondents, during oral submissions conceded that he was mistaken to have believed that suspending a Principal Chief suspends his or her status, such as to disentitle her to sue as the Principal Chief. In my view, this concession was correctly made. The consequences that follow upon the Principal Chief being found guilty of misconduct are to be found in section 18 of the Chieftainship Act No. 22 of 1968. This section reads:

> "When the Disciplinary Committee has made a finding in terms of section 16(8) or 16(9) and after considering any representations in connection with its disciplinary order, the Disciplinary Committee may
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> -
>
> (a) ***Deprive*** the Chief of all or some of the powers and duties of his office to an extent and for a period specified in such order; or
> (b) Reprimand the Chief."(my emphasis)

Clearly, suspending a Chief does not suspend her status as well, as section 18 indicates. Upon being found guilty, only the exercise of certain powers and duties of the office excisable by such a chief may be curtailed or completely suspended for a determinable period. It follows that, this point was not correctly taken and is accordingly dismissed.

[6] (2) *Non-Joinder of Mr.Joel Mathealira.*

After the applicant was suspended, the Mathealira family appointed one Joel Mathealira to hold fort during her suspension as the acting Principal Chief of Tsikoane, Peka and Kolberg. The point in *limine* raised in respect of Joel Mathealira is that he should have been joined in this proceedings as he has

a substantial interest in the outcome of this case as the acting Principal Chief. In my view this point should be dismissed as it is not a point to be raised in *limine*. The said Joel Mathealira is aware of these proceedings as he even deposed to an affidavit in support of the Acting Principal Secretary of 1st respondent. Mr. Molise could not answer the question I posed to him as to why Mr Mathealira did not seek to intervene in this case as he was fully aware of these proceedings. In my considered view this point is dismissed as it was badly taken (**see *Makoala* above at para. 6**)

[7] *Duty to act fairly in conducting disciplinary proceedings.*

On the merits, the applicant has attacked or sought to assail the disciplinary proceedings against her on the score that the charges which were preferred against her were vague and lacked particularity, in violation of the provisions of section 16(5) of the Act.

Every person who is a subject of disciplinary proceedings is entitled to the full benefit of the principles of natural justice. Even in respect of the disciplinary proceedings against the Principal Chief, these hallowed principles are obligatory. These principles, in terms of which disciplinary proceedings should be conducted are provided for under section 16(5) and (6) of the Act. It provides as follows in relevant parts:

> "(5) (a) If the Secretary of the Disciplinary Committee is satisfied that there are reasonable grounds for instituting disciplinary proceeding against the Chief, he shall cause a notice to be served on the Chief personally calling upon the Chief to appear before the Disciplinary Committee on a stated day, at a stated time and at a stated place;
>
> (b)……

(c) The notice shall inform the Chief with reasonable clarity of the allegations against him and of his right to produce such evidence to the Disciplinary Committee as he thinks fit:"

Further under subsection 6, the Act provides:

"6 (a) The proceedings of the Disciplinary Committee shall be conducted in such a way as to give a fair hearing to the Chief against whom an allegation has been made;"

The requirement in terms of section 16(5) (c) of the Act has been stated as follows, in the case of ***Klein v Dainfern College and Another (33033/04) [2005] ZAGPHC 102 (1st Oct. 2005)*** **at para. 34**:

"It is the principle of natural justice that the accused is entitled to have the charge clearly formulated with sufficient particularity in such a manner as will leave him/her under no misapprehension as to the specific act or conduct proposed to be investigated. (**See Fisher v SA Bookmakers' Association 1940 WLD 88 at 91**). The charge sheet must also clearly indicate the nature of the offence although it need not set out the same detail and precision as is required in a criminal indictment. **See De Vos v Die RingsKommissie Van die NGK 1952 2 SA 83 (0) at 97**."

Further, in ***Coetzee v Financial Planning Institute of South Africa and Others 2015 (3) SA 28 (SCA)*** **at para. 17** the court said:

"There is authority for the proposition that a charge-sheet in a disciplinary enquiry does not have to be framed with the same degree of particularity, or with all the formalities, of a charge in a criminal trial. However, the better view is that, although the same degree of formality is not required, the same degree of particularity, of the factual information underlying the allegations made, is required to enable the accused to know what case he or she has to meet. *This is particularly so where the disciplinary body has the power (as in the present case) to make findings with for-reaching consequences."* (My emphasis)

[8] Applying these principles to the factual matrix of this case it is plainly clear that the charge-sheet is gravely deficient in this material respect. All the charges are couched in general, unintelligible, vague and unspecific manner; for example, all the charges are alleged to have been committed between the years 2007 and 2012 with the exception of count 5 which is alleged to have been committed between the years 2012 and 2013. The individuals against whom the transgressions are alleged to have been committed are not mentioned. Even with regard to count 5 which is alleged to have been committed against the Minister, precision and particularity in the drafting of this charge is not exemplary as, for example, it is not clear on what basis the Minister based his decision that the applicant took monies from the livestock farmers "illegally"; or where the duty on the applicant to call the pitso to inform the people of Hleoheng and Peka about the decision of the Boundary Committee emanated from. In *casu,* the disciplinary committee before which the applicant was arraigned, is endowed with far-reaching powers. For this reason alone, the charges against the applicant should have been drafted with sufficient degree of particularity to enable her to know the case she had to meet. It is unfathomable, in the light of the foregoing discussion, how the applicant would have prepared to defend herself when the charges are this deficient in respects outlined in the preceding discussion. My considered view in light of the foregoing discussion is that this review application should succeed on the ground that the manner in which the charges were couched breached the fundamental principles of natural justice as enshrined in section 16 (5) (c) of the Act.

[9] It is rule of practice that splitting of charges and duplication of convictions should at all costs be avoided *(**S v Tantsi 1992 (2) SACR 333 (TK) at 334f***). The courts have developed two tests to be used in determining whether there has been unnecessary splitting of charges and duplication of convictions; It is the "single intent test" and the "evidence test". **Curlewis JP** explained the two tests thus, in ***R v Johannes 1925 TPD 782*:**

> "It seems to me that the court can safely lay down that under certain circumstances both these tests or the one or the other, may be applied, *viz,* the test of whether two acts are done with a single intent and constitute one continuous criminal transaction and the test as to whether the evidence necessary to establish one crime involves proving another crime." (**See *S v Wehr 1998 (1) SACR 99 (c) at 100.*"**

In *casu*, all the charges, with the exception of count 5, have been split.

(i) Count 1 and Count 3.

In terms of count 1, it is alleged that the applicant between the years 2007 and 2012 contravened the provisions of section 17(h) of the Act by (misuse of powers) "refusing to work with a Customary Committee elected customarily and also prevented initiation rituals to be performed in your area of jurisdiction…," and in count 3, the applicant is alleged to have contravened the same provisions of the Act, i.e section 17(h), between the years 2007 and 2012 "by refusing to grant grazing permits to livestock farmers who intended to transfer their livestock to the highlands. You also made others to illegally pay you sums of money which were used for your own benefit and were not paid into the Government coffers as the law prescribes."

Applying the duplication tests stated above to these two charges, it is clear that the evidence proving one count necessarily involves proving the other. Under these two supposedly different counts, the applicant is alleged to have contravened the same section (s.17 (h)). Unnecessary splitting of charges is so obvious in this regard. Both counts accounts for an effective suspension period of five (5) years.

(ii) Count 2 and Count 4

In terms of count 2 the applicant is alleged to have contravened the provisions of section 17 (i) of the Act, it being alleged that between the years 2007 and 2012 she behaved "in a manner that is prejudicial to the office of the chief by refusing to give services to members of the public and sending them away because they did not greet you in a manner known to you alone which is not prescribed by the law."

In terms of count 4, it is alleged that the applicant contravened the provisions of section 17 (c) of the Act between the years 2007 and 2012 "by refusing to serve the people in the area of your authority and to promote their welfare and lawful interests and to perform all the lawful duties of the office impartially, efficiently and quickly according to the law, in that your (sic) refused to serve them on the basis that they did not greet in a certain manner known solely by you but which is not sanctioned by law."

In respect of these counts too, it is clear that evidence in respect of count 2 serves the purpose of proving count 4. These charges have been split, resulting in duplicated convictions which account for a combined suspension period of seven years. In my view the egregious consequences of splitting

charges and duplicating convictions are conspicuous even to the most undiscerning eye, in this case. On this score, again, this application should succeed.

[10] In the result,the following order is made:

(a) The application for review succeeds with costs.

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M.A MOKHESI

ACTING JUDGE

For Applicant: Attorney T. Matooane

For Respondents: Adv. T. Molise and Adv Tau