

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/86/2016

In the matter between:

CHIEF JOEL MOSHOESHOE

APPLICANT

AND

CHIEF KHETHISA TAU

1st RESPONDENT

THE CHAIRMAN OF THE BOUNDARY

COMMITTEE (CHIEF BOLEPO J. THEKO)

2nd RESPONDENT

THE BOUNDARY COMMITTEE

3rd RESPONDENT

THE MINISTER OF LOCAL GOVERNMENT

CHIEFTAINSHIP AND PARLIAMENARY

AFFAIRS

4th RESPONDENT

THE ATTORNEY GENERAL

5th RESPONDENT

JUDGMENT

CORAM:

HON. J.T.M. MOILOA J

DATE OF HEARING:

15 MAY 2017

DATE OF JUDGMENT:

25 MARCH 2019

[1] **INTRODUCTION**

The dispute between the parties in this matter is a simple one: a boundary between the areas of jurisdiction of Applicant's predecessor in title and First Respondent's predecessor in title made by their grandfather Chief Jonathan Molapo Moshoeshe in his lifetime between his sons Tau Jonathan Molapo Moshoeshe and Letsie Jonathan Molapo Moshoeshe. The respective chiefdoms created by Chief Jonathan Molapo for his sons are Pitseng Ha Tau for his elder son and Matlameng for his younger son. Where did Chief Jonathan Molapo grandfather of present litigants establish a boundary between the areas of jurisdiction of the fathers of the present litigants? That is the gist of the dispute between the litigants before me today. It was the crucial point of determination for the Boundary Committee set up by Fourth Respondent.

[2] **APPLICANT'S CASE**

Applicant contends that the boundary between Matlameng Ha Letsie and Pitseng Ha Tau was established by Chief Jonathan, their grandfather on 16th November 1909 when the two chiefdoms were created by his grandfather Jonathan within his area of jurisdiction and when he awarded Pitseng and Matsoku to his elder son Tau and Matlameng to his younger son Letsie. Applicant contends that when Jonathan made that boundary between the two wards he did so in to the presence of the then Assistant District Commissioner for Leribe, Mr. MacGregor and the Paramount Chief's representative, Mr. Makhoathi. A record of that boundary determination was reduced to writing by MacGregor is kept in the National Archives of Lesotho and is available to the public on request. Applicant produced to the Boundary Committee (2nd and 3rd Respondents herein) an extract copy of that boundary determination by Chief Jonathan of 1909. It is a certified copy of that Archival Record by Leribe Administrator, Mr. A.

L. Nkotoane on 14 September 1972. It cannot be disputed that Mr. Nkotoane was a Commissioner of oath *ex officio* by virtue of being District Administrator of Leribe in 1972. There is no dispute that MacGregor was Assistant Commissioner for Leribe district in 1909. Neither is there any dispute that Nkotoane who certified a copy of the extract from National Archives was indeed District Administrator of Leribe in September 1972. The extract was presented by Applicant to 2rd and 3rd Respondents as Exbt. “JM2”. It was admitted as Applicant’s exhibit ‘JM2’ by the Committee. However, in its findings the Boundary Committee made a finding concerning this Exbt JM2 that it is worthless because it does not have the signature of its author. I find this finding of the Committee curious and grossly irregular and unjust to Applicant for two primary reasons. Firstly, the extract (i.e. Exht JM2) bears the signature of MacGregor dated 16th November 1909. It is certified as a true copy of the record that presently is kept by the National Archives Records by Mr. Nkotoane, District Administrator of Leribe.

[3] **FIRST RESPONDENT’S CASE**

First Respondent’s answer to Applicant at Paragraph 10 contends that Exbt. JM2 does not show that in fact the High Commissioner defined the boundaries between Applicants area and his area.

[4] **ANALYSIS OF RESPECTIVE CASES OF PARTIES**

I fail to understand First Respondent’s argument here because Applicant’s contention and evidence before the Committee is that the boundary between Pitseng and Matlameng were defined and pointed out to District Commissioner and Paramount Chief’s Representative (Mr. Makhoathi) by their grandfather Chief Jonathan Molapo and submitted to the High Commission for approval as such. The evidence of Applicant before the

Committee is that Macgregor wrote down the boundary between the two sons as pointed out to him and Paramount Chiefs Representative by the late Chief Jonathan in 1909. Applicant's contention is that Chief Jonathan delineation of the boundary between his sons, Tau and Letsie (Pitseng and Matlameng) were accepted by the High Commissioner as the appropriate authority in such matters. It is information which is kept by Lesotho Government in its National Archives. In my view it is not enough for First Respondent just to deny it without offering credible reasons in its place. The Boundary Committee seeks to have been dubbed by this allegation that the document Exbt. JM2 did not have signature of its author. The Committee even made a finding that McGregor did not sign JM2. Instead the Committee opted to rely on oral evidence of people who were all not born in 1909 when the boundary was made. All of the oral evidence in opposition to "JM2" was hearsay from beginning to end. It is based on oral history of people who were not alive in 1909 when Chief Jonathan himself established the two wards whose boundary is being disputed by the third generation of persons now ruling those area. DW1 (Rachobe) is only 63 years old. DW2 (Tjama) is 61 years old. DW3 is a mere 40 years at the date of his testimony. None of them were there in 1909. None have first-hand evidence. PW1 (Makolana) was 88 years old at time of his testimony. He was the eldest of all the witnesses that appeared before the Committee. Yet even him, he was not there in 1909 when the boundary was delineated by its author Chief Jonathan. PW2 was 60 years old. In my view "JM2" was a much more reliable piece of evidence compared to the hearsay oral evidence attempting to discredit it. In my considered view it was incumbent upon the Committee, if it had any lingering doubt about JM2, to itself go to the National Archives and verify from the original records that indeed the extract (JM2) is a true copy as Nkotoane certified in 1972. The Committee failed to appreciate that the oral evidence that it was

comfortable to rely on was all hearsay evidence given by third generation persons and in some instances fourth generation individuals to Chief Jonathan's determination of the boundary between his sons in 1909. It cannot be more reliable evidence than official records of Lesotho Government concerning the boundary between Applicant and First Respondent which is kept in the National Archives of Lesotho. The Committee made a finding that JM2 did not define a boundary between Applicant and First Respondent. I don't know where the Committee get that from. JM2 does define the boundary between these disputants' grandfathers. It is clear, that the boundary from the escarpment follows the waters of Lifatjaneng down into Pitseng River until it reached the rivulet of Morotong, up the waters of Morotong stream up to its source. It is clear that the boundary follows the waters of these rivers and streams as clearly described in "Exbt. JM2".

[5] **CONCLUSION**

For the reasons explained above I am of the opinion that Second and Third Respondents committed a serious irregularity in their findings and recommendation regarding the true and faithful definition of a boundary between Matlameng (Applicants' Area) and Pitseng (First Respondent's Area). Accordingly I set aside the findings and recommendations of Second and Third Respondent to the Minister and to His Majesty concerning the correct boundary between Matlameng and Pitseng. I determine that that boundary is indeed as determined by Chief Jonathan and accepted by the High Commissioner through his Assistant Commissioner in 1909. It is the boundary described in Exbt. JM2 Annexure JM2 is a genuine extract of an official record of a boundary that demarcated the area of Matlameng and Pitseng which is kept in the National Archives. In my view "JM2" is an authentic and historical source

of documentary evidence available at the National Archives. It is better evidence compared to that of hearsay oral history purportedly given by First Respondent's witnesses before the Boundary Committee. In my view the Committee should have pointed out to His Majesty the boundary between the two wards following JM2 physically on the ground. The boundary is therein described. It was not for the Committee to try and determine the boundary between the two wards afresh. It is there as pointed out by its author Chief Jonathan and as recorded the National Archives in 1909.

COSTS

First Respondent shall pay costs of suit.

J. T. M. MOILOA
JUDGE

FOR THE APPLICANT: ADV. M. TEELE KC

FOR THE RESPONDENTS: ADV. K. E. MASHAILE