

**IN THE HIGH COURT OF LESOTHO**

In the matter between

**PONTŠO SEOEHLA MATHEALIRA**

**APPELLANT**

And

**JOEL LECHESA MATHEALIRA**

**1<sup>ST</sup>RESPONDENT**

**MINISTRY OF LOCAL GOVERNMENT**

**AND CHIEFTAINSHIP**

**2<sup>ND</sup>RESPONDENT**

**ATTORNEY GENERAL**

**3<sup>RD</sup>RESPONDENT**

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**JUDGMENT**

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**Coram:** His Honour Justice Keketso Moahloli

**Heard:** 29 November 2019

**Delivered:** 20 February 2020

***SUMMARY***

*Chieftainship – Succession – Whether a subordinate court has jurisdiction to review and set aside a notice of approval issued by the King pursuant to Section 10 (7) of the Chieftainship Act No. 22 of 1968 – Generally subordinate courts do not have review jurisdiction except where specifically conferred by legislature – Review powers conferred by Section 11 (2) limited to disputes over nomination of successors to chieftaincy.*

## **Moahloli J**

### **Introduction**

[1] Morena Lechesa Jonathan Mathealira (“Morena Lechesa”) was the Principal Chief of Tsikoane, Peka and Kolbere until his demise in December 2006. He had two male sons from his only marriage. The first-born son Seoehla Lechesa Mathealira predeceased his father in 1998. He was at the time married to Mē Pontšo Seoehla Mathealira (“Mē Pontšo”), but they had no male issue. The second son of Morena Lechesa is Ntate Joel Lechesa Mathealira (“Ntate Joel”) who claims to be the rightful successor to his father’s title of Principal Chief over his sister-in-law Mē Pontšo who was gazetted as Principal Chief after being nominated as his successor by Morena Lechesa (with the concurrence of 72 Chiefs and Headmen of Tsikoane at a meeting held on 26 January 2006). His Majesty the King approved her succession to the office by Government Notice No. 50 of 2006 published in the Government Gazette of 16 June 2006 (Vol. LI, No. 34).

### **At the Magistrate’s Court**

[2] In May 2018, Ntate Joel instituted action in the Leribe Magistrate’s Court against Mē Pontšo and the Minister of Local Government and Chieftainship (“the Minister”), for an order: (i) directing the Minister to advise His Majesty the King to appoint him to be the rightful successor of his deceased father Morena Lechesa as Principal Chief of Tsikoane, Peka and Kolbere; (ii) Setting aside Government

Notice No.50 of 2006 purporting to appoint M'e Pontšo as successor in title of the late Morena Lechesa; and (iii) Declaring the purported appointment of M'e Pontšo as Principal Chief of Tsikoane, Peka and Kolbere as *null and void*.

[3] On 21 December 2018 His Worship Magistrate Bale issued an order granting Ntate Joel all the above reliefs with costs on the attorney and own client scale. The order is signed by the learned Magistrate as well as the Clerk of Court. The Record also contains what seems to be the judgement in the case, which document however does not bear the name or signature of the learned Magistrate, nor a date of issue or the order made. To me it looks like an incomplete draft judgement.

[4] Also in the Record is an Interim Order of Court issued by Her Ladyship Justice Guni on 7 September 2006, in case number CIV/APN/373/06, *inter alia* restraining the Minister from publishing (sic) or declaring M'e Pontšo as Principal Chief of Tsikoane, Peka and Kolbere and interdicting M'e Pontšo and the Minister from holding a pitso for the purpose of announcing M'e Pontšo as Principal Chief. According to M'e Pontšo plea in the Magistrate's Court case, Ntate Joel "never prosecuted his case" and "the said case has not been withdrawn to date". This was probably because Ntate Joel realised that at the time of launching the application the horse had already bolted.

### **The Appeal**

[5] Mofumahali Pontšo has appealed against the decision of the Magistrate on the grounds that:

*“1. The judgement of the court a **quo** does not make the order that is contained in the court order.*

*2. Even if it does,*

*a) The Magistrate’s court as a creature of statute has no power to make a declaratory order*

*b) The Magistrates court as a creature of statute has no power to set aside a Government Gazette*

*c) The Magistrates court as a creature of statute has no power to make an order of specific performance to a Minister*

*3. The judgement of the Court a **quo** is legally deficient as it has not made any order*

*4. The court failed to take into account the fact that the late Seoehla Mathealira died as a major who had a family which should be given precedence over the house of Ntate Joel*

*5. The court a **quo** failed to give enough weight to other relevant authorities cited on behalf of Mofumahali Pontšo.”*

## **Discussion**

[6] In Lesotho, succession to chieftainship is regulated primarily by sections 10

and 11 of the Chieftainship Act No.22 of 1968. Section 10 reads as follows:

### ***“Rules of succession to the office of Chief***

*10. (1) In this section a reference to a son of a person is a reference to a legitimate son of that person.*

*(2) When an office of Chief becomes vacant, the firstborn or only son of the first or only marriage of the Chief succeeds to that office, and so, in descending order, that person succeeds to the office who is the first-born or only son of the first or only marriage of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provision of this subsection.*

*(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 provision of this subsection.*

(4) *The only surviving wife of a person, or the surviving wife of a person who, but for his death or incapacity, would have succeeded to an office of Chief succeeds to that office when it is vacant, and she has no male issue.*

(5) *If when an office of Chief becomes vacant there is no person who succeeds under the three preceding subsections, the only surviving wife of the Chief, or the surviving wife of the Chief whom he married earliest, succeeds to that office of Chief, and when that office thereafter again becomes vacant the eldest legitimate surviving brother of the male Chief who held the office last before the woman, succeeds to that office, or failing such an eldest brother, the eldest surviving uncle of that male Chief in legitimate ascent, and so in ascending order according to the customary law.*

(6) *A person is incapable of succeeding to an office of Chief if he is not a citizen of Lesotho.*

(7) *No succession to an office of Chief in terms of this section or section 11 shall have any effect unless and until the King acting in accordance with the advice of the Minister has approved thereof.*

(8) *If the King acting in accordance with the advice of the Minister should refuse to approve of the succession to an office of Chief of the first person who has the right to succeed, the person next in order of prior right shall have the right to succeed.” [My emphasis]*

[7] And section 11 provides the following:

***“Power to nominate and present a successor***

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 by means of public announcement of the nomination of 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 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.*

*(5) The presentation of a successor to an office of Chief in respect of which an application has been made under sub-section (2) shall be made in accordance with the judgement of the court or, if that judgement is the subject of an appeal, in accordance with the judgement of the court to which that appeal lies*

*(6) The Chief Justice may make rules with respect to the practice and procedure of courts in relation to the jurisdiction conferred by or under subsection (5), including rules with respect to the time within which application may be made to the court that subsection, but so that no such rules shall prevent a person who was a minor when nominating was announced under subsection (1) from applying to the court under subsection (2) when he becomes a major*

*(7) After an announcement has been made under subsection (1), or after judgment has been given on an application made under subsection (2) or any appeal arising from that judgment, or after that application has otherwise been disposed of by the court, or abandoned or not prosecuted, but no sooner, the person or persons nominated in that announcement or in that announcement as varied by the judgment of the court, shall be presented to the chief having senior authority over the office in respect of which the announcement or judgment was made, by the Chief who holds that office, or if he is deceased, or otherwise unable, for the reasons specified in subsection (1) to make the presentation, by the paternal uncles of each person nominated or by other persons whose duty it is under the customary law do to so*

*(8) The Chief having senior authority as aforesaid shall take all such proceedings as may necessary and appropriate to inform those Chiefs who are his superiors, and King through the Minister, of every nomination, announcement, application, judgment and presentation under this section*

*(9) Subsection to the provisions of this Act, succession to an office of Chief has effect from the time when that office becomes vacant.”*

[8] *In casu* it is clear that Me Pontšo’s nomination as successor by the late Morena Lechesa supported by the meeting of local chiefs, was approved by His Majesty in terms of section 10 (7) and duly gazetted. And according to the judgment of the Court of Appeal in *Makoaie Masupha v Molefi Libe Masupha* [C of A (CIV) No.41/2015 delivered on 29 April 2016] “as long as the approval by the King of

[a person's] succession to the chieftainship is not set aside on review, it stands and it may not be ignored, even if it is considered that the approval was incorrectly granted.

[9] Respondents argue that M'e Pontšo's appointment was successfully challenged and set aside by the Leribe Magistrate Court. They maintain that according to *Nko v Nko [LAC (1990-1994) 312]* the Magistrate's Court was in terms of section 11 (2) set out above a court of competent jurisdiction to entertain such a dispute and grant the reliefs it did. I do not agree because generally speaking Magistrates' Courts do not have review jurisdiction. Review is largely a matter entirely within the jurisdiction of the High Court, save where the subordinate courts are given limited review powers. For instance the section 11 (2) Respondents seek to rely on only give Magistrates' Courts limited review powers in the instance of a challenge to have the nomination of a successor, set aside or varied. *In casu* what was challenged at the Magistrates' Court was not the nomination of M'e Pontšo, but her approval and gazettelement as a successor by His Majesty. In my view such challenge could only be entertained by the High Court which in terms of section 119 (1) of the Constitution read together with High Court Rule 50 has the power to review the decisions or proceedings of, *inter alia*, any person performing judicial, *quasi-judicial* or public administrative functions under any law.

[10] Consequently I come to the conclusion that the learned Magistrate *a quo* did not have the competence and authority to grant the orders that he did on 21 December 2018.

**ORDER**

(1) The appeal is upheld with costs

(2) The orders made by the magistrate are set aside and it is declared that while Government Notice No.50 of 2006 remains in force, the 1<sup>st</sup> Respondent, Joel Lechesa Mathealira is not entitled to succeed to the principal chieftainship of Tsikoane, Peka and Kolbere and to the chieftainship of Peka and of Tsikoane.

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**KEKETSO L. MOAHLOLI**  
**JUDGE**

**Appearances**

Mr T. Matooane for Applicant  
Adv Letompa for Respondents