IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

ROBERT POTLANA NTLE — Appellant

v

KHUBELUM KAKETLA KHAKETLA — Respondent

HELD AT MASERU

CORAM:

MAISELS, P.

SCHUTZ, J.A.

GOLDIN, J.A.

J U D G M E N T

GOLDIN, J.A.

This is an appeal against an order for maintenance in respect of an illegitimate child.

The facts as found by the magistrate, sitting at Qacha's Nek, are not in dispute. The appellant seduced the respondent and as a result she gave birth to a child namely Lehohang Khaketla. He paid six head of cattle as compensation for seduction and the parties never married each other. He was ordered to pay maintenance in the sum of R15 per month. Appellant's contention that payment of compensation relieved him of responsibility

to maintain the child because "the child born of such a union remains part and parcel of the girl's family" was rejected by the magistrate and on appeal to the High Court.

The learned Chief Justice summarised his decision as follows :

> "The position seems to be that by ancient pure customary law the matter ended with payment of compensation. The concept of maintenance for an illegitimate child was then unknown. The parents of the girl were admittedly under a duty to maintain the child and they often did so, but the cattle were entirely theirs to do with as they please, and indeed were often disposed of in payment of bohali for their own son or sons upon marrying. The Basotho did not see in the advent of the Roman-Dutch law concept of maintenance followed by statutory enactments to this effect (some with criminal sanctions attached) as conflicting with their own previous concept. The relevant legislation can be found in Title VIII Vol II, Laws of Lesotho, p1061 to p1084, which culminated in further amendments to the Deserted Wives and Children Proclamation 60 of 1959 in Act 29 of 1971 and Act 1 of 1977. The administration that enacted the old laws and the Lesotho legislature in 1971 and 1977 (after Independence) are presumed to have been perfectly aware of the customary Laws on the subject and it was manifestly intended that payment of maintenance should be an additional remedy available to the mothers of legitimate or illegitimate children.
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> In an earlier case, Motlatsi v Rex, (CAIA./8/81) Rooney J, dealing with a similar situation, said inter alia :
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> "Under Sesotho law the child fathered by the appellant belongs to the

> Matlosa family. They are responsible for her future maintenance. Under the same law the damages awarded to the Matlosa family operates as a discharge of all further obligations to maintain the child on the part of the appellant or any member of his family. Under the common law, the situation is quite different. The liability to maintain the child falls in the first instance upon its natural parents. The two legal systems are in conflict in that they provide for different rights and obligations. This raises the question as to which system of law should be applied to the appellant and the further question as to whether the application of one system necessarily excludes the other."

There can be no doubt that the obligation to pay maintenance under Sec.3(1) of the Proclamation, as amended by the Deserted Wives and Children (Amendment) Order 1971 extends to illegitimate children. In Leboko v R, CRI/A/22/74 (unreported Cotran J. (as he then was) so held following R v Davis, 1909 EDC 149 and Adams v Abrahams, 1918 CPD 24. The obligation extends to the mother of the child (S v Pitsi), 1964(4) SA 558).

It appears, and it was not in dispute, that under Lesotho customary law the compensation is payable for seduction in the same amount regardless of and unaffected by whether or not the woman gives birth to a child as a result of the intercourse between the parties. As the Chief Justice said, "the object of such compensation is to make amends to the parents who may, upon the daughter's subsequent marriage to another man, lose out on the quantum of the usual bohali paid by the suitor (or his parents) on the grounds that she has been deflowered and they are not entitled to the full bohali."

Under customary law the natural father is not liable for maintenance of a child if he does not become its guardian or is not allowed by the girl's father to keep it. If the guardian of the woman takes the child as he is entitled to and usually does, no action lies against the seducer for maintenance or any other expenses concerning the illegitimate child. The use of terms "custody" and "guardianship" are really inappropriate as they do not have the common law meaning under customary law. The child "belongs" to the father or guardian of the seduced woman. The seducer acquires no rights and incurs no obligation towards the child. Mr **Moorosi**,who appeared for the respondent accepted that "the concept of maintenance for an illegitimate child by its natural father was unknown in Lesotho society". (See Vernon & Parmer's, "The Roman Dutch and Sesotho Law of Delict at 153, and Poulter on Legal Dualism in Lesotho Law at 80.) I find it unnecessary to decide whether at this stage of development this concession was correctly made.

The legislation relied upon does not determine the question of liability for maintenance and is only concerned with enforcement of payment by a person liable to maintain a child. Thus section 3(1) of the Deserted Wives and Childrens(Amendment) Order 1971 applies to "any person legally liable to maintain any other person..." Similarly section 6(b) of the Deserted Wives and Children Act (No 60 of 1959) also deals with "the person legally liable to maintain the child". The Act does not create any new liability. Liability must be sought in the general law as it exists

outside the Act. The legislation simply provides essential and speedy machinery by which effect may be given to existing liability. Disputes such as paternity, validity of marriage or adoption of a child can arise in determining the existence of liability. In short the Act says that a person "legally liable" can be compelled to pay maintenance but does not define or deal with who is or is not "legally liable". (See In re Robert, 1953(3) SA 97 where a similar situation concerning liability for maintenance and the effect of similar legislation in Zimbabwe (then Rhodesia) was decided.

The effect of similar legislation was also considered in Adams v Abrahams, supra, at p26. The court pointed out that "liability" may involve a considerable enquiry as to paternity whether the child is alleged to be legitimate or illegitimate. Under Roman-Dutch common law it is clear that a father is bound to support his illegitimate child. Cf. R v Davis, supra; Adams v Abrahams, supra; van der Westhuizen v R, 1924 TPD 370; R v Rantsoane, 1952(3) SA 281 (T).

As Professor Poulter says (Legal Dualism, supra, at p80):

> "At common law a father's duty of support extends to his legitimate and illegitimate children, whereas under customary law this liability rests solely upon the mother's family, although they are entitled to recover compensation from the father's family for seduction."

Two distinct systems of law are applicable in Lesotho namely Roman-Dutch and customary law. There are general provisions concerning recognition and application of Lesotho Law and custom but there are also specific subjects such as marriage and succession in which customary law is rendered applicable in defined circumstances. (See Sections 4 and 42 of the Marriages Act 1974, Section 3 of the Administration of Estates Act No 19 of 1935 and Makata v Makata C of A (CIV) No 8 of 1982.)

The general provisions are relevant to this case and they are as follows :

Section 2 of the General Law Proclamation (2B of 1884) as amended by Proclamation 12 of 1960, provides :

> "2. In all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope: Provided, however, that in any suits, actions or proceedings in any Court, to which all the parties are Africans, and in all suits, actions or proceedings whatsoever before any Basuto Court, African law may be administered."

Section 9 of the Central and Local Courts Proclamation, Chapter 6; Laws of Basutoland 1949, as amended (Government Gazette No 3468 of 23 April 1965) provides :

> "9. Subject to the provisions of this Proclamation a central or local court shall administer

(a) ;

(a) the native (now African) custom prevailing in the territory so far as it is not repugnant to justice or morality or inconsistent with the provisions of any law in force in the territory

(b) ...

(c) ...

(d) ..."

It will be observed that while in any court customary law may be administered, central and local courts shall administer such law. One is permissive while the latter is peremptory. This action was commenced in a magistrate's court which is governed by the permissive provisions in the General Law Proclamation. Schreiner, J A, has rightly said that "no doubt the discretion to decide which system of law to apply in a case carries with it great responsibility - greater than that generally borne by courts of law". (Ex parte Minister of Native Affairs: In re Yakov Beyi 1948 (1) SA 388 at 398.)

Cases decided in South Africa on this aspect are distinguishable because there the "Native Commissioner" has a discretion whether or not to apply customary law in his court. Cf. R v Rantsoane, supra, p285. In the case R v Mofokeng, 1954(1) SA 487 the court in considering liability for maintenance for an illegitimate child held that a plaintiff being dominus litis can select the court in which to bring such an action. If the plaintiff chooses a magistrate's court then customary law cannot apply, whereas if he chooses a "native

commissioner's" court, that court has power in its discretion to administer customary law. The difficulty in deciding which system of law to apply can, therefore, only arise in a "native commissioner's" court. In Ex parte Minister of Native Affairs : In re Yako v Beyi (supra at 397) Schreiner J A considered how and when a native commissioner's court should exercise its discretion. He said :

> "... the better view is that the Native Commissioner should exercise his discretion without regarding either of the systems of law as prima facie applicable. In each case he has at some stage to determine which system of law it would be fairest to apply in deciding the case between the parties. I think that he should only finally decide which system of law he is going to apply after considering all the evidence and argument as part of his eventual decision..."

The magistrate in the case before us was entitled to apply customary law. The unusual situation in South Africa where a litigant can choose a court which does not apply customary law and thereby obtain maintenance as provided by common law, does not arise here. It is relevant to refer to the decision of Tredgold, C J, in the case of Ex parte Robert (supra) in considering this aspect in a similar dispute. He said (at 97) :

> "By native law a child born of an irregular union ... is regarded as belonging to its mother's family and that family must maintain it. The mother's family may have a claim for seduction but after that his liability ceases..."

He went on to say (at 97) :

> "... Should the present issue be decided by native law and custom or under the common law? It is argued that the provisions of section 3 of the Native Law and Court's Act apply only in a case between natives in a native court and as the present proceedings were in a juvenile court and as the State is involved, the common law must be applied.
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> The implications of this argument are very far reaching and are such as could scarcely have been contemplated by the legislature. It would be a novel and intolerable situation in which the substantive law governing the relationship between the same parties varied in accordance with the court in which it fell to be decided."

The question remains, which system of law is applicable in this case? It is not desirable, or indeed possible, to formulate precise rules and each case has to be decided in the light of its own facts and the subject matter in dispute. I am of the view that the following general approach is justified and applicable in this case.

Firstly, any Lesotho customary law which is repugnant to justice or morality or inconsistent with the provision of any law in force in Lesotho, will not be administered by any court. Whether it is peremptory or permissive to administer such law and custom it can only be done subject to the repugnancy provision which is expressly applied in the Central and Local Courts

Proclamation. It is clear that it could never have been intended that in applying customary law in other courts by virtue of the provision of the General Law Proclamation it can be done regardless of its repugnancy to morality or justice.

The repugnancy provision to which I have referred, differently worded, but to the same effect, is to be found in nearly every country in Africa which was occupied or controlled by Great Britain. (See A N Allot, Judicial and Legal Systems in Africa (1902) and Kuper & Kuper, African Law, Chapter 10 by Professor L Rubin at 201.)

Secondly, a Lesotho customary law will not be condemned or not applied on the ground that it is repugnant to justice and morality merely because it is different from or does not accord with concepts of morality or justice under Roman-Dutch law. It is implicit and obvious that where two systems of law exist, each of them may be based on different principles or concepts of morality or justice.

In my view a proper, even if not comprehensive test, is to be found in the decision on similar legislation in South Rhodesia (Zimbabwe, as it is now).

In the case of Tabitha Chiduku v Chidano, 1922 SR 55, Tredgold, J, said :

> "Whatever these words (repugnant to natural justice and morality) may mean, I consider

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> that they should only apply to such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence."

Thirdly, it may be that the rule of customary law which absolves or relieves a natural father of any duty or obligation to support his illegitimate child is not necessarily repugnant to justice or morality because the child belongs to the mother's family who are responsible for his support and care and are able to do so. In other words the child is not left without provision and responsibility for his maintenance. (Ex parte Robert 1953(3) SA 97 at 100 SR.) I wish to emphasize however that I do not and need not express any final view on this aspect of the case. It does not arise in the present case.

Fourthly, if it is established, however, that such an illegitimate child who belongs to the mother's family is without adequate means of support because the mother's guardian, or whoever is responsible for his maintenance under customary law, is unable, or cannot be compelled, to support such child, then the mother and father of the child become liable for its maintenance. It would obviously be repugnant to justice or morality to leave a child without adequate provision for its maintenance (cf R v Rantsoane, supra p286 and Nkoko v Nkoko, 1967 - 70 LLR 328.)

The effect of this approach is that while customary law

is ordinarily to be administered when an illegitimate child belongs to the mother's family who then becomes responsible for its maintenance, the common law will be enforced whenever those responsible under customary law for the child are unable to support it adequately.

If customary law concerning an illegitimate child is not invoked or applied by the parents of the mother of a child, then obviously the common law on the subject will govern their respective rights and obligations.

It is relevant to appreciate that customary law is often not enforced or not observed, or is modified in practice, as a result of changing economic conditions or cultural standards. This is particularly the situation in urban areas. (Kuper & Kuper, African Law Adaptation and Development (University of California Press) at 199-200; Julius Lewin, Studies in African Native Law (Cape Town: African bookman) Chapter 10 and The Future of Law in Africa, edited by Professor A N Allot (Butterworth.)

On the facts of this case the appellant paid compensation for seduction as required under customary law. He wanted to marry the respondent but the magistrate accepted respondent's version "that it is (appellant) who has not fulfilled the essential for the marriage by paying Bohali". The evidence, therefore, shows

that the parties regulated their association and its consequences in accordance with Lesotho Law and custom. It clearly emerges that the child is without adequate support and that the respondent is also not able to support the child without assistance from the appellant. I am, therefore, of the view that the learned magistrate rightly came "to the conclusion that both parties will have the responsibility to maintain the child Lebohang" and ordered the appellant to pay respondent the sum of M15.00 per month as his contributions towards the maintenance of the child.

For these reasons I would dismiss this appeal with costs.

I would further order that the appellant is liable to pay the maintenance ordered by the magistrate with effect from the date of judgment by the magistrate, i.e. 19th May 1982.

I would also order that the costs are to go into the revenue of the Chief Legal Officer under the provisions of section 10(5) of the Legal Aid Act 1978 (Act 19 of 1978).

B GOLDIN
JUDGE OF APPEAL

I agree

I A MAISELS
PRESIDENT

I agree

W P SCHUTZ
JUDGE OF APPEAL

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An order will issue in the terms proposed by Goldin, J A.

I A MAISELS
PRESIDENT