CIV/APN/51/81

IN THE HIGH COURT OF LESOTHO

In the Application of :

JOEL THEKO — Applicant

v

1. MINISTER OF INTERIOR
2. CHIEF WILLIAM C.THEKO — Respondents

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 10th day of September 1982

The gazetted headman of Mohlakaoatuka Ha Tumahole in the Ratau area of the Ward of Thaba-Bosiu was Tumahole Theko. He married Matsenolo Theko. They had no sons. When Tumahole died he was succeeded by his wife Matsenolo who is still alive. Section 10(5) of the Chieftainship Act 1968 provides :

> "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 officer 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".

Matsenolo succeeded her late husband under the "first leg" of the above section and it is common cause that upon her death the person entitled to succeed to the headmanship would be the second respondent William Cameron Theko who is the last surviving brother of her late husband Tumahole under the "second leg" of s.10(5) of the Chieftainship Act supra. He is already a headman in his own right over another area known as Hlokoalemafi Ha Molengoane in the same ward.

/Now

Now Matsenolo is getting on in years and is anxious to give up her duties. She requested the Theko family to have the applicant Joel Theko "adopted" by her (he has in fact been helping her in the administration and is a close relative) and a family meeting held in October 1979 nominated the applicant Joel Theko to succeed her. The family purported to act in terms of s.11(1) of the Chieftainship Act. This provides :

> "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 of that person (or those persons, in order of prior right) by 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".

The family wrote to the Ministry of Interior accordingly. The second respondent William Cameron was himself present at that meeting and allegedly raised no objection to the nomination at the time but there is little doubt that a couple of months later he did so and proceeded to contest the nomination administratively by appealing to the Minister of Interior who apparently declined to accept the applicant's nomination as successor to the headmanship. The Minister is entitled to withhold his approval of the succession or nomination under s.10(7) of the Chieftainship Act which provides :

> "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".

The application was launched against the Minister as first respondent and William Cameron Theko as second respondent. It was couched in the following terms:

> "(a) Directing the first respondent to gazette applicant as the chief or acting chief Mohlakaoatuka in the Ratau area of the ward of Thaba-Bosiu in the district of Maseru.

/Restraining

(b) Restraining the second respondent from interfering with the applicant's nomination except by due process of law".

I should mention that under s.12 of the Act gazettment in a substantive capacity could not be made except after Matsenolo's death.

At the pleadings stage the Minister withdrew his opposition presumably because he was prepared to abide by the Judgment of the Court. The respondent William Cameron opposed the application on the simple ground that there is no room in the legislation for an "adopted" son to succeed so long as there is a person who qualifies under s.10(5) of the Chieftainship Act and that he is that person.

Mr. Maqutu argued firstly that in sotho law and custom an adopted son is a son in the full sense of the word and can both inherit property as heir and also succeed to the chieftainship in terms of s.10 and secondly that the respondent William Cameron, having originally agreed to the nomination, is estopped from challenging the validity of the family choice since he failed to take appropriate action in a court of law in terms of s.11(2) of the Act. This provides :

"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 person so claiming may apply to a court of competent jurisdiction to have the nomination set aside or varied accordingly".

Mr. Matsau for the second respondent William Cameron contends firstly that s.10 applies only to a legitimate natural born son not to an adopted son and secondly that the respondent William did not acquiesce in the nomination and had applied to the Minister to withhold his consent. In other words he had a right to approach the Minister in the first instance and need not immediately invoke the law. With these propositions I agree.

I think that the second respondent William Cameron's position is completely unassailable. He may succeed to property but not to the impending vacancy. The only way applicant can succed to the headmanship is by the respondent renouncing his right to the succession. This he did not do. There is thus no estoppel. (Lebona's case infra pp 11-12).

/The

The precedent that comes to my mind is Lebona v The Minister of Interior and the Solicitor-General CIV/APN/371/77 dated 3rd April 1978 unreported - but in that case the adoption and nomination of the applicant Lebona took place during the lifetime of the chief and his wife, and more importantly before the coming into force of the Chieftainship Act 1968. Poulter in Family Law and Litigation in Basotho Society p 264 is of opinion that after the passing of the Act the intention of the legislature was to outlaw any child (from succeeding the chieftainship) fathered by anyone other than the chief himself. He cited for this proposition Molapo v Molapo 1971-1973 LLR 289 and 1974-1975 LLR 116. In Lebona's case supra, I did leave the matter of a son adopted after the Act somewhat open but I did say that the words used in s.10(2) and s.10(3) ,viz, "the first born or only son of the marriage" do unmistakably indicate the exclusion of adopted children from succession.

It follows that the application must be dismissed with costs.

T. S. Cotran

CHIEF JUSTICE
10th September 1982

For Applicant: Mr. Maqutu
For 1st Respondent: No Appearance
for 2nd Respondent: Mr. Matsau