

IN THE HIGH COURT OF LESOTHO

In the application of :

'MADLAMINI MOSOTHO CHONA. Applicant

and

THEKOANE CHONA 1st Respondent
BELO CHONA 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 30th day of June, 1983.

The applicant herein seeks an order of this Court in the following terms :

- "1. Declaring that the applicant herein, until Ndaba Chona attain the age of majority, is the lawful successor to the title of chieftainship over the area of Belo in the district of Butha-Buthe which title was last held by the late chieftainess Mamaziboko Chona on behalf of the late Mosotho Chona;
2. Declaring Ndaba Chona to be, subject to prayer 1 supra, the successor to the title of chieftainship over the area of Belo in the district of Butha-Buthe;
3. Directing the First Respondent, jointly and severally with the Second Respondent in the event of opposition, to pay the costs of this application;
4. Granting the Applicant such further and/or alternative relief as the Court deems fit."

In her founding affidavit, the Applicant deposed that the title of chieftainship of Belo's in the district of Butha-Buthe was held by the late Mosotho Chona who, at the time of his death due to incapacity to carry out the

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duties of his office, was represented by his mother the late Chieftainess 'Mamaziboko Chona. She (applicant) was the first widow of the late Mosotho Chona. The second and the third widows of Mosotho Chona being 'Mamashinini and 'Mabelo respectively. Applicant averred that she had no living male issue but 'Mamashinini, the second widow, had a son, Ndaba Chona, aged 14 years. The third widow, 'Mabelo, also had a male issue namely, the second Respondent.

Some time during the month of February 1982, the Principal Chieftainess of Butha-Buthe, Chieftainess 'Malihaelo Mopeli, called a pitso for the purpose of nominating a successor to the chieftainship of Belo's. The first Respondent herein, purporting to be acting on behalf of the Chona family, nominated the second Respondent herein as the successor. Applicant thereupon objected and pointed out that since she, as the first widow of the late Mosotho Chona, had no male issue, the heir and successor to the chieftainship of Belo's was Ndaba Chona born of 'Mamashinini, the second widow of the late Mosotho Chona and not the second Respondent who was born of 'Mabelo, the third widow. However, she (applicant) was by virtue of her seniority, ex lege entitled to act as a regent for Ndaba Chona until the latter had reached the age of majority. - vide S. 13(1) of the Chieftainship Act No. 22 of 1968 which provides :

"13. "(1) Unless she is married to the King or is Regent in respect of the office of King, the senior surviving wife or only wife of the person who, but for his death or incapacity, would have succeeded to an office of Chief in accordance with the provisions of section 10, exercises the powers and performs the duties of that office until the holder of that office has attained the age of twenty-one years or has married, whichever first occurs."

The District Administrator for Butha-Buthe then advised her that she should, before an announcement was made of the second Respondent herein as the successor to the title of the Chieftainship of Belo's, approach the High Court for an appropriate order. She accordingly filed this application and prayed for an order as aforementioned.

The application was opposed by the Respondents who in their opposing affidavits denied that applicant was the

first wife of the late Mosotho Chona. They averred that the first wife of Mosotho Chona was 'Mabelo. Applicant and 'Mamashinini were, respectively, his second and third wives. Applicant could not therefore act as regent for Ndaba or anybody at all. As 'Mabelo was the most senior wife of Mosotho Chona and had a son, the second Respondent herein, the latter was the heir and rightful successor to the Chieftainship of Belo's. Ndaba Chona who was born of 'Mamashinini in the third house of Mosotho Chona was not the heir and could not, therefore, succeed to the chieftainship.

The Respondents admitted that in February, 1982, a meeting was called during which the first Respondent, acting for the family of Chona, rightly nominated the second Respondent as the successor to the chieftainship of Belo's.

As the facts disclosed by affidavit papers in this application were clearly disputed, it could not be easy to resolve the issues involved. An application to lead viva voce evidence was made and granted.

In her evidence on oath supported, as far as it was material, by all her witnesses, applicant testified that in 1936, she got married to Mosotho Chona by customary rites and 20 head of cattle were paid towards her bohali. Since that time she lived with Mosotho Chona as his only wife until 1948 when her husband married a second customary wife, 'Mamashinini Chona. The following year 1949, 'Mabelo, a young girl from Natal in the Republic of South Africa, was visiting at the home of Applicant's in-laws to see a sick relative, when Mosotho Chona abducted and subsequently married her as his third customary wife.

The people of 'Mabelo were notified of this happening. The marriage was negotiated and although she was not aware how many cattle (if any) were paid in the form of money, applicant knew that six (6) head of cattle were paid towards the bohali of 'Mabelo. The second Respondent was the first male issue born of the marriage between 'Mabelo and the late Chief Mosotho Chona.

Although Applicant did not remember the exact year, there was a time when 'Mamashinini deserted and went to live in the Republic of South Africa for many years leaving her husband and their 3 little girls at Belo's. Later on, the late Chieftainess 'Mamaziboko wanted 'Mamashinini back home claiming that she was a woman married with her cattle. With the assistance of the Police, 'Mamashinini was traced and returned home. She was accepted in the family by Chieftainess 'Mamaziboko and her husband Mosotho Chona. On her return home, 'Mamashinini had 5 additional children of whom the first two were girls followed by the boy, Ndaba Chona, who was then about 11 years old. Applicant conceded that as 'Mamashinini had been away from home for many years, Ndaba could not have been fathered by Mosotho Chona.

Applicant contended, therefore, that as he was born in the second house of Mosotho Chona, Ndaba and not the second Respondent who was born in the third house, was the heir and entitled to succeed to the chieftainship of Belo's. She (applicant) was, by virtue of her seniority, the person entitled to act as regent for Ndaba until he had reached the age of majority.

In support of applicant's evidence, P.W.2, Arthur Maqutu, told the Court that from 1938 he had known Applicant as the only wife of Mosotho Chona who later married 'Mamashinini and 'Mabelo as his second and third wives, respectively. Applicant was therefore the senior wife of Mosotho Chona by virtue of her first marriage.

An interesting point of P.W.2's evidence was that after Mosotho Chona had married the Applicant and 'Mamashinini, it was decided by the family of Chona and the nation or the people of Belo's that he should marry a woman who would give birth to their future chief. According to custom, the marriage of a woman who was to give birth to a future chief was arranged with the people. The Applicant and 'Mamashinini could not give birth to a future chief on the ground that their marriage had not been pre-arranged with the people. As P.W.2 put it, according to custom, when he married Applicant and 'Mamashinini, Mosotho Chona was still

cleaning his unwashed eyes - meaning he did not know what he was doing.

Following the decision and the arrangement made with the people 'Mabelo was, therefore, married to give birth to the future chief of Belo's. Although admittedly married after the Applicant and 'Mamashinini, 'Mabelo gave birth to a son who was, so to speak, destined to be the heir and rightful successor to the chieftainship of Belo's. In the contention of P.W.2, it would be a sheer dream, therefore, to say the second Respondent was not the rightful successor to the chieftainship of Belo's.

I must hasten to reject outright the contention held by P.W.2 on this point. The question of succession to the chieftainship in this country is governed by Part III of the Chieftainship Act (as amended) No. 22 of 1968, Sec. 10(2) of which clearly provides :

"When an office of chief becomes vacant, the first born 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 provisions of this subsection."

Whatever P.W.2's contention about the custom that is the criterion for determining the successor to chieftainship, it cannot override the provisions of S. 10(2) of the Chieftainship Act, supra.

The Respondents and their witnesses did not dispute that Applicant and 'Mamashinini were married by the late Chief Mosotho Chona in 1936 and 1948 respectively. What they disputed was that 'Mabelo was married in 1949. It may, therefore, be safely accepted as common cause that applicant and 'Mamashinini were lawfully married by Mosotho Chona in 1936 and 1948 respectively.

According to the evidence for the Respondents, in 1932, the parents of Mosotho Chona met with those of 'Mabelo and concluded an agreement whereby their two children, Mosotho and 'Mabelo were to be married. 30 head of cattle were paid towards the bohali for 'Mabelo. The customary marriage between Mosotho and 'Mabelo was, therefore, concluded in 1932. When they were married in 1936 and 1948 the applicant and 'Mamashinini, respectively, became the second and the third wives of Mosotho Chona. For that reason the applicant could not claim to be the first wife of Mosotho Chona.

The Respondents conceded that there was a time when 'Mabelo visited Chona's family at Belo's but that was in 1937 and not 1949. The reason for 'Mabelo's visit was to be introduced, in accordance with custom, to her in-laws. Shortly thereafter she returned to her maiden home and 1949 was the year in which she eventually came to join and live with Mosotho Chona as husband and wife. The first male issue born from their marriage was the second Respondent who, by virtue of his being the first male issue in the first house of Mosotho Chona, was the successor to the chieftainship of Belo's. Two reasons were advanced why 'Mabelo, though married in 1932, only joined her husband in 1949. They were firstly, that it had been so decided by the elders and secondly that in 1932 'Mabelo was still young and had not yet reached the marriage age.

It may be convenient to deal with the question of 'Mabelo's seniority at this stage. I shall assume, for the sake of argument, that Respondents' version was correct that the parents on either side agreed that Mosotho and 'Mabelo should marry each other and 30 head of cattle were paid as bohali. It was however, the Respondents's evidence that in 1932, 'Mabelo was still young and had not reached the marriage age. That being so, it must be inferred that she could not have consented to

marriage. Consent of either parties being one of the essential requirements even for a customary marriage (see 34(1)(a) of the Laws of Lerotholi, Part II), it must be accepted that in its absence no valid marriage could have taken place between Mosotho and 'Mabelo. The agreement concluded between the parents of either side and the payment of the so-called bohali could not have been anything but arrangements constituting, in the words of Jacobs, C.J. in Tsepe Falatsi v. Molaoa Falatsi 1971-73 LLR 217 at p. 220.

"An engagement to be married at some future date which, as between the boy and the girl, probably would have been worthless but which might, as between the elders who entered into agreement have had certain legal consequences if the hoped - for marriage did not materialise."

In the circumstances, I take the view that Respondents' contention that 'Mabelo was married in 1932 and was therefore the most senior wife of Mosotho Chona is untenable and it is accordingly rejected. I accept as the truth the evidence for the applicant that 'Mabelo was married in 1949 after both the Applicant and 'Mamashinini had respectively been married as the first and second wives of Mosotho Chona. She is therefore the third widow of the late Chief Mosotho Chona.

It follows that, in my opinion, Respondents' claim that the second Respondent is entitled to succeed to the chieftainship by virtue of his being born in the first house of the late Mosotho Chona cannot be sustained. He could only succeed to the chieftainship upon proof that Mosotho Chona had no son in either of his senior houses namely those of the Applicant and 'Mamashinini.

As has been pointed out, it was common cause that there was no male issue in the Applicant's house. There was, however, evidence that 'Mamashinini had a son, Ndaba Chona. That evidence was not disputed by the Respondents. What the Respondents did dispute was Applicant's evidence that Ndaba Chona is the son of the late Chief Mosotho Chona. Respondents' evidence confirmed that of the Applicant in that

there was a time when 'Mamashinini deserted Mosotho Chona. Unlike the applicant's the Respondents' evidence was positive that 'Mamashinini had deserted from 1955 up to 1977 and on her return she had five (5) children of whom the first two were girls followed by the boy Ndaba Chona. Respondents confirmed Applicant's evidence that as he was clearly born during the time when 'Mamashinini had deserted and was not living with her husband Ndaba Chona could not have been fathered by Mosotho Chona. He was, therefore, an illegitimate child and as such could not succeed to the chieftainship for the simple reason that he was not the son of Mosotho Chona within the meaning of the Chieftainship Act No. 22/1968, S.10(1) of which provides :

"In this section a reference to a son of a person is a reference to a legitimate son of that person."

It has been argued that as the question of legitimacy of Ndaba had not been raised on affidavit papers filed with this Court, it was argumentative and the Court need not, therefore, deal with it. In my view, if Ndaba were to succeed to the chieftainship it is, in terms of S.10(1) of the Chieftainship Act, supra, important that he is proved a legitimate son of the late Chief Mosotho Chona. The question of his legitimacy is, therefore, quite apposite in the present case.

It was further argued that there was no hard and fast rule of rebutting legitimacy and that one of the main rules was non-access which was proved by absence of opportunity for access. In the present case all that we knew was that 'Mamashinini and her husband had separated. But mere separation was no proof of non-access for we did not know whether 'Mamashinini used to visit her husband or vice versa. There was, therefore, no sufficient evidence to enable the Court to draw an inference that 'Mamashinini and her husband had been visiting each other when as a result Ndaba was born.

I have no hesitation in rejecting this argument. There was undisputed evidence that 'Mamashinini had deserted for

many years. She returned home only after the late Chieftainess 'Mamaziboko had been looking for and was able to trace her with the assistance of the police. A clear indication that it was difficult to trace her whereabouts. If she and Mosotho Chona had been visiting each other why was it so difficult to trace her! In my view the preponderance of probabilities is, on the evidence, that 'Mamashinini and Mosotho Chona did not visit each other during the former's desertion. The argument that 'Mamashinini and her husband could have been visiting each other has, therefore, no evidential basis. It is a mere speculation which a Court of law, properly advising itself, cannot entertain in the face of clear evidence that 'Mamashinini had deserted and had not been living with Mosotho Chona for many years when Ndaba was born.

It was submitted in argument that, according to custom, even if he had not been fathered by Mosotho Chona, Ndaba was legitimate on the Grounds that he had been born of a married woman during the subsistence of her marriage and accepted in the family of Chona. The same argument was in Molapo v. Molapo 1971 - 73 LLR 289 at p. 294C put in the following terms :

"All children born of a woman during the subsistence of a marriage and even after her husband's death, if the bohali cattle had not been returned are regarded in customary law as legitimate"

Jacobs, C.J. who presided over the case expressed his grave doubts whether that was so. I have no doubts in my mind that that is untenable. As I see it, the question of legitimacy revolves on whether a person is or is not born in wedlock. If born in wedlock he is legitimate, if not he is illegitimate. My view that a person born out of wedlock, even by a woman married in accordance with custom, is illegitimate finds fortification in Molapo v. Molapo 1974-75 LLR 116 at p. 120A where Smith, J.A. writing a

majority judgment of the Court of Appeal is reported as having said Molelekeng (a child born out of wedlock) was an adulterine child.

The argument that all children born of a married woman are legitimate is clearly based on the Sesotho adage:

"Mosali ea nyetsoeng h'a tsoale sekhaupane."

If this maxim were to be interpreted as meaning that all children born of a married woman during the subsistence of her marriage are legitimate regardless of whether or not they had been fathered by her husband, I fail to see how it can be reconciled with the finding of the Court of Appeal that Molelekeng was an adulterine or illegitimate child.

In interpreting the above quoted Sesotho adage it must be remembered that apart from the ordinary type of marriage as stated in Sec. 34(1) of Part II of the Laws of Lerotholi there were other "special" types of customary marriage such as, for example, mala, lebitla, lebota, etc., whereby a family which had no male issue or the only male issue had died leaving no children would conclude an agreement with another family that the latter's daughter should be married to the former's non-existent or fictitious son and the bohali cattle were duly paid. After this type of marriage had been concluded, the family of the fictitious husband would then appoint a man (usually a relative) to have sexual relations with the newly married woman for purposes of producing children in that family. Although, for obvious reasons, the children could not have been fathered by the fictitious husband the important thing is that the arrangement was recognised as a valid customary marriage. The children were, therefore, born in wedlock and legitimate. Hence the maxim:

"Mosali ea nyetsoeng h'a tsoale sekhaupane".

Outside this context the maxim is, in my view, nothing but a rebuttable presumption. It is by no means a blanket

licence that every child born of a married woman is legitimate regardless of whether or not it is born in wedlock.

From what has been said, it is clear that I take the view that Ndaba is illegitimate and not the son of the late Chief Mosotho Chona within the meaning of S.10(1) of the Chieftainship Act No. 22 of 1968. The second Respondent who is the first male issue in the third house becomes the heir and successor to the chieftainship only by reason of Mosotho Chona having no son in his first and second houses.

In the premises, I order as follows:

1. Ndaba Chona cannot be, and is not, the successor to the title of chieftainship over the area of Belo in the district of Butha-Buthe:
2. As the senior surviving wife of Mosotho Chona, the applicant is, in terms of S. 13(1) of the Chieftainship Act, supra, entitled to act as regent, not for Ndaba Chona but, the second Respondent until the latter has reached the age of majority and is, through proper channels, proclaimed the chief of the area.
3. This being a family dispute and both parties having succeeded in part, no order as to costs is made.


B.K. MOLAI,

JUDGE

30th June, 1983.

For the Applicant : Mr. Sello
For the Respondent : Mr. G.N. Mofolo.