

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MOLULA-KHOTLA THIBELLA NOE Appellant

V

JOBO THIBELLA NOE Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 7th day of May, 1986.

This appeal is against the decision of the Judicial Commissioner in a case in which the Respondent (hereinafter referred to as Jobo) had sued the Appellant (hereinafter referred to as Molula-Khotla) before Mount Moorosi Local Court for 60 sheep, 6 head of cattle, 2 horses and 4 donkeys being inheritance. The case has been before the courts of law since 1964 and, in the interest of clarity, it is perhaps useful to set out its long history.

It is common cause that the late Mabusetsa Thibella Noe had two wives to whom he was married according to Sesotho Law and Custom. Mabusetsa Thibella Noe had, therefore, two houses viz. that of his senior wife, 'Masetleli Noe, and his junior wife 'Matumeliso Noe. Jobo is Mabusetsa's heir in the house of 'Masetleli whilst Molula-Khotla is his heir in the house of 'Matumeliso.

It transpired that during his life time, Mabusetsa was sued by his senior wife, 'Masetleli, for allegedly using animals that belonged to the senior house in the junior house. The case CC.85/64, was heard before Mount Moorosi Local Court which found that two of the cattle that Mabusetsa was using for the junior house, in fact belonged to the senior house and should, therefore, be restored there. It was further ordered that proper investigations should be carried out with a view to establishing

the status of the other livestock of Mabusetsa. The investigations were, however, not carried out as directed by the court or if at all carried out, the results were never made known.

It would appear that after the death of Mabusetsa there was a time when Jobo approached some members of the family with a request that Molula-Khotla should be instructed to restore to him animals that remained in the junior house after the two that Mabusetsa had restored to the senior house pursuant to the decision in CC.85/64 - That is, the animals which were the subject of investigations. It was then that Sephothomane, who was apparently the senior member of the family heading that meeting, said he would think over the matter and give a decision on a later date. However, before the decision could be given, Jobo took the matter to Mount Moorosi Local Court where he sued Molula-Khotla for 60 sheep, 6 head of cattle, 2 horses and 4 donkeys which he said were animals belonging to the senior house but had been carelessly earmarked to the junior house by his late father, Mabusetsa. On the papers before me that case was CC.185/74 although it is not clear what the decision of the Local Court was.

Whatever the decision, one thing clear is that Jobo felt aggrieved by that decision against which he appealed to the Central Court of Quthing. In CC.16/75 the Central Court granted what amounted to an absolution from the instance, namely that as Sephothomane had not yet given his decision, the provisions of S.14(4) of the Laws of Lerothoii had not been complied with. In other words the matter had been prematurely brought before the courts of law and should therefore, go back to the family for its decision. It was specifically directed that a family meeting presided over by Sephothomane should be held to determine the claim made by Jobo against Molula-Khotla.

After he had in vain tried, on several occasions, to secure the attendance of Molula-Khotla to a family meeting, Sephothomane eventually convened the family meeting at

which a decision was taken that Molula-Khotla should restore 60 sheep, 6 head of cattle, 2 horses and 4 donkeys to Jobo. Molula-Khotla repudiated that decision on the grounds that it had been taken in his absence at a meeting which was presided over by a person who was, in fact, not the head of the family. Well, as we have seen several attempts were made to secure the attendance of Molula-Khotla at a family meeting but he refused or neglected to attend. That being the case, the family meeting was, in my view, rightly held in his absence for to hold the contrary would be tantamount to saying he could hold the family at ransom regarding the holding of a family meeting - a position which is totally untenable in my view. As a result of the attitude adopted by Molula-Khotla in this matter Jobo sued him as aforesaid. The case was instituted before the Local Court of Mount Moorosi as CC.141/75.

It would appear that the Local Court was impressed by the contention of Molula-Khotla that Sephothomane was not the proper head of the family and the decision taken at the family meeting over which he presided had no legal effect. For this reason the case was dismissed on the ground that the provisions of S.14(4) of the Laws of Lerotholi had not been complied with. Jobo was dissatisfied with the decision against which he appealed to the Central Court.

In CC.50/76, the Central Court took the view that as he had been specifically instructed by the court to convene a family meeting and come to a decision, Sephothomane had rightly presided over the family meeting. The provisions of S.14(4) of the Laws of Lerotholi had, therefore, been complied with. I entirely agree. However, the Central Court allowed the appeal on the ground that Jobo had proved his entitlement to the animals that he claimed against Molula-Khotla. Molula-Khotla was unhappy with the decision and appealed to the Judicial Commissioner's court which however, dismissed the appeal. It is against that decision that Molula-Khotla has appealed to this court.

It may be mentioned that after he had lodged his appeal out of time Molula-Khotla passed away. Application to substitute his heir Tsehla Thibella, as the appellant and condone the late noting of appeal in this matter has already been granted by Levy A.J. It is, therefore, not necessary to deal with these matters.

In as far as it is material Jobo testified before the trial court that he was told that the animals, the subject matter of this case, belonged to the senior house by his mother, 'Masetleli, who was, however, not called as a witness. The animals were acquired as "bohali" for his (Jobo's) aunts and Mabusetsa carelessly earmarked them for the junior house of 'Matumeliso. According to Jobo he was at times present when the earmarking was taking place but could not do anything as he was still young.

The acquisition of the animals was described by Jobo as being 3 cattle that came from Mputana Sekhitlane, 1 cattle that came from Molupe Sekhitlane. He clearly accounted for 4 cattle and it may thus be presumed that he conceded that 2 of the 6 cattle had been restored to the senior house by Mabusetsa. That being so, he should have sued for only 4 and not 6 cattle. Be that as it may, the witness continued to testify that he knew that 4 donkeys were given to 'Matumeliso by Mabusetsa. He did not, however, say where Mabusetsa had acquired the donkeys from. He mentioned 2 horses that came from the parents of Mputana Sekhitlane and 60 sheep that came from Mputana Sekhitlane himself. Later on in his evidence the witness told the court that those animals had in fact all died and what he was claiming was their progeny. How he knew that those animals had begotten as progeny the animals that he claimed was never made clear to the court.

According to Jobo the court had ordered Mabusetsa to restore the animals to the senior house but that decision was never executed. Hence his action against Molula-Khotla who is the heir in the junior house of 'Matumeliso. What Jobo had in mind here was clearly the decision in CC.85/64

and apart from only two, he was obviously wrong in saying Mabusetsa was ordered to restore any other animals to the senior house. As has been pointed out earlier, the court decision was that investigations should be carried out about the true position of Mabusetsa's other livestock. The decision was, however, never carried out.

The witness, Sephothomane Noe, was called in support of the evidence of Jobo. He, however, told the court that his knowledge of the animals is based on the dispute in CC.85/64. We now know that apart from the two cattle that were restored to the senior house, the court could not come to a definite decision that any other animals in the possession of Mabusetsa belonged to the senior house. That was a matter which had to be investigated.

Sephothomane was at pains to describe how Mabusetsa had acquired possession of the animals. He said of the 6 cattle 2 came from Molupe and thus contradicted Jobo who had said only one came from Malupe; He said another cow came from Qacha who was, however, never mentioned by Jobo; He said a donkey and its filly came from Mputana but this was not disclosed by Jobo; He said other 2 animals (we do not know what animals) came from Molupe; He did not even know their colours and the probabilities are high that he was only told about these animals. The only point in which the evidence of Sephothomane corroborated that of Jobo was that Mabusetsa had acquired possession of the 2 horses from Mputana. It is significant, however, to bear in mind that Jobo himself had told the court that all these animals were acquired as "bohali" for his aunts. Sephothomane did not gainsay this.

All that the witness Sempe Noe told the court was that he did not know how Mabusetsa had acquired possession of the animals. He could not therefore be said to have corroborated the evidence of Jobo on the material issue that was before the trial court, namely, the acquisition of these animals.

The witness Lira Noe tried to describe how Mabusetsa had acquired possession of the animals but his evidence was

was a further contradiction to the evidence of Jobo and Sephothomane. He said 3 of the cattle came from Molupe thus contradicting Jobo who had said only one cattle had come from Molupe; he was, indeed, also contradicting Sephothomane who had said 2 of the cattle had come from Molupe; He said only two cattle came from Mputana thus contradicting Jobo who had said 3 cattle had come from Mputana; He again said 2 donkeys and a filly came from Molupe whereas Sephothomane had said only one donkey and a filly had come from Mputana.

In his evidence Molula-Khotla denied knowledge of the animals claimed by Jobo and stated that he had bought all the animals that were in his possession. Palesa Noe was called to tell the court that he and not Sephothomane was the head of the family. He knew nothing about the livestock of the litigants. Nkalo Noe corroborated Molula-Khotla in his evidence that he had acquired the animals in his possession through his earnings. He further stated that the animals belonging to the house of 'Masetleli got finished whilst he (Nkalo) was herding them at the cattle posts. 'Matumeliso Noe was also called to testify that she was not aware that the animals claimed by Jobo were ever earmarked to her house.

It is clear from the record of proceedings that it was Jobo who instituted this case against Molula-Khotla claiming the animals which he said were his inheritance. The onus rested squarely on his shoulders to prove on a balance of probabilities that there were such animals and he was entitled to inherit them. The evidence adduced on his behalf on the existence of such animals was, however, so contradictory that no court of law properly advising itself could decide the case in his favour. On the evidence it could not, therefore, be said that Jobo had satisfactorily discharged that onus.

As has been pointed out earlier the trial court dismissed the case on the ground that the provisions of S.14(4) of the Laws of Lerotholi had not been complied with simply because the family meeting was presided over by Sephothomane who was not regarded as the head of the family. I do not think the question of who presides over the family

meeting is material under the provisions of S.14(4) of the Laws of Lerotholi. What is important is that the members of the family should constitute the family meeting to resolve the disputed property. There is ample evidence in the present case that a number of members of the family of Noe did constituted a family meeting presided over by Sephothomane. Whether or not Sephothomane was the rightful person to preside over that meeting is now immaterial because he did so on the specific instruction given by a court of Law. The trial court should not, therefore, have dismissed the case on the ground that no valid family meeting had been held. It should have in fact dismissed the case on the ground that Jobo had failed to prove that Molula-Khotla had in his possession animals which he (Jobo) was entitled to inherit. The Central Court, in my view, correctly allowed the appeal in this case although it may have been for a different reason.

In his judgment, the Judicial Commissioner, indeed, the Central Court took the view that there was evidence that the animals claimed by Jobo were acquired as "bohali" for the daughters of 'Masetleli and, therefore, belonged to the senior house of Mabusetsa. This may have been the evidence in CC.85/64 and even then in respect of only two cattle that were actually restored to the house of 'Masetleli. However, as I have endeavoured to show in this judgment there was no evidence at all in CC.141/75 that the animals presently claimed by Jobo were acquired as "bohali" for his sisters, the daughters of 'Masetleli. On the contrary it was the evidence of Jobo himself that the animals he was claiming were acquired by Mabusetsa as "bohali" for Jobo's aunts i.e. the sisters of Mabusetsa. That being so, the animals, if any, belonged to neither of the two houses of Mabusetsa. The Sesotho maxim "malapa h'a jane" could not apply to them. They formed part of Mabusetsa's unallocated property which he was free to donate to either of his two houses.

In the circumstances, it is obvious that the view that I take is that as Jobo had failed to prove the existence of the animals he claimed from Molula-Khotla and/or his right to inherit any such animals, the decision of the court of

Judicial Commissioner dismissing the appeal was wrong and cannot be allowed to stand. The decision of the trial court dismissing Jobo's claim was correct and is, therefore, reinstated albeit on the ground that he had failed to discharge the onus vested in him viz. proof that the animals he claimed existed and his entitlement thereto.

The appeal is allowed with costs.

B.K. MOLAI
JUDGE

7th May, 1986.

For Appellant : Mr. Maqutu,
For Respondent : Mr. Mda.