

IN THE HIGH COURT OF LESOTHO

In the Application of :

MAKHABANE MATALA Applicant

and

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| LESAOANA PEETE | 1st Respondent |
| MINISTER OF INTERIOR | 2nd Respondent |
| ATTORNEY-GENERAL | 3rd Respondent |
| MOKHACHANE MATALA | 4th Respondent |

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 31st day of October, 1989.

This is an application in which the Applicant herein moves the Court for an order, against the Respondents, framed in the following terms:

1. Declaring that the Applicant was duly nominated as chief of Masaleng village in the Koeneng and Mapoteng Ward of the district of Berea in terms of the provisions of section 11(1) and (2) of the Chieftainship Act, 1968.
2. Declaring that the nomination and/or presentation by the Principal Chief of Koeneng and Mapoteng of Mokhachane Matala as Chief of Masaleng in succession to the late Chief Malefetsane Matala is null and void and is hereby set aside.

3. Commanding the Principal Chief of Koeneng and Mapoteng to take all such proceedings as may be necessary and appropriate to inform those chiefs who are his superiors and the King through the Minister of the nomination, announcement, application, judgement and presentation of Makhabane Matala in terms of the provisions of subsection (8) of section 11 of the Chieftainship Act, 1968.
4. Granting further and/or alternative relief, and
5. Costs of suit on an Attorney/Client scale against the First and Fourth Respondents and on an ordinary scale against the Second and Third Respondents if they oppose this application."

Only the first and the fourth Respondents have intimated intention to oppose this application. The second and the third Respondents have not filed any notice of intention to oppose the application and it may, therefore, be safely assumed that they are prepared to abide by whatever decision is arrived at by the Court in this matter.

Affidavits were duly filed by the parties and, in as far as it is relevant, the gist of the facts emerging therefrom is that during his life time Malefetsane Matala was the chief of Masaleng within the administrative jurisdiction of the first Respondent who is the Principal Chief of Koeneng and Mapoteng Ward in the district of Berea.

3/ According

According to the Applicant, Malefetsane Matala was customarily married to four wives viz. 'Maseeng, 'Majobo, 'Malebabo and 'Mamakhabane by order of seniority. He had, therefore, four houses by his four wives. The averments of the Respondents are, however, slightly different in that according to them Malefetsane had five wives viz. 'Majane, 'Majobo, 'Malebabo, 'Mamakhabane and 'Mapuleng.

It is significant that although the applicant says the name of the first wife of Malefetsane is 'Maseeng, in his answering affidavit the 4th Respondent calls her 'Majane. I shall assume that "Majane" is another name for Malefetsane's first wife, 'Maseeng i.e. 'Majane or 'Maseeng is one and the same person.

However, what is of some concern to me is that in the answering affidavits it is averred that only 'Malebabo, 'Majobo and 'Majane, alias, 'Maseeng were lawfully married by Malefetsane whilst 'Mapuleng and 'Mamakhabane were not. The reason advanced for this averment is that no "bohali" cattle were ever paid for the marriage of 'Mapuleng and 'Mamakhabane whereas 18, 20 and 20 head of cattle were paid as "bohali" in the case of the marriage of 'Malebabo, 'Majobo and 'Majane, alias 'Maseeng, respectively. These averments are, however, denied in the Replying Affidavits deposed to by Lerema Mphutlane and Dinizulu Mabaso both of whom averred that "bohali" cattle were, in fact, paid at least for the marriage of 'Mamakhabane.

There is clearly a dispute over the existence or otherwise of a lawful marriage between 'Mamakhabane and Malefetsane. However, such a dispute cannot, in my view, be

4/ resolved

resolved on affidavit papers.

Be that as it may, it is common cause from the affidavits that in the first house of 'Maseeng alias 'Majane, Malefetsane Matala had no children. In the second house of 'Majobo, he had a son by the name of Jobo, who is admittedly the father of the 4th Respondent i.e. the question that the 4th Respondent is an illegitimate son of Jobo and cannot, therefore, succeed him as a chief does not arise. In the third house of 'Malebabo a boy was born. His name was Lebabo. He has since passed away apparently leaving no male issue. A number of boys were born in the fourth house of 'Mamakhabane. They are, by order of seniority : Makhabane (the present applicant), Posholi, Mopeli, Mohale, Khomo-ea-Leburu and Poshoane. No male issue was born in the fifth house of 'Mapuleng.

It is, however, worth noting that in support of the applicant's Replying affidavit a certain Matala Lebabo deposed to an affidavit in which he averred that he was the son of Malefetsane Matala by his wife 'Mamakhabane and, therefore, a younger brother of the applicant. He further deposed that he was the gazetted chief of Sefateng.

A curious thing about the averments of Matala Lebabo is that he was not mentioned as one of the brothers of the applicant in either the founding or the answering affidavits. Although he claimed to be the gazetted chief of Sefateng no gazette was annexed or cited as proof thereof. I have also tried to search for such a gazette but all in vain. I can

only take his word that he is the gazetted chief of Sefateng.

I must, however, point out that in proceedings of this nature it is important that parties annex documents they rely upon as proof of their averments. Failure to do so does not render the task of this Court easy.

It is further common cause that Malefetsane Matala had two brothers viz. his elder brother, Makotoko, who was the chief of Sefateng, and his younger brother, Maletapata, who was the chief of Menyameng. Both Makotoko and Maletapata had no issues. In his founding affidavit the applicant avers that during his life time chief Makotoko (now deceased) requested Malefetsane Matala to give him a child who would succeed him in the chieftainship of Sefateng. A family council was consequently convened and a decision taken that Jobo, the father of the 4th Respondent, should be given to chief Makotoko as his adopted child. Jobo did go to Chief Makotoko at Sefateng but returned to his father at Masaleng after a very short time.

In this regard the applicant is corroborated by Lerema Mphutlane who, in the affidavit he filed in support of the applicant's founding affidavit, deposed that in 1943/44, and on the instructions of Malefetsane Matala, he actually took Jobo to Chief Makotoko at Sefateng.

It must, however, be mentioned that although in the affidavit which he filed in support of the applicant's founding affidavit Lerema Mphutlane was positive that the year in which he took Jobo to Sefateng was 1943/44, he was not so positive in the second affidavit which he filed in support of the applicant's Replying affidavit. In the second affidavit he merely contended himself with the averment :

6/ "I ...

" I remember that at one time the late Malefetsane sent me to take Jobo his son by his wife 'Majobo to live with Makotoko and I did so."

(My underlinings)

I have underscored the words "at one time" and "to live with" in the above cited passage to indicate my view that in the second affidavit Lerema Mphutlane was ambiguous and not so certain that it was in 1943/44 when he took Jobo to Chief Makotoko at Sefateng. Likewise what is meant by the words "to live with" is ambiguous in as much as it does not necessarily imply adoption.

In any event, the applicant went on to aver that when Jobo returned from Sefateng to Masaleng, Malefetsane Matala told him that since he had refused to be adopted by Makotoko he would not recommend him to be the chief of Masaleng or any other area. Indeed, on 10th April, 1982 Malefetsane convened a family meeting at which he decided to appoint the applicant as his successor to the chieftainship of Masaleng. The family meeting agreed to the decision of Malefetsane that the applicant would succeed him in the chieftainship of Masaleng.

In his answering affidavit the First Respondent who, as it has already been pointed out earlier, is the Principal Chief of Koeneng and Mapoteng Ward averred that if Jobo had, indeed, gone to Sefateng as the adopted son of Chief Makotoko the records in his office would have reflected that important event. They have not. He nonetheless conceded that he had information that Jobo never went to Sefateng albeit for a very short period.

7/ It is

It is significant that notwithstanding his averment that he had information that Jobo never went to Sefateng albeit for a short period the first Respondent does not disclose the source of his information. The result is that such averment is hearsay and of no evidential value. In support of his averment that on 10th April, 1982 Malefetsane convened a family meeting at which he intimated his decision to appoint him as his successor in the chieftainship of Masaleng and the decision was agreed to by the family meeting, the Applicant has attached annexure 'A' to the founding affidavit. It is, however, worth noting that according to annexure 'A' only Malefetsane attended the so called family meeting. For reasons unknown to Malefetsane other members of the family did not attend despite the fact that they had been invited. A list of signatories is made on a separate piece of paper which is attached to the Sesotho version of annexure 'A'. Assuming the correctness of the contents of annexure 'A' there is no doubt in my mind that no family meeting was ever held on 10th April, 1982, as alleged by the Applicant. He has, on a later day obtained the list of signatories which is attached on the separate paper/^{and} attached to the Sesotho version of annexure 'A' only in an attempt to deceive this court into believing that a family meeting was held. In my view the onus was on the Applicant to prove, on a balance of probabilities, that Jobo was given to Chief Mokotoko as his adopted child to succeed him in the chieftainship of Sefateng. He has not satisfactorily discharged that onus.

Be that as it may, following the death of Chief Malefetsane Matala, on 2nd September, 1984, the family of Matala held a family meeting at which it was decided that the Applicant be recommended to the appropriate authorities to succeed in the

chieftainship of Masaleng. This decision was, however, turned down by the Principal Chief of Koeneng and Mapoteng who, instead of the applicant, recommended and installed the 4th Respondent as the chief of Masaleng. The applicant is aggrieved by the decision taken by the Principal Chief and hence the present application.

Assuming the correctness of the averment that the 4th Respondent is the legitimate son of Jobo who was admittedly born in the second house whilst the applicant was born in the fourth house of the late chief Malefetsane Matala, it would appear that the 4th Respondent is, by virtue of his being a descendant in the second house, senior to the applicant. He has, therefore, a better right to succeed his late grandfather in the chieftainship of Masaleng.

This otherwise simple and straightforward issue was, however, complicated by the averments that Jobo, the father of the 4th Respondent was, by the decision of Malefetsane Matala and his family, meeting given to Makotoko, the elder brother of Malefetsane, as his adopted son to succeed him in the chieftainship of Sefateng. Jobo allegedly returned to Masaleng. In other words, he refused to be adopted by the elder brother of Chief Malefetsane Matala who then deprived him of his birth right to succeed in the chieftainship of Masaleng or for that matter, any other area.

I have already found that there is no convincing evidence that Jobo was adopted by chief Makotoko to succeed him in the chieftainship of Sefateng. It is perhaps convenient,

9/ at this juncture

at this juncture, to pose a rhetorical question viz. whether or not, in Sesotho law and custom a child has a right to decline its adoption.

I shall assume, for the sake of arguments, that the answer is in the negative. In that event it seems to me that if it were true that Malefetsane and the family council had taken the decision that he was adopted, Jobo became the child of Makotoko, the chief of Sefateng, regardless of whether he returned to Masaleng or remained at Sefateng. By the decision of Malefetsane and the family council he had forfeited his birth rights in the house of Malefetsane, including the right to succeed him in the chieftainship of Masaleng, and acquired new rights in the house of Makotoko including the right to succeed him in the chieftainship of Sefateng particularly so, because the latter had admittedly no other child to succeed him.

It is common cause that both Makotoko and Jobo are now deceased. The latter is, however, survived by the 4th Respondent. If Jobo were indeed, the adopted child of Makotoko it is only logical that his surviving heir, the 4th Respondent, would have succeeded him in the chieftainship of Sefateng. However, as it has been pointed out earlier, a certain Matala Lebabo who claims to be a younger brother of the applicant is, in his own averment, the gazetted chief of Sefateng. How could he be gazetted the chief of Sefateng in the presence of the 4th Respondent, the rightful heir to the chieftainship of Sefateng.

It must always be borne in mind that succession to the office of chief is, in Lesotho governed by the provisions of Part III of the Chieftainship Act, 1968. The alleged decision

10/ of Malefetsane

of Malefetsane Matala to deprive Jobo of the right to succeed to the office of chief in any area was contrary to the provisions of Part III of the Chieftainship Act, 1968. It was for that reason null and void and of no legal effect. That being so the 4th Respondent who is Jobo's heir and therefore, his lawful successor to the chieftainship of Sefateng would have been gazetted at Sefateng.

If, on the other hand, it were assumed, for the sake of argument, that the answer to the rhetorical question is in the affirmative then it must be accepted that when he returned from Sefateng and came back to Masaleng, thus declining the adoption by Makotoko, Jobo was exercising his lawful right. That being so, there could be no justification for Malefetsane Matala and his family council to deprive Jobo of birth right to succeed him in the chieftainship of Masaleng, as the applicant wants this court to believe that the former did. As it has been stated earlier, succession to the office of chief is governed by the provisions of Part III of the Chieftainship Act, 1968 and certainly not by the wishes/decisions of individuals and/or family councils. It, therefore, necessarily follows that the family council was wrong in deciding, as the applicant avers it did, that the applicant should be recommended to the appropriate authorities to succeed his late father in the chieftainship of Masaleng in accordance with the wish/decision of Malefetsane Matala. The Principal Chief of Koaneng and Mapoteng Ward and, indeed, this Court cannot be bound by the wrongful decision of Malefetsane Matala and/or his family council.

11/ Regard being

Regard being had firstly to the fact that the 4th Respondent is the only surviving son of Jobo who was admittedly the eldest son of Malefetsane Matala and, therefore, entitled to succeed him in the chieftainship of Masaleng, secondly to the fact that there is no conclusive evidence that Jobo was given to Makotoko as his adopted son and successor to the chieftainship of Sefateng and thirdly that Matala Lebabo is, in his own words the gazetted chief of Sefateng, I am of the view that the 4th Respondent and not the applicant is entitled to succeed Malefetsane Matala in the chieftainship of Masaleng. That being so, this application ought not to succeed.

I accordingly dismiss it with costs.

B.K. MOLAI
JUDGE

31st October, 1989.

For Applicant : Dr. Tsotsi
For Respondent : Mr. Maqutu.