C OF A (CIV) 23 of 89

IN THE LESOTHO COURT OF APPEAL

Held at Maseru

In the Appeal of:

MOLOMO MAJARA	APPELLANT
AND	
MAMABELA MAJARA	1ST RESPONDENT
QHOBELA MAJARA	2ND RESPONDENT
MINISTER OF INTERIOR	3RD RESPONDENT
ATTORNEY GENERAL	4TH RESPONDENT

And in the Appeal of C of A (CIV)25 of 89

MAQHOBELA LERATO	Appellant
v	
MOLOMO MAJARA	Respondent

Coram

Mahomed P.
Ackermann J.A
Browde J.A

JUDGMENT

MAHOMED P.

The late Chief Leshoboro MAJARA ("Chief LESHOBORO") married two women during his lifetime. His first wife is the first respondent ("MAMABELA") in the first appeal identified in the heading to this judgment. This union was contracted in 1939.

Because this union produced no children, Chief LESHOBORO, entered into a second union with the appellant ("MAQHOBELA") in the second appeal. The purpose of this union which was contracted in 1964, was to produce an heir to the chieftainship held by Chief LESHOBORO and the choice of MAQHOBELA as the bride was made by the first wife MAMABELA herself. The union was contracted according to customary rites and produced four children. The eldest is a boy, ("QHOBELA") who is the second respondent in the first appeal.

Both the women who were married to Chief LESHOBORO contend that QHOBELA is entitled to recognition as the successor to the chieftainship of Chief LESHOBORO.

This claim is, however, disputed on behalf of a nephew ("MASUPHA") of Chief LESHOBORO by the family of Chief LESHOBORO's late brother TUMO MAJARA, ("the TUMO family"). The TUMO family contends that MASUPHA is entitled to the chieftainship held by Chief LESHOBORO because

1. There was no male heir born of the union contracted in 1939 between Chief LESHOBORO and MAMABELA.

2. The second union contracted in 1964 between Chief LESHOBORO and MAQHOBELA was invalid, because it was contracted during the subsistence of a valid marriage between Chief LESHOBORO and MAMABELA in accordance with the civil law.

3. Chief LESHOBORO therefore had no legal heirs to the chieftainship which accordingly accrued to the male heir of his late brother.

The TUMO family represented by MOLOMO MAJARA (the uncle of MASUPHA) accordingly sought an order in the Court *a quo*, inter alia prohibiting MAMABELA from "publishing" QHOBELA "as the lawful successor to the Principal/Ward Chieftainship" of the "Berea Ha Majara" and an order declaring that MASUPHA "is the right person to be published by the Majara family as the lawful successor to the said chieftainship". That application, which was opposed by the respondents MAMABELA and QHOBELA as well as the Minister of Interior and the Attorney General was dismissed with costs. It is the subject matter of the first appeal.

3. The existence of such a preceding marriage precluded the parties from contracting any subsequent marriage by Civil law and that the purported marriage by civil law between the parties in 1939 was therefore itself invalid.

4. In the result the only valid marriage which had subsisted between Chief LESHOBORO and MAMABELA at time when the Chief entered into a customary law marriage between himself and MAQHOBELA in 1964 was the marriage by customary law entered into with MAMABELA in 1939.

5. Customary law allowed Chief LESHOBORO to contract the customary law marriage with MAQHOBELA in 1964 (notwithstanding the valid pre-existing customary law marriage between himself and MAMABELA) and the validity of the 1964 marriage is protected in these circumstances by Section 42 of the Marriage Act of 1974.

6. In the result QHOBELA is the legitimate son of Chief LESHOBORO and MAQHOBELA with a legitimate and lawful claim to the disputed chieftainship.

The reasoning of the Court *a quo* was supported on appeal by Counsel appearing on behalf of the Minister of Interior and the

Attorney General. It was not supported by Mr. Sello who appeared on behalf of the widows of the late Chief LESHOBORO. Mr. Sello, argued at great length that on a true analysis of the ceremonies performed by Chief LESHOBORO in 1939, he had in fact contracted only one marriage with MAMABELA; that marriage was by civil law only but accompanied by the payment of "BOHALI" in accordance with custom. He defended the claim of QHOBELA to the chieftainship, however, simply on the basis that he was the issue of a putative marriage and therefore legitimate.

For the purposes of adjudicating upon the validity of the claim of QHOBELA to the Chieftainship, however, it is in my view unnecessary to determine whether the marriage between Chief LESHOBORO and MAMABELA in 1939 by civil law was indeed a valid marriage, (even if it was possible on the affidavits to determine precisely what were the ceremonies which took place when Chief LESHOBORO married MAMABELA, what the intentions of the parties were at the time and what the effects of the different acts performed might be). I say this for two reasons.

In the first place, even if it were to be assumed that the customary law marriage which Chief LESHOBORO contracted with MAQHOBELA in 1964 was invalid (because of the existence of any pre-existing valid marriage with MAMABELA by civil law), it does not

follow that QHOBELA the eldest son of the customary law marriage in 1964, has no claim to the disputed chieftainship.

The relevant Statute which governs the rules of succession to chiefs in Lesotho is the Chieftainship Act of 1968. Section 10 of that Act provides as follows:

> "10(2) 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."
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> "10.(3) If when an office of chief becomes vacant there is no person who succeeds under the preceding subsection, the first-born or only son of the marriage of the chief that took place next in order of time succeeds to that office, and so, in descending order of seniority of marriages according to the customary law, that person succeeds to the office who is the first-born or only son of the senior marriage of the chief or of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection."
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> "10.(4) The only surviving wife of a person, or the surviving wife of a person who, but for his death or incapacity, would have succeeded to an office of chief succeeds to that office when it is vacant, and she has no male issue.
>
> "10(5) 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 who he married earliest, succeeds to that office of chief, and when that office 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."

Although section 10(1) of the Act provides that a reference in the section to a son of a person is a reference to a legitimate son of that person, it does not follow that QHOBELA is not for the purposes of the section a legitimate son with a claim to successorship in terms of section 10. QHOBELA is the issue of a marriage between Chief LESHOBORO and MAQHOBELA in accordance with customary law, which permits and contemplates polygamous marriages properly conducted according to customary law. Chieftainship is itself an institution of customary law. For the purposes of succession to Chieftainship, "the first born or only son " of a chief, could very arguably include a son of a customary marriage properly concluded according to customary rights even if that customary marriage might otherwise be invalid for other purposes on the ground that at the time when it was contracted there was a pre-existing valid marriage by civil law between one of the parties and another person. Such a finding cannot however finally or properly be made in the absence of MASUPHA himself (the nephew of Chief LESHOBORO and the other claimant to the disputed

chieftainship), as a party to the proceedings, although his uncle MOLOMO MAJARA purported to represent the interests of the TUMO family.

In the second place, an order declaring QHOBELA to be legitimate on the grounds that the marriage between his parents was putative, would in any event render him legitimate for the purposes of successorship to the disputed chieftainship. This was indeed the order unsuccessfully sought by MAQHOBELA in the Court *a quo*.

Mr. Sello submitted that we should make such an order declaring QHOBELA to be the legitimate son of a putative marriage, and he contended that where the impugned marriage was celebrated with prescribed formalities by one or both spouses in good faith and in ignorance of any impediment to the marriage, there was no reason why such an order should not be made. There is undoubted support for these submissions in the case law. (See Prinsloo v Prinsloo 1958(3) SA 759 (T); Ex parte Soobiah: in re Estate Pillay 1948(1) SA 873 (N); Vather v Seedat 1974(3) SA 389 (N)).

The difficulty which I have with the submission that this Court should on appeal make such an order is that all the parties who might potentially be affected by such an order have not been

joined in the proceedings before us. These parties are entitled to be heard before such an order is made and there may well be disputes as to what the state of mind was of the parties to the customary law marriage contracted by Chief LESHOBORO with MAQHOBELA in 1964, and precisely what formalities were in fact then observed (See Potgieter v Bellingan 1940 EDL 264).

There appears, however, to be scant advantage in rendering entirely abortive the protracted litigation which has already commenced and I would make the following Order:

1. The judgment and orders of the High Court in Civil Appeal 24 of 1989 [CIV/AN/138/89] and in Civil Appeal 25 of 1989 [CIV/AN/124/89] are set aside.

2. The following orders are substituted for the orders set aside in terms of paragraph 1:

"(a) A rule nisi is issued calling upon all interested parties to show cause, if any, on or before the 2nd September, 1991, why an order should not be made,

(i) declaring as legitimate the children of the customary union contracted between the late Chief LESHOBORO and MAQHOBELA MAJARA in 1964.

(ii) declaring that QHOBELA MAJARA the eldest son of the said union referred to in sub paragraph (i) above is, in terms of Section 10 of the Chieftainship Act of 1968, entitled to succeed to the office of Chief of Berea Ha Majara, vacated by the late Chief LESHOBORO.

(b) The rule in terms of paragraph (a) above shall be

(i) served on MASUPHA MAJARA and on all the parties in

(ii) published in a newspaper circulating in the area of jurisdiction of the late Chief LESHOBORO

(iii) served on the local authority with jurisdiction in the said area, with a direction that efforts be made to bring it to the attention of members of the MAJARA clan in the area.

3. The costs of the appeals and the applications referre to in paragraph 1 are reserved for determination by the Hig Court, on the return date of the rule referred to in paragraph 2.

Dated at MASERU this 25th day of JULY, 1991.

I. MAHOMED
PRESIDENT OF THE COURT OF APPEAL

I concur

L.W.H. ACKERMANN
JUDGE OF APPEAL

I concur

J. BROWDE
JUDGE OF APPEAL

Delivered at Maseru this 26th day of July 1991.

For the Appellant : Mr. M.K. Seotsanyana
For the Respondents : Mr. K. Sello
Mr. T. Mohapi