CIV/APN/15/94

IN THE HIGH COURT OF LESOTHO

In the matter between :

SEKHONYANA LETSIE	APPLICANT
and	
CHIEF MOHLALEFI BERENG	1ST RESPONDENT
'MASEKHONYANA LETSIE SEKHONYANA	2ND RESPONDENT
ATTORNEY GENERAL	3RD RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
On the 24th day of May, 1994

The Applicant is a retired former policeman. At the material time the Applicant stayed at a village of Tsoeneng Ha Letsie in the District of Maseru. The village is under the chiefly control of the First Respondent (Chief Mohlalefi) who is also the Principal Chief of Rothe and Thaba-Tseka. The First Respondent is the head of the Applicant's family, meaning that he is the senior most male in status and in the family affairs of the Applicant as we Basotho understand this to mean, according to custom. The Second Respondent is the widowed mother of the Applicant, the Applicant being the eldest male issue and an heir

according to custom in his father's estate.

During his service as policeman the Applicant is said, in evidence, to have spent most of the time in the towns of Lesotho and had only returned to the said village of Tsoeneng after his retirement. It was further stated that the Applicant had maintained two wives or marriages. The senior wife stayed in the village of Tsoeneng while the junior wife resided with the Applicant in the Lesotho towns in which he worked as a policeman. What is important is that the Applicant seems not to have build a house but had raised an uncompleted wall on the portion of the site in the homestead of her deceased father and her widowed mother. In the meantime the mother of the Applicant accomodated the Applicant in one set of rooms or a flat adjacent to the main house of the homestead. It does not seem to be very important what the size of the space was.

It was for about seven months that the Applicant and the second Respondent lived in peace until a misunderstanding surfaced. This was caused by what was considered by the Applicant as "Second Respondent interfering with my style of upbringing my children" and, "the Applicant chasing away his elder sister's daughter when she returned home after deserting her husband". Was he entitled to chase away the child? That is only significant in so far as it resulted in the second

Respondent calling a family meeting on the 14th January 1994, convened by Chief Mohlalefi at his Rothe Administrative Office. At the meeting the Second Respondent was not in attendance.

It is common cause that at the meeting the Applicant objected to the Chief Mohlalefi chairing and conducting the meeting. The Applicant says that he therefore refused to co-operate with the gathering and refused to answer the 1st Respondent's questions. He says he was adamant that unless the gathering appointed another person to conduct the proceeding he would refuse to co-operate. Chief Mohlalefi then proceeded to warn the Applicant that, in his chiefly powers, he was ordering Applicant to leave his home (that of his father and mother) and to look for a shack to live in on or before the 16th January 1994.

Knowing the unhealthy relationship between the Chief Mohlalefi and himself (Applicant) and judging from the grave mood in which Chief Mohlalefi was, the Applicant feared that Chief Mohlalefi was nothing but serious in his threats to use his chiefly powers. The Applicant's fears were aggravated by the fact that no one in the family said anything to contradict the Chief's orders. Applicant adds that Chief Mohlalefi had gone on to further threaten that he would take further action against him if he refused to vacate the premises. Although he did not know

what action was contemplated by Chief Mohlalefi he had reason to believe that the Chief Mohlalefi would carry out his threats. It is for this reason that the Applicant approached this Court on an urgent basis and further averred that he had no other remedy but to approach the Court as he did.

The Applicant was granted a rule nisi on the 18 January 1994, calling upon the Respondents to show cause why :

" (a) Dispensing with the periods of notice provided for in the Rules on account of urgency should not be dispensed with.

(b) First respondent should not be restrained from interfering with the applicant's right to occupy his late father's immovable property pending finalisation of this application.

(c) Declaring that applicant is the rightful owner of every right in and to the improvements on his late father's site at Tsoeneng, and that first respondent could only remove him by due process of law.

(d) Granting applicant such further and/or alternative relief.

(e) Respondents to pay for the costs of this application.

2. Prayer 1 (a) and (b) to operate with immediate effect as interim interdict."

I would say from the beginning that the reasons for decision of this dispute should revolve around the following arguments.

(a) Whether it is correct that according to customary law (regarding residential sites, houses and garden) where the heir is a major, the heir can only enjoy possession of his inheritance after the widow's death. That when heir occupies the houses and uses the gardens of the estate during his mother's lifetime it is only by leave and licence of the widow.

(b) The Land (Amendment) Order No.6 of 1992 provides for immovable property of a deceased allottee to devolve on his widow in the first instance or on a person designated by him if he dies leaving no widow or on a person nominated by the surviving members of his family where the first two options are inapplicable and on his customary heir.

I did not accept the explanation regarding the citing of the Attorney-General as the Third Respondent. Chief Mohlalefi acted

as a Chief. It is untenable that the Attorney-General should end up taking the blame for Chief Mohlalefi's action as a chief. Any other argument would not be valid. Much as a chief is a public servant and although the Minister of Home Affairs is ultimately responsible for the affairs of chiefs, I did not see a chief as a civil servant. He is not controlled by the Government, to the extent that the Attorney-General ought to represent such a chief in civil proceedings such as the instant proceedings.

There is no doubt that the calling of formal meetings of a family group is an occurance and an institution which is well recognized in our customary law. The family meeting is a forum for resolving disputes and making a variety of resolutions concerning amongst others marriage, contracts and status of family members. The size of the group differ from family to family. Rules of procedure differ from family to family but they are always informal and fickle. The matters over which any family will meet cannot be defined with exactitude. But what is expected is that such meetings are called by the family head. The members of the family are given an opportunity to make representations and put questions to those concerned.

So many things can go wrong in a family meeting. I suppose that matters to do with certain perceptions, certain inclinations, personalities and eccentrities of the family

members influence the quality and the substantial justice of each family meeting's decisions. But at most times meetings are open, informal and fair. But I do observe that in this meeting (subjent matter of this proceedings) if there was no substantial justice, this appears to have been caused by the attitude of the Applicant himself. I do not think that anything has been demonstrated to the effect that Chief Mohlalefi went about his role as family head in a wrong way. The learned author J.C. Bekker in his work Seymour's Customary Law in Southern Africa. Fifth Edition says at page 94 :

> "The object of calling a meeting is bound up with the idea of collective right and responsibility which exists in customary law; the family head (or family heads) not only apprises his relatives of the step about to be taken, or of the details of the contract about to be entered into, but there is abundant evidence of what is being done. In addition, the family head is able to demonstrate that he is acting within his rights in a matter concerning which customary law may permit him to do the act in given circumstances only."

I would find no fault with the performance of Chief Mohlalefi. Otherwise the Applicant in effect invites this Court to impose its wisdom on the family matters of the Applicant's family. I

would borrow the words of Crossman J in Printers and Fisher Ltd vs HOLLOWAY 1964 ALL E.R 731 at 736."The law will defeat its own object if it seeks to enforce on this field standards which would be rejected by the ordinary man," as quoted in LINKOE FC vs LESOTHO FOOTBALL ASSOCIATION & 4 OTHERS CIV/APN/1/94 per W.C.M. Maqutu AJ. I say furthermore that the Applicant in effect invites the Court to review the decisions of the Applicant's family meeting. I would adopt the reasoning that the Courts will only intervene where there is evidence of *mala fide*, or non observance of procedures laid down for the functioning of domestic tribunals and that the Court would be doing what in effect amounts to substituting its own decision for that of a domestic tribunal (see Lesotho Evangelical Church vs Rev Phinias Lehlohonolo Pitso, C of A (CIV) No.5/92 - 11/05/92, per Browde JA - unreported)

This coincidence of Chief Mohlalefi being a chief and at the same time being a head of his family has been quite unfortunate. The reason is that the line of dermacation can be hard to draw. But the Applicant has attempted to draw the line by suggesting that on one occasion and at the end of the family meeting the chief Mohlalefi was exercising his chiefly powers and threatened to use those powers. This is admitted by Chief Mohlalefi and he says in his supporting Affidavit "as the Applicant refused even to talk to us, I stated I would use my

administrative powers to compel him to abide the family decision if he neglected to oblige it". Against the background of the Applicants conduct I do not see that the chief was acting beyond his powers or acting out of bad faith. I would hesitate to restrain the chief in the use of his legitimate powers. I would see his alleged threat as a mere threat whose apprehension does not really entitle the Applicant to approach this Court. This is more so that I do not see the threat as based on an illegality. It would be against public policy to restrain chiefs from threatening to use their chiefly powers legitimately. I refuse to believe that there is such power whose use cannot be threatened (to be used), in order to put pressure for purpose of compliance. Sometimes it works by inducing fear in the subject. I would in the result find no basis for interfering with Chief Mohlalefi's action.

I am in full agreement with the Applicant's submission that the eldest male in a family is an heir according to Sesotho custom. "In the original customary law, a woman was in state of perpetual tutelage. Before her marriage, her father or his heir was her guardian, and after her marriage, her husband became her guardian, her husband's death did not affect her position at his family home, and <u>she became the ward of his heir."</u> (See Seymour Customary Law in Southern Africa Fifth Edition JC Bekker at page 215) This what I call the traditional position as against the

current position. The traditional position which would virtually mean (in the extreme) that:

(a) The widow (if the heir is a major and married) was a dependant of the heir.

(b) The homestead, the gardens, the fields and livestock were controlled by the heir (if the heir was a major and married).

(c) The heir's siblings (if unmarried) were under the control and tutelage of the heir.

(d) The heir would represent all the family's interests before the chief, in village affairs and in arranging contracts for marriage of his siblings, with the widowed mother being kept in the background almost in respect of all aspects of the described activities.

I would say there is a modern or current situation that is considerably changed or watered down in the following respects.

(a) The widow (if the heir is a major and married) is <u>only</u> a dependant if she is forced by destitution, illhealth or other disabilities but is otherwise similar to a partner in

the family affairs, both being required in practice to consult each other in almost all the affairs mentioned in (b) and (c) below.

(b) The homestead, the gardens, the fields and livestock are used by the widow for consumption and benefit subject to consulting the heir where the properties are sought to be encumbered and/or disposed of. (see also see 7(7) laws of Lesotho and S Poulter - Family Law and Litigation in Basotho society - page 291-292).

(c) These children of the widow (if unmarried) are under the control and tutelage of the widow. At all times except for serious need for disciplinary action on the children, the widow takes care of and rears the children almost independently, subject to the need to consult the heir in case of matters to do with amongst others the marriage of her children, in which case she will consult the heir and his uncles.

(d) The widow represents all family interests before chiefs and other authorities. This kind of extreme situation is exemplified in the case of BERENG GRIFFITH vs MANTSEBO SEEISO GRIFFITH (1926-53 HCTLR 50), which endorsed the widows' rights in public affairs. Realistically speaking

very very few vestiges of such disabilities such as contracting for finance before banks and other remain in the way of a modern widow.

This case is a case of a need to resolve two conflicting claims. That is the rights of occupancy and use of the premises by the widow on the one hand and the heir on the other. It is primarily a question of the less superior right of possession and control and the ultimate right of ownership of premises. I am ever attracted by this statement by the learned author S Poulter in his valuable work Family Law and Litigation in Basotho Society where he says at page 280. " The decisions of the higher courts are therefore inadequate in their pursuit of the limited goal of defining who has control of the property." The paragraph continues to underline the greater need of the widow to be maintained and the heir to support the widow out of the estate. A clear statement is made of the constructive control of the property by the heir allowing for actual physical control by the widow as a form of maintenance and dependancy. This appears to be the whole case of the Applicant. So that the widow (as submitted by the Applicant) is akin to a perpetual lessee, that is until her death. The Applicant suggests that he has a right to direct as to how the premises ought to be used, with him as a co-occupier as a matter of right or must. This is where the conflict lies. The situation was aggravated by the decision of

the family to have the Applicant vacate the premises which the Applicant regards as his by reason of his being an heir.

I am convinced that in 1992 the legislature intervened by means of section 5 2(a) the Land (Amendment) Order No.6 of 1992 which reads:

(2) Notwithstanding section (1), where an allottee of the land dies, the interest of the allottee person to,

(a) Where there is a widow, the widow is given the same rights in relation to the land as her deceased husband but in case of re-marriage the land shall not form part of any community of property and where a widow re-marries, on the widow's death, title shall pass to the person referred in paragraph (c).

(b) Where there is no widow a person designated by the deceased allottee.

(c) Where paragraphs (a) and (b) do not apply a person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee's family or

(d) ....." (my underlining)

This was against the background of what the learned author S. Poulter in his said work Family Law and Litigation in Basuto Society says at page 281: "..... against the requirements of the widow must be balanced with the general interest of the heir, both in terms of his right to make overall decisions about the administration and preservation of the estate property and in respect of his own beneficial use. It is to be hoped that the higher Courts will adopt a flexible approach to the whole question in the future and confine itself within the narrow framework of inquiry". It is clear therefore that since this statement much water has run under the bridge. The Courts do not have to adopt any approach but follow the Land (amendment) Act. The Courts did not have to interfere. My interpretation of the Land Amendment Act of 1992 is that it has had the following effects:

(a) to make the widow an heir herself with all rights of control, beneficial use and ownership of all rights and interests over the land in question;

(b) during the widow's life the widow has the power to decide who to grant lesser rights of occupation (by her leave and licence) akin to a lease (sui generis).

I feel that the submission that the Second Respondent is

a usufructuary of the estate flies against the provisions of the Land (Amendment) Act. I seem to recall that this argument (about the usufruct) has been rejected by one commentator but for other reasons. It is however interesting to surmise as to what the effect of the Land (Amendment) Act 1992 will be on the provisions of Section 14 of the Deeds Registry Act 12 of 1967. I need not comment about that now.

In INWARDS v BAKER 1965 ALL ER 446 it was held that despite the title being in the Plaintiff's, the son had an equity to remain "in the bungalow" as long as he desired to use it as his home. Danckwarts LJ said that : "equity protected him so that an injustice may not be perpetrated." This is according to the equitable principles of the English law. I do not think a widow would be duty bound to accommodate a major married son. If she does decide to accommodate him it would be of her own free will and by her leave and licence. In that English case the son expended money on the land under an expectation created or encouraged by Plaintiff that he would stay on the land. The judge went on to say: "It seems to me that this is one of the cases of equity created by estoppel." This is not the case here.

I would therefore reject the Applicant's argument that he has inherited the estate. There is no proof of that. The Applicant has no clear right nor any right to be violated. I

would reply to the Applicant's query that he has been given short notice or that the family has taken the law in its own hands by saying that I did not find fault with the family's decision. I have stated my reasons.

These are the reasons upon which I discharged the Rule Nisi and dismissed the Application with costs on the 25th May, 1994.

T. MONAPATHI
JUDGE

For the Applicant : Mr. Mafantiri

For the Respondents: Mrs Makara