CIV/APN/322/93

IN THE HIGH COURT OF LESOTHO

In the matter between :

NGAKA MAKEPE	Applicant
and	
TSELE MAKEPE	1st Respondent
PRINCIPAL CHIEF OF HA MAAMA	2nd Respondent
MINISTER OF HOME AFFAIRS AND CHIEFTAINSHIP	3rd Respondent
ATTORNEY GENERAL	4th Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 11th day of August, 1995

There was no replying affidavit to the 1st Respondent's answering affidavit. The answering affidavit was filed as long ago as the 13th September 1993. The rule in PLASCON EVANS PAINTS LTD vs VAN RIEBECK PAINTS 1984 (3) SA 620 at page 63 as adopted and approved in MAMATLAKALA MAPHISA vs PULE LECHEKO AND 3 OTHERS C of A (CIV) 16 of 1993 of 28th July 1995 at pages 5-6 and in G. M. A. FLORIO vs MINISTER & OTHER C of A (CIV) No.2 of 1992 of 7th August 1992 at page 39 is of application here. Consequently I do not see why I should decide for the Applicant's in the face of serious denials and challenges contained in the Respondent's

answering affidavit. The Applicant applies for rescission of a default judgment and stay of execution thereof in case number CIV/APN/406/92 (the original application)

A very strong assertion is made that the Applicant has been served with papers of the application including the Court Order. Secondly the Applicant has not complied with rule 27 in that "the Applicant did not make the application timeously in the light of those two returns and that he has not even paid security for my costs pursuant to the said rule" as contended in paragraph 6.3 of the answering affidavit. It is clear that the Applicant has been in wilful default. With regard to payment of security in terms of Rule 27(6)(b) Mr. Pheko did not want to insist for the reason that he felt the matter was a serious one of status. His insistence would have bore no fruit since the application appeared to be made under Rule 45.

Contained in the Respondent's reply is what I consider to be a matter so serious that it surely called for reply from the Applicant. This is more so in the context of the contention by Respondent in paragraph 7.2 of his answering affidavit where he states that the Applicant is illegitimate son of Chief Mpho Makepe. The late Chief Mpho Makepe (deceased) was the Chief of Ngope-Tsoeu. In that paragraph he goes on to say:

"In this regard the Honourable Court is referred to the letter of Chief Makepe which is self explanatory. The letter and its translations are attached hereto marked TM1 and TM2 respectively. The letter clearly shows that even though Chief Mpho lived with the Applicant's mother for a long time, they never married."

There are three (3) requirements for a successful application for rescission. Firstly that the application should not be filed for purpose of delaying the Applicant or Plaintiff enjoying the fruits of his judgment. Secondly that the Applicant should not have been in wilful default. And thirdly that there a *bona fide* defence to the claim. These requirements must go together. The view I will take will be that the application was lacking in all of these, the last requirement having been most abundantly demonstrated to be lacking. Different considerations would apply if the Applicant was able to show that the judgment was entered into by error or mistake.

The Applicant says that he has not been served with the papers of the application nor the Order that resulted after the judgment by default. I do not find any sufficient reasons for rejecting the deputy sheriff's return of service which are *prima facie* evidence of service of the process. I believe that the

attendance of the Applicant at the Ministry of Interior for no other reason but to remind the Applicant of the Court's decision. It could not have been to introduce the Applicant to the existence of the Court Order. He already knew about the Court Order.

The Applicant says that he is the only son of the late Chief Mpho Makepe through 'Mabatho Mpho Makepe. This is denied by the First Respondent. The First Respondent's answering affidavit is supported by the diposition of Mahleke Sekese, an elderly male of 84 years, on the most important feature of this dispute namely: whether the Applicant's mother was a lawful wife of the deceased Chief. The deceased Chief was Mahleke Sekese's cousin and had been also been his subject. He knew that the late Chief and Applicant's mother lived together for some years but were never married to each other, either by civil rites or by Sesotho law and custom. He also knew when the late chief took the Applicant's mother to live with her and brought her first to his (Sekese's) place. Although 'Mabatho had used the late chief's surname she was not actually married to the late chief. And furthermore that the Applicant is the illegitimate son of the late chief. This strand goes through the whole yarn of the deposition of the First Respondent including his founding affidavit in the original application.

In the face of the serious contention of his illegitimacy, there was no sound reply put up by the Applicant except a bare assertion that: "I am the son of the late chief Mpho Makepe who was chief of Ngope-Tsoeu by his second wife, whilst the First Respondent is the son of the younger brother to Mpho." There was absolutely nothing put up by way of proving the alleged marriage either by custom or civil rites. Nothing was put forward to suggest such circumstances that could lead one to conclude on the existence of the marriage.

It could not have escaped the present Applicant that the issue of succession and heirship to the Chieftainship of Ngope-Tsoeu has always been a problematic one. On 27th October 1990 the First Respondent was introduced, pursuant to section 11(1) of the Chieftainship Act 1968, as the lawful successor to the gazetted Chief of Ha Ngaka Ngope-Tsoeu to the senior chief of Popanyane and Thaba-li-mmele.

The Chief of Popanyane and Thaba-li-mmele passed the decision of Makepe family appointing the First Respondent as the lawful successor with an approval of Principal Chief of Maama Chieftainess M.S. Maama (the Principal Chief) for onward transmission to the Minister of Interior and Chieftainship Affairs (the Minister). This was with the sole purpose of facilitating gazettement of the First Respondent, pursuant to

Chieftainship Act 1968. When the matter was placed before the Principal Chief she did not want to pass it to the Minister because the Applicant who had been appointed acting chief of Ngope-Tsoeu raised a query. The Maseru District Secretary (District Secretary) was approached to intervene. The District Secretary advised the Principal Chief that the Applicant be advised to challenge the First Respondent herein in the Courts of law as provided in the Chieftainship Act.

During February the Principal Chief instructed the Chief of Popanyane and Thaba-li-mmele to call a public pitso to introduce the First Respondent as lawful successor to the office of Chief of Ha Ngaka Ngope-Tsoeu pursuant to section 11(1) of the Chieftainship Act 1968. The public pitso was held and First Respondent was introduced as the successor. When the Principal Chief was to be informed at the pitso being held, the Applicant herein raised a query once more that he (instead) should be successor. This time the Principal Chief wrote a letter to the family of Makepe with a copy to the District Secretary and the Principal Secretary that the family of Makepe should take the aspect of succession to the Courts of law.

The First Respondent contended that this Applicant should have complied with Section 11(8) of the Chieftainship Act 1968 in that he should have challenged the First Respondent's

nomination as successor in the Court of law. He did not proffer such a challenge. This is one of the aspects that the Applicant do not advert to in his application for rescission. In his contending that he has a *bona fide* defence he cannot ignore making a reference to this aspect in the application. But this he did not do.

The question of who his successor would seem to have excercised the mind of the deceased chief for over a considerable time. This is shown by some two letters that he wrote. One is dated the 27th July 1968 and has been marked Annexure "A" to Applicant's founding affidavit. The other (dated the 11th July 1988) has been marked Annexure "TM2" to the First Respondent's answering affidavit. Both letters suggest that the deceased Chief had lived with three wives namely 'MAHABOFANOE, 'MANEO and 'MABATHO (Applicant's mother).

The First two paragraphs of TM2 read as follows :

" Chief I hereby inform you that yesterday I had called the family of Makepe to inform it about my family, that is that of Mabatho.

I informed the said family that although I have been living with that wife for a long time, and have

children with her, she is not my lawful wife I just stayed with her out of love not legally."

From the fourth line of the last paragraph it further reads as follows :

" ..... I continue to explain that all my rights will remain mine together with my legal wife Mahabofanoe. If I die my property and debts should be inherited by Mahabofanoe as she is my legal wife. After my death the Makepe family should appoint my heir from the families in terms of who of our fathers come first in the succession line. The family should consult Mahabofanoe." (My underlining)

Annexure A reads:

" This is a letter to confirm that he who is my heir/successor. I as chief Mpho Maplanka Makepe is my son who is called NGAKA MPHO MAKEPE I have informed MASA MAKEPE, those who were witnesses MIKHANE MAKEPE, SEIPATI MAKEPE, RATJOMOSE MAKEPE, MAKOPANO on behalf of MOKOATSI MAKEPE, MABONANG on behalf of RATSEPO MAKEPE and MANGAKA MIKHANE MAKEPE and MASAKANA R MAKEPE who I had called for this matter because those

of MANEO's family were alleging that I have not married MANEO ....." (my underlining)

It has been submitted by Mr. Pheko for the First Respondent that this letter has a two-fold effect. Firstly that the Applicant was appointed by the late chief in anger after having been insulted by the relatives of MANEO in suggesting that he had not lawfully married MANEO. Secondly that the deceased chief regarded MANEO as his lawful wife. The suggestion is being made that the deceased chief only regarded MAHABOFANOE and MANEO as his two wives but certainly not MABATHO. It was submitted that in the circumstances the late chief would not validly appoint the Applicant. He was illegitimate.

The above treatment of the three questions of appointment in section 11(1) of the Chieftainship Act 1968 and the absence of a challenge in the Courts of law on the one hand; and the absence of a lawful marriage between the deceased chief and the Applicant's mother and the allegation of the illegitimate birth of the Applicant and the absence of a reply on the other hand has been done for the following purpose. First to indicate that the Applicant would have no defence. Secondly although the matter of the dispute is an important one of status (which Mr. Pheko for First Respondent accepts) it would be a futile exercise to give the Applicant an opportunity to defend. I did observe with

interest a suggestion by Mr. Mathafeng that the practitioners who previously handled the matter on behalf of the Applicant did not go about the matter in a proper way as evidenced by their failure to file a replying affidavit. That may be so. But I did not see how better the important question of the legitimacy of the Applicant would have been handled in order to bring about a different conclusion. That is why I was not prepared to accept that the matter ought to be stood down to motivate an application for condonation for late filing of a replying affidavit.

The conclusion is irresistible that by hand of the late chief in the letters left by him he did not regard MABATHO as his lawful wife. In this country only legitimate sons can inherit. The chief's direction that his successor be appointed from the sons of the other MAKEPE family was realistic in the circumstances. He regarded himself as having no legitimate male successor in his own family.

I remain persuaded that if a defence is fanciful and cannot stand in law it is not *bona fide*. This is the approach I adopted in LESOTHO AGRICULTURAL DEVELOPMENT BANK vs LEABUA THAABE CIV/APN/27/95. At all times the business of our Courts should be seen for what it is. A serious business. It would be most unhelpful and wasteful to give the Applicant an opportunity to defend. Default judgment have an important place in our

procedure namely to avoid delays and to put pressure on litigants to speed up the finalization of cases. For other considerations see GEORGE NTSEKE MOLAPO vs MAKHUTUMANE MPHUTHING & TWO OTHERS CIV/APN/188/94, W.C.M. Maqutu J, 17 March 1995 (Unreported)

The result is that I dismissed the application with costs.

T. MONAPATHI
JUDGE

11th August, 1995

For the Applicant : Mr. Mathafeng

For the 1st Respondent : Mr. Pheko