C.OF A (CIV) NO.13/1996

IN THE COURT OF APPEAL OF LESOTHO

In the matter of:

PELELE LETSOELA Applicant

and

CHIEF KOLOJANE 1st Respondent
CHIEF OF KUENENG AND MAPOTENG 2nd Respondent

HELD AT MASERU

CORAM:

STEYN, P
KOTZ'E, J.A.
V.D. HEEVER, J.A.

JUDGMENT

V.D. HEEVER, J.A.

This is an appeal against an order of the High Court refusing to rescind its judgment in an unsuccessful application brought by the appellant in May, 1991, to compel the respondents to deal with his alleged nomination as chieftain of an area he calls Ha Letsoela. (The respondents speak of it as Hoatane and Khomokhoana). I refer to this as the main application and begin at the beginning; which is the relief claimed in that Notice of Motion. The order sought against the respondents was one

> "(a) Directing 1st Respondent to pass to the second the nomination of the applicant as rightful successor to the chieftainship of Ha Letsoela in the district of Berea.
>
> (b) Directing 2nd Respondent in his/her turn to pass such nomination to higher authority in terms of the **Chieftainship Act 1968**"

with costs against the first respondent, and against the second respondent only in the event of his/her opposing the application.

The founding affidavit is brief.

On 8 January 1991 Chief Moifo Letsoela ("the deceased") died. Appellant is his nephew. He says that "the family of Letsoela, being the people vested with the right to determine the ... successor to Moifo Letsoela" sat together and decided that appellant's uncle Ralikomiki Letsoela should act as chief in the interim, and appellant succeed the deceased. First respondent, the immediate superior of the chief of Ha Letsoela, was advised of the appellant's nomination so that he might in turn pass it on to the chief senior to him namely the second respondent.

The first respondent replied that he was considering the matter, though in law having no discretion thereanent. Letters to the second respondent asking his

assistance remained unanswered. There were rumours that the first respondent intended imposing on the family of Letsoela as the chief, a woman living in the Republic of South Africa, on the pretext that she is the widow of the deceased.

This the main application was opposed by the first respondent, Peete Nkuebe Peete, the Chief of Kolojane. I summarise the evidence tendered by way of affidavits. There were opposing nominations for a successor to the deceased. One faction referred the appellant's name to the first respondent (via Khahlai Seeiso who was acting in Mr. Peete's name). The mother of the deceased and others simultaneously proposed 'Maletsoela Letsoela, the widow of the deceased, as regent for her minor son Letsoela Moifo Letsoela. Both nominations were premature since the family were still in mourning. An instruction was issued that another family meeting should take place, which had not yet occurred.

Secondly, the respondent denies that his function is merely that of a forwarding agent in such matters. In terms of the **Chieftainship Act of 1968**, he is obliged to pass on recommendations by the chiefs under him only if satisfied that they are correct and that all the proper procedures have been followed. Not only has the full family not yet met, but the appellant does not qualify in terms of the order of succession prescribed by section 10 of the Act. The deceased had married 'Maletsoela Letsoela (born Papali Molupe) both under civil law and according to custom. He had obtained a marriage certificate from the Law Office at Maseru, which he annexes as "M".

In the third place, he says that the application was within the jurisdiction of a subordinate court within the meaning of Section 6 of the **High Court Act of 1978** and required special leave of the High Court to be brought there.

He accordingly asked for the application to be dismissed.

A good deal of material was annexed to, and in support of this opposing affidavit.

The mother of the deceased, 'Mamoifo Letsoela, confirmed that her son had married Papali Molupe by both Basotho custom and civil rites. The first five cattle were sent on 27 May 1978, then the couple contracted a civil marriage on 16 August 1978, and on 19 February a further six head of cattle were delivered towards her bohali. The reason why a civil marriage was contracted, was "for evidencing purposes", because of the hostility of the appellant's father towards the deceased and the then regent, Chieftainess "Mampoi Letsoela. "Mamoifo confirmed that a faction had nominated appellant as successor to the deceased during the period of mourning; and that she herself and other members of the Letsoela family had taken steps to stop the first respondent from recognising the appellant as the successor of the deceased. Her son had a son born of his marriage. Were that boy, then twelve, to die unmarried, his mother would be next in line of succession, and after her, the younger brother of the appellant's father. The appellant, in short, has no claim to the succession.

'Maletsoela Papali Letsoela deposed that she is the widow of the deceased. She had eloped with him in May 1978, and been accepted by the family: a sheep was slaughtered and she was made to wear a long dress as a sign that she was a married woman. On 16 August 1978 she and the deceased were married at the Berea District Administrator's office, as witnessed by annexure "M". A son was born of the marriage on 30 July 1979. She left the deceased in January 1980 "because of persistent assaults" and returned to her parental home in the Transvaal, where she bore three further children. After the death of the deceased she returned

to her marital home, "was made to wear mourning cloth by the Letsoela family" which accepted her back, and now lives with her in-laws.

Kahlaisa Seisa confirms and elaborates on the facts set out in the affidavit of the first respondent. He had written to the appellant that when the period of mourning "including that of Chaka Letsoela passed away shortly after the removal of Moifo Letsoela's mourning cloth" had expired, he "would call them immediately thereafter to come and nominate a successor." On 10 April 1991, the mother of the deceased informed him that she would be removing her daughter-in-law's mourning cloth after which she would present her to the office of first respondent as Regent for her minor son. He himself then wrote summoning "the Acting Chief of Hoatane and Khomokhoana" to the first respondent's office on 25 April with the person who had nominated the appellant, Dingaan Letsoela, and the mother of the deceased . At the meeting which followed on that date, he discovered from her that the mother had not been consulted before the letter nominating the appellant was written. Dingaan refused to reply to inquiries but said he would reply in court. The deponent then ordered the opposing parties to settle the dispute by 14 May and give him what I understand to be a nomination agreed upon between them. They did not do so. He extended the date to 21 May 1991.. Instead, the main application was launched. He annexes letters that passed between the appellant's supporters and himself as annexures A and B. In "A" dated 10 May 1991, the Acting Chief of Ha Letsoela wrote that the chieftainship belonged to the Moqeetsane family which alone had the right to nominate a successor to the deceased, and had on 12 March already introduced the appellant to the people and headman as successor to the deceased. He said that he did not acknowledge first respondent's alleged right to interfere with decisions of the Moqeetsane family or give him orders he could not execute. In "B" Seisa replied insisting that the Acting Chief settle the dispute failing which it should

be transferred to the office of the first respondent. No family decision on nomination was reported.

In his replying affidavit, the appellant says that a family pitso was held. The mother of the deceased was present, did not object, or mention the existence of Papali Molupe and an overwhelming majority of the men entitled to attend and vote, decided to nominate him. All the correct procedures were followed, it was only after either the mother of the deceased or Peete or both had "gone to Soweto to fish for Papali Molupe", that they started complaining.

He denies that a valid marriage was contracted between the deceased and Papali Molupe. The deceased had lawfully married 'Maliboho Letsoela, the daughter of Stephen M. Ralikomiki under Sesotho law in 1970 and was debarred by the **Marriage Act of 1974** from marrying any other woman while such Sesotho marriage was in existence. It was still so extant when Papali Molupe allegedly married the deceased by civil rights; although first respondent in 1970 had abused his then ministerial powers to oppose the union of the deceased and 'Maliboho. He had removed the deceased from Ha Letsoela to live in Maseru and desert his new wife, whence he fled to Pretoria to escape the clutches of the first respondent, returning only five years later in 1975. The first respondent had tacitly recognized the mother of the deceased as successor to his property - including cheques for money due to him in December 1989 - and said not a word about a lawful widow and son to succeed to his property. The deceased had taken several women and lived with them at various times "as his wives even though he was married to 'Maliboho Letsoela since 1970." When he returned home and resumed the chieftainship "he lived at home with several women in turn but not with Papali Molupe".

The replying affidavit is supported i.a. by one deposed to by Dingaan Pelele Letsoela; which is interesting because he says that he believed that no steps had ever been taken to terminate the marriage between the deceased and 'Maliboho, "but I also know from reports that...(she) eventually got married to one of the Mokotoane family" The deceased took and lived with a whole procession of women he called wives, without any of them being introduced by the deceased to the family nor there being any evidence of marriage produced during his lifetime. So too Papali Molupe may have cohabited with the deceased in South Africa, but she was never brought to the family as his wife, or made to wear mourning clothes for him.

Finally Ralimukomi, Matobakele Stephen Letsoela, the father of 'Maliboho testified of the arranged marriage between her and the respondent: Agreement was reached and a first instalment of R400 paid over as bohali. This was about the 20th of June, 1970. He himself returned to South Africa. He later heard from his father that the latter had received a further 6 head of cattle as bohali and, still later, that the first respondent had caused the deceased to be taken away from Ha Letsoela after which 'Maliboho was sent back home to her mother until the state of emergency should end. She eventually eloped with a man from the Mokotoanes. No legal steps were taken with the Letsoela's to terminate her marriage to the deceased. This deponent, Maliboho's father, "personally went through the motions of Sesotho marriage with the Makotoanes .... to avoid her becoming a simple concubine there." When the deceased returned to Lesotho he did nothing about his wife.

All three the deponents to the replying affidavits state that the deponents are prepared to give oral evidence, if necessary and permitted: respectively that the alleged civil marriage between the deceased and Papali Molupe is invalid; that first

respondent has in the past and is now again meddling in the affairs of the family of Letsoela; and about the "entirely unhappy disappearance" of the deceased from home under the cloud of the state of emergency. When the main application was called in court, there was no appearance for the appellant. The application was dealt with in the absence of his attorney and counsel, and dismissed with costs.

An application for the rescission of this judgment was immediately launched, but because of a number of postponements dealt with only years later. In his affidavits the appellant says that he knew that the main application was to be heard on 20 August 1992. He and a number of his relatives came from Ha Letsoela the previous day already and were on the premises of the High Court by about 08.00 on the 20th. Mr. Khasipe, (whose name appears throughout on the record as appellant's attorney of record) was not to have argued the matter. He had briefed advocate Seotsanyana to do so. Appellant and his relatives waited outside the courtrooms. Advocate Seotsanyana "eventually arrived" and informed them "of having had his file of my matter misplaced and consequently been much delayed" (emphasis added). He went to investigate and came back and reported that the matter had been disposed of although the appellant himself would, he says , have been prepared to argue his case personally if need be. That case, he urges, is a good one, or at least of the kind deserving a proper hearing.

Advocate Seotsanyana confirms that he and his opposition, Mr. Maqutu, the attorney for the first respondent, had agreed on the 20th August as the date for the hearing of the main application. He says "I had had some problem locating my own file of the matter and arrived after 09h30" (which is the time at which the court commences) without saying when it was that he did turn up. Another opposed matter was being heard, in which Mr. Maqutu was also involved. He himself was

"a little surprised" to later learn from Mr. Maqutu that he had proceeded with the main application because appellant's attorney, Mr. Khasipe, was also absent. Adv. Seotsanyana submits that it was Mr. Maqutu's duty to have called the appellant into court when he saw that neither appellant's attorney nor counsel were not there at 09h30.

I interpose that both of these gentlemen assume that Mr. Maqutu saw that the appellant was on the court premises. They do not testify as a fact that he did so, nor on what their assumption is based. Nor is there any explanation at all why Mr. Khasipe was not there.

The first respondent opposed the application for rescission.

His comment that the appellant should have explained his problems to Mr. Maqutu arising from the absence of his counsel, is a valid one. The suggestion in these papers of some fault on Mr. Maqutu's part in not of his own accord looking after his opponent's interest, has no merit.

The main thrust of the objection to rescission, is that the application has no prospect of success. If the deceased was married to Maliboho and she was his only wife, she, and not the appellant would be his successor. If there was no such marriage or it was dissolved, the deceased was married to Maletsoela Letsoela by both Basotho custom and Christian rites and a son was born who is the successor.

In reply the appellant counters that the first respondent himself has no **locus standi** to contest the chieftainship of Ha Letsoela in court. The first respondent is not a member of the Letsoela family and therefore has no grounds for claiming

better knowledge of the family than the appellant. The alleged legitimate son "is not known to the family and does not live at Ha Letsoela if he exists at all.... I have every prospect of success as long as it is Chief P.N. Peete contesting my family rights for his illegitimate purposes."

The application to rescind was refused, on the grounds that there had been no reasonable explanation of the appellant's default, and that there was in any event no prospect of the appellant's succeeding in the main application.

In his notice of appeal, the appellant relies **inter alia** on two alleged factual misdirections by the court **a quo** in arriving at its conclusion:

> "(d) in holding that the evidence on Appellant's side included Maletsoela Papali Letsoela amongst the women Chief Moifo Letsoela had lived with.
>
> (e) in holding that the father of Maletsoela Papali Letsoela confirmed that he received eleven head of cattle for his daughter's bohali as he had not filed any affidavit to that effect."

I doubt whether paragraph (d) constitutes a misdirection at all. The judge **a quo** did not find, erroneously, that the appellant had included the name of Papali among those the appellant set out as women who lived with the deceased as his "wives." When he said "They (i.e. the deponents replying in the main application) include Maletsoela among such women" he probably referred to their view as to the status of Maletsoela, since the sub-paragraph naming three women and the years they lived with the deceased, was followed by just that: an opinion:

> "(e) it was therefore, always on the cards that one, some or all of

> these or other women could produce some evidence of marriage to Moifo other than by Sesotho law' (emphasis added).

Even if I am wrong as to what the court **a quo** intended to say, it can have no bearing on the outcome of this appeal. The same applies to what undoubtedly was an erroneous transposition by the court **a quo** as regards whose father confirmed receipt of bohali, and the **obiter** comment that the civil marriage between the deceased and Maletsoela " is **null and void."** The order refusing rescission was correct since the two pillars on which it was founded, are unassailable.

As regards the first, there is in fact no explanation at all why counsel should have assumed that the application would be dealt with at his convenience, not that of the court. No reason is given why no steps were taken whatever to protect the interests of the litigants the lawyers represented, by at the very least the courtesy of a telephone call to the Court. Nor, as already pointed out, is there any explanation why the attorney was not present.

Mr. Pheko who appeared before us for the appellant, contended that the court **a quo** had erred in assuming that the appellant was aware of the date of set-down and did not attend court. Therefore, he said **High Court Rule 45(1) (a)** applies, and in terms of decisions such as **Topol and Others v. L.S. Group Management Service (Pty) Ltd. 1988(1) S.A. 639(W), 648B**, it was unnecessary for the appellant to show a reasonable prospect of success. Rescission should have followed as a matter of course.

This contention is untenable. The appellant's own papers show that he and his counsel were fully aware of the date of set-down. It had been arranged to suit

his counsel's convenience. The appellant did in fact attend at court. Neither the court nor the respondent can have any responsibility foisted on them for the fact that appellant though at was not in court when the main application was called. Any error there was, was not on the part of the court in granting an order against a party not given an adequate opportunity to state his case. The error was on the part of the representative to whom the appellant had entrusted the conduct of his case and indeed of the appellant himself, in not making use of the adequate opportunity made available to him.

In short, there was no irregularity in the proceedings. The court did not lack legal competence to have made the order. It has not been shown that the court was unaware of facts which, if known to it, would have precluded the granting of an order. The appellant accordingly had to establish that he had a **bona fide** claim which **prima facie** carries some prospect of success. (**Promedia Drukkers & Uitgewers (Edms) Bpk v. Kaimowitz and Others,** 1996(4) S.A. 411 (CPD), 417 - 418D),

It should perhaps be borne in mind what the intent of the order sought was, in the light of the undisputed fact which preceded the launching of the application From his own papers it is clear that the appellant knew that not all the members of the Letsoela family supported his nomination. He did not dispute the allegations according to which it was not accepted that it had been procedurally correct. The allegations that he was informed that the nomination was premature because the family was in mourning; that he was summoned to the office of the first respondent on 25 April where a meeting between representatives of opposing factions took place; and that a command was issued that all the parties should get together before 21 May are not denied.

Instead, the appellant launched the main application which in effect aimed at obtaining acceptance by the first respondent that his nomination by Dingaan as successor to the deceased was in order, both procedurally and as regards content. He did not see fit to join those whom he knew after the meeting at respondent's office, if not earlier already, to claim to have an interest in the matter: primarily Papali on her own behalf as well as that of her son. It does not under those cicurmstances behove the appellant to attack the first respondent, as he does in reply, for "interfering" or "refusing to accept the family's nomination in the same illegitimate way that he misused his ministerial powers during the 1970 Emergency (Qomatsi)..." Having rejected the opportunity to have the nomination which he claimed to have been endorsed by the majority of the family of Letsoela, "reaffirmed" by a **pitso,** he did not wait for Papali to attack that nomination in court in terms of section 11(2) of the **Chieftainship Act of 1968**. That he instead attempted to compel the first respondent to in effect formally endorse his own nomination, could perhaps reflect a lack of confidence in at least the procedural validity of that step.

When the respondent challenged his very claim to the succession, as opposed to whether the correct procedure had been adopted, he did not object to that issue being thrashed out in these papers. He met the challenge; though only obliquely, in the first instance by tendering to produce oral evidence of undefined nature and origin that the civil marriage between the deceased and Papali Molupe is invalid. This appears to be irrelevant where he does not challenge the validity of their prior marriage by bohali. He also introduced the woman Maliboho whose existence, however, cannot benefit appellant himself in any way. Maliboho is a totally irrelevant entity. If her marriage to the deceased was not accepted as having been terminated,

terminated,

(a) her father would have had no right of which I am aware or which he himself suggests, to accept cattle for a second marriage to another man. As the wife of another, at the time of the death of the deceased, she could not on that death become the widow of the deceased. And if the second marriage is void in the absence of steps taken to terminate the first one, then she would have a right superior to that of the appellant, to the chieftainship. There is in any event nothing on record as to what steps should have been taken to put an end to her relationship with the deceased and consequently status as his legitimate wife.

(b) there is no suggestion that any legitimate son was born of that union.

(c) nothing prevents the deceased having contracted a second recognized marriage with Papali, under Sesotho customary law, and there is nothing to contradict the allegation that a son was born of such union.

In the main application the learned judge was correct that, as already noted, the appellant challenged only the validity of the civil law marriage between the deceased and Papali; founding this challenge on the **Marriage Act of 1974.** That marriage has significance as evidence of the intention of the parties particularly as regards the status of the bride. It is unnecessary to decide in these proceedings whether that marriage is valid, or null and void, although the appellant appears to misconstrue the provisions of the statute. Section 4 distinguishes between a marriage entered into according to Sesotho custom and one entered legally. It is clear from the other provisions in the statute, that the legislature was referring to marriages performed by marriage officers as "legal" marriages, without classifying unions in terms of customary law as "illegal" or "null and void". The Act applies to and regulates civil marriages only (section 42), save and except that in terms of

section 4 a customary union may be registered unless one of the parties is already married by a designated marriage officer in terms of the civil law. See too section 24, which seems to discriminate against the children of a prior customary union should a widow or widower with children thereafter marry in terms of the civil law. Nothing in the Act expressly annuls a previous customary union. Whether a subsequent civil marriage does do so where it is concluded with a different partner is also irrelevant. I can think of no reason why that should be the case where it amounts to no more than what the mother of the deceased testified the same partners intended: a confirmation or evidencing of an already extant situation; any more than a second civil marriage to the same woman would annul one previously entered into. What is clear - and irrelevant - is that after the marriage evidenced by annexure M, the deceased would have been unable to register any customary union(s) he may have wished to conclude thereafter.

In short, there is no evidence to contradict that of the mother of the deceased that he entered a valid customary union with Papali,confirmed by Papali herself. If the subsequent civil union affected the status of Papali at all, it in my view strengthened rather than undermined her status as the wife of the deceased. In any event the appellant does not contend that the civil marriage deprived her of her status in terms of customary law. The provisions of the Chieftainship Act not discriminate between marriages in terms of civil law and customary unions. For present purposes, it is unnecessary to inquire what the order of succession would be were the dispute one between two women each a widow of the same man recognized under what are conflicting systems, or between children born of such different unions. Section 11 of the **Chieftainship Act** is clear and the court correct in the main application, that the family who nominate the successor to a chief do not have a free hand. They must follow the provisions of section 10 in which the order

of prior rights of succession is set out in detail. On his own papers, the appellant is not the next in line to the chieftainship that fell vacant when Moifo died, nor has he shown any other potential claimant to have a better right than Papali and her son, to exist.

The appeal is accordingly dismissed with costs.

LEONORA VANDEN HEEVER
JUDGE OF APPEAL

I agree: Sgd :

J.H. STEYN
PRESIDENT

I agree: Sgd:

G.~~P.C.~~ KOTZ'E
JUDGE OF APPEAL

Delivered on 5th Day of February, 1997.

For Applicant: Mr.Pheko
For Respondent: