CIV\APN\9\96

IN THE HIGH COURT OF LESOTHO

In the Application of :

LERATA TSIU	**Applicant**
vs	
THE COMMANDER, LESOTHO DEFENCE FORCE	**1st Respondent**
THE ATTORNEY-GENERAL	**2nd Respondent**
MAMORETLO TSIU	**3rd Respondent**

J U D G M E N T

Delivered by the Hon. Mr Justice M L Lehohla on the 8th day of May, 1998

After hearing oral submissions in the above matter on 7th April, 1998 this Court reserved Judgment till 8th May, 1998.

The applicant Lerata Tsiu; styled in papers (as legal guardian of Pelaelo Tsiu) a minor "granddaughter" of his, approached this Court on Notice of Motion served initially on the first two respondents seeking an order against them in the following terms:

1. Directing first respondent to cause to be paid to Pelaelo Tsiu, all terminal benefits due to her as the appointed heiress and beneficiary thereof following the death of her father, Liteboho Tsiu.

2. Directing respondents to pay the costs hereof.

3. Further and\or alternative relief.

In his founding affidavit the applicant avers that he is a Public Servant in the Ministry of Agriculture, Lesotho Government. He says that he is suing in his capacity as the grandfather and legal guardian of the minor child Pelaelo Tsiu aged one and half years as of January 1996.

The founding affidavit sets out that one Liteboho Tsiu who died in a motor accident towards the end of 1994 is the son of the applicant. The said Liteboho was a member of the Lesotho Defence Force under the command of the first respondent.

It is categorically stated that he was survived by his wife and his minor child Pelaelo. No mention in that pungently pointed regard is made of the 3rd respondent.

The Tsiu family appointed the applicant as legal guardian of the deceased's family particularly the minor child Pelaelo. The said minor child was appointed heiress to her father's deceased estate and beneficiary of all terminal benefits due

on the death of her father. A copy of the family decision is attached to the papers and marked "LT1" a translation of which into English is marked "LT2".

The applicant is aggrieved that his efforts to implement the family decision have been frustrated by the first respondent's refusal to pay the terminal benefits to him for the benefit of the heiress in accordance with the family decision.

Thus the applicant maintains that the first respondent's action is unjustified and prejudicial to the minor child of whom the applicant is guardian. Thus the applicant states that he has accordingly approached this Court as the upper guardian of all minors. He appeals to this Court to help protect and preserve the interests of the minor child Pelaelo. He says these terminal benefits are required for the upbringing and maintenance of the minor child.

The third respondent brought an application to be joined and this was granted. Among points she raised in her application for joinder the third respondent indicated that she was married to the deceased Liteboho Tsiu by Christian rites on 4th July 1987. She has attached a copy of the marriage certificate in support of her assertion that she was married to the deceased and states further as of the date when the deceased died in June 1994 the marriage between him and her was still in

subsistence.

She indicated that the marriage between her and the deceased produced no children.

She has attached a copy of a letter from the District Secretary confirming that she is the sole heiress in her late husband's estate. This is marked "B".

It is indeed a matter of grave surprise that a matter of such great importance as the fact that the third respondent was married by Christian rites by the deceased should not be disclosed by the applicant in his founding affidavit and instead a lame excuse for such an omission should be advanced by reference to the fact that Annexture "LT1" to the founding papers alludes to the fact that the applicant is authorised by the family to look after the two wives of the deceased namely "Mamoretlo and Mapelaelo (who happens to be the 3rd respondent as she hadn't been joined in the first place)" in a veiled attempt to water down this big omission.

The reason for not joining her in the first instance is that she could not be traced. But strangely enough as *Mr Maieane* for the 3rd respondent indicated it occasioned no hardship for the Tsiu family to look for and secure the presence of

the 3rd respondent at the time that the family sought to make her wear her husband's mourning cloth. It seems to me that this omission to enlist her participation in the family gathering in which her interests were directly concerned was a rather fine excuse aimed only at her exclusion. The Tsiu family took advantage of the convenience that the 3rd respondent's absence occasioned.

The next point of importance concerns how amply Browde J.A. directed that an application for the appointment of a *curator-ad-litem* should be moved. The instant application does not seem to be different from what seems to be an attempt to apply for the appointment of a *curator-ad-litem*. I shall attempt to show below what the Court of Appeal said and in italics supply my own comments relevant thereto.

The learned Appeal Court Judge in ***Alina Mabataung Mofolo vs Henry Tseko Ntsane and Others*** Lesotho Law Reports and Legal Bulletin 1991-1992 at page 200 stated that an application for the appointment of a *curator-ad-litem* should be made *ex-parte*. *The instant one was not made ex-parte.*

The learned Judge ruled that the Court will appoint a *curator-ad-litem* when such minor has no guardian. *The instant minor has her own mother who has not*

been so appointed.

The learned Judge of Appeal further indicated that in exceptional cases the Court will appoint a *curator-ad-litem* to a minor whose guardian is still alive if the interests of the minor and those of the guardian conflict. *No indication exists to show this to be the case in the instant case; unless it could be said the 3rd respondent is the minor child's guardian. But an attempt has been made to appoint the applicant as the minor child's guardian as even in papers it is common cause. Surely this attempt should not adversely affect the interests of the 3rd respondent who was no part of the arrangement. Mr Ntlhoki* for the applicant sought on strong authorities to point out that

> "......It would seem the rationale in the notion (that although born illegitimate a child may be regarded as legitimate) is that the Basotho shunned the stigma of illegitimacy and felt that rather than let it widen in scope it should be restricted within narrow limits. Thus they would less readily acknowledge illegitimacy in respect of a child of a mother who was once married than in respect of the child of an obvious one who gives birth to a child even though she has never married at all....."

He buttressed his arguments by reference to ***Letlatsa vs Letlatsa*** CIV\A\16\86 (unreported) where on further appeal in C. of A. (CIV) 16 of 1987 Schutz P made reference to the importance of the order or placement of a person during scarification at a circumcision school being a decisive factor as to legitimacy.

Great store was laid by Mahomed P's remarks in C. of A. (CIV) 23 of 1989 ***Majara vs Majara & 3 Ors*** (unreported) at 8 - 9 where the learned President of the Appeal Court indicated that arguably a son of a customary marriage properly concluded according to customary rights even if that customary marriage might otherwise be invalid for other purposes may after all be regarded as legitimate.

What *Mr Ntlhoki* seems to have over-looked here is that what was dealt with in the above case was succession to Chieftainship not heirship or successorship simpliciter.

Indeed taken in its proper perspective the learned Mahomed P's remark was confined to an interpretation of a statute on Chieftainship.

The full text of his dictum went as follows :

> "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 .... 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".

Because obviously what was involved in the above authorities related to successorship to Chieftainship which itself is an institution of custom then ways were sought by the legislature to make illegitimacy which otherwise would disqualify a Chief from succeeding in office and become heir, pose no such bar. Suffice it then to say the instant case does not deal with successorship to chieftaincy. Thus resort to relevant cases in treating of illegitimacy would be profitable. Caution must be exercised that Mahomed P didn't rule that every customary marriage however concluded shall be valid. He instead recognised possible grounds of its invalidity being if it was contracted at the time when there was already a pre-existing valid marriage by civil law between one of the parties and another person as in the instant case where third respondent had contracted a valid civil law with the deceased at the time the deceased purported to enter into a customary marriage with Pelaelo's mother. Accordingly I would repose my faith in the soundness of the submissions by PJJ Olivier in **The South African Law of Persons and Family Law** at p.320 that -

> "..............an illegitimate child is one born of parents who were not legally married to each other at any such time .... Our law recognises the rebuttable presumption that every child is the child of the husband; in other words that it is a legitimate child".

It stands to reason therefore that where a customary marriage was purported to be entered into despite a pre-existing civil marriage the offspring of such customary marriage would be illegitimate. In C.of A. (CIV) No.1 of 1976 ***Mokhothu vs Manyaapelo*** (unreported) Smith J A held that

> "a customary marriage entered into during the subsistence of a civil marriage between one of the parties thereto is null and void *ab initio* and produces none of the legal consequences of a marriage".

Needless to say one of the legal consequences which cannot be produced by such a marriage is conferment of legitimacy on children born therefrom.

Thus it would be inconceivable under the law that the little girl Pelaelo could be entitled to be an heiress to the deceased estate of her father which by law devolved exclusively on 'Mamoretlo Tšiu the wife of the deceased Liteboho by civil rites. See again CIV\APN\109\81 ***Mohale vs Mohale*** (unreported) at 3 where Rooney J extracted from ***Mokhothu*** the following passage

> "It is quite clear that in Lesotho the common law is that a man or a woman, who enters into a customary marriage during the subsistence of a civil marriage to another, commits adultery if the customary marriage is consummated ....".

See also the important decision of the Court of Appeal in C. of A. (CIV) No.2 of 1983 ***Makata vs Makata*** by Goldin J A (unreported) where a salutary approach

was advocated in regard to the dualism in marriage. Goldin J A said

> "'dualism' describes; and relates to, the existence of two independent principles or systems of law. A person either has a choice between them or is compelled to be bound by a particular system. He cannot enjoy the two simultaneously".

In the instant case it seems the applicant attempts to secure simultaneous enjoyment under the two mutually exclusive systems of law; that cannot avail.

For the above reasons the application is dismissed with costs and in the result the 3rd respondent remains the sole heiress in her late husband's estate.

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JUDGE
8th May, 1998

For Applicant : Mr Ntlhoki
For 3rd Respondent : Mr Maieane