

IN THE HIGH COURT OF LESOTHO

In the matter between:-

**SEPHESANA POTSE (Guardian)**

**APPLICANT**

and

**MAKOAILE MORAHANYE  
METROPOLITAN LIFE  
LESOTHO NATIONAL INSURANCE  
GROUP**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

Delivered by the Honourable Mr Justice S.N. Peete  
on the 4<sup>th</sup> February, 2002

On the 10<sup>th</sup> November 2000, my Brother **Mofolo J.** granted an interim order couched in the following terms:-

-1-

*“Dispensing with the rules of court as regards normal periods of service of court process due to the urgency of this matter.*

-2-

*A RULE NISI be issued returnable on the 20<sup>th</sup> day of November 2000 calling upon the respondents to show cause, if any, why;*

-2-(a)

*The 1<sup>st</sup> respondent and her family shall not be interdicted from claiming the proceeds of insurance policies held by the late NTHOFELA POTSE with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; either for themselves or any capacity, pending the outcome hereof.*

-2-(b)

*The 2<sup>nd</sup> and 3<sup>rd</sup> respondents shall not be interdicted from releasing the said proceeds of the said policies to anyone pending the outcome hereof.*

-2-(c)

*The applicant herein shall not be declared as the lawful guardian of the minor child LIKA POTSE/MORAHANYE, according to Sesotho Law and custom, who is entitled to claim and receive such proceeds on behalf of the said minor child.*

-3-

*Prayers 1, 2(a) to 2(b) shall operate with immediate effect as Interim Orders pending the outcome hereof.*

-4-

*1<sup>st</sup> respondent pay costs of this suit and 2<sup>nd</sup> and 3<sup>rd</sup> respondents pay such costs only in the event of opposition of this application.*

-5-

*Applicant be granted further and better alternative relief."*

In his founding affidavit the applicant avers that he is father of the late Nthofela Potse, the mother of Lika Potse/Morahanye, now a minor. Nthofela passed away on the 9<sup>th</sup> day of October 2000.

It is not in dispute that Sello Morahanye also now deceased was the father of the young Lika who was born sometime in 1984; Nthofela and Sello Morahanye later married according to Sesotho custom and seven head of cattle were duly paid on the 19<sup>th</sup> June 1987. A chit dated 19 June 1987 reads-

*"I receive seven (7) head of cattle which is R700.00 for marriage between the daughter of SEPHESANA POTSE and the son of EDWIN MORAHANYE.*

*I, Sephesana W. Potse*

*Edwin A. Morahanye*

*Witnesses: Constance N. Makhetha*

*Tebello Potse"*

It is quite clear therefore that the boy Lika was, born out of wedlock in 1984 that is before his parents entered into a customary marriage in 1987. It is quite evident and very important that the chit does not seem to say anything about the child Lika being "married along" with the mother.

It is also not in dispute that sometime in 1985 Nthofela eloped with Sello Morahanye and the child Lika was later fetched from the applicant's home and taken to live with her mother at her marital home; the young Lika began using the surname of Morahanye especially in his passport.

The applicant further avers that when Nthofela died in October 2000 she had been separated from her husband for about ten years, and that he, the applicant, nursed her to death and was supporting the young Lika and paying his school fees at Emmanuel High School.

In her answering affidavit the first respondent submits that Lika belongs to Morahanye family and states that:-

*“It was during the negotiations that it was agreed that the child would be married together with its mother and no bohali was sought by applicant. I learned this from my husband and I verily believed him.”*

This shows that she did not attend the bohali negotiations personally. She goes on to say that after Nthofela and Sello eloped in 1985, the child Lika (then probably a year old baby) was fetched to come and to live with its mother in the Morahanye family.

She goes further to state that upon Lika's arrival in Mathokoane Leribe, a sheep was slaughtered to welcome him into the Morahanye family and was given the name Mare to accord with the Bafokeng tradition. She states that ever since then the child Lika was raised in her homestead and on bereavement. Lika wore the Morahanye mourning cloth like other Morahanye family members.

She denies that Sello and Nthofela ever separated but lived apart because of exigency of employment.

She finally states that Lika has been legitimized and cannot be bastardized by the applicant.

In his replying affidavit, the applicant states that the child Lika was never included in the *bohali* negotiations and that as late as 1988 Lika was baptized as POTSE and contends that even if the child Lika was made to wear a mourning cloth, that “would never make him one of them because ... Lika Potse was never married along with his mother into Morahanye family.” He states that even when two head of cattle were later paid in 1994 “not one of these was ever meant to marry Lika into Morahanye family.”

The court ordered that *viva voce* be led regarding the bohali negotiations and the applicant gave evidence on oath in which he stated that in 1987 *chobeliso* was discussed and it was agreed that the seven head of cattle were for bohali and marriage. He insisted that there was no discussion about the child Lika. He said that when he first informed the first respondent about Nthofela’s pregnancy, the first respondent retorted by saying that her son could not impregnate a child of a prostitute. The seven head of cattle were however later paid only after Sello and Nthofela had eloped.

Under cross examination the applicant was made to admit that Lika was being labeled illegitimate. He however stated that when Lika was later fetched by the Morahanye’s after her mother Nthofela eloped, he took this to be a mere visit and not a family reunion. He admitted that on one occasion he attended a Morahanye family ritual and that Lika was treated like a Morahanye; he took this to be happening because Lika’s mother wished it so.

The following are the pertinent issues in this application

- (a) As a matter of fact, whether the child Lika got “married” along with his mother in 1987.
- (b) Did the subsequent conduct of Applicant Potse indicate acquiescence?
- (c) Is there a customary practice that unless a child born premaritally to its parents’ subsequent marriage is “married” along with the mother, that such a child remains illegitimate and a bastard?
- (d) Is that customary rule consistent with the Constitution of Lesotho?

Issues (a) and (b) are factual and the latter two are essentially legal and constitutional. It is not in dispute that when the child Lika was born in 1984, his parents Sello and Nthofela were not yet married. **Maqutu J** in his book “*Contemporary Family Law of Lesotho*” 1992 states at page 151-

*“An illegitimate child in Basotho custom belongs strictly to the mother’s family subsequently married the child’s mother, that did not change his position towards the child. In Basotho custom there is no automatic legitimation of an illegitimate child subsequent to the marriage of the child’s parents. In order for legitimacy to take place, not only has the natural father to marry the mother but he must also enter into a special agreement acknowledging the legitimacy of the*

*child and agreeing with the mother's parents for transfer of the child to the natural father's family. This agreement is sealed by the natural father's family giving an ox or a cow to the mother's parents for bringing up the child up to the time of the agreement. This beast is called Khomo ea seotla. Unless this happens the illegitimate child remains a member of the mother's family over which the natural father has no claim."*<sup>1</sup> P.151.

The learned author thus encapsulates the Basutho custom on the matter and goes on to say at page 152.

*"It often happens that the child follows the mother to the natural father's household. If no agreement is made regarding the said child's future the consequences can be tragic."*

Whether or not there was an agreement is purely a question of fact to be decided by the court in each particular case. In the present case the following facts are clear.

- a) That the child Lika was born in 1984.
- b) That Sello Morahanye and Nthofela were his parents.

<sup>1</sup> Under Roman Dutch Law premarital children of the spouses are legitimated by the marriage of their parents – Ex parte J – 1951 (1) SA 665 (o). The legitimation is by operation of law (ex lege).

- c) That in 1985 Sello and Nthofela eloped and started living together.
- d) That in 1985 the child Lika was also fetched from Potse family and taken to live with his parents in the Morahanye family.
- e) That in 1987 seven bohali cattle were paid by the Morahanye family as *bohali* thus bringing into being a customary marriage between the parents of Lika.
- f) That no mention was ever made about Lika in the bohali negotiations.
- g) That the child Lika started using the surname of Morahanye and participating as a Morahanye in the family rituals.

It seems to me that whilst **Maqutu J.** has succinctly restated the customary law on the subject and this has been endorsed in several decisions of the High Court, it is another matter whether it can be said that such customary rule is compatible with section 19 of the Constitution of Lesotho on the ground that one of the consequences of this customary law rule is to cloak the premarital child with a permanent label of illegitimacy and to disenfranchise him from any benefits he would otherwise enjoy as a biological child of his parents who marry subsequent to his birth and start a family. Certainly this rule creates an untenable situation of inequality, and, I dare say, iniquity or unfairness. Equality implies equal treatment under law. Why should a premaritally born child be disenfranchised from benefits enjoyed by his siblings born after the marriage of their common parents? Why should the court protect and preserve the state of bastardy or bastardize



such a child? Should not the court lean in favour of the idea that the parents will not bastardize or disown their own offspring? The common law and customary law must always be interpreted in benevolent way such as not to violate the sacred principles of our Constitution, especially one of equality before the law.

It seems to me that there is much substance in **Mr Teele's** submission that in this case the *best interests* of the child demand that the child Lika be treated as legitimate offspring. In my views the constitutional considerations far outweigh the customary rule of practice which labels such a child as illegitimate. In my view where the biological parents of a child born out of wedlock later marry, the tragic consequences which are often iniquitous must not be protected or preserved by the court. Where however the mother marries a man other than the child's biological father, different considerations may apply.

We know that a "*Lesala lapeng*" child does not seem to enjoy any tangible or enforceable rights even in the maiden family of its mother. Such a child is a mere dependent for the rest of his life! See **Poulter** – *Family Law and Litigation in Basotho Society* (1976) – P.235-7.

I am not however prepared to say that this customary rule is repugnant to morality and justice because to do so would draw me into the realms of philosophy and morality. And the same time, I am not inclined to declare it to be unconstitutional mainly because there has been no counter application seeking that declarator.

The joinder of second and third respondents indicates that the real motive behind the application is to lay someone's hands on the insurance monies to which the child Lika stands to benefit and whoever may become his legal guardian too. He is an unfortunate pawn in the tussle and tug-of-war. If the parents of Lika had not died leaving some insurance benefits, the application for custody and guardianship could not have seen the light of day.

The child Lika is now about 17 years old and was, until lately a high school student and I had found it necessary to invite the child Lika to state his preferences but I am told he is now in the circumcision school. He has human right too to have to say in matter that relates and affects his status Section 11 (1) of the 1993 Constitution of Lesotho reads:-

*“Every person shall be entitled to respect for his private and family life and his home.”*

In my view a man and woman who purposely beget children biologically naturally do so in order to form a family. Children thus begotten belong to the family. It is their human right so to belong. It is therefore against public policy to bastardize children without good cause.

Upon what has been said above, I discharge the rule. Thus being a family matter, I make no order as to costs.

A handwritten signature in black ink, consisting of several overlapping loops and a vertical stroke, positioned above the printed name.

S.N. PEETE

JUDGE

For Applicant : Mr Makotoko

For Respondents : Mr Teele