

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

'MATAALA 'MAMPILI KOTELO

APPLICANT

AND

TOKONYE KOTELO

1st RESPONDENT

THE EMPLOYMENT BUREAU OF AFRICA LTD

2nd RESPONDENT

JUDGEMENT

Delivered by Honourable Mr. Justice G. N. Mofolo
on the 23rd day of August, 2002

The applicant has approached this court claiming an order as follows;

- (a) That applicant be declared the sole guardian and trustee of the minor child TAALA KOTELO.
- (b) Respondents pay costs only in the event of opposing the application.
- (c) Applicant be given further and/or alternative relief.

1st Respondent has opposed the application.

FACTS OF THE CASE

From the record of proceedings it would appear a letter co-signed by the applicant and first respondent was written Mr. Rae, General Manager of TEBA, Maseru on 7th December, 1993 to the effect that 'with reference to the financial benefits accruing from the late Mokete Kotelo's Group Insurance, the family had decided that the whole amount be used up as an insurance policy for Master Taala R. Kotelo with the Lesotho National Insurance Company (Pty) Ltd' (vide annexure "A" dated 7 December, 1993).

By letter dated 24th February, 1994 the applicant wrote to Mr. R. Mitchell, Manager, TEBA, Maseru advising him of her having entered into civil marriage and hence the only legal guardian of her children; she also revoked her signature in the letter dated 7th December, 1993 addressed to Mr. Rae and she suggested funds be released to her without delay.

On the 10th March, 1994 Adv. Kotelo wrote a letter to TEBA, addressed to Mr. Mitchell reiterating some legal points raised pertaining to the legal status

of a widow who entered into Civil Marriage saying on the death of her husband the woman is liberated and consequently alone she is guardian of her minor children. In his reply by letter of 11th March, 1994 (annexure "B") Mr. Mitchell advised Adv. Kotelo that Mr. Kotelo senior had intimated he intended to contest young Kotelo's guardianship as his parents were married by both Customary and Civil Law. Rather wrongly, Mr. Mitchell had expressed the view that his investigations pointed to civil marriage superceding customary marriage. Mr. Mitchell had also asked for copy of the civil marriage certificate for his records adding it was his intention to have Mrs Mataala Kotelo as signatory on the savings book opened in young Kotelo's name.

Annexure "B4" pleaded for the appointment of a trustee for 'as soon as this is done, we will hand the money over.' In her letter of 18th May, 1994, (annexure "B5") Adv. Kotelo complained of the delay and wondered if TEBA was resiling from its undertaking of 11th March, 1994. By annexure "B6" dated 20th May, 1994 Mr. Gregory of TEBA appeared taken aback by Adv. Kotelo's attitude but nevertheless assured her as Taala Kotelo is a minor, 'a trustee must be appointed to administer the funds-----'

By letter of 1st August, 1994 (annexure "B7") Mr. Gregory requested Adv. Kotelo to advise him as to who had been nominated trustee of the beneficiary Taala Kotelo.

It seems to me as negotiations has stalled as to the appointment of a trustee and according to Adv. Kotelo had reached a cull-de-sac, the court was approached to break or undo the Gordian knot as Adv. Kotelo intimated.

At this juncture, although the applicant cancelled or as it were revoked her signature to annexure "A", it is significant that the 1st respondent acknowledged the applicant as "LEGAL GUARDIAN" and I am wondering on what basis.

I am to mention that this case has to do with an alleged dual marriage and to this end the court having converted the application into a trial the court had ruled the question of customary and civil marriage was to be decided first and to this end the applicant had called:

P.W.1 Thaka-Lesetla Lehloenya who sworn had stated he was 63 years old and he belonged to Roman Catholic faith. They had embraced the Catholic faith through his grandfather Mafa Lehloenya who had married by civil rites. The applicant was born of her late father Matlamukele Lehloenya. Patrick Lehloenya was his elder brother though not from the same mother as his mother was married on the death of Patrick Lehloenya's mother. He says Patrick Lehloenya is at Maseru East sickly owing to old age; he fell and can no longer stand and he has lost all memory. Applicant was brought up by Patrick Lehloenya. On applicant's parents death his father had said Patrick should take over applicant as his own child. When Patrick brought up applicant the latter was a young child.

As for applicant's marriage the Kotelo's had come to Patrick and he was present. It was in 1987 though he did not remember the date when the Kotelo's came asking for applicant's hand in marriage for their son Mokete Kotelo. The witness, Patrick Lehloenya, Thabo Lehloenya and others asked the applicant whether she knew Mokete Kotelo and she agreed saying Mokete was his boyfriend and agreed on being asked in marriage; he had asked the Kotelo's to

make lay-bye (tebeletso) payment as a means of securing applicant's marriage and the lay-bye was 25 head of cattle which counted as expectation for marriage. He says it was necessary to pay these cattle because after their payment marriage would take place. To them marriage was going to Church. He says they have no customary marriages their custom being to go to Church. He says their children are considered married if they go to Church and security is designed to stop other marriages. As for the applicant, the Kotelo's had taken them to Abia's beyond Lithoteng and there they had shown them three 'tebeletso' cattle - these were live at 'Moloa's and the 1st respondent had said cattle you wanted here they are and others will follow; the cattle had been taken to Patrick's at Mahloenyeng, Matsieng. To show they were not lobola (marriage) cattle they did not have a bewys for they had been paid as 'tebeletso' (expectation-in-marriage) cattle; there were these cattle and M3,700.00 (three thousand, seven hundred Maloti) although he does not remember the exact details. He says he was present when these cattle were received. One beast by reason of its weight amounted to two beasts and plus M3,700.00 the number amounted to 16 head of cattle. After receiving the 16 head of cattle he says he does not remember whether the transaction was reduced to writing nor does he

remember whether payment of cattle was acknowledged. After the receipt of the cattle Mokete Kotelo and 'Mampili were taken to Church by parents on either side. After cattle were paid and before going to Church applicant had remained at Patrick's home. After being married in Church she had left Patrick's home with Kotelo's people. He witnessed the wedding. Mahloenyeng people had taken applicant to Kotelo's where she was married. The marriage had been solemnized by a priest he can no longer remember.

Cross-examined by Mr. Matsau the witness says Patrick Lehloenya was affected by loss of memory recently and it would be about 2 months ago though before then his mental condition was good. Patrick was born in 1917. Put to him Patrick's so-called custom is peculiar to Lehloenya's and not Basotho custom, he says Basotho have 'tebeletso' custom and he understood it to be marriage in expectation and the Kotelo's family ensured this in order that the child remained faithful to those interested in her because there were others interested in her too. He says 'tebeletso' scale is not fixed and it forms part of 'bohali' including 'tlhabiso' (slaughter beast in acknowledgement of lobola cattle) which signifies Sesotho marriage. He says he did say the Lehloenya's

do not follow Sesotho rituals but Christian customs. That 'tebeletso' is a Sesotho custom he says he had nothing to do with it their custom being Church custom. He says he is literate having been in the civil service holding matriculation certificate. When the Kotelo's came to ask for 'mohope oa metsi' (water calabash) applicant had not informed them she wanted to get married. When the Kotelo's arrived their daughters response had been that she knew their son Mokete and they had asked them to put their case and the Lehloenya's had said by their custom 'tebeletso' was payable and as it appeared their daughter was in love with their son and wished to marry Mokete as parents they did not object, provided the children went to Church. After the Kotelo's had laid down their demands they had gone to 'Molaoa's at Abia's where their seroto (basket) would be; he says 'seroto' is stretch-to-so much or 'namele (stretch your legs towards me). He says it had been agreed the children go to Church on a particular day and the date was after payment of cattle. He says wedding was fixed after payment of cattle. He says they agreed because it seemed the Kotelo's were serious namely the bride and bridegroom. As for the balance of nine cattle they were not expecting payment.

On Mr. Matsau saying a few minutes ago the witness had said nine head of cattle were owing, the witness agrees saying it was only wordplay. He says though the balance has not been paid the intention was marriage in Church. He says he is not in a position of applicant's parent. Mr. Matsau says in the event he will not be in a position to ask whether the balance was paid. He says he does not remember whether the agreement was reduced to writing. He agrees where cattle are paid in expectation of marriage these matters are reduced to writing.

He says he remembered last when he was in court under cross-examination. He says after the case adjourned he does not remember having discussions with applicant's counsel. That this morning he had discussions with applicant's counsel in latter's chambers he says not himself in person though he did enter the room while counsel was engaged with someone else. He denies he set in applicant's counsel's chambers. He says Tumo's surname is Lehloenya. He says he went into the chambers to talk to Tumo. He denies he said Kotelo's family went to Mahloenyeng to pay bohali for this was tebeletso. He says he does not remember whether he said Kotelo's family went

to pay cattle in the form of money. He says he spoke of 'tebeletso' and cattle were paid as tebeletso. On Lehloenya's side Thabo Lehloenya was present and he forgets the others. He says he does not remember whether Tumo was present though Patrick Lehloenya was present. He does not remember if Ntoahae Lehloenya was present. On Kotelo's side Tokonye (1st respondent) Ndaba, Palo (though not quite sure if he was present) were present. He does not remember if Rasekoai was present nor does he remember if Mosoeu Kotelo was present though there was an elderly man present. He says he did say an amount was paid and cannot deny he mentioned M3,700.00. He agrees the amount of M3,000.00 was in addition to 3 head of cattle shown them at Abia's. He also agrees one of the three herd of cattle counted for two cattle making five (5) head of cattle in all. That five cattle plus M3,700.00 made 16 (sixteen) head of cattle in all he says he does not remember the figure 16 though he does not deny he did say the five cattle and M3,700.00 made 16 head of cattle. He says 'tebeletso' was 25 head of cattle. He denies after the 16 head of cattle were paid a sheep was slaughtered for the Kotelo's for 'moremoholo' was not done in that fashion. He says after payment of lobola 'tllhabiso' (slaughter of beast in recognition of lobola paid) is given groom's family this being

'seeababaeng' which is an arm of a beast to eat and 'seeakabaeng' goes with 'moremoholo'. He says these rituals did not take place. He agrees in his evidence he had said he did not remember whether there was a written agreement. He agrees if such an agreement existed he would have signed it. He says he sees the document and sees the portion when it is signed and also sees witness no.2 which is his name though the handwriting is not his. Put to him it is his handwriting he disagrees. That the handwriting of the signatories is of different people he says does not know for he is not a handwriting expert. He says 2 and 3 is D. T. Lehloenya and both are Thaka-Lesetla Lehloenya and he could not sign twice. He agrees before court he said he is Thaka Lesetla Lehloenya. Put to him he is not D. T. he says Thaka Lesetla is one name. He says abbreviated his name is D. T. Lehloenya.

The court is shown and undated document showing cattle paid for 'bohali'. He agrees it was 1987 when Kotelo family came asking for their daughter in marriage. He agrees it was after cattle were paid that the children married in Church. He does not deny the Christian marriage could have taken place on 27th May, 1987. He says the heading is 'litumellano tsa bohali pakeng

tsa 'Mamatlamukele Lehloenya ka morali oa hae Mampili M. Lehloenya le Monghali Tokonye Kotelo ka mor'a hae Mokete T. Kotelo (Marriage agreement between 'Mamatlamukele Lehloenya per her daughter Mampili M. Lehloenya and Mr. Tokonye Kotelo per his son Mokete T. Kotelo). He agrees 'Mamatlamukele is applicant's grandmother. He agrees applicant's parents are late. He says he does not agree the document confirms with what he has said in court. That the document is memorandum of an agreement between the Kotelo's and Lehloenya's he says it says it refers to 'Mamatlamukele Lehloenya who has nothing to do with the agreement though the agreement is in order if it agrees with his evidence. He agrees he did say there is an outstanding balance which agrees with the document. He says he did not say there were three head of cattle which although the Lehloenya's saw were not handed over to them much as they were not handed over to them much as they were added to the 16 head of cattle paid. He says for the first time they went to Abia's when they were shown three head of cattle. He agrees he said there was a balance of nine cattle making altogether twenty-five head of cattle. He says he had no quarrel with the document having been signed by the Lehloenya's and Kotelo's. As for bohali agreement he says he sees this but disagrees this was

the nature of the agreement for the agreement for marriage of the child was by Patrick Lehloenya. Since the document is undated he says he does not agree with it; besides 'Mamatlamukele knew nothing about the agreement and thirdly, there is the question of Thaka-Lesetla and D. T. Lehloenya. He says 'Mamatlamukele was born in 1911 and was 90 years old. His father had since died. When cattle paid healthwise 'Mamatlamukele was alright. Applicant was 'Mamatlamukele granddaughter being Matlamukele's daughter. Matlamukele was 'Mamatlamukele's eldest son. He maintains cattle were paid for 'tebeletso.'

Put to him the agreement he signed confirms marriage he says he could not sign for an undated document. He says he did not sign the agreement for the signature thereon is not his and he does not know why the agreement agrees with his evidence. After cattle were paid he does not remember when the ceremony in Church took place though payment of cattle came first. He agrees applicant was taken to 1st respondent's home after the Church ceremony; that this was in accordance with Sesotho custom he disagrees. Re-examined he says 'Mamatlamukele signature does not appear on the document.

Mr. Matsau says what the witness said is; 'I wonder whether 'Mamatlamukele knew anything about the marriage' and Ms. Kotelo says she takes his evidence to be: I do not believe 'Mamatlamukele knew anything about these things.

Court: The witness's evidence is that he did not believe 'Mamatlamukele knew anything about these affairs.

P.W.2 'Mataala 'Mampili Kotelo sworn has stated she is 37 years old and lived at Thetsane's, Maseru and had children Taala and Ntoetsa a boy and a girl both aged 12 and 10 years respectively. At present the children were living with her at Thetsane's. She had done Form V at school in addition to electrical qualifications being a certificate in electrical engineering while at present she was doing a degree in economics and was in her last year with Technikon, South Africa and' was graduating next year. She got married by civil rites on 27th May, 1987 and had met her late husband in 1985 while she was a girl and he a boy and they had fallen in love. They had agreed to marry in 1986 by civil rites so the marriage could be solemnized in Church and the decision was their

own. She says in 1986 she was 21 years old and her late husband was 35 or 36 years old having been born on 19th November, 1956. She says she was born on 26th November, 1963. They had decided to tell their parents they intended marrying by Civil Rites in Church. When the Kotelo's came she was staying with her guardian Patrick Lehloenya and his wife 'Manthuoah Lehloenya at Maseru East. On the 27th May, 1987 they were wedded at St. Louis Roman Catholic Church in Matsieng. She acknowledges the marriage certificate and says at time of marriage she was a spinster and her husband a bachelor. Before 27th May, 1987 she had lived with her parents in Maseru East. After 27th May, 1987 immediately after the wedding and on the same day of the wedding they had departed from Mahloenyeng with her husband and his next of kin to Maseru at her husband's home namely to her husband's parental home the reason being that in two to three days time her husband was to leave for Switzerland to attend a conference for three weeks. When his husband left he left her at his parents home at Tokonye Kotelo's the reason being she would not stay alone. Her husband had rented a quarter at Moshoeshe II. After three weeks her husband had arrived and they left for their home at Moshoeshe II, Maseru. She says they lived European style of life sleeping on the bed, drawing

water from a tap, used knife and fork, though she did not wear a blanket; also she bathed. She wore shoes, did not till fields and travelled in a vehicle. She says a beast was not slaughtered for her on arrival at her in-laws home nor was she given anything by her in-laws on arrival at their home the clothing she wore having come from her parental home. She had not been shown an animal for slaughter. When she was seven months pregnant her in-laws had not given an animal for slaughter. When she was seven months pregnant her in-laws had taken her to her parental home and after having a child had stayed at her parental home for three months from where she returned to her home. During the life of her husband she worked as a draftsman at the Lesotho Electrical Commission. She attended Church at the Roman Catholic Church. Though Patrick Lehloenya was her guardian, she took him as her father because from her adolescence she had looked upon him as her father having known no other father. She says evidence of her marriage is her marriage Certificate and herself and her late husband had fixed date of marriage. At her parental home there was nothing she did. Payment of cattle and things done before the birth of her child had no bearing on the kind of marriage she entered into nor did it change their style of life.

Cross-examined by Mr. Matsau to the effect that her names on the marriage certificate are 'Mampili Maria she agrees saying she acquired the name 'Mataala by marriage and was now her official name and it was the name she was using in court. She agrees she was given the name before the child was born. That she was given the name by custom she says she was given the name after the wedding ceremony. Put to her naming is not Christian custom she says having a name after marriage is habit and practice. She agrees she has dropped her Christian name Maria in the papers. She agrees her in-laws went to her people to ask her for her in marriage. That is going to her parents it was to seek their consent she disagrees for the purpose of the visit was familiarization of the two families. She says she can't dispute the fact that the Kotelo's went to her parents to ask for her hand in marriage. She says at the time she was over age and it was unnecessary to ask for her hand in marriage. She says the consent was from the parties and parents. She agrees the purpose of going to her home was to seek their consent and parents consent. That she went to her in-laws home after custom she says she does not know custom and is not sure this is general Sesotho custom. She agrees she was returned from Mahloenyeng to her in-laws by her parents and does not know whether this is

Sesotho custom. That her compliance was in accordance with the wishes of her parents she says it was in compliance with wishes of parents on either side. She agrees her in-laws were involved in her marriage but that this was up to having the first child and disagrees this was in accordance with Sesotho custom. She says she was taken to live with her in-laws while her husband was away and on arrival went to live in their own quarter. She disagrees this was in accordance with Sesotho custom for she could not stay at the rented quarter alone. She says when her husband went overseas for two years she stayed with someone at her own home. She says it is not true she stayed at her in-laws with her husband after his return overseas. She says she agrees with what's in the marriage certificate. She agrees she is wearing a mourning cloth in accordance with Sesotho custom though this is widespread and done all over the world. She says the mourning cloth is in respect of her father, Patrick Lehloenya who stood in loco parentis to her. She says she bought the mourning cloth for herself and nobody prescribed on her to wear it. Her husband at the time of his death was a personnel manager and agrees they were able to hire a person to stay with them at Moshoeshoe II. She says she was not given a dress and blanket in accordance with Sesotho custom nor was a sheep slaughtered it

being said here is a sheep slaughtered for you. She says after the wedding she was given the name 'Mataala to signify her acceptance into Kotelo's family and this was in the presence of the two families. When the child was born she had been given something, being animal feet worn on the neck called 'khoeetsa,' - she says she did not know this having been practiced by her husband.

That she was aware of customary marriage after bohali was paid she says she doesn't know whether cattle were paid. She says in Sesotho marriage the girl becomes part of the family. That she is oblivious of her Sesotho marriage and would have only civil marriage recognised, she says there was no Sesotho marriage. That after her marriage she did all that was in compliance with Sesotho customary marriage, she says this is Kotelo's and not Sesotho customary marriage. She says after the passing of her husband she wore a mourning cloth by her in-laws. That this was in accordance with Sesotho custom she says it is not Sesotho custom alone for it is individual choice.

Put to her she was taken to her parental home to remove the mourning cloth in accordance with Sesotho custom, she denies it was in accordance with

Sesotho custom for it did not flow from Sesotho custom. That all these were in celebration of and proof of Sesotho marriage, she denies.

Re-examined she says much as she entered into civil marriage, not all Lehloenya's wear the mourning cloth she is wearing. 'Khoetsa' was not put by her on her child having been placed by her in-laws.

Applicant's case.

D.W.1 Phillemon Molefi Jacob Rasekoai sworn has stated he lived at Ts'osane's, Maseru. He knew the 1st respondent Mr. Kotelo. He also knew his deceased's son Mokete Kotelo who married the applicant. He know the Kotelo to have gone to Mahloenyeng about the marriage of the two children. He was on the side of the Kotelo's. Present were Ndaba and Tokonye Kotelo. On Lehloenya's side were Patrick Lehloenya, Thabo Lehloenya and he did not remember the others. He knew the late Patrick Lehloenya who was his teacher seven years and they worked together while he was a cabinet minister and the witness was a cabinet secretary; they had seen each other frequently. Patrick

Lehloenya was deceased. The visit to Mahloenyeng had concerned marriage negotiations. They had been placed separately in two houses that it so say the Lehloenya's and the Kotelo's and there was a co-ordinator. He says they were discussing payment of applicant's 'bohali'. Sixteen (16) cattle had been paid for 'bohali' made up of cattle and money. The agreement had been recorded. He says he does not know who recorded the agreement though it was by the Lehloenya's. He had seen the recorded agreement, and participants had signed the agreement. He had personally signed. Mr. Matsau says the agreement was handed in though not marked. The court marks the document Exh. "A". He says he sees the document and can identify his signature and the names thereon. He says on the reverse side appears his name being the third from top of the page. He says 'bathetsi' means people who negotiate the marriage. He says he agrees with the contents of the document being the document he signed in negotiating bohali.

As for Thaka Lesetla's evidence that the agreement concerned 'tebeletso', he says this is wrong. He says 'tebeletso' is between two parents and 'tebeletso' is payment of one beast done while a child is a minor and not ready

for marriage. On marriage the 'tebeletso' becomes part of bohali.

Cross-examined by Ms. Kotelo the witness says he is 74 years old. He was born in Matelile at Sebelekoane Nthonyana's. He held BA degree and University Diploma in Education. He also had Primary Higher Certificate. He was a teacher and became a civil servant being promoted to Assistant Secretary and Private Secretary to the Prime Minister. He became Ambassador in East Africa, Nigeria and Ghana. He says he has explained what 'tebeletso' is. That it was not put to Thaka Lesetla what 'tebeletso' is, he says he does not know that this was not put to Thaka Lesetla. That what he calls, 'tebeletso' is not 'lebeletso' he says there was no 'tebeletso' for they were given 'fomo' being a beast slaughtered when bohali has been paid to wash hands put to the witness this is not the question asked he says he would like the question repeated. He says he is aware the document is undated. He says 16 (sixteen) cattle were paid; that the document does not mention 'marriage', he says the heading reads 'litumellano tsa bohali' (marriage agreement). That the document says nothing about bohali and it is heard for the first time that the document was written by Lehloenya's people he says he hears. Mr. Matsau complains this is inaccurate.

The witness says during negotiations he had not seen the applicant and he did not know if applicant was present after cattle were paid and he did not know whether she was brought by Lehloenya's people to Kotelo's. He had seen applicant at Kotelo's and had been present at the Church wedding. He says during the wedding he does not know whether it was the customary marriage that was being confirmed. Applicant had worn a white wedding dress. He did not know if Patrick Lehloenya filled an affidavit. That Lehloenya says he did not conclude customary rites he says he does not know. That Patrick says applicant the late Mokete had decided on a civil marriage he says he does not know. Put to the witness he received cattle signifying engagement otherwise called 'tebeletso', ho mo hloma lesiba' (meaning marriage in expectation, to stick a feather) he says he does not know. That the finale in payment of cattle was decided in Church by the wedding ceremony the witness says he does not know. He agrees that on 27th May, 1987 the children were joined in holy matrimony. He also agrees after the wedding the children were for the first time taken home. He says he does not know whether where there is customary union the fact was to be shown on parties marrying by civil rites. He says he does not know whether applicant and Patrick Lehloenya agreed to

the customary marriage.

Re-examined the witness says Patrick was present in the marriage negotiations and he appended his signature on the document Exh "A". Under 'lipaki' (witnesses) he is the first signatory. He says he has said Patrick was his teacher for seven years and they had worked together when he was a minister of government. He says the heading makes reference to 'bohali'.

D.W.2 Tokonye R. Kotelo sworn has stated he was born in 1929 and is a retired civil servant and former Registrar of the High Court, High Commissioner for Lesotho in Maputo and Nairobi and also former Resident Ambassador. He was also former Minister of Foreign Affairs. Applicant was married to his late son. The purpose of showing the Lehloenya's certain cattle was to compute them towards the marriage of his son. These were four (4) cattle of which one accounted for two cattle. The cattle were shown Patrick Lehloenya. The cattle mentioned had gone to Mahloenyeng. The discussions at Mahloenyeng was to conclude marriage negotiations. There had been the discussions before and he had gone to Maseru East to engage his daughter the

applicant and having been accepted he had been given a scale being 25 head of cattle; he says this was in his presence and presence of his younger brother, Manyathe Ndaba, his uncle Motseki Mosoeu Kotelo and Mokete Kotelo his younger brother all members of the family; D.W.1 Mr. Rasekoai was also present when they went to Lehloenya's. At Mahloenyeng the Kotelo's and Lehloenya's occupied different rooms and there was a go-between relaying messages from either side - it was Tumo Lehloenya and he is not sure if Tumo Lehloenya is before court; he says the result of the negotiations were that 16 head of cattle were paid and Tumo had brought papers which they signed when they had already been signed by the other side. He says Patrick Lehloenya was on the side of the Lehloenya's and so was chief Thabo Lehloenya, Thaka Lesetla Lehloenya, Tumo Lehloenya and the others he does not recall; this was sometime in 1987. He says the document he is shown is the one he said he signed. He reads the heading; he says the reverse side was signed by him, Mokete Kotelo, Philemon Molefi Jacob Rasekoai and his younger brother Manyathe Kotelo, and Motseki Mosoeu Kotelo under 'bathethesi'. He says he kept the document because it was his receipt for bohali. He says he hands it is an exhibit and it is marked Exh. "A". He says they were given 'fomo'

indicating their acceptance; having been slaughtered he had taken away portion of it. They should have eaten it on the spot but as negotiations took long they had left with their portions. As for Thaka Lesetla's 'tebeletso', he says it did not form part of marriage negotiations besides 'tebeletso' is a single beast and he would not pay in expectation for a person who was already eligible for marriage and was wanted then and there. 'Tebeletso' was never discussed and on Exh. "A" there is no tebeletso. When he asked for applicant's hand in marriage there was nothing about tebeletso which has cropped up here in court. Having married customarily they had gone to marry in Church.

Patrick Lehloenya and himself were Christians and are faith bound to take the children to Church otherwise they would be excommunicated. Patrick was a Roman Catholic and he belonged to Lesotho Evangelical Church and then he was a Church elder. He says even when a marriage has gone through custom it must be solemnised in Church. The Church ceremony had taken place at Mahloenyeng. After the solemnization of marriage Mokete had returned home but wife had remained behind to be brought to her in-laws according to Sesotho custom. The wife had come later brought to his home. Before solemnization

of marriage Mokete had been living by himself. When 'Mampili was brought home Mokete and 'Mampili lived in his home not for long and they had gone to where Mokete was living. He says the reason for staying in his home is because a daughter-in-law has to be 'bekoed' (taught family customs). He says these things are in accordance with Sesotho custom and he knows nothing about Western customs. The first born child had been born to his son and he was called Taala. When the child was born he was overseas and he had issued instructions that the daughter-in-law go to her maiden home to give birth and this was according to custom. He had given the baby boy the name Taala Raliketso Kotelo.

The witness has testified under cross-examination he has an elder brother Shokhoa Lazarus Kotelo being sons of Jane Kotelo. Shokhoa was head of the family. He says when his son married the applicant, he is not sure the applicant was 23 years old. Mr. Matsau says applicant's age is not in dispute. That at 23 years applicant was at liberty to choose the kind of marriage she desired to enter into, the witness says according to Sesotho custom an unmarried woman is a child for the children she makes belong to her family. He agrees a girl may

choose a boyfriend. He says he does not agree at her age the applicant was at liberty to chose the kind of marriage she intended to enter into and had no such election though there has to be agreement between a boy and girl if they wish to marry. He says he does not agree that for these to be customary marriage both the boy an girl must agree. Put to him he never went to Maseru East to ask for applicant's hand in marriage, he says when they went to Mahloenyeng they had already been to Maseru East. He says they did not go to Maseru East to ask for applicant's hand in marriage. As for contents of the document Exh. "A" that it says nothing about marriage he agrees. He re-iterates the document was written by the Lehloenya's. He agrees there is nothing about 'bathethesi' above the Lehloenya's signatures. He says he sees 'bachelor' and 'spinster' on the marriage certificate and also sees the other document reflecting marriage between David Motseko and Fanyeng Ralethoko where words 'previously married according to custom' appear.

Mr. Matsau objects saying a witness is being cross-examined on a faintly written document a document unknown to court and not certified by the Registrar of Deeds and Counsel appears to be introducing evidence from the

back door. If the purpose of the document was to show how the marriage is contracted, this is something that can be done by the person in whose custody the document is or by the parties mentioned in the documents; there was also the danger that the document is a copy of another copy for it is hand written.

Ms. Kotelo says what counsel has said makes a lot of sense and she proposes to shelve her questions for the time being. In further cross-examination put to the witness that the applicant has said she got married for the first time on 27 May, 1987 he says the applicant had first been married by payment of cattle. Mr. Matsau now says the previous day he raised the question of whether Patrick Lehloenya's affidavit can be introduced as evidence in view of the fact that Patrick is now dead and were now in a trial within a trial. Ms. Kotelo says the affidavit is part of the record and was sworn to in December, 1994 and the document is not new evidence. In reply Mr. Matsau says the affidavit came late and is prejudicial to respondent's case in that it came late and has not been replied to - he says the document can only be handed in by consent of the parties. He says it is improper to allow cross-examination on the document because the witness has not given evidence. Ms.

Kotelo says evidence is evidence whether it is viva voce or documentary and this is not a trial within a trial.

Court: Objection is reserved though cross-examination on the document is allowed for if at the end the day if the court finds there should have been no cross-examination on the document the cross-examination can be expunged from the record. Put to the witness the Kotelo family did not appoint him as guardian of either the applicant or her son Mokete -----, Mr. Matsau has intervened saying the question being asked is the main contention of the application. In reply the witness says on the death of Mokete the Kotelo family had not set to appoint a guardian. Put to him in the affidavit Patrick denies entering into customary marriage with the witness, the witness says they did for he signed the marriage agreement and this is common cause. Put to him what's common cause is the signature he agrees. Put to the witness Patrick was clear that no child of his would enter into customary marriage, the witness says but Patrick went on to do the contrary although in the affidavit Patrick appears to have remarked: 'if I had a choice no child on mine would go through a customary marriage.' The witness says the marriage certificate speaks for

itself. He agrees it was after the wedding that the applicant and the late Mokete stayed together as husband and wife. Put to him on the day of the wedding applicant says she left with her late husband, Nadi with Nathanael driving and themselves at back seat he says Nathanael Maphathe has not driven any of his cars; the witness denies they left for home on the day of the wedding. As for 'koe' (a sheep slaughtered to acknowledge the newly weds as husband and wife) that the applicant denies was slaughtered for her he says it was slaughtered. Ms. Kotelo says since it was not put to the applicant that she was given 'koe' she abandons the issue whether such a question was asked. The witness denies the applicant left her ancestral home with Mokete's relatives for the Kotelo's; put to him when she said this he was next to his lawyer and heard this, the witness says he does not remember whether he heard the question. He says he heard when the applicant said Mokete was going overseas shortly. That applicant went to the witness's home because Mokete was leaving for Switzerland, the witness says this is not true for what's true is that Mokete did not go to Switzerland immediately after the wedding. He denies Mokete left eight or so days after the wedding. He denies Mokete attended a three week conference in Switzerland. Put to him these matters were not denied, he says

they were denied. Put to him the Lesotho Evangelical Church (L.E.C.) does not excommunicate followers simply because they are married by custom, he says it can happen; as to Roman Catholic's attitude, he says he is not sure. Put to the him he cannot speak for Patrick Lehloenya on what the Roman Catholic Church can do, he agrees, the witness says he says he sees the marriage certificate and the stamp thereon and says he does not deny the stamp is an original stamp and that it is marriage certificate of 17 December, 1978 between Mohapeloa and Lephoba. Under condition is written ----- Mr. Matsau objects saying the marriage certificate has no bearing on the present case.

Mrs. Kotelo says she merely wants to draw a distinction though the certificate is not an exhibit.

Court: The exercise can be presented in agreement and there is no need for cross-examination on the certificate.

D.W.3 Justinus Thabo Mahao Lehloenya sworn states he lives at Maseru East and he is chief of Takalatsa ha Mahao, Lesobeng. He knows the applicant

herein and he also knows the 1st respondent. Applicant was daughter of his elder brother according to the family structure. His elder brother he is referring to is the late Lehloenya. He also knew 'Mamatlamukele Lehloenya who was in Maseru at present and it is four months since last seeing her and when he saw her she was in Maseru. He knew the late Patrick Lehloenya and also knows Thaka Lesetla Lehloenya. In 1987 he was living in Lesotho and there was a time when he was involved in discussions between 'Mataala and Kotelo's son, Mokete, though he does not quite recall it was in 1987 when there were marriage discussions concerning Thaka Lesetla's daughter called at the time 'Mampili Lehloenya. The Kotelo's had come to marry off their son Mokete at Mathakalesetla Lehloenya's and eleven cattle had been paid made up of money.

The same day according to custom a number of cattle were counted at Tokonye Kotelo's though not seen and it had been agreed that Tokonye's son marry 'Mampili daughter of Thakalesetla Lehloenya according to custom and to this end they were given a 'fomo' designed to bring the two families together. The bohali agreement had been reduced to writing and is able to

identify his writing which is number three on the document. He says 'J' stands for Justice while 'T' stands for Thabo and 'M' for Mahao. He says he signed for the no.3 name. That the gathering according to Thakalesetla concerned 'peeletso' he says it was bohali there having been no discussions about 'peeletso'.

Cross-examined by Ms. Kotelo he says he knows Tumo Lehloenya very well for he is his elder brother. He agrees he was close to the late Patrick Lehloenya. Seth Mahao was his younger brother. That there is a dispute to headmanship between his brother Seth Mahao and Tumo Lehloenya, he agrees saying he is not bitter about this. That he is in court to express his vindictiveness about the dispute he disagrees saying Counsel is misled. That he gives evidence as he does in an effort to get at Patrick Lehloenya's family he denies saying Counsel is misled. That he gives evidence as he does in an effort to get at Patrick Lehloenya's family he denies saying Counsel is misled. He says 'seroto' is total 'bohali' when paid. He says the eleven cattle were for bohali and the heading to the agreement explains the rest according to custom. That Thakalesetla and Patrick say it was 'peeletso' he says not so for the

heading speaks of bohali.’ He says the truth is in the heading of the agreement for is speaks of bohali. He says the truth is in the heading of the agreement for it speaks of bohali. Put to him he was schooled about the heading the says he is a Mosotho and does not need schooling. He agrees that after cattle were paid ‘Mampili remained with her grandmother ‘Mathakalesetla he agrees. ‘Mampili had not come into the room in which they were. As to ‘Mampili’s attitude towards the marriage, he says he knew her attitude even before the discussions. He says ‘Mampili was told the Kotelo’s were coming. The witness says when there was Church marriage he was absent.

No re-examination

By court he says he is 74 years old and is a gazetted chief and has been chief for over 20 years and people bring cases to him for settlement and he is conversant with Sesotho custom. Apart from being a chief he was a parliamentarian for ten years and was for a while a teacher. He says he knows Sesotho custom very well. He says ‘tebeletso’ concerns a young girl in whom a family may be interested and to reserve her for marriage a cow not cattle are

paid for 'tebeletso'. When she attains maturity she is then married for the boy though 'tebeletso' does not necessarily stop others that may be interested. In his experience he has not heard or seen where 'tebeletso' amounts to several head of cattle.

Arising by Ms. Kotelo that 'tebeletso' does not require a girl to be young he says old as he is he does not know this much as he is well experienced in custom. He denies 'tebeletso' can be in the form of many cattle. He says he did say we will marry her to our young child.

Mr. Matsau says questions arising can only be through the court. After several interruptions Ms. Kotelo says there is nothing more to say.

Defence case.

The court has said that the record is to be paginated.

After several months counsel has submitted their heads of argument

saying in view of the fact that heads have been submitted the court was to reach its decision on the basis of the heads.

Facts of the case in so far as marriage is concerned is that 1st respondent's son being interested in the applicant the latter was engaged from her father in loco parentis Patrick Lehloenya. After engagement it had been decided that the late Mokete marry the applicant. As to the form of marriage that the late Mokete and applicant entered into, this is in dispute. Undoubtedly though, a maximum of sixteen head of cattle was paid and applicant's case is that there were 'tebeletso' cattle while 1st respondent's case is that it was 'bohali' cattle. Since there was dispute of fact as to the kind of marriage that was contracted, the court had converted the application into a trial and hence the evidence I have summarised.

From the applicant's evidence, apart from being engaged, it is not clear and there has been no evidence that she agreed to a customary union. However, the document Exh. 'A' reflects some kind customary union for applicant's people are signatories to this but not as consenting parties but as

witnesses. I am not aware that 1st respondent's people have signalled their consent to Exh. 'A' or for that matter signed as witnesses. Instead they have endorsed the first page of the alleged agreement not in their capacities as consenting parties to the 'bohali' or witnesses but as 'bathetisi' or people involved in marriage negotiations and, shockingly, this include the 1st respondent who was, in fact, a contracting party.

I am of the view that 'bathetisi' are distinct from parties who engage in marriage like the in-laws and groom and bride. Applicants witnesses have largely been to the effect that there was no customary marriage but Church marriage and 1st respondent's witnesses testimony can be summarised as saying that while there was Church marriage, there was an attendant Sesotho customary marriage. Credibility of witnesses in this inquiry is of import and so is the law that applies and this court has as a result decided to resolve the dispute by deciding on:-

- (a) Tebeletso and its place in our law.
- (b) Was customary marriage entered into by the applicant and her late

husband before solemnization of the marriage in Church.

- (c) If the answer to 2. above is positive or negative who, in law, is young Taala's tutor and trustee?

As for (a) above Duncan in his *Sotho Law and Custom*, undoubtedly a primary authority on Sesotho Law and Custom, says at p.21 instant betrothals are said to have and occurred occasionally in the old days where a man might pledge his sister or daughter in marriage in which case one or two cattle called *tebeletso* (expectation) were exchanged as a pledge in good faith. It could well be that the intention of the Lehloenya's in accepting the 16 head of cattle was for 'tebeletso' and not marriage. While I agree that some families abide by custom and others don't, unfortunately the Lehloenya's have used a term that is identifiable with Sesotho custom according to which *tebeletso* is payment of one or two cattle for a young girl in expectation of marriage. Some of 1st respondent's witnesses who gave evidence as to what 'tebeletso' is/are mature, responsible people and well versed in Sesotho custom and it would have been unheard of not to believe them on this score.

As for (b) above, since it is common cause that sixteen (16) head of cattle

were paid to the Lehloenya's and since I have rejected the contention that the cattle were paid for 'tebeletso', one could say it follows that the sixteen (16) cattle were paid for bohali: I must however, caution that the fact alone that sixteen (16) head of cattle were paid is not conclusive that there was customary marriage bearing in mind that payment of cattle is not the only requisite or essential of a valid customary marriage.

I go back to Duncan (p.19) who says the essentials of a Sotho marriage are laid down in Laws of Lerotholi II; 34(1) being (a) agreement between the man and woman, their families and (b) payment of part of the bohali. Duncan goes on and say that before the rule was made it had been held in the High Court in **QHOBELA VS. H.C.C. 24/43** that these were the requirements according to custom thought it was not necessary as contended by counsel for the appellant, that the bride, in addition to the above requirements, was to be handed over to the husband's family.

Seymour (Customary Law in Southern Africa - 5th Ed.) says at p.105

essentials of customary marriage are;-

- (i) consent of the bride's guardian
- (ii) consent of the bride
- (iii) payment of bohali
- (iv) the handing over of the bride to the bridegroom.

Seymour p. 108 says 'There is no customary marriage until the girl has been handed over to the bridegroom;' he further says 'the concise statement cannot be enlarged upon in anyway' for it states the correct position. He further says physical consummation is not necessary, so long as the bride has been sent to the family home where the bridegroom lives, as his wife, even if the bridegroom is away at the time though, among the Sotho, if the bride's guardian has slaughtered a beast at the lobola negotiations, the killing signifies his acceptance of the bridegroom as his daughter's husband and consummates the customary marriage, even though the girl is not handed over at the time. To this effect Seymour has quoted Duncan at pp. 19 and 28. As to p. 19, this has been dealt with above - p. 29 has to do with 'tlhabiso' cattle normally two,

the departure of the bride, here 'bekoa' (tender care) by mother-in-law and 'koe' which signifies acceptance into the family. Koe is euphemistic and it could well be that Duncan had poor translators or those who advised him were reluctant to tell him what 'koe' in this context means for it is literal approval of consummation of marriage between the bride and groom by in-laws who slaughter a sheep to effect consummation. Private body parts are not called or named in Sesotho except in anger and substituted names usually mild ones, are used. These corrupt names have always been in common use and make Sesotho unintelligible, sometimes.

Seymour also says these ceremonies are only outward forms having nothing to do with validity of marriages. I agree that they are only manifestations of marriage though their existence in many ways prove that a customary marriage took place. Maqutu in his Contemporary Family Law of Lesotho is not much different except he does not mention the handing over of the bride to the bridegroom. Poulter (Family Law and Litigation in Basotho Society) is to the same effect as Maqutu. Like in any other marriage, common sense dictates that after marriage the bride will in any circumstances be

expected to join her husband to consummate the marriage and as we have seen euphemistically if the marriage is customary the bride will be given koae by her in-laws. It is claimed in this application that the applicant was given koae on account of the marriage being a customary one and I have no doubt in my mind that this transpired though the question is whether the applicant was informed for if she was informed and acceded, it is clear that she approved of customary rites and hence marriage. Although the 1st respondent testified applicant was given koae after custom to signify customary marriage, I am not aware that 1st respondent confirmed the applicant had been shown the koae sheep; in any event applicant has denied a sheep was slaughtered to signify her customary marriage. Of importance is the fact that even if a sheep was slaughtered it was not on the heels of a customary marriage but a civil marriage. As for applicant being taken to her maiden home to have a child, surely this is optional and is practiced by married parties irrespective of the type of marriage as indeed is the wearing of a mourning cloth. From personal experience and most probably custom, a woman married by custom is as soon as possible after marriage ceremony removed from her maiden home to join her husband. Having joined her husband since they are now married, they may decide to go through a civil

ceremony or parents by reason of being Christians may prevail on them to go through a Church ceremony. There is absolutely no sense in a woman going through a customary ceremony and a civilian or Church ceremony while at her maiden home. Even if I am wrong on this score, I must still decide whether the essentials of a customary marriage were fulfilled throughout the entire marriage negotiations, for nowhere is it stated that applicant agreed to be married by custom. On the contrary, she consented to be married in Church as is evidenced by her marriage certificates. Both her late husband and applicant claimed, at the time of their marriage, to be respectively bachelor and spinster. It is of significance that it is claimed 'parents' give their consent; if so, the impression given the marriage officer was that the parties were marrying for the first time. Indeed if the civil marriage was contracted during the subsistence of a customary marriage, parents who, according to the marriage certificate gave their consent (and according to evidence before me parents on either side agreed to the Church marriage) it would have been expected of them to inform the marriage officer that the bride and bridegroom were not spinster and bachelor respectively but that they were previously married, a fact the marriage officer would have endorsed on the marriage certificate.

As for Exh. "A" purporting to be marriage agreement, if 1st respondent and 'Mamatlamukele were contracting parties, it is expected that they would have signed one in his capacity as father of the bridegroom and another in her capacity as mother or guardian of the bride. None have signed in these capacities and while 1st respondent has signed under 'bathethesi' 'Mamatlamule has not signed at all. Sesotho marriage is a public event invariably witnessed by a chief or his representative who imprints his stamp on the document. Chief Patrick Lehloenya was himself a chief or at least a man of great experience in the affairs of the country and I do not agree that he would be party to an undated, unstamped document nor do I conceive how 1st respondent and D.W.1 Mr. Rasekoai could be party to such a slipshod document.

I have viewed Exh. "A" with scepticism amounting to doubt and I have had no option but I reject it.

As for the late Patrick Lehloenya's affidavit, it is part of the proceedings and since the author can no longer be traced I have no reason to reject it and

I take it be admissible evidence.

I come to the conclusion that there was no valid customary marriage between the late Mokete and the applicant and that, on the contrary, the two were married in Church by civil marriage.

To answer (c) above, I have already said that I have found there was no customary marriage between the applicant and her husband. And according to the Administration of Estates Proclamation No 19 of 1935, it would seem irrespective of marriage deceased's estates are determinable by the mode of life the parties led.

Mr. Kotelo (the 1st respondent) has said his family is tribal and governed by Sesotho Law and custom. Against this is the applicant's evidence to the contrary. As to the parties' way of life, I consider that the onus was on the 1st respondent to discharge this on a balance of probability. As it has turned out, it has been 1st respondent word against that of the applicant and I cannot say that the onus was discharged. From the evidence, it has not appeared to me

that applicant's family leads a tribal lifestyle but that they are knee-deep in western ways. If their habits were tribal, one would have expected Lehloenya's to have slaughtered a beast (tlhabiso) in acknowledgement of payment of the first ten (10) head of cattle. (see **Poulter; Family Law and Litigation in Basotho Society pp. 118 - 121**) And as to the contention that there was customary marriage which I have rejected, where there is customary marriage, this is the only ceremony which parents on either side attend having no interest in subsequent civil marriage or ceremony which is invariably confined to the bride and groom.

Undoubtedly, 1st respondent's lifestyle appears more Westernised than tribal fitting, as it were, into the brocard 'Westernised African Gentlemen'. Not without cause for from the evidence the 1st respondent is a retired civil servant and former Registrar of this court. High Commissioner and Resident Ambassador and was also a former Minister of Foreign Affairs while the applicant has a certificate in electrical engineering and is presently pursuing a degree in economics.

Admittedly style of life has to do with succession according to the Administration of Estates Proclamation No.19 of 1955. And according to Maqutu in his Contemporary Family Law of Lesotho - 1st Ed. p. 171, the Proclamation 'provides that only estates of Africans who have abandoned the African way of life and adopted a European one are to be administered in terms of the common law' while other estates are to be administered according to the indigenous law. According to the learned author, the question of the individual's way of life is inquired into only after his death. Maqutu has also quoted from Khatala's case (Khatala H.C.T.L.R.97, 1963-66) in terms of which notwithstanding the fact that the widow had been married in community of property (civil law or received law) the court had ordered that the whole estate of the deceased be administered according to Basotho law.

Some would say we are here concerned with guardianship and trusteeship having nothing to do with succession. Well, that may be so though in the instant application administration of an estate is in issue and it would be necessary according to the Proclamation to decide the lifestyle of the parties and depending on this to say which law applies that is to say, the indigenous

law or common law. On this aspect I am not persuaded that the parties lead customary lifestyles but I find they live a European one and are Westernised.

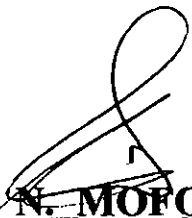
According to the judgement in **Van Rooyen v. Werner (1892) 9 sc. 425 at 429**, on the death of either parent the other, in the ordinary course events, becomes the sole guardian of the minor children of the marriage and it would seem the law can be stated as simply that if the wife dies first the husband remains the guardian and custodian of the minor children of the marriage; conversely, if the husband dies first, the wife becomes the sole guardian and custodian of the minor children. And judgement in **van Rij N.O. v. Employer's Liability Assurance Corporation Ltd., 1964 (4) SA 737 (WLD)** it was held even where there is a guardian available the court can, for good cause, appoint another as curator dative or bonis to administer all or a particular part of the property of the minor; and in **Ex Parte Misselbrook NO. In re: Estate Misselbrook, 1961(4) SA 382 (D., CLD)** it was held functions of natural guardians are to administer the minor's estate, not to use them up but to invest surplus funds and use the income for the minor's maintenance and

education though, when the need arises, they may be authorised to use the capital in their hands for maintenance and education.

In **B. v. E., 1992(3) SA 438(T)** the court found the main consideration in the application was what was best in the interest of the child and further, that all the facts and circumstances had to be considered in order to determine what was best in the interest of the child.

This court considers that the applicant as natural guardian of the minor child Taala is best suited to administer the minor's affairs during the latter's minority. The court also finds there is no good cause to appoint any other guardian or trustee other than the applicant and further, having considered all the facts and circumstances pertaining to this application finds it in the best interests of the child Taala that the applicant be the sole guardian and trustee of the said minor child Taala.

Accordingly, the application is granted as prayed. As this is a family matter, there will be no order as to costs.



G. N. MOFOLO
JUDGE

For the Applicant : Mrs. Kotelo

For the 1st Respondent : Mr. Matsau