IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CIV) NO. 21/08

In the matter between:

MOPELI MOHALE	**FIRST APPELLANT**
'MAMOPELI MOHALE	**SECOND APPELLANT**

AND

TLALI MOHALE	**FIRST RESPONDENT**
ATTORNEY-GENERAL	**SECOND RESPONDENT**

CORAM: RAMODIBEDI, P
MELUNSKY, JA
SCOTT, JA

Heard : 30 March 2009
Delivered : 9 April 2009

SUMMARY

Declaration of rights – First appellant applying for a declaratory order that he was the legitimate son of the late Chief Nkhahle Mohale – The application dismissed by the High Court – Delay – The appellants instituting action for the same relief after a delay of 22 years after the High Court's order – The High Court wrongly dismissing the appellants' claim on the ground of delay without giving them an opportunity to be heard on the issue and to apply for condonation – The appellants, however, failing to show the Court of Appeal that the delay was reasonable and that, therefore, it fell to be condoned. – Appeal accordingly dismissed with costs.

JUDGMENT

RAMODIBEDI, P

[1] This appeal essentially seeks to reopen a long standing claim by the first appellant that he is a legitimate son of the late Chief Nkhahle Mohale ("the Chief"). It is convenient at the outset to note that on 23 March 1982, in 'Mamonica Mohale v Mopeli Mohale CIV/APN/109/81, the High Court (Rooney J) declared Chieftainess 'Mamonica Mohale ("Mamonica") the sole wife of the Chief. The first appellant was the respondent in that case. More importantly, it is crucial to bear in mind the following remarks of the High Court in that case:-

> "The respondent (now first appellant), who claims to be the eldest son and heir of the Chief by a subsequent marriage, opposes this application and prays that this Court should declare him the legitimate child of Chief Nkhahle Mohale and his wife "Mamopeli Mohale" (now second appellant).

[2] The facts in the present case established that on 21 January 1951, the Chief married 'Mamonica by civil rites. They had no male issue. In or about 1958, and during the subsistence of this civil marriage, the Chief "married" the

first appellant's mother, namely, the second appellant by customary rites. The purpose was admittedly to raise a male issue who would succeed the Chief to the chieftainship of the area in question.

[3] In these circumstances, the High Court in CIV/APN/109/81 declared the customary marriage between the Chief and the first appellant's mother (second appellant) null and void *ab initio* by reason of the fact that it followed a civil marriage between the Chief and 'Mamonica. Needless to say that, as Rooney J correctly held, in law such a marriage produces none of the legal consequences of a marriage. On the contrary, children born of a void marriage, as opposed to a putative marriage, are in law illegitimate. See, for example, **Sechele v Sechele 1985-1989 LAC 297** at 300 – 301.

[4] Significantly, no appeal was filed against the High Court's declaratory order as fully set out above.

[5] It is common cause between the parties that from 1982 to 1992, a period spanning 10 years, the Chief was suspended from office. During that period 'Mamonica took over the office. It is not disputed that the appellants did not challenge her throughout that period. No explanation has been offered for this inaction.

[6] It is further common cause that the Chief was reinstated in his office in 1992. Once again, the appellants did nothing until after the Chief's death. He died on 11 February 1999.

[7] In CIV/APN/383/00, the first appellant once again launched an application on notice of motion for an order

declaring him to be a legitimate son of the Chief. He, however, subsequently withdrew the application, tendering costs in the process.

[8] On 9 November 2004, a period spanning 22 years after the High Court's declaratory order referred to in paragraph [1] above, the appellants issued summons for a declaration that the first appellant was a legitimate son of the late Chief in terms of s 10 (1) of the Chieftainship Act 1968. It is instructive to observe at the outset that subsection 10 of the Act provides in no uncertain terms that "a reference to a son of a person is a reference to a legitimate son of that person."

[9] The parties are on common ground that the respondents raised three defences in their plea based on (1) *res judicata,* (2) that the High Court was *functus officio*,

having pronounced itself on the matter in CIV/APN/109/81 and (3) unreasonable delay since the High Court judgment of 23 March 1982.

[10] In her judgment, however, the learned Judge *a quo* did not refer to the point of delay when she said the following:-

> "Although the plea of *res judicata* was not raised by way of a special plea, the parties through their respective counsel approached this Court, sought and were granted permission to address it on those points of law first. The Court directed them to prepare written submissions and file their heads of argument in that regard."

The parties are on common ground that the "points of law" referred to by the court *a quo* were *res judicata* and *functus officio*. These were the only issues which the appellants' counsel were called upon to address.

[11] It was not seriously disputed in argument on the respondents' behalf in this Court that the appellants were not given an opportunity to address the court *a quo* on the

question of delay. This notwithstanding, the court *a quo* decided the matter against the appellants purely on this question. I have no hesitation in coming to the conclusion that the learned Judge *a quo* was wrong in adopting this approach. She was not entitled to adjudicate on an issue not referred to her. She flouted the basic principle of *audi alteram partem* rule. The appellants were clearly prejudiced in the process. As will be demonstrated shortly, this error on the part of the court *a quo* does not, however, dispose of the matter in the particular circumstances of this case.

[12] We have now been told by the appellants' counsel what the reason for condonation of the delay in question would have been if they had been given an opportunity to address the issue in the court *a quo*. Basically, it is the appellants' contention that they could not institute any

action on the issue of the first appellant's legitimacy as long as the Chief was alive. They contend that legitimacy and chieftainship go together. Hence they awaited the Chief's demise before taking further action. This contention is, in my view, untenable. There is no acceptable explanation why legitimacy and chieftainship should be tied together. The conclusion is inescapable, in my view, that the appellants' explanation is itself unreasonable.

[13] It follows from the foregoing considerations that the appellants do not have an acceptable explanation for the inordinate delay in the matter. In the meantime, the parties are on common ground that the first respondent had already been gazetted as the Principal Chief of the area concerned. In this regard it is convenient to repeat

the following remarks of this Court in **Mohale v Mahao 2005 – 2006 LAC 101** at 111:-

> "[27] It remains then to say that, as a matter of policy, it would be wrong for this court to allow the appellant to effectively open a can of worms, so to speak, after 64 years since the Paramount Chief's decision in question. Although each case must admittedly depend on its own facts, this would in my view most probably lead to confusion and uncertainties over similar boundaries throughout the country with disastrous results. It would undermine law and order and to prevent all of these is the fundamental function of this Court. The appellant's inordinate delay in challenging the Paramount Chief's decision in these circumstances was rightly held to adversely affect any rights he might have had."

Although that was a case concerning a decision in a boundary dispute, the principles laid down in that case apply with equal force to a claim for legitimacy and/or chieftainship as in *casu.*

[14] Weighing all of the foregoing considerations, it follows that the appeal cannot succeed. It is accordingly dismissed with costs.

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

D.G. SCOTT
JUSTICE OF APPEAL

For Appellants : Adv R. Thoahlane
(with him Adv R.A. Sepiriti)

For First Respondent: Adv L.A. Mofilikoane
(with him Mr. M. Ntlhoki).