

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.41/2015

In the matter between

MAKOAE MASUPHA

APPELLANT

and

MOLEFI LIBE MASUPHA

RESPONDENT

CORAM : LOUW, AJA
CHINHENGO, AJA
MAJARA, CJ

HEARD : 12 APRIL 2016

DELIVERED : 29 APRIL 2016

SUMMARY

Chieftainship - succession to in terms of Part III of Chieftainship Act, 1968 - effect of Chieftainship (succession

to the office of Chief) Notice in terms of section 10(6) of Chieftainship Act - may not simply be ignored.

JUDGMENT

LOUW, AJA

[1] This is an appeal against the judgment delivered and orders made by Makara, J on 27 April 2015, in a matter which came on appeal to the High Court from a decision of the Magistrate's Court for the district of Berea.

[2] The dispute before the Magistrate's Court concerned conflicting claims of succession to the chieftainship of Sefikeng Ha Fako in the district of Berea (the chieftainship). Succession to the office of chief is governed by the provisions of Part III of the Chieftainship Act, 22 of 1968. Sec 10 is relevant to these proceedings and reads as follows:

“10. (1) In this section a reference to a son of a person is a reference to a legitimate son of that person.

(2) When an office of Chief becomes vacant, the firstborn or only son of the first or only marriage of the Chief succeeds to that office, and so, in descending order,

that person succeeds to the office who is the first-born or only son of the first or only marriage of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection.

(3) If when an office of Chief becomes vacant there is no person who succeeds under the preceding subsection, the first-born or only son of the marriage of the Chief that took place next in order of time succeeds to that office, and so, in descending order of the seniority of marriages according to the customary law, that person succeeds to the office who is the first-born or only son of the senior marriage of the Chief or of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection.

(4) The only surviving wife of a person, or the surviving wife of a person who, but for his death or incapacity, would have succeeded to an office of Chief succeeds to that office when it is vacant, and she has no male issue.

(5) If when an office of Chief becomes vacant there is no person who succeeds under the three preceding subsections, the only surviving wife of the Chief, or the surviving wife of the Chief whom he married earliest, succeeds to that office of Chief, and when that office thereafter again becomes vacant the eldest legitimate surviving brother of the male Chief who held the office last before the woman, succeeds to that office, or failing such an eldest brother, the eldest surviving uncle of that male Chief in legitimate ascent, and so in ascending order according to the customary law.

(6) A person is incapable of succeeding to an office of Chief if he is not a citizen of Lesotho.

(7) No succession to an office of Chief in terms of this section or section 11 shall have any effect unless and until the King acting in accordance with the advice of the Minister has approved thereof.

(8) If the King acting in accordance with the advice of the Minister should refuse to approve of the succession to an office of Chief of the first person who has the right to

succeed, the person next in order of prior right shall have the right to succeed.”

[3] The appellant (Makoae) was the fourth of four plaintiffs who instituted an action in the magistrate’s court. They claimed to be the legitimate sons of the late Chief Mojela Masupha who died in 1987 and thus to be entitled to the chieftainship in ‘descending order’. The first three plaintiffs withdrew their claims at the commencement of oral evidence before the Magistrate’s court and Makoae remained as the sole plaintiff.

[4] The respondent Molefi Libe, is the son of the late Libe Masupha who was the younger brother of the late chief Mojela Masupha. At the time of the institution of the action, the respondent had already set in motion proceedings to become the holder of the chieftainship.

[5] Makoae as remaining plaintiff, sought orders declaring that Molefi Libe was not entitled to succeed to the chieftainship and that he, Makoae was entitled to succeed to the chieftainship.

[6] The respondent filed both a special plea wherein he raised a number of *in limine* defences and, finally, a plea to the merits, in August 2001.

[7] The trial in the magistrate's court commenced on 8 July 2009, almost 8 years after the close of pleadings in the matter. It appears from the record that the matter had initially proceeded before another magistrate and then commenced de novo before the magistrate who ultimately found in favour of Makoae. Makoae's *locus standi* to proceed with the action while his older brothers who had withdrawn, were still alive was challenged at the commencement of the proceedings but the magistrate ruled in his favour and dismissed the challenge.

[8] This Court in **Masupha and Anor v Masupha LAC (2005-2006)** 11, on 12 April 2001 upheld an order made in the High Court declaring that there was never any valid marriage between the defendant's mother and (the late Chief Mojela). Molefi Libe was the plaintiff in that matter. It is not clear from the report who the defendant was, but we were told from the bar that it was the erstwhile first plaintiff in this matter, Maama Masupha. This is

presumably why Maama withdrew from the action in this matter. During the course of the judgment, Ramodibedi, JA stated that the evidence presented in the High Court in that case was to the effect that the late chief Mojela had only two wives namely, the first wife 'Mankata who acted as chief after his death and 'Mahlomelang (alias 'Mankhololi) and that the late chief Mojela had no male issue from these two wives and that Molefi Libe who was the respondent in the appeal before this Court in the earlier matter, had a direct and substantial interest in that matter because he was the son of the younger brother of the late chief Mojela. Makoae and his mother were not parties to the proceedings in that case and it is trite that any findings and order made therein are not binding on Makoae and his mother.

[9] Makoae presented the evidence of eight witnesses before the magistrate. Molefi Libe was the only witness who testified on his behalf.

[10] It appears from the evidence that after chief Mojela died in 1987, one of his wives, 'Mankata acted as

chieftainness until her death in 1995, whereafter one Masira Masupha acted as the chief.

[11] The principal challenge to Makoe's entitlement to succeed to the chieftainship was founded on the contention that his mother 'Mamakoe was not married to the late chief Mojela. On the basis of the evidence presented before her, the magistrate concluded that the appellant's mother 'Mamakoe had been married to the late chief Mojela and that Makoe was the rightful successor to the chieftainship and that Molefi Libe, being the son of a younger brother of the late chief Mojela ranked behind the appellant and therefore had no right to succeed to the chieftainship.

[12] During the course of his evidence before the magistrate, Molefi Libe handed in as exhibit D1, a Government Gazette containing Government Notice N0 37 of 2001, being a Chieftainship (Succession to the office of Chief) Notice, 2001, which reads as follows:

"I, King Letsie III, pursuant to section 10 (7) of the Chieftainship Act of 1968 and acting in accordance with the advice of the Minister of Local Government approve of

the succession to the office of chief by the person whose names appear in the schedule below.”

[13] Molefi Libe’s name appears in the schedule which reflects that his Majesty King Letsie III has approved of his succession to the position of chief of the Sefikeng area in the Berea district.

[14] The notice was issued in terms of section 10 (7) (as amended) of the Chieftainship Act of 1968 which provides:

“10 (7) No succession to the office of Chief in terms of this section or section 11 shall have any effect unless and until the King acting in accordance with the advice of the Minister has approved thereof”

[15] It is clear that the approval of the King is an indispensable part of the succession to the position of Chief under section 10. This is clear from the wording of section 10 (8) which provides that

“(8) If the King acting in accordance with the advice of the Minister should refuse to approve of the succession to an office of Chief of the first person

who has the right to succeed, the person next in order of prior right shall have the right to succeed.”

[16] The provisions of section 10 (8) shows that the King may refuse to approve of the succession of a person who has the first right to succession under the provisions of section 10 (2), 10 (3), 10 (4) or 10 (5). Therefore, a person who is first in line does not automatically succeed. To succeed to the chieftainship, even if you are the first in line in terms of the provisions of the Act, you still require the approval of the King, who may refuse to give his approval.

[17] The learned judge a quo, correctly in my view, held that despite the fact that on the evidence presented before the magistrate, Makoae had the first right to succeed as chief, the approval by the King of the succession to chief of Molefi Libe cannot simply be ignored and thereby rendered nugatory. As long as the approval by the King of Molefi Libe’s succession to the chieftainship is not set aside on review, it stands and it may not be ignored, even if it is considered that the approval was incorrectly granted. ***(Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) 222 SCA at 242 AC,***

which was referred to with approval in this Court in ***Mothobi and Anor v The Crown LAC (2009-2010) 465 at 472 B-H***).

[18] It follows that the appeal cannot succeed and must be dismissed. The order made by the High Court must for the sake of clarity be amended.

[19] The following orders are made:

1. The appeal is dismissed with costs.
2. The judgment and order of the court a quo is replaced with the following order:

“The order made by magistrate is set aside and it is declared that while Government Notice NO 37 of 2001 (exhibit D1) remains in force, the appellant, Makoae Masupha is not entitled to succeed to the area chieftainship of Sefikeng Ha Fako in the district of Berea.”

W.J LOUW
ACTING JUSTICE OF APPEAL

I agree:

M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:

N MAJARA
CHIEF JUSTICE

For Appellant : Adv Q Letsika

For Respondent : Phoofolo Chambers