IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 7B/2016

In the matter between

LEPOQO DAVID MASUPHA **APPELLANT**

And

SEMPE GABASHEANE MASUPHA	**1ST RESPONDENT**
SEEMOLA MATUMAHOLE GABASHEANE MASUPHA	**2ND RESPONDENT**
CHIEF OF HA 'MAMATHE	**3RD RESPONDENT**
PRINCIPAL CHIEF OF HA 'MAMATHE THUPA-BUKU AND JOROTANE	**4TH RESPONDENT**
DISTRICT SECRETARY TEYATEYANENG	**5TH RESPONDENT**
DIRECTOR OF CHIEFTAINSHIP AFFAIRS	**6TH RESPONDENT**
MINISTER OF LOCAL GOVERNMENT	**7TH RESPONDENT**
THE ATTORNEY-GENERAL	**8TH RESPONDENT**

CORAM: FARLAM, AP

DR MUSONDA, AJA

GRIESEL, AJA

HEARD: 12 OCTOBER, 2016

DELIVERED: 28 OCTOBER, 2016

SUMMARY

Chieftainship – section 10 (1) of Chieftainship Act 22 of 1968 – meaning of word 'legitimate'.

JUDGMENT

FARLAM AP:

[1] The appellant in this case appeals, with the leave of the court *a quo*, against its finding that the present respondent, Sempe Gabashane Masupha, is the rightful successor to the office of Principal Chief of Ha 'Mamathe, Thupa-Kubu and Jordane. In making that finding the judge in the court *a quo*, **Moiloa J**, sitting in the High Court, upheld the appeal brought by the respondent against a decision of the subordinate court of Berea, which had held that the present appellant, Lepoqo David Masupha (alias Lesenyeho), was the rightful successor to the said office.

[2] In giving leave the learned judge framed the question of law for determination by this court as follows:

Did the court err in finding that because:

'(a)There was a valid civil marriage between David Masupha and Rachael contracted by them on 1 February 1969 in terms of Proclamation 7 of 1911 [the Marriage Proclamation]; and

(b) *there was a purported subsequent customary union between David and Appellant's mother, during the subsistence of the marriage in (a) above and invalid in terms of the received law, therefore Appellant did not satisfy the requirements of section 10 of the Chieftainship Act 22 of 1968 to succeed the late Chieftainess 'Masenate 'Mampota Rachael Masupha in the office of the Principal Chief of Ha 'Mamathe, Thupa-Kubu and Jordane.'*

[3] The question of law which this Court has to answer is accordingly whether the appellant's claim to be the rightful successor to the office had to be dismissed because his father was still married by civil rites to the appellant's stepmother when he purportedly entered into a customary union with the appellant's mother.

[4] In order to answer the question of law it is necessary to refer to section 18 of the Marriage Proclamation 1911, which has since been re-enacted as section 29 (1) of the Marriage Act 10 of 1974, and section 10 (1) to (4) of the Chieftainship Act 22 of 1968.

Section 18 of the Marriage Proclamation 1911 reads as follows:

'18. No person may marry who has previously been married to any other person still living unless such previous marriage has been dissolved or annulled by the sentence of a competent Court of law.'

Section 10 (1) to (4) of the Chieftainship Act reads:

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 first-born 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) If when an office of Chief becomes vacant there is no person who succeeds under the two preceding subsections, the only 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.'

[5] The appellant's father had two brothers, the late Koali Gabashane and the respondent. The respondent based his claim to his brother's office on the fact that his late brother had no son by his wife, Rachael, and the fact, so he alleged, that his nephew, the appellant, was illegitimate.

[6] The appellant does not deny that by the applicable rules of family law, he is illegitimate but he contends that as chieftainship is an essentially customary law institution questions arising under section 10 must be decided under the customary law which permits polygamous marriages.

[7] He relies very strongly on a dictum by **Mohamed P** in **Majara v Majara** LAC (1990-1994) 130 at 133 H to I and 134 I to 135 D, which reads as follows:'

> *'In the first place even if it were to be assumed that the customary law marriage which Chief Leshoboro contracted with Maqhobela in 1964 was invalid (because of the existence of any pre-existing valid marriage with Mamabela by civil law) it does not follow that Qhobela, the eldest son of the customary law marriage in 1964, has no claim to the disputed chieftainship.'*

> '*Although section 10 of the Act provides that a reference in the section to a son of a person is a reference to a legitimate son, it does not follow that Qhobela is not for the purposes of the section a legitimate son with a claim to succession in terms of*

section 10. Qhobela is the issue of a marriage between chief Leshoboro and Maqhobela in accordance with customary law, which permits and contemplates polygamous marriages properly conducted according to customary law. Chieftainship is itself an institution of customary law. For the purposes of succession to chieftainship "the first born or only son of a chief, could very arguably include a son of a customary marriage properly concluded according to customary rights even if that customary marriage might otherwise be invalid for other purposes on the ground that at the time when it was contracted there was a pre-existing valid marriage by civil law between one of the parties and another person.'

[8] The appellant's counsel conceded that these remarks were obiter but he contended that they have persuasive authority. Counsel contended further that this dictum is, as he put it, '*unassailable as indicating that a choice of law, in a matter of internal conflicts of law, needs to be made'* and that the choice of law indicated in these dicta is beyond reproach.

[9] In support of this submission he referred to a line of authority in the High Court, which without especially adverting to the fact that it was making a choice of law, followed the approach set out in the dictum. The cases to which he referred were **Tsosane v Tsosane** 1971-1973 LLR 1, **Ramafole v Ramafole** 1978 LLR 261 and **Malebanye v Chabaseoele** 1981 (2) LLR 437. They all concern the establishment by a husband who has married more than once of separate '*houses'* (i.e. estates) for each of his wives and their children. In all three cases the husband had married his first wife by custom and a later wife by civil rites. For matrimonial property purposes and thereafter when disputes arise after the

husband's death regarding the succession to his property the courts have recognised '*the existence side by side of a civil marriage and a customary union and that a "second house" was created by the civil marriage.'* (Per **Jacobs CJ** in **Tsosane v Tsosane,** *supra*, at 2 E-F.)

[10] Counsel for the appellant also submitted that support for **Mohamed P**'s approach can be found in **Seedat's Executors v The Master (Natal)** 1917 AD 302. This was a dispute which arose under Natal Act 35 of 1904, which dealt with the succession duty levied on deceased estates. In all cases where the successors were lineal descendants of the testator the duty was 1 percent; where the successor was a stranger in blood the duty was five per cent and a successor who was a surviving spouse was exempt from paying duty. It was common cause that by 'surviving spouse' was meant a survivor of a marriage recognised by South African law as valid and that the expression *'lineal descendant'* as applied to children meant children regarded by South African law as legitimate. The deceased, while domiciled in India, had married his first wife by Islamic rites and had four children, all born in India. He then emigrated to Natal where he obtained a certificate of domicile. It was held with regard to the wife that the validity of the marriage (which was valid in India, although potentially polygamous, but invalid by South African law) had to be determined under South African law, with the result that it was held that she was not exempt from the payment of succession duty.

The children were in a different position. Though the marriage of their parents was regarded as invalid under South African law, the question as to whether they were legitimate had to be determined by the law of their birth place, namely India, which recognised them as legitimate. Reference was made to a case decided in the Court of Session in Scotland, **Fenton v Livingstone** 3 Macqueen 497, in which it was held that a man born in England, where he was to be regarded as legitimate, was to be regarded also as legitimate in Scotland even though his parents' marriage was regarded by the law of Scotland as being incestuous. One of the Scots judges, **Lord Ivory**, was quoted as saying, *'what is in issue is not the validity of the marriage, but the status of the defender as a legitimate child.'*

[11] Counsel for the appellant argued that this was an example of a case where a marriage was valid in terms of one system and invalid in terms of another and the decision that had to be made was which system was applicable. Counsel argued further that here we have a similar situation: the received law does not recognise the customary marriage as valid but the customary law does. The appellant, he submitted, *'is merely seeking recognition of his status under the law of the land (customary law) and is not to blame for the resultant conflicts situation created by his late parents.'*

[12] Counsel went on to submit that section 10 of the Chieftainship Act *'itself clearly points to customary law as the applicable law in disputes of succession to the office of chieftainship.... The fact that section 10 refers to polygamous marriages is a clear endorsement, by necessary implication, of the applicability of the customary law. But it is express that customary law is applicable under section 10 (3) and 10 (4).'*

[13] Counsel also argued that it would be against the spirit and purport of the Constitution, which recognises both the received law and the customary law, 'to recognise', as he put it, *'the alleged superiority of the civil rites marriage over the customary rites marriage.'*

[14] Counsel for the respondent submitted that the dictum in **Majara's** case on which the appellant relied only applied to putative marriages and that as it was clear that the *'marriage'* between the appellant's parents was not a putative one they were not applicable in this case. I am satisfied that this submission cannot be accepted and that the language used by **Mahomed P** cannot be restricted to cases where the claimant to a vacant chieftainship was born of a putative marriage.

[15] Counsel submitted further that the proposition that a marriage can be void for one purpose and valid for another is a contradiction in terms because a void marriage is one that is a

nullity from the beginning. Counsel referred to this Court's decision in **Mokhothu v Manyaapelo** LAC (1970-1979) 200, in which Smit JA, with the concurrence of **Maisels P** and **Ogilvie Thompson JA,** held that a customary marriage that was entered into during the subsistence of a civil marriage was null and void. This is because section 18 of the Marriage Proclamation 1911 and the section which replaced it, section 29 (1) of the Marriage Act 1974, commit people who marry under the Proclamation and the Act to monogamy. The resultant invalidity of a subsequent customary marriage arises not because a civil marriage is '*superior*' to a customary marriage but because of the parties' choice to enter into a civil and not a customary marriage.

[16] Counsel for the respondent denied that it can be said that section 10 of the Chieftainship Act clearly points to the customary law as the applicable law in disputes regarding succession to the office of Chieftainship. The section, he contended, does not preclude chiefs from entering into civil marriages. On the contrary section 10 (2) recognizes the possibility of a chief getting married monogamously, hence its reference to *'the first born or only son of the first or only marriage of the chief.'*

[17] In my view the submissions made on behalf of the appellant cannot be upheld and the dictum of **Mohamed P** in the **Majara** case is not correct. I agree with the comment made by **Ramodibedi JA** (as he then was) in Leoma v Leoma and Another LAC (2000-2004) 253 at 256 H-J, viz:

> *'It is to be regretted that this court in* ***Majara v Majara and Others (supra)*** *was never referred to any authorities such as* ***Mokhothu v Manyaapelo (supra)*** *and, indeed, none were cited by the court in its judgment. The court's reluctance to decide the issue at hand and to rely on the existing law, including a judgment of this court, stems from the fact that the court was obviously not aware of this judgment in* ***Mokhothu v Manyaapelo (supra)***'

[18] It is to be borne in mind that the question for decision in this case is what did the legislature intend when it enacted that '*a reference to a son of a person is a reference to a legitimate son of that person'.* Legitimacy is a well known concept from the law of persons where its meaning is clear. If Parliament had not meant it to bear its ordinary meaning but to apply to partial legitimacy (legitimate for one purpose but not for another) or hypothetical legitimacy (referring to someone whose parents were not validly married and did not even think they were but who would have been legitimate if their marriage had not be invalidated by section 18 of the Marriage Proclamation or section 29 (1) of the Marriage Act), then I would have expected that the framers of the Act would have made this clear.

[19] I do not agree with counsel for the appellant's contention that the appellant is merely seeking recognition of his status under the law of the land (customary law). The expression 'the law of the land' is more aptly to be used to refer to statutes which straddle, as it were, the divide between the received law and

the customary law and have an impact on both. Section 18 of the Marriage Proclamation and section 29 (1) of the Marriage Act provide an example of this. See, e.g., **Makata v Makata** LAC (1980-1984) 198 at 200J-2001A, where **Goldin JA**, in discussing section 29 (1) said:

> '*while, in my respectful view, it has been rightly decided that a customary marriage by a husband while still married to another woman by civil rites is void ab initio, the position is equally, if not more, clear concerning a civil rites marriage during the subsistence of a customary marriage . The latter situation is expressly prohibited by sec 29 (1).'*

[20] It must follow that it is not correct to say that a man (like Chief David) who was married by civil rites could validly under customary law marry another woman by customary rites. Such a '*marriage'* would be void not only under the received law but under the statutory law of the land, with the result it would not be correct to say that it was valid under customary law.

[21] I am also not satisfied that the cases on separate 'houses' referred to in para [9] above assist the appellant. Although they say that '*marriages*' can exist side by side, clearly for matrimonial property purposes and succession, they do not go so far as to say that children born of the second marriages are legitimate. (Whether these cases can survive this Court's decision in **Makata v Makata**, *supra*, was not debated before us and need not be decided in this case.)

[22] I also do not think that the **Seedat** case assists the appellant. The children in that case were not legitimate for one purpose and illegitimate for another. No supposed doctrine of partial or hypothetical legitimacy applied to them. The simple fact was that they were legitimate because their status was regulated by the law of India, in terms of which they were legitimate. That conclusion cannot be transposed to the facts of this case because as I have endeavoured to show the appellant's status is governed by section 18 of the Marriage Proclamation, as interpreted by this Court in the decision of **Makata**, supra.

[23] I am also of the opinion that it is not correct that section 10 of the Chieftainship Act clearly indicates that the customary law is to be looked to to ascertain the meaning of the word 'legitimate' in section 10 (1). The references to polygamous marriages later in the section were clearly inserted because Parliament appreciated that many of the chiefs whose successors were to be identified by applying the rules in the section might well be parties to polygamous marriages.

[24] In my view the appeal must be dismissed with costs and it is so ordered.

I.G. FARLAM
ACTING PRESIDENT

I agree:

DR P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

B.M. GRIESEL
ACTING JUSTICE OF APPEAL

For the Appellant: Adv M.E. Teele KC

For the Respondents: Adv K.K. Mohau KC

assisted by Adv T Khatala