

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C of A (CIV) 23/2022
CIV/APN/70/2021**

In the matter between: -

THABO LETŠOLO

APPELLANT

AND

‘MALEBONA LETŠOLO (NEE TIEHO)

FIRST

RESPONDENT

OFFICER COMMANDING MOHALE

POLICE STATION

SECOND

RESPONDENT

MASTER OF THE HIGH COURT

THIRD RESPONDENT

ATTORNEY GENERAL

FOURTH

RESPONDENT

CORAM:

K. E. MOSITO P

J VAN DER WESTHUIZEN AJA

N T MTSHIYA AJA

HEARD:

23 OCTOBER 2022

DELIVERED:

11 NOVEMBER 2022

SUMMARY

Application for an heirship declaratory order and other incidental relieves – Deceased allottee marrying first wife without payment of bohali – Entitlement of children of the marriage to inherit landed property- Second wife wishing to inherit both the estate of the first wife and hers – Land Act, 2020 applicable.

Appeal succeeds with costs.

JUDGMENT

K. E. MOSITO P

Background

[1] This is an appeal against the judgment of the High Court (Mahase J). The dispute orbits around the issue of inheritance and heirship.

[2] The Applicant, now the first respondent, approached the High Court seeking an order declaring her heir to the property that used to belong to the late Pali Letšolo and herself. She also prayed for some interdictory relief against the appellant.

Facts

(3) The appellant is the first son born from the deceased Pali Letšolo and 'Mampolokeng Letšolo. Their other children were girls and are now all married. His parents had a matrimonial dispute culminating in her mother fleeing to her maiden home. In 1987, the said Pali approached the Local Court, allegedly for divorce. Instead of granting the divorce, the Local Court granted an annulment of the marriage between the appellant's parents. The reason for the annulment was that no cattle had been as bohali for the marriage of the appellant's marriage. Suffice to say that the said Court went on to pronounce that the children born of the marriage between the appellant's parents were born out of wedlock, by implication, illegitimate.

[4] It is also a common cause that the appellant's parents had built a residential house at Likalaneng in the district of Maseru. 'Mampolokeng passed on in 1987, leaving her minor children with their father, Pali Letšolo. On 8 July 1987, Pali Letšolo married the first respondent by civil rites and together brought

up the said children. It is also a common cause that Pali Letšolo built a residential house for the first respondent at Koalabata in the district of Maseru. The said Pali passed on 6 January 2021.

[5] After Pali's demise, the family convened to deliberate on issues of inheritance and the reporting of the estate to the Master of the High Court. At the family meeting, some members suggested the appellant, while others suggested the name of the first respondent for heirship.

Issues for determination

[6] The issues for determination in this appeal are:

- (a) Whether the first respondent is the proper person to be declared heiress to the estate of the late Pali Letšolo and if so.
- (b) Whether the appellant should be excluded from the heirship.
- (c) Whether the first respondent is entitled to be declared heiress to the landed properties of the late Pali Letšolo at both Koalabata and Likalaneng.

[7] Events have overtaken the other two issues. They are whether there has been compliance with Rule 8(19) of the High Court Rules 1980 and the provision of the reasons for judgment by the Court *a quo*. These last issues will not be considered as they were subsequently complied with.

The law

[8] To wit, Lesotho operates a legal dualism: Sesotho (customary) law and the received law (Roman-Dutch law of the Cape). According to section 11(1) of **Laws of Lerotholi Part 1**, it is the first-born male child of the first wife who becomes the deceased's, customary heir. The law relating to customary heir explicitly addresses the question of the heir as the first-born son of the first wife because the Sesotho customary law recognises polygamy. Thus, in **Khatala vs Khatala**¹, it was held that where there is an heir who has reached the age of majority, then the widow cannot have any better rights than the heir.

[9] I must hasten to point out that, in terms of section 154 of the Constitution of Lesotho, the term "customary law" means the customary law of Lesotho for the time being in force subject to any modification or other provision made in respect thereof by any Act of Parliament. An Act of Parliament applying to the present appeal and modifying the customary law of inheritance and heirship is the **Land Act 2010**. This is an Act which repeals and replaces the law relating to land, provides for the grant of titles to land, the conversion of titles to land, the better securing of titles to land, the administration of land etc., and for connected purposes.

[10] Section 3 of the Act provides that, on and after the commencement of this Act, notwithstanding any other written law to the contrary, except the Constitution of

¹ Khatala vs Khatala 1963-66 HCTLR 97.

Lesotho 1993, this Act shall apply to all land in Lesotho. The Act goes on to provide that:

Presumption of joint title in marriages

10. (1) Where persons are married in a community of property either under civil, customary, or any other law and irrespective of the date on which the marriage was entered into, any title to immovable property allocated to or acquired by any one of them shall be deemed to be allocated to or acquired by both partners, and any title to such property shall be held jointly by both.

(2) Subsection (1) shall apply in the same manner in the case of polygamous marriages as if each household was a monogamous marriage.

...

[11] Another issue is whether the Local Court has jurisdiction to annul a customary marriage. Section 118 of the Constitution provides that the judicial power is vested in the courts of Lesotho, which inter alia consist of such tribunals exercising a judicial function as may be established by Parliament. Thus, the Local Court is a creature of statute, deriving its powers and duties from the statute that created it. It is bound by the terms of the statute and possesses no inherent powers. It does not have the power to annul a marriage in terms of the Act.

[12] Another concept applicable to the resolution of this appeal is annulment. Annulment is a legal procedure for declaring a marriage null and void.² Unlike divorce, it is

² Statsky, William (1996). *Statsky's Family Law: The Essentials*. Delmar Cengage Learning. pp. 85–86. ISBN 1-4018-4827-3.

usually retroactive, meaning that an annulled marriage is considered to be invalid from the beginning almost as if it had never taken place. In legal terminology, an annulment makes a void marriage or a voidable marriage null.³ A difference exists between a void marriage and a voidable marriage. A void marriage is a marriage that was not legally valid under the laws of the jurisdiction where the marriage occurred and is void *ab initio*. In our law, although the marriage is void as a matter of law, an annulment is required to establish that the marriage is void or may be sought to obtain formal documentation that the marriage was voided. The annulment grounds are connected with the formation of marriage. A voidable marriage is a marriage that can be cancelled at the option of one of the parties. The marriage is valid but may be annulled if contested in court by one of the parties to the marriage.

As Schreiner, J.A once stated, even if for the purpose of deciding the question of custody it becomes necessary to hold that the child is illegitimate this would not prevent another Court, in different proceedings, from holding her to be legitimate, on the ground either that the priest who married her parents was a marriage officer or that the principles applicable to so-called putative marriages suffice to render her legitimate.⁴ The recognition of the legitimacy of the children born of putative marriages may rest primarily on the considerations of fairness to the children.

³ John L. Esposito (2002), *Women in Muslim Family Law*, Syracuse University Press, ISBN 978-0815629085, pp. 33–34.

⁴ *Bam v Bhabha* 1947 (4) SA 798 (A).

I believe these legal principles are central to resolving the dispute in this appeal.

Consideration of the appeal

[12] I now turn to consider the appeal. Taken together, the first two grounds of appeal raise the issue that the learned Judge *a quo* erred in declaring the first respondent as the sole heir to the estate of the late Pali Letšolo to the exclusion of his son, who is the appellant herein. The basis of the decision of the Court *a quo* as supported by the first respondent's Counsel before this Court is that the Likalaneng Local Court found and ordered that the appellant's mother was not validly married according to Sesotho law in as much as no *bohali* had been paid for her marriage.

[13] The corollary of this line of reasoning is that the children born of the marriage between the late Pali Letšolo and 'Mampolokeng Letšolo were not only illegitimate but also could not inherit from the estate of the late Pali Letšolo.

[14] This Court has, in the past, considered a case similar to the present. This was the case of **Ramootsi and Others v Ramootsi**.⁵In that case, at all material times since August 2003, Thabo, *alias* Katampa Ramootsi ("the deceased"), lived with the respondent as husband and wife, purportedly in a customary law marriage. They produced a baby girl named Lineo Ramootsi. In his lifetime, the deceased amassed

⁵ Ramootsi and Others v Ramootsi (CIV) NO.14/08.

considerable property, such as a house at Maputsoe in the Leribe district. On 18 July 2007, the deceased passed away.

[15] The central issue in the case, **Ramootsi and Others v Ramootsi** (*supra*), was whether *bohali* was an indispensable requirement of a valid customary law marriage in all cases. In answering the question, this Court held that the Basotho had always recognised the reality that some people may lack the means to pay *bohali* when they coined the expression “*monyala ka peli o nyala oa hae*” loosely translated, “even two beasts are sufficient to constitute a marriage.”

[16] This Court further recognised that in a developing country like Lesotho, it is not hard to imagine that many people do not have the means to pay *bohali*. The Court recognised that it would be a sad day if they were denied marriage merely because they failed to raise *bohali* as such. In winding up the issue, the Court held that:

It follows from the foregoing considerations that in this day and age, I should be prepared to lay it down as being in accordance with common sense and logic that the absence of payment of *bohali* is not fatal to the validity of a customary law marriage in all cases. Put differently, *bohali* is not a *sine qua non* of the validity of a customary law marriage in all cases. What I consider to be of fundamental importance is the agreement by the respective parties to create a validly binding customary law marriage regardless of *bohali*. In this regard, I agree with the approach of Maqutu J, as he then was, in *Tseli Moeti v Tanki Lefalatsa & Another* 1999 – 2001 LLR 511 (HC) at 515 that he was “not prepared to accept the bare assertion that

there is no marriage merely because 'not a single bohali beast was paid'."

[17] I agree with the above remarks and hold that the Likalaneng Local Court's judgment was fundamentally flawed in bastardising; Mampolokeng's children based on non-payment of bohali. I am also unable to agree with the Court's judgment that because the decision of the Likalaneng Local Court was neither appealed nor reviewed, it must therefore stand. There are two reasons for rejecting this proposition. First, the appellant was not a party in the proceedings before the Likalaneng Local Court. The failure to appeal or review the said decision cannot, in all fairness and justice, be blamed on him. Second, the Court was seized with a divorce suit, yet it gave an annulment order. In the absence of fuller argument on the subject than was presented to us I would not be disposed to rule, as a matter of law, that the appellant is not the legitimate offspring of a putative marriage. In addition, the **Native Courts Proclamation**⁶ and The Act does not clothe the Court with the power to bastardise the children.

[18] On whether the first respondent is the proper person to be declared heiress to the estate of the late Pali Letšolo, I believe she is so entitled. However, that can only be concerning the residence at Koalabata and not at Likalaneng. This will be consistent with the principle in section 15(3)(b) of the Land Act that provides that the interests of the deceased

⁶ No. 62 of 1938. the Native Courts Proclamation was renamed the the Central and Local Courts Proclamation in 1965.

allottee shall pass to a person nominated as the heir of the deceased allottee by the surviving members of the deceased allottee's family. I am also of the opinion that the late Pali Letšolo's residence at Likalaneng belongs to the 'Mampolokeng Letšolo's house. Now that Pali has passed on, his interests as a deceased allottee must pass to a person nominated as his heir by the surviving family members in which the house falls.

[19] I have already addressed the issue above on whether the first respondent is entitled to be declared heiress to the landed properties of the late Pali Letšolo at both Koalabata and Likalaneng. The other non-landed properties will be inherited in terms of the other inheritance principles discussed in the preceding paragraphs.

Disposition

[20] It is evident from the foregoing reasons that this appeal is bound to succeed.

Order

[21] The following order is made:

- (a) The appeal succeeds with costs.
- (b) The order of the Court a quo is set aside and replaced with the following:
 - (i) Prayer 2(b), (c) and (d) cannot be granted.
 - (ii) Prayer 2(a) is confirmed".



KE MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree



N T MTSHIYA
ACTING JUSTICE OF APPEAL

FOR APPELLANTS:
SHAKHANE

ADV L MOLATI & M

FOR RESPONDENTS:

ADV KHATALA