CIV\A\14\90

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MAKOANYANE LETELE **Appellant**

vs

SEKAKE LETELE **Respondent**

JUDGMENT

Delivered by the Hon. Mr Justice M.L. Lehohla on the 30th day of October, 1997

On 5th September, 1995 this Court upheld the appeal but ordered that each party bear its own costs because of the unwieldy state of the record and the jumbled up condition the facts have been found to be.

The Court further appreciated the help rendered to it by the respondent's

counsel *Mr Mathe* who drew a graphic picture of the family tree; a factor that went a long way towards throwing some light on the matter.

The appellant sued the respondent in the Court of first instance at Matsieng over Chieftainship rights of the area known as Ha Letele, urging that such rights be restored to him following the death of Chieftainess 'Masera.

The judgment of the Judicial Commissioner at page 25 of the record is very stimulating insofar as it attempted to give background to the chronology and family tree of the parties in this rather confused matter which was bedevilled by the preference of the Court of first instance to time and again rebuff the plaintiff by advising that he should petition for leave to appeal out of time from a decision which is not a judicial decision and by also referring him to administrative *fora* and family meetings instead of giving a judicial decision.

The Judicial Commissioner set about throwing light on the family tree as follows :

Chief Nkhahle had two sons Letele and Letšoenya and both Chief Nkhahle and

his eldest son Letele died some years ago before the year 1939. However, when he died, Letele already had two sons Thota and Petrose. Thota had two wives 'Malebona and 'Masera but he died without a male issue in both houses.

I may just add that Masera became Chieftainess in her own right by virtue of her marriage to Thota Letele. Indeed the answer to question 5 on page 2 of the record illustrates this point as follows : 'Masera attained Chieftainship when she got married to Thota Letele".

The Judicial Commissioner goes further to record that :

Thota's younger brother Petrose had a son and that is Sekake, the present appellant. Although the evidence is not clear, but it seems as if both Thota and Petrose died before their father Letele who also died subsequently. By High Commissioner's Notice No.171 of the 26th September, 1939, Letšoenya Nkhahle was declared by the then High Commissioner a headman of Thaba-Putsoa Ha Letele and was to act in that capacity until further notice. It is common cause that 'Masera the junior wife of the late Thota succeeded Letšoenya as headman of Ha Letele until she died either in 1982 or 1983. As a result of the death of 'Masera, a dispute arose as to her legal successor. It is common cause that 'Masera had a son called Makoanyane (the present respondent) who was born long after the death of Thota her husband. Section 10(1) of the Chieftainship Act No.22 of 1968 reads as follows :

> "In this section a reference to a son of a person is a reference to a legitimate son of that person".

It is now important to note that the present appellant who was the respondent in the Judicial Commissioner's Court was the defendant in the Court of first instance. To avoid confusion then it is preferable to refer to parties as they stood in the Court of first instance.

The defendant has appealed to this Court against the decision of the Judicial Commissioner's Court on the following grounds; that :-

1. The learned Judicial Commissioner erred in law in not recognising the difference between legitimacy according to Basotho customary law and legitimacy according to the "received" law as inherited from the Cape of Good Hope.

2. Section 10 of the Chieftainship Act No.22 of 1968 (as amended) does not distinguish between legitimacy according to Basotho Custom and legitimacy according to the "received" law from the Cape of Good Hope. Consequently the learned Judicial Commissioner erred in choosing the "received" law meaning.

Inasmuch as Chieftainess 'Masera Thota of Ha Letele was a widow who became a Chieftainess in her own right, after her husband's death, according to law it was her child the appellant who had to succeed to the Office of Chief not her husband's brother.

4. Inasmuch as a Basotho Customary marriage is not dissolved by death and there is the *Leverite(Kenela)* custom, a child born long after the death of the husband is legitimate provided the widow lived with her husband's relatives under their power and protection.

5. The learned Judicial Commissioner disregarded the case of ***Mothebesoane vs Mothebesoane*** CIV\T\12\1972 that stated clearly that a child born to a widow while under the power of her husband's family is legitimate.

6. A widow without a son was given rights to succession in her own right under Section 10 of the Chieftainship Act No.22 of 1968(as amended) because her husband's relatives are expected by law to father a son in her.

7. The record does not show when the appellant's father died and when he was born. The onus of showing this was clearly on the plaintiff. Consequently even if the *Kenela or Leverite* custom was not accepted as being envisaged in Section 10 of the Chieftainship Act 1968 the respondent who was plaintiff failed to prove appellant's posthumous birth.

8.1 The 1948 judgment which the respondent accepts states that the late

'Masera Thota Letele (who was the Chief whose succession was in issue) was a regent for her son Makoanyane the appellant. Consequently the Court of First Instance was right in basing its judgment on it.

8.2 Having regard to the fact that the Court of First Instance was the one which determined matters of credibility and law, the Judicial Commissioner as an appellate court could upset the judgment of the Court of First Instance only if it was clearly wrong. Inasmuch as even the post-humous birth of the appellant was not clearly demonstrated in evidence, the Judicial Commissioner had no evidential basis to interfere with the Judgment of the Court of First Instance.

Page 1 of the record at line one of the plaintiff's statement at trial indicates that his claim is based on the family decision restoring him to the Chieftainship of Ha Letele.

However both parties, each in his respective way, claim that they have been nominated. It is, in part, for this reason that the Chief of Matsieng told them to seek relief from courts of law.

The defendant is the son of Chieftainess 'Masera as testified to even by the plaintiff in his first response to the question put to him under cross-examination. The answer is recorded as :

"Yes, I know you. You are Makoanyane the son of Chieftainess 'Masera. I don't know your father".

The plaintiff further claims that he is the successor to the defendant's mother, the late 'Masera. As stated earlier 'Masera became Chieftainess of Ha Letele in her own right by virtue of her marriage to Thota Letele who predeceased her without male issue. Makoanyane was born years after 'Masera's husband's death.

Little wonder then that in answer to the question put and referred to earlier the plaintiff said he didn't know the defendant's father. However the plaintiff's reply number 4 to the defendant's question, though inarticulate sums up the position in law. From it can be distilled the crux of Jacobs C.J.'s dictum in ***Mothebesoane vs Mothebesoane*** 1978 LLR 384. I shall refer to this decision later. Suffice it to say the plaintiff's reply was :

"Chieftaincy is nominated lawfully, but not by-passing the family of the deceased, from which they take over, by the lawful child".

Fortunately the Sesotho version is available at page 3 of the manuscript record and it truly makes sensible reading, to wit :-

"Borena bo behoa ke Molao bo sa pote ka thoko ho lelapa la mofu eo ho kenoang lieteng tsa hae ka ngoana oa Molao".

This text can be rendered in lose or even literal translation as follows : Chieftainship is installed by law and does not by-pass the family of the deceased into whose shoes entry is sought through his *lawful* child. I am inclined to think in the context which the word "lawful" has been used above, that it means legitimate.

It is therefore fitting to make a determination of what is meant by a "lawful child". To achieve this, no doubt, previous decisions on the subject by the High Court and Court of Appeal would be of much use.

I hasten, therefore, to point out and rely on the dictum of Jacobs C.J. in ***Mothebesoane*** above that -

> ".....so long as a child born of a widow is begotten by a man approved of by the man having control of her, the child is regarded as having been begotten regularly"..

See page 389 of the above authority. It is stimulating to note that the question of a name given to the child born of a widow has an added impetus on whether or not such a child is regarded as legitimate. Jacobs C.J. goes further in illustrating the

importance of this fact to say at page 389 :

> "There is no suggestion in this case that Lephoto Snr rejected plaintiff's child. In fact he apparently allowed the plaintiff to give *the child his own name* : It may well be that different considerations will apply where the head of the family by word or deed rejects the child as a *picked up* child as it happened in the case of ***Motšoene vs Peete*** J.C. 78a\51 quoted by Duncan on page 30".

Nothing in the name of the instant appellant(defendant) suggests that he was rejected by the head of the Letele family when he was born. It is a notorious fact that Makoanyane is a name that commands adoration and high regard in Lesotho because it is a name of the renowned hero of the founder of the Basotho Nation King Moshoeshoe I.

What is deducible from the dictum of Jacobs C.J. in ***Mothebesoane*** is that a child born of a widow while under the power of her husband's family is legitimate. There is no suggestion in evidence that 'Masera ever left her marital home for good after her husband's death; no suggestion that the '*bohali*' cattle that married her were returned to her marital home or her husband's faily till her death.

The fact then that she gave birth to the appellant extremely long time after her

husband's death is not inconsistent with the account taken by Jacobs C.J. in the above authority of the fact that :

> 1. "After Kopi's death and until Lephoto Jnr was born plaintiff was under the control of Lephoto Snr and it was he who had the right, if he wanted to, to charge a male member of the family, with the widow's consent, to assume the rights and privileges of the late husband";

nor is it inconsistent with the conclusion this learned Chief Justice reached couched in the following terms that :

> 2. "I therefore come to the conclusion that at the death of Lephoto Snr Lephoto Jnr became the heir of the first house and that the right of occupation vested in plaintiff as his mother and still vests in her".

Likewise the right of occupation of 'Masera's House and of getting into her husband's shoes should, on the extension and application of the rule distilled from the above authority, vest in the defendant.

It is enlightening to note that in ***'Mamasoabi Molapo vs Lishobana Mahooana*** 1926-54 HCTLR 309 AT 311 Willan C.J. said :

> "I have no hesitation in finding that the Judicial Commissioner was wrong. Both the Basuto Assessors who sat with me on the hearing of this appeal advised me that the native courts were correct in their interpretation of Basuto Custom".

That interpretation is supported by the extracts obtained from Whitfield.

Whitfield's extracts found in his 2nd Ed. of **South African Native Law** are

(a) "In Native Law a customary union is a contract not only between 'husband' and 'wife', but also between the family groups"

(b) "Death of the husband does not dissolve the marriage in Bantu Law".

Willan C.J's statement above was in reaction to the Judicial Commissioner's judgment which was accordingly reversed that death of a husband terminates a Basotho customary marriage thereby making it possible for a widow to remarry. It follows, therefore, that in terms of ***Molapo*** above, the death of the husband does not terminate the marriage nor does it put an end to the widow's procreative activity.

I would not hesitate to conclude that the Judicial Commissioner in the instant case erred in not recognising the difference between legitimacy according to Basotho Customary Law and legitimacy according to "received" law as inherited from the Cape of Good Hope. Suffice it to say as illustrated in ***Mothebesoane*** above according to customary law the widow's husband may have died ten years ago but if

she gives birth to a child while she is still under the wing of the head of the husband's family that child is legitimate.

Section 10 of the Chieftainship Act No.22 of 1968 (as amended) also doesn't seem to distinguish between legitimacy according to Basotho Custom and legitimacy according to the "received" law from the Cape of Good Hope.

Section 10(1) reads :

> "In this section a reference to a son of a person is a reference to a legitimate son of that person".

We have seen above how misleading it can be to interpret this section as solely and exclusively meaning, by legitimate, a child born in wedlock, or born of its married parents during the subsistence of that marriage. In this sense Basotho Customary Law differs from the "received" law from the Cape of Good Hope. Although Section 10(1) is a statute which as such would lend itself to interpretation favoured by and known to the "received" law, caution is urged that since this section is an attempt to interpret legitimacy in a manner that does not violate tenets of custom which it was sought to preserve, then it is inevitable that great bewilderment may befall the unwary when it appears that what to all intents and purposes is an illegitimate child is looked

upon as legitimate through interpretation of this section. This is in part because according to the customary law that is sought to be preserved when interpreting this section, death of the husband does not terminate the marriage. If so, how could anybody be bewildered if the child is born of that marriage several years after the death of the widow's husband? The learned Judicial Commissioner erred in choosing the "received" law meaning of legitimacy therefore.

Given the above background it will be appreciated and recalled how it seems, albeit not purposefully the learned Judicial Commissioner treated the provisions of Section 10(1) at face value. Comparison of Judicial the Commissioner's approach in the interpretation of that section with the approach adopted by Mahomed P, as he then was, in C. Of A. (CIV) 23 of 1989 ***Majara vs Majara & 3 Ors*** (unreported) at p.8 will help illustrate the point I am trying to make. The learned President said :

> "Although section 10(1) of the Act provides that a reference in the section to a son of a person is a reference to a legitimate son of that person, it does not follow that Qhobela is not for the purposes of the section a legitimate son with a claim to successorship in terms of section 10 ..... 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".

While the immediate temptation would be to regard a son born in such a customary marriage as illegitimate the compelling reasons advanced by Mahomed P clearly suggest it would do violence to the interpretation of section 10(1) to do so as that would obviously fail to preserve the institution that customary law itself created including the portion that death of the husband does not terminate the marriage and by implication also the portion that the widow through active assistance of head of family can with her consent, provide seed the products of which would be regarded as legitimate.

Mahomed P also suggests at p.6 that even if Customary Law marriage is assumed invalid because of pre-existing Civil marriage, the product of the customary law marriage cannot be barred from laying a claim to the disputed Chieftainship. Taken a step further it would seem that if he succeeds in such dispute that would be proof that he has satisfied the requirements of legitimacy in terms of Section 10(1) *despite the invalidity of his parents' marriage* - a factor which at first blush would tend to render him illegitimate.

Taking a simplistic approach when interpreting Section 10 would as shown above result in unsatisfactory results which would tend to subvert the essence and vestiges of true antiquity in our customs.

I don't think it was necessary for the Judicial Commissioner to seek to base his decision on the fact that there was a vacancy which at the time was not filled because there was nobody to fill it in terms of subsection (3). I say the Judicial Commissioner erred because 'Masera continued to serve as Chieftainess in her own right in the Ha Letele area. Furthermore attempts were made by the plaintiff to sue her for the Chieftainship of this area, but to no avail. See page 2 answers to questions 7 and 8 respectively that : "Yes, we once disputed with Chieftainess 'Masera and the judgment was in her favour" and "I don't know the copy of 1949 judgment that says Chieftainess 'Masera is the care-taker of Makoanyane". The reason that made it unnecessary to seek to do what the Judicial Commissioner did is that there were no appeals against the Judgments that went against the plaintiff.

In fact though smacking of a beleaguered litigant's arrogance the plaintiff's answers 16 and 17 as well as 13 and 14 at page 2 of the record amply illustrate the point that he didn't appeal against decisions made against him in the disputes between

him and 'Masera to wit,

- at 16 "It was said the judgment was made long time ago, and therefore cannot be appealed"

- at 17 "I don't have a copy that says when a person is deceased words in the judgment should be changed".

- at 13 "I sue you because I don't know you"

- at 14 "I did not dispute the judgment of 1954 that said I cannot sue Chieftainess 'Masera".

The position is clear that during her Regency succession to 'Masera's Chieftaincy was an issue of litigation. It is amazing then that if a man fails in a legal contest waged during 'Masera's lifetime over an issue of such vital importance as who should succeed her, and further doesn't bother to appeal against the decision that went against him, he should nonetheless hope to succeed in a suit instituted for the sole purpose of thwarting the logical consequence of that decision taking effect later i.e. on the death of 'Masera.

Subsection (3) says :

> "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".

Because there is no evidence to suggest that the defendant's mother 'Masera was not under the wing of the family head as indicated at page 2 answers to questions 18 through 20 of the record, it becomes imperative that the defendant be looked upon as legitimate on the authority of ***Mothebesoane*** read with ***Molapo*** above.

At page 4 the defendant indicated that Chief Thaba Tsoeu who was required to introduce him to the Principal Chief refused the call by the Principal Chief of Matsieng. This aspect of the matter is well substantiated by letters i.e. Exhibits "D and "C" that the defendant referred to. Thus the "Principal Chief of Matsieng, represented by the owners of the names already mentioned nominated me on the 25-6-84" so said the defendant at page 4.

At page 5 Sehoai Letele the defendant's witness said under cross-examination:

- at 7 : "I am not the eldest at ha Letele; although I have nominated Chief

Makoanyane to be the successor.

- at 8 : "The Chief of Matsieng accepted him"

- at 9 : "It was I, Sehoai, Seetsa, Tlakafu, Phakiso"

- at 10: "They are those I referred to as the family".

Indeed pages 4 through 6 of the record show that the family of Letele accepted the defendant. His legitimacy is thus unnecessarily being questioned rather belatedly.

In line with ***Mothebesoane*** above, inasmuch as 'Masera was Chieftainess (after the death of her husband) in her own right being the widow of Thota Letele it would seem that according to law it was her child the defendant who had to succeed to the Office of Chief and not her husband's brother.

It is important to appreciate that Section 10 was enacted to incorporate an aspect of what is meant by legitimacy in the customary law sense and as understood by the Basotho to whom such customary law applies and for whom it encapsulates the traditional norms of their society in all its quaint peculiarities.

To sum up then and try to lay the ghost forming the basis of the controversy in

Section 10 I would stress that the interpretation of this section is best given effect to if the main purpose for which it was enacted is preserved and not destroyed. That purpose is recognition of customary law notion of legitimacy. The effect of that purpose is that according to Sesotho custom legitimacy is possible even long after the widow's husband has died. Thus as we have seen, unlike in the "received" law where legitimacy would definitely cease if the gestation period which is nine months from the day of conception is exceeded by a handful or a mere number of days, considerations of gestation period and its length are irrelevant in Sesotho Custom in circumstances where the widow who continued to live under the control and protection of a family head of her deceased husband's family group or household, gave birth to a child even decades after her husband's death. But in the "received" law if it can be established that the last sexual contact between the widow and her husband before his death occurred, say, ten months before she gave birth to a child, that child would be illegitimate.

It would seem the rationale in the notion referred to above is that the Basotho shunned the stigma of illegitimacy and felt that rather than let it widen in scope it should be restricted within narrow limits. Thus they would less readily acknowledge illegitimacy in respect of a child of a mother who was once married than in respect

of the child of an obvious one who gives birth to a child even though she has never married at all. The generality of the above submissions should not be understood to detract from the principle that presumption of legitimacy is a rebuttable presumption. Indeed PJJ Olivier in **The South African Law of Persons and Family Law** at p.320 neatly rams the point home by saying :

> "..... an illegitimate child is one born of parents who were not legally married to each other at any such time. ..... Our law recognises the rebuttable presumption that every child born of a marriage, is the child of the husband; in other words that it is a legitimate child. Where therefore, the woman is legally married at the time of the conception or the birth of the child, or at any intervening time, the presumption applies that the man to whom she was married, and not any other person, is the child's father .....".

One more hurdle that the plaintiff had to reckon with is that the record does not show when the defendant's father died and when the defendant was born. The onus of showing this was clearly on the plaintiff and he failed hopelessly to discharge it yet it was he who was asserting the question of illegitimacy of the defendant. In CIV\A\16\87 ***Letlatsa vs Letlatsa*** (unreported) at p.10 this Court accepted as valid the fact that "at common law a child does not bear the onus to prove his legitimacy"..... The onus was on the party who challenged the defendant's legitimacy to prove his assertion that the defendant is illegitimate. It served no useful

purpose to half-heartedly harass 'Masera about her Regency when she was still alive only to resume this pursuit with full vigour after her death. That in short amounts to barking up the wrong tree.

I am inclined to the view that since the plaintiff accepts the 1949 judgment which states that 'Masera was a regent for her son Makoanyane, the Court of First Instance was correct in basing its own judgment on it. See p. 2 answer 10 saying : "I don't have a copy of that judgment that would challenge that statement that said 'Masera should *take care of you Makoanyane*".

In the premises, I reaffirm the judgment of the Court of First Instance that entered judgment in favour of the defendant and dismissed the plaintiff's claim.

Thus the appeal in this Court was upheld. Each party was ordered to bear its own costs.

.....
J U D G E
30th October, 1997

For Appellant : Mrs Kotelo
For Respondent : Mr Mathe