

# IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/A/08/2016

In the matter between:

‘MAKO MOHALE

APPELLANT

AND

THATO MOHALE  
DISTRICT ADMINISTRATOR MAFETENG  
DIRECTOR OF CHIEFTAINSHIP AFFAIRS  
MINISTER OF LOCAL GOVERNMENT &  
CHIEFTAINSHIP  
ATTORNEY GENERAL

1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT  
3<sup>rd</sup> RESPONDENT  
4<sup>th</sup> RESPONDENT  
5<sup>th</sup> RESPONDENT

## JUDGMENT

CORAM:

HON. J. T. M. MOILOA J.

DATE OF HEARING:

8 AUGUST 2017

DATE OF JUDGMENT:

25 SEPTEMBER 2017

## ANNOTATIONS

### Statutes:

1. Court of Appeal Act, No.10 of 1978
2. Chieftainship Act, 1968

### Cases:

1. Lehlola Mofoka vs Lineo Lihanela (C of A (CIV) No. 6 of 1988) (unreported) 26 January 1989
2. ‘Mamonica Mohale vs Mopeli Mohale 1982 -1984 LLR 17
3. Lepoqo Masupha vs Sempe G. Masupha (unreported: C of A (CIV) 7B of 2016 (unreported) 28 October 2016

### Summary

*Applicant lost his appeal in the High Court from a judgment of the Magistrate. On an application for a Judges Certification for a further appeal to the Court of Appeal.*

**Held:** *Application must satisfy two requirements namely:*

*(a) That his appeal is on point(s) of Law only in terms of **Section 8(1) of Court of Appeal Act, 1978.***

*(b) That his grounds of appeal on points of law so raised, if permitted to pursue them on further appeal have merit and that as such the further appeal his reasonable prospects of success.*

- [1] On 26<sup>th</sup> January 2017 I handed down my judgment in an appeal wherein Appellant appealed to this court from a judgment of the Magistrate. I dismissed the appellants appeal on the grounds that, *inter alia*, Appellant had no *locus standi in judicio*.
- [2] The pleadings in the Magistrate's Court disclosed that Appellant was the grandson of an illegitimate father born of an adulterine relationship of late Chief Nkhahle Mohale with one 'Mamopeli Posholi also referred to as 'Mamopeli Mohale. In the case before the Magistrate, Appellant sought to succeed to the vacant office of chief of First Respondent's father who was the immediate past incumbent in the vacant office of chief following First Respondent's father's death, in November 2014. Appellant's own father had died in January 2014 still a commoner having failed in 2008 to unseat First Respondent's father from office of Chief of Tajane Ramoetsana and Pontšeng.

[3] First Respondent raised a “Special Plea” of Appellant’s “Lack of *locus standi in judicio*.” The trial court of first instance upheld the Special Plea raised by First Respondent.

[4] **On First Appeal:**

On the pleaded facts I determined that Appellant’s appeal fell to be dismissed. I concluded that the Magistrate’s decision was correct in dismissing Plaintiff’s claim on the grounds that Plaintiff’s summons and declaration failed to disclose a cause of action as Plaintiff had no *locus standi in judicio*.

[5] This Court held that:

5.1 A plaintiff must found his title to sue personally, and must establish that of the defendant to be sued as well. Where title of plaintiff to sue is not established in his declaration, such Plaintiff fails to disclose a cause of action, for a cause of action accrues when there is in existence a person who can sue and another who can be sued.

5.2 A lack of *locus standi in judicio* is a Special Plea in bar and a point of law that may be determined without the need for extrinsic evidence if the undisputed facts disclosed by the pleadings established jurisdictional facts that support such a plea are present.

5.3 *Locus Standi* is both a procedural issue as well as a substantive issue. As a substantive issue it concerns the sufficiency and

directness of interest in the litigation to be accepted by the Court as a party. It may be argued as an exception as happened in this case.

- 5.4 Any subsequent “marriage” to a valid marriage contracted in terms of the received law is null and void “*ab initio*”.
- 5.5 A son born of the adulterine father does not satisfy the requirements of **Section 10(1) and (2) of the Chieftainship Act 1968**.

In **Section 10(2) of Chieftainship Act, 1968** reference there to a legitimate first born son of Chief is reference to first born son of the immediate past incumbent Chief in the vacant office of Chief.

- 5.7 Accordingly, Appellant’s appeal was dismissed with costs to Respondent. Such costs were ordered to be on party and party basis including costs consequent upon employment of two counsel.
- [6] In the result the following orders were made by me in amplification of the court’s decision:-
- 6.1 Appellant’s appeal from the judgment of the Mafeteng Subordinate Court in **CC 05/15** is hereby dismissed with costs to First Respondent. Such costs to include costs attendant upon the employment of two Counsel.
- 6.2 Setting aside the nomination of First Respondent as successor to the office of Chief of Principal Chief of Tajane, Ramoetsana and Pontšeng is hereby refused.

- 6.3 Presenting the name of Appellant as the alleged lawful successor to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng is refused.
- 6.4 The nomination of Thato Mohale by the Mohale family to His Majesty the King, as the lawful successor to the office of the Principal Chief of Tajane, Ramoetsana and Pontšeng is hereby confirmed to be correct and lawful in terms of **Section 10(1) and (2) of Chieftainship Act, 1968.**

[7] **Test Applicable on a Second Appeal**

- 7.1 The test applicable on a second appeal in this jurisdiction is found in **Section 8(1) of Court of Appeal Act No. 10/1978** and in the case of **Lehlola Mofoka vs Lineo Lihanela C of A (CIV) 6/1988** (unreported, delivered on 26 January 1989).
- 7.2 **Section 8(1) of the Court of Appeal Act, No. 10 of 1978** reads as follows:
- “8 (1) Any party to an appeal to the High Court may appeal to the Court of Appeal against the High Court Judgment with the leave of the judge of the High Court, or, when such leave is refused, with the leave of the Court on any ground of appeal which involves a question of law but not on a question of fact nor against severity of sentence.”*
- 7.3 In terms of **Section 8(1) of the Court of Appeal, 1978**, Appellant is allowed a further appeal only on a point of law.
- 7.4 In **Lehlola Mofoka vs Lineo Lihanela** (supra) **Mahomed JA** held at page 3

of the judgment in relation to **Section 8(1)** as follows:

*“In deciding whether or not leave to appeal should be granted, it is clearly relevant and necessary to consider the prospects of success on appeal and for this reason it was necessary to consider the merits of the appeal”.*

The grounds of appeal filed by Appellant are focused on issues of law, namely, *locus standi*, granting prayers allegedly not sought by either party and whether or not the High Court was correct in law to award costs of two Counsel.

7.4 In terms of Mahomed’s judgment referred to above therefore, in addition, in the instant application the Appellant must satisfy this court that there exists reasonable prospects of succeeding on those grounds of law raised by him on further appeal of Appellant if permitted to do so. In other words on evaluation by this court, this court must be satisfied that another court (Court of Appeal) might reach a different conclusion favourable to Appellant than this court on these points of law.

[8] Dissatisfied with the decision of this court, Appellant has noted a further appeal to the Court of Appeal on the following grounds:

8.1 This Court has erred in dismissing his appeal as he had “the necessary *locus standi* to litigate in relation to the contested nomination.”

8.2 This “court erred in granting prayers not sought by any of the parties to the appeal.”

8.3 This “court erred in awarding costs of two Counsel on a limited and simple argument on *locus standi*.”

[9] **As to Locus Standi of Appellant:**

This court dealt extensively with this topic in its judgement at appeal stage in paragraph 6, through to paragraph 19. Indeed the bulk of that judgment concentrated on this issue as it was really the central issue of Appellants therein. No purpose will be served by rehashing the legal principles dealt with there already. On a further appeal, the test is whether on the law another court (Court of Appeal) might come to a different conclusion to mine favourable to Appellant. In other words the question is whether Appellant has in law prospects of succeeding before the Court of Appeal. In my view once Appellant at the court of first instance founded his right to succeed to the office of Principal Chief of Tajane Pontšeng and Ramoetsana on the right to succeed to that office by Mopeli Mohale (and not on Tlali Mohale) who was declared to be in law illegitimate progeny of the late Chief Nkhahle Mohale and ‘Mamopeli, Appellant cannot have *locus standi*. The long list of legal authorities in the way of Mopeli such as **‘Mamonica Mohale vs Mopeli Mohale, Mokhothu vs Manyapelo, Makata vs Makata** and more recently **Lepoqo vs Sempe G. Masupha** make him non-suited. These decisions are all to the effect that a “marriage” contracted subsequent to a valid marriage contracted in terms of the received law (statute) is null and void *ab ignitio*.

In these circumstances, I hold that alleged prospects of success are in fact non-existent. On this ground I would refuse this further appeal.

- [10] Now, Appellant has on notice of motion applied to the court in terms of **Section 8(1) of the Court of Appeal Act, 1978** for a certificate from me that a second appeal on a point of law is appropriate for ‘Mako Mohale in this instance. Appellant’s motion is opposed. In his Founding Affidavit Appellant says that the grounds of appeal he has raised constitute questions of law and he has been legally advised that he has high prospects of success before the Court of Appeal.
- [11] In his heads of argument in the motion for grant of Judge’s Certificate, Appellant in support of the contention that the court erred in finding that the meaning to be attributed to **Section 11** in the context of Appellants case is that the court erred and in concluding that **Section 11** cannot be read in isolation but must be read in conjunction with **Section 10 of the Chieftainship Act**. Appellant contends that **Section 11** does not need to be read with **Section 10** at all but is a standalone provision which entitles anyone to object to a nomination of someone he considers ineligible to succeed to the office of chief.
- [12] In the view I take of this matter particularly in the context of Appellant’s case here, Appellant is clearly wrong in law. For starters, Appellant’s prayers at Paragraph 20(a) and (b) of his declaration asks the court not only to set aside nomination of First Defendant (Thato Mohale) but he asks the court to declare him “as the lawful successor to the office of Principal Chief of Tajane Ramoetsana and Pontšeng.” The basis of these two prayers is premised on the legal contention of Appellant that his late father Mopeli Mohale was legitimate son of the late Chief Nkhahle Mohale. Appellant ignores the legal fact that this court found in 1982 that Mopeli Mohale was not a legitimate son of Chief Nkhahle Mohale.



12.2 The decision in ‘**Mamonica Mohale vs Mopeli Mohale 1982 – 1984 LLR 17** has not been set aside as wrong by a superior court of appeals until Mopeli Mohale’s death in January, 2014. Mopeli Mohale in fact himself failed against Tlali Mohale on 09<sup>th</sup> April 2009 to have himself declared in law as a legitimate son of and successor of the late Chief Nkhahle Mohale. So, Mopeli Mohale upon whose right Appellant founds his claim to succeed to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng himself failed in his lifetime to establish his legitimacy to the office in preference to Tlali (First Respondents father). In **Lepoqo Masupha vs Sempe G. Masupha C of A (CIV) 7B of 2016**, an identical case to Appellant’s case here Farlam AJP summarised the position in law as follows:

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

[13] **As to contention that High Court granted prayer sought by neither party:**

The formulation of these final orders the Court made based on the Appellant’s original prayers in his summons before the Subordinate Court in CC 05/15. See Paragraph 20 of Plaintiff’s summons. They were in fact answers to the original relief orders sought by Appellant in the Trial Court. This was an effort on the part of this court to state in simple terms the essence and effect of the dismissal of Appellant’s appeal. It was not a

grant of prayers neither party had sought as alleged in the grounds of Appeal. The orders of this court were in fact an answer to Appellant's own summons before the trial court.

[14] **As to Costs Awarded to Respondent:**

In regard to Appellant's prayer concerning award of costs consequent upon employment of two counsel, I have the following to say. This court's reasons for allowing costs consequent upon employment of two counsel are articulated at length in paragraph 21 of the court's judgment. Before me in Appellant's application for leave for a second appeal apart from the simple statement that the case was a simple one not justifying award of costs of two counsel, Appellant did not pursue this point at all in his Heads of Argument or in oral argument. Consequently First Respondent did not address himself to it in his Heads of Argument either presuming that Appellant had abandoned the point. I presume so too. I am not persuaded that award of costs consequent upon employment of two counsel was not justified in the first appeal. I consider such award fully justified in the circumstance of that appeal. I have no hesitation in concluding here that this ground of Appellant has no legal merit.

[15] In the light of the exposition of the law above I find that there are no prospects of success on the appeal of Appellant to have himself declared a legitimate successor in law to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng. I therefore refuse Applicant a further appeal to the Court of Appeal on the ground that it lacks any merit in law.

**J. T. M. MOILOA**  
**JUDGE**

**FOR APPELLANT:**            **Adv. M. E. Teele KC (Instructed by T. Matooane & Co.)**

**FOR RESPONDENTS:**       **Adv. W. C. M. Maqutu KC (with him Adv. S. Malebanye KC) (Instructed by Harley and Morris)**