

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/126/2014

In the matter between

MOJELA LIRA HLAJOANE

APPLICANT

AND

SEMPE SESHOPHE LESAOANA

1st RESPONDENT

CHIEF OF MOKOMAHATSI

(SESHOPHE HLAJOANE)

2nd RESPONDENT

PRINCIPAL CHIEF OF KUENENG AND

MAPOTENG

3rd RESPONDENT

THE MINISTER OF LOCAL GOVERNMENT

AND CHIEFTAINSHIP

4th RESPONDENT

ATTORNEY GENERAL

5th RESPONDENT

JUDGMENT

CORAM:

HON. J. T. M. MOILOA

DATE OF HEARING:

15 August 2016

DATE OF JUDGMENT:

20 October 2017

ANNOTATIONS

Legislation

1. Chieftainship Act, 1968
2. Contemporary Family Law of Lesotho (1992) by W.C.M. Maqutu
3. Sesotho Laws and Customs (1960) Patrick Duncan

Cases

1. Motšoene Lebona vs Minister of Interior 1978 LLR 120
2. Joy to the World vs Neo Malefane C of A (CIV) 09/2016

INTRODUCTION

[1] My brother Peete J. formally recused himself from hearing this matter in March 2014. My sister Majara J, as she then was, also reached the same decision of recusal and I was subsequently seized with this application. The first appearance before me was on 31 March 2014, the motion being made on an urgent basis. I did not find urgency in the matter and ordered that it should proceed in the ordinary cause. The matter was then allocated hearing dates. It was initially scheduled for 13 August 2015, then 12 December 2015. However, due to unavoidable postponements I finally heard arguments on 15 August 2016.

[2] **RELIEVE SOUGHT BY APPLICANT**

Prayers in the notice of motion are *inter alia* that:

(a) The nomination/appointment of First Respondent as Chief of Bakaneng Ha Mojela be cancelled and set aside;

and (b) That Applicant be declared the area Chief of Bakaneng Ha Mojela by acquisitive prescription.

[3] It is common cause that the Chieftainess of Bakaneng was the late ‘Majonathane Mojela. It is common cause that Mojela, Seshophe and Hlajoane are all sub-families within the Peete family. She died in 1992 without leaving any male issue. In 1971 Applicant had been gazetted to act in the office of Chief. He was still holding that acting position upon the demise of Chieftainess ‘Majonathane in 1992. Her passing was followed by litigation in the Berea Magistrate Court under **CC 41/09**. Present Applicant was Plaintiff in that matter, seeking an order that his name be forwarded to the King for approval as substantive Chief of Bakaneng. He also sought an order gazetting him as a substantive Chief of Bakaneng. Chief Magistrate E. F. Makara as he then was, presided

over the matter in **CC 41/2009**. He dismissed plaintiff's prayers and ordered that the family should convene and appoint Chief of the area. That decision of Magistrate Makara in **CC 41/2009** was never appealed against by present Applicant. On 01 February 2014 First Respondent was appointed Chief by the family. Applicant objected to the nomination. And we are here now.

[4] Applicant supports his prayers by averring that he was adopted by the Mojela family in 1966 to be Majonathane's child. The court is called upon to determine the legality of the alleged adoption of Applicant by Majonathane. It is therefore critical for this court to determine whether Applicant on the papers has established jurisdictional fact of adoption and following that whether in law Applicant in terms of **Section 10 read with Section 11 of Chieftainship Act 1968** qualifies to succeed to the office of Chief of Bakaneng following the demise of 'Majonathane Mojela in 1992.

[5] **ADOPTION AND EFFECTS THEREOF:**

W.C.M. Maqutu on Contemporary Family Law of Lesotho (1992) at page 154 writes that adoption was done in consultation with the family and the Chief was often informed. The adoption "must be well known and witnessed by members of the family." The learned author goes on to say that once the adoption goes through the adopted child becomes the natural child of his adoptive parents and has the same rights as the natural child. Applicant's counsel in her heads of argument refers to **Sesotho Laws and Customs by Patrick Duncan Reprint of the Original 1960 Edition pg 8**; that the effect of adoption is such that the child is regarded as a child of the house into which he is adopted in the fullest sense. The adopted child would even be the heir.

[6] From the two authorities referred to above, it is clear that the family plays an important role in the adoption process. In *casu* Applicant avers that the adoption was approved by all members of the family. It is not much to expect therefore that the Head of Peete family would have knowledge of such fact especially in view of the fact that the late 'Majonathe was occupier of a public office of Chief ultimately answerable to him in his role as Principal Chief of Kueneng and Mapoteng. Naturally, the office of Principal Chief would be expected to have a record of such a fact in any case if such fact existed. However, nothing has been attached to his founding papers to support this averment. In fact this is denied in clear terms by First Respondent who is supported by Second Respondent who is the next senior Chief to Chief of Bakaneng. Second Respondent is described by Applicant as the Chief of Mokomahatsi in the Ward of Kueneng and Mapoteng (Third Respondent). First Respondent's contention is further that Applicant has failed to prove his adoption either verbally or documentarily. The court holds a similar view. In his heads of argument Counsel for Applicant submits that the adoption was done under Sesotho custom therefore no writings were made in that regard. Counsel for Applicant is wrong on Sesotho customary adoption and how that event is arrived at and recorded by the family. It is not only a family matter but it is also a public act witnessed by the family's Chief. In the instant case it is more so for such adoption impacted on public office (i.e. office of Chief of Bakaneng). Since Applicant avers that the adoption was approved by all family members, that fact should have been known by the two senior most members of Peete Family like First and Second Respondents. In motion proceedings a litigant stands or falls by their papers. On these papers I am not persuaded that Applicant was adopted by the Peete family to be 'Majonathane Mojela's child. Having failed to

prove the adoption claim it follows that he cannot assume heirship rights of a natural child of 'Majonathane for in my view he has failed to establish on a balance of probabilities that he was, as a fact, adopted as 'Majonathane's child according to Sesotho custom as he claims was done in conformity to Sesotho custom and mores to the knowledge of the Peete family. On the contrary Second Respondent who is head of Peete family flatly denies such adoption and states in clear terms that in the annals of his office there no record of any such adoption. He states that Applicant has never been Chief of Bakaneng. I agree with Third Respondent's contention for if Applicant had ever been appointed Chief of Bakaneng that process would have gone through Peete family of which he is head and more importantly also through his office administratively as Principal Chief of Kueneng and Mapoteng to have Applicant gazetted as substantive holder of that office. What evidence is produced by Applicant (and it is not disputed by Respondents) is that he has acted in the office of Chief of Bakaneng during the lifetime of 'Majonathane. Of course that was 'Majonathane's election when she was herself substantive holder of that office. Applicant has failed to present before me credible evidence that he was ever nominated as Chief of Bakaneng by the family. This is also denied by First Respondent. He denies that Applicant was ever nominated to be successor to the office of Chief of Bakaneng. He denies that Applicant ever became heir to 'Majonathane Mojela's family. The evidence is clear that following the decision of Magistrates court dated 2nd January, 2013 that the family nominate someone to that office in fact the family nominated Sempe Seshophe Lesaoana Hlajoane not Applicant.

- [7] **Part III of the Chieftainship Act 22/1968: Section 10(1)** thereof reads “in this section a reference to a son of a person is a reference to a legitimate son of that person.”

Section 10(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 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.”

- [8] First Respondent’s contention is that Applicant is not the biological son of ‘Majonathane whereby he would be entitled to succeed to the office of Chief after her passing. I am not in agreement with this argument. The section speaks of a legitimate **NOT** a biological son. Had Applicant proved his adoption by Mojela and to ‘Majonathane that adoption would have legitimised him. Applicant has failed to prove that he was legally adopted by Mojela and ‘Majonathane Mojela in accordance with well-known customary principles of adoption which require that such adoption be approved by the whole family and thereafter the adoption be a public act notified to the chief and public announced to the public at large. In this case the head of the family namely, Principal Chief of Kueneng and Mapoteng and the Chief of Mokomahatsi should have been part of that decision and their respective offices should have had record of that seeing that such act would also involve a public office, Chieftainship of Bakaneng. That way he would be eligible for this succession in the ordinary course. Maqutu supra refers to the case of **Motšoene Lebona v Minister of Interior and Others 1978 LLR 120**. He summarises that in that case a close relative had been adopted into the family to be not only a son but a sub-chief as well, with the approval of the principal Chief who had a right of succession. The adopted son successfully sought a High

Court order to be proclaimed chief. However, in *casu* Applicant has failed to establish the fact of his adoption.

[10] I am in agreement with Advocate Mokaloba's submission that Applicant's rights have been dealt with by the then Chief Magistrate E. F. Makara in **CC 41/2009**. In the judgment it appears (as it does in the present application) that plaintiff's foundation of his case is his testimony that he was adopted by the family of 'Majonathane. He led evidence and was cross-examined. He maintained under cross examination that he was adopted by 'Majonathane but conceded that being 18 years old at the time he was not privy to the question of whether or not the adoption agreement was verbally or documentally concluded. In deciding whether or not Plaintiff (now Applicant) by virtue of his alleged adoption by 'Majonathane commands a better title to succeed her in the Chieftainship of Bakaneng the trial court understandably explored the provisions Part III of the Chieftainship Act. Trial court found that from the evidence it transpires that Chieftainess Majonathane wanted to adopt Plaintiff as her son and to be heir to her Chieftainship and to her estate. But the court found like us, that Applicant failed to establish that in fact family did. On the other hand the trial court found credible counter evidence (by Plaintiff's uncle) that the family did not approve the adoption. In the end the court was satisfied that Plaintiff's claim and evidence on the subject was challenged. These findings the trial court made on the basis of *viva voce* evidence and the present application does not disclose anything factually material to the contrary for me to find otherwise.

[11] Another legal argument on behalf of Applicant is that he has a better and clear right than any other person in the family to succeed to the office of Chief of Bakaneng because his adoption took place way before the

Chieftainship Act of 1968. The same argument was traversed in **CC 41/09**. The trial court's finding in this regard was that before the Chieftainship Act succession to the office of Chief was governed by customary law and that the Act has in fact codified the customary law principles on successor rights to the office of a Chief. In this regard the trial court found that under customary law adoption is a prerogative of the family and must be blessed by the family. In the instant case Applicant has produced no evidence that he was in fact Applicant was adopted by the family to be the son of 'Majonathane Mojela. I am not persuaded that this fact of adoption has been established by Applicant.

[12] Acquisitive prescription is yet another issue raised before this court, not for the first time as it was raised in the trial court as well. It is Applicant's view that having been in the acting position of Chief for more than forty years without successful objection, he stands to suffer prejudice should any other person be nominated. The "LHM1" is proof that Applicant was gazetted to act for the late 'Majonathane. However, the Trial court found that Plaintiff had failed to prove with reference to any relevant law that his gazettelement as Acting Chief gives him a legitimate right to be presented to the King to be substantive Chief of Bakaneng. It is my view also, that the number of years of holding the acting position does not confer non-existent rights. I accordingly reject his acquisitive prescription contention. Frankly it has no relevance here.

[13] In conclusion, the succession debate for the chief of Bakaneng has been extensively dealt with by the Berea Magistrate Court in **CC 41/2009**. No appeal has been noted against that decision. Nor are there new issues raised in *casu*. In the introductory words of **GRIESEL AJA**, "it is in the public interest that there should be an end to all litigation." See **Joy to the**

World vs Neo Malefane C of A (CIV) 09/2016. The Court of Appeal in that case recognised the common law requirements to successfully rely on the *res judicata* exception being that:

(a) That relief claimed and

(b) The cause of action be the same in both the case in question and the earlier judgment

(c) Parties must be the same and

(d) The same issue must arise.

[14] Plaintiff in **CC 41/2009** is the current Applicant in **CIV/APN/126/14**. In both cases the cause of action is succession to chieftainship wherein Plaintiff/Applicant seeks orders declaring him as Chief of Bakaneng. As already discussed under paragraphs 10 to 12 of this judgment the issues are the same and nothing new has been advanced before this court to persuade this court to different findings. The appropriate step to have been taken by Applicant would have been to note an appeal against the decision in **CC 41/2009** instead of having this court rehash old arguments. In any case as we have seen earlier Applicant is wrong on the law anyway. The application is dismissed.

[15] **COSTS:**

Given the long running litigation by Applicant on the same issue over and over again, I think that this is an appropriate case where costs must follow the result. I accordingly dismiss this application with costs to First, Second and Third Respondents.

J. T. M. MOILOA
JUDGE

For Plaintiff: Adv. E. M. Kao

For Respondents: Mr. V. M. Mokaloba