

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**

**1st Respondent
2nd Respondent
3rd Respondent

4th Respondent
5th Respondent**

JUDGMENT

CORAM:

HON. J. T. M. MOILOA J.

DATE OF HEARING:

9th DECEMBER, 2016

DATE OF JUDGMENT:

26th JANUARY, 2017

ANNOTATIONS:

Statutes

1. Chieftainship Act, 1968
2. Legal Notice, 39 of 2001
3. Subordinate Court Order 1998
4. Subordinate Court Rules 1996
5. Marriage Act No.10 of 1974
6. Marriage Proclamation No.7 of 1911

Cases

1. Mamonica Mohale vs Mopeli 1982-84 LLR 117
2. Mokhothu vs Manyapelolo 1976 LLR 281
3. Makata vs Makata LAC (2000-04) 253
4. Leoma vs Leoma LAC (1980-1984) 198
5. Lepoqo vs Sempe G. Masupha (C of A (CIV) 7B/2016)
6. Florinah Nko vs Lijane Nko LSCA (2000) 5
7. S.A. Coding Services vs Church Council of Full Gospel Church 1955(3) S.A. 541
8. Anirudh vs S. Amdea & Others 1975(2) S.A. 706
9. M. Ntsoele vs M. Ramokhele 1974/75 LLR 130
10. Royal Sechaba Holdings vs Coote & Another 2014(5) SA 562
11. Caesarstone Sdot – Jam vs World of Marble and Granite 2000 cc and others 2013(6) SA 499
12. K. T. Khauoe vs Attorney-General & M. B. Seeiso CIV/APN/53/95
13. Soropoulus vs Niemen 1973(2) S.A. 767
14. Leihlo Lenono vs Moeketsi Lenono 1976 LLR 171
15. Mankhahle Sebili vs Chief Leuta Mahao
16. Ramatekoa vs Ramatekoa 1980-84 LAC 47
17. Mopeli Mohale & Mamopeli Mohale vs Tlali Mohale C of A (CIV) 21/2008

Textbooks

1. Herbstein & Van Winsen: Superior Practice of the Superior Courts of South Africa 3rd Ed.
2. Beck's Theory & Principles of pleadings in Civil Actions 6th Ed.
3. Jones and Buckle Civil Practice of Magistrate's Courts in S.A. 10th
4. Joubert et al: Law of S.A. vel. 3(1) 2nd Edition
5. Dictionary of Legal Words and Phrases Vol.4
6. Black's Law Dictionary 2nd Ed.
7. The Law of South Africa 2nd Edition Vol. 9: Joubert et al

SUMMARY

Appellant is the grandson of an illegitimate father born of adulterine relationship of late Chief Nkhahle Mohale and 'Mamopeli Mohale. Appellant seeks to challenge First Respondent to succeed to vacant office of chief of First Respondents' father who was the immediate past incumbent in the now vacant office of chief following First Respondent's father's death. First Respondent

raised a Special Plea of “lack of locus standi in judicio” on the part of Appellant. Magistrate upheld Special Plea raised by First Respondent. In an appeal to High Court.

Held:

- 1. A plaintiff must found his title to sue personally and that of defendant to be sued. Where the 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 inexistence a person who can sue and another who can be sued.*
- 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.*
- 3. Locus standi is both 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 exception as happened in this case.*
- 4. Any subsequent marriage contracted in terms of the received law is null and void ab initio.*
- 5. A son born of an adulterine father does not satisfy the requirements of section 10(1) and (2) of the Chieftainship Act 1968.*
- 6. 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.*

[1] **INTRODUCTION**

The present appeal has come before me as a result of a dismissal by the Mafeteng Magistrate (Mr. Thoso) of an action brought by Appellant

against 1st Respondent and four other Respondents for orders couched in the following terms in the summons:-

- (a) *Setting aside nomination of 1st Respondent (Thato Mohale) as a successor to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng.*
- (b) *Presenting the name of Plaintiff (‘Mako Mohale) as the lawful successor to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng*
- (c) *Costs of suit.*
- (d) *Further and/or alternative Relief.*

[2] **BACKGROUND AND PLEADINGS**

It is common cause that:-

- 2.1 That on 21st January, 1957 late Chief Nkhahle Mohale married chieftainess ‘Mamonica Mohale by civil rites in the Roman Catholic Church at Mpharane.
- 2.2 That in or around 1958 the late chief Nkhahle Mohale purported to marry Appellant’s grandmother ‘Mamopeli by customary rites.
- 2.3 That the late Chief Nkhahle Mohale and ‘Mamonica were not blessed with a male issue.
- 2.4 That the late Chief Nkhahle Mohale and ‘Mamopeli procreated a male child, Mopeli, father of present Appellant before Court.
- 2.5 Chief Nkhahle Mohale died on 11th February, 1999 without legitimate male issue in terms of the judgment of Rooney J in the

case of ‘**Mamonica Mohale vs Mopeli Mohale 1982 – 84 LLR**. Though the date of death of Chief Nkhahle is not specifically pleaded in the summons this fact is picked up from **C of A (CIV) 21/2008** between Appellant’s father and grandmother against **Tlali Mohale**, First Respondent’s late father. See Paragraph 5 of Defendants Plea. The next male issue was Tlali Mohale who was Chief Nkhahle’s younger brother in the Fourth House of their father Chief Mohale with Chieftainess ‘Maseqobela.

- 2.6 Following the death of Chief Nkhahle, the Mohale Family nominated Chief Tlali Mohale as the legitimate successor in title to Chief Nkhahle and presented him to the Minister and the King for approval and installation as successor to Chief Nkhahle. Tlali Mohale was approved and appointed by King Letsie III as lawful successor to the office of Principal Chief of Tajane Ramoetsana and Mohale’s (Pontšeng) pursuant to **Section 10(7) of the Chieftainship Act, 1968**. As such Chief Tlali Mohale succeeded his older brother Chief Nkhahle Mohale on 20th July 2001. See **Legal Notice 39 of 2001 in Gazette no. 58 of 20th July, 2001**.
- 2.7 The immediate past Principal Chief of Tajane, Ramoetsana and Mohale’s (Pontšeng) was the late Chief Tlali Mohale who was installed in that office in 2001 by His Majesty the King acting on the advice of the Minister in terms of **Section 10(g) Chieftainship Act, 1967**.
- 2.8 Chief Tlali Mohale was substantive Principal Chief of Tajane Ramoetsana and Pontšeng Ha Mohale between 20th July 2001 and 20th November 2014.

- 2.9 The late Chief Tlali Mohale died on 20th November, 2014.
- 2.10 1st Respondent (Thato Mohale) is the legitimate and lawful son of late Chief Tlali Mohale.
- 2.11 Appellant is not the son of late Chief Tlali Mohale. Appellant is son of late Mopeli Mohale who is in turn is biological (not legitimate) son of Nkhahle and ‘Mamopeli as was determined by the High Court per Rooney J in **Mamonica Mohale vs Mopeli Mohale in 1982/84 LLR 117**.
- 2.12 The purported marriage of late Nkhahle Mohale and ‘Mamopeli Mohale became the subject of litigation in this court between ‘**Mamonica Mohale vs Mopeli Mohale** in early 80’s. It is reported as ‘**Mamonica Mohale vs Mopeli Mohale 1982-84 LLR 117**. This case was part of Plaintiff particulars of claim at paragraph 13.1. It was decided by Rooney J. on 23rd March, 1982. Rooney J. held that the purported customary marriage between Chief Nkhahle Mohale and ‘Mamopeli Mohale was null and void ab initio on the grounds that the purported customary marriage of Chief Nkhahle Mohale to ‘Mamopeli Mohale was entered into by ‘Mamopeli fully knowing that Chief Nkhahle Mohale was married to ‘Mamonica Mohale by Christian rites. The decision of **Rooney J.** followed the decision of this Court in **Mokhothu vs Monyaapelo 1976 LLR 281**, which in turn was confirmed by the Court of Appeal. See **1970 – 1979 LAC 200**. It has been followed in **Leoma vs Leoma LAC (2000-04) 253** and several others like **Makata vs Makata LAC (1980 – 1984) 198** and lately in **Lepoqo**

David Masupha vs Sempe Gabashane Masupha (C of A (CIV) 7B/2006) delivered on 28 October 2016 (unreported).

2.13 Mopeli's attempt to be declared a legitimate son of Chief Nkhahle and therefore his successor in title to succeed him failed in 2008. See **Mopeli Mohale and 'Mamopeli Mohale vs Tlali Mohale and Attorney General C of A (CIV) 21/2008.**

2.14 Mopeli Mohale (Appellant's father) died in January, 2014.

2.15 The judgment of Rooney J. in '**Mamonica Mohale vs Mopeli Mohale (supra)** has never been set aside.

[3] **DEFINITION OF THE DISPUTE BETWEEN PARTIES**

I define the crux of the dispute between the parties to be as follows: Between Appellant and First Respondent who is the rightful successor to the late Chief Tlali Mohale in the office of Principal Chief of Tajane Ramoetsana and Pontšeng Ha Mohale in terms of **Section 10(1) and 10(2) of the Chieftainship Act, 1968**? It is the legal answer to this legal question that lies at the heart of the dispute between 'Mako (Appellant) and the First Respondent (Thato Mohale).

[4] In the Court a quo the case of Appellant to sue was founded on the title of succession of Mopeli Mohale to the office of Principal Chief of Tajane Ramoetsana and Pontšeng Ha Mohale. Strange as this might sound but this is the crux of Appellant's foundation in his case. It is not founded in the succession of Chief Tlali Mohale the immediate past incumbent

Principal Chief of Tajane, Ramoetsana and Pontšeng whose succession is in issue in these proceedings.

[5] Appellant pleads that his father Mopeli Mohale should have succeeded late Chief Nkhahle Mohale. Tlali Mohale should never have succeeded Chief Nkhahle Mohale, so proceeds Appellants case foundation and reasoning.

[6] In response to Appellants summons in the Court a quo First Respondent (Thato Tlali) raised two special pleas, namely, that Appellant lacked “*locus standi*” and that the Magistrate’s Court “*lacked jurisdiction*” to adjudicate on the dispute between the parties.

6.1 As to lack of “*locus standi*” First Respondent pleaded that as plaintiff was grandson of the late ‘Mamopeli Posholi whose marriage to the late Chief Nkhahle Mohale had been declared *null and void ab initio*, the children of a void marriage are illegitimate and therefore as plaintiffs father was illegitimate plaintiff could not succeed to office of Principal Chief of Tajane Ramoetsana and Pontšeng. As the plaintiff’s claim and foundation was premised on the title of his late father Mopeli who was illegitimate plaintiff could not have *locus standi in judicio*. As he cannot succeed to such office plaintiff therefore had no “*locus standi in judicio*” to bring the action.

6.2 As to the plea of “*lack of Jurisdiction*” of the Magistrate’s Court, First Respondent developed the foundation of that plea as follows and I summarise here the essence of it: the kind of prayers sought by the Plaintiff can only be dealt with and granted by the High

Court sitting in its original jurisdiction and not the Magistrate's Court. In essence therefore the special plea of lack of jurisdiction contended that prayers 20(a) and (b) were declarators in nature and substance and as such were beyond the jurisdictional competence of the Magistrate Court to which he presented himself.

- [7] In the Court a quo Counsel requested the Court to hear their addresses on the special pleas first and dispose of them. The Court agreed.

Addressees commenced with the special plea of jurisdiction. The Court a quo relying on the decision in **Florinah Mantia Mapali Nko vs Lijane Nko, LCSA (2000) 5** dismissed the special plea. The Court of Appeal per Kotze JA (Ackermann JA and Steyn J concurring), in this case held that the Magistrate's Court had competency and jurisdiction to decide questions of succession to chieftainship. The Magistrate therefore followed Kotze JA judgment in dismissing Defendant's Exception. That aspect of the case ended there and is not before me now. The Magistrate considered that decision of the Court of Appeal to be binding on him. He was correct.

- [8] The Court a quo thereafter heard arguments on the Special Plea of plaintiff's *locus standi*. Defendant (present First Respondent) contended that Plaintiff (present Appellant) did not have *locus standi* to claim that he is the rightful person to be nominated as Principal Chief of Tajane, Ramoetsana and Pontšeng Ha Mohale. The basis of Defendant's contention was that the Plaintiff having been born of Mopeli who was the illegitimate son of Nkhahle and 'Mamopeli cannot be nominated to succeed Chief Tlali Mohale as Principal Chief of Tajane, Ramoetsana and

Pontšeng Ha Mohale in terms of **Section 10(1) and (2) of the Chieftainship Act, 1968.**

[9] **GROUNDS OF APPEAL**

It is this decision of the Magistrate that Appellant before me challenges primarily on two grounds, namely, that there were no undisputed facts upon which the Magistrate could have reached that conclusion purely on a special plea without referring the matter to oral evidence to establish the legitimacy of Mopeli Mohale and therefore the qualification of Appellant to succeed to the current vacant position of Principal Chief of Tajane, Ramoetsana and Pontšeng Ha Mohale following the death of Tlali. Secondly, Appellants contention is that **Section 11(2) of Chieftainship Act, 1968** qualifies him to stake his claim to be nominated to that vacant office. The Magistrate in his well-reasoned written judgement came to the conclusion that it was wrong to read the provisions of Section 11(2) in isolation of **Section 10(1) and (2) of the Chieftainship Act 1968.** I agree. In so far as the second leg of the plaintiff's submission was concerned the Magistrate took the view that as a subordinate Court he was obliged to follow the decisions of the High Court that Mopeli was illegitimate and of the Court of Appeal in **Mopeli Mohale vs Tlali Mohale C of A (CIV) 21/2008** that Mopeli failed before the highest Court of the land to upset the decision of Rooney J that declared him illegitimate. In other words Mopeli failed to succeed that he had a better right than Chief Tlali to succeed to the office of Principal Chief of Tajane Ramoetsana and Pontšeng Ha Mohale.

[10] I now turn to deal with Appellants grounds of appeal before me. The Appellant contends principally that the Court a quo misdirected itself in treating special plea as though it were an exception that can be dealt with without trial of “disputed” facts to establish supporting evidence. The question that comes to my mind is; which facts is Appellant referring to which he says are disputed. In oral arguments before me Mr. Teele KC for Appellant said it was the legitimacy of Mopeli as the legitimate son of Chief Nkhahle according to customary law. In other words Mr. Teele KC, contended that the marriage of Chief Nkhahle to ‘Mamopeli was lawful by customary rites and therefore Mopeli was legitimate and should have succeeded his father Chief Nkhahle instead of Chief Tlali, father of First Respondent. This argument is fraught with many difficulties for it is not supported by undisputed facts which have been outlined in paragraph 2 of this judgment above. The facts of the case are not in dispute. It is the legal consequences flowing from those facts that are in dispute; and those are matters of law and not facts.

10.1 It will be seen from the pleaded facts which are common cause to the parties and are largely pleaded which I summarised in Paragraph 2 of this judgment that the Appellant’s case is firmly anchored on him being the son of Mopeli Mohale who this court determined in 1982 in **Mamonica Mohale vs Mopeli Mohale** to be the illegitimate son of Chief Nkhahle and ‘Mamopeli. Appellant has in his averments founded his title to sue in the succession of Mopeli Mohale – not in the succession of Chief Tlali Mohale whose succession is in issue in these proceedings. In **S.A. Cooling Services vs Church Council of Full Gospel Terbannacle 1955(3) S.A 541 @ 543 C - E, Caney J.** said the following in relation to *locus standi*:

“I consider it to be necessary for a plaintiff to make in his declaration the averments required, not only to show that he has locus standi, but also that the defendant has.”

The learned judge continued and stated that:

“A plaintiff must found his title to sue and that of the defendant to be sued. Otherwise, it seems to me, he does not disclose a cause of acting for a cause of action accrues when there is in existence a person who can sue and another who can be sued.”

I agree entirely with Judge Caney. It is the legal position in Lesotho as well. As Judge Dambutschena said in **Khauoe vs Attorney General 1995-96 LLR & LB 470 @ page 48:-**

“A person who wants to institute an action must not only sue on his own behalf. The right or interest which he seeks to enforce or to protect must be available to him personally.”

- 10.2 As we have seen, Appellant is his averments’ founded his title to sue in the succession of Mopeli Mohale to the late Chief Nkhahle and not in the succession of Chief Tlali Mohale, the immediate past incumbent Principal Chief of Tajane, Ramoetsana and Pontšeng whose succession is in issue here.
- 10.3 For purposes of the special plea, Appellant averments at Paragraph 16(b) are correct that the Principal Chieftainship moved from the House of Chief Mohale with ‘Mankhahle to the House of Chief Mohale with his fourth wife ‘Maseqobela who bore them a legitimate son being Chief Tlali Mohale, father of First Respondent in this appeal.

[11] **Subordinate Court Rules: Exceptions and Special Pleas**

- 11.1 It cannot be disputed that at the time of trial of this matter the Magistrate was guided by **Subordinate Courts Order No.9 of 1988 and Subordinate Courts Rules 1996.**
- 11.2 The main point in Appellant's Grounds of Appeal is that the Special Plea of *non-locus standi in judicio* cannot be raised and determined without leading evidence. In the alternative he urges on me, that the learned Magistrate in this particular case erred in upholding the plea of *non-locus standi in judicio* against the Plaintiff on the facts.
- 11.3 It is trite law that pure issues of law may be dealt with and determined at any stage of the case without adducing evidence. When this is done the facts of the issue that is challenged are assumed to be correct for purposes of argument. Mr. Maqutu KC submits that Appellant has misunderstood the procedure of advancing or arguing a Special Plea when he claims that in all cases extrinsic evidence has to be led. I agree with Mr. Maqutu KC that all that needs to be done in fact is to bring facts that link and prove the special plea that are already on record. Pleas in bar of trial like *non-locus standi in judicio* do not always introduce fresh matter which must be proven by extrinsic evidence. See **Beck's Theory and Principles of Pleadings in Civil Litigation 6th Edition @page 56.** The learned authors say:-

“The question of locus standi is in a sense procedural, but it is also a matter of substantive law. It concerns the sufficiency and directness of interest in the litigation to be accepted as a party.”

In my view this statement of the law by the learned authors cannot be faulted. It is true and correct.

11.4 **Rule 17 of the Subordinate Court Rules, 1996** does not speak of Special Pleas but it speaks only of Exceptions. The exceptions mentioned in **Rule 17(2)** are:

- that the summons does not disclose a cause of action
- that the summons is vague and embarrassing

[12] But that does not mean that a litigant before court is exempt from establishing that he has *locus standi* in *judicio* (a substantive and direct interest to sue) and that the defendant being sued also has a direct and substantive interest to be sued. See for example the decision of this court in **K. T. Khaue vs Attorney General and Another (supra)**.

In the instant case the person who wants to institute an action being ‘Mako must personally have an interest in the succession to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng as a legitimate son of Tlali Mohale in terms of **Section 10(1) and 10(2) of Chieftainess Act 1968**. **Herbstein & Van Winsen: Superior Practice of the Supreme Court in South Africa 3rd Ed.** expresses the principle in the following terms at page 183:

“It must appear from the summons that the plaintiff has an interest or a special reason entitling him to sue, i.e. that he has locus standi in the matter.”

In my opinion the above statement by the learned authors is a correct statement of our law on the issue of *locus standi*. I accept it as such for my purposes in the instant case.

[13] In **Samdei & Others 1975(2) SA 706** it was held that an objection to non-joinder or *non-locus standi* in *judicio* can be competently raised by

means of a Special Plea much the same way that on exception maybe raised. In this case special plea was argued like an exception. The defendant took the facts as pleaded and contended that they did not entitle the plaintiff to succeed Chief Tlali Mohale to the office of Principal Chief of Tlajane Ramoetsana and Mohale's. In deciding an exception a Court must assume the correctness of facts made in the relevant pleadings which of necessity must be confined to undisputed pleaded facts readily found in the pleadings. As we have seen earlier in this judgment the case of **Mamonica Mohale vs Mopeli Mohale CIV/APN/109/81** in the original judgment of the reported case which Appellant introduced at paragraph 13 and 14 of his particular of claim in his summons is the reported case of **Mamonica Mohale vs Mopeli Mohale 1982 -84 LLR 117**. In that case Rooney J held that Mopeli Mohale was illegitimate son of Chief Nkhahle and 'Mamopeli. It seems to me to be to be perfectly in order for the Magistrate to feel entitled to treat the Special Plea in the same way as exception if First Respondent elected not call evidence.

- [14] In **C of A (CIV) 21 of 2008 Mopeli Mohale & 'Mamopeli Mohale vs Tlali Mohale & Attorney General** was correctly used by the Magistrate as a decided case of the highest court in the land that both the decisions, "set precedents for this court and they are binding on it that Mopeli Mohale is illegitimate son of late Chief Nkhahle and 'Mamopeli." The Magistrate cannot be faulted on that score. Appellant's father attempted and failed to overcome his illegitimacy in a case against the late Chief Tlali Mohale in a court of competent jurisdiction. So, in the end Appellants father died in January, 2014 having a declaratory order of illegitimacy against him. In the result the trial Magistrate legitimately noted that Mopeli died having failed to upset Rooney J's decision that he was illegitimate and could not set up any right of succession against

Mamonica Mohale nor Tlali Mohale. Mamonica and Nkhahle were succeeded by Chief Tlali Mohale as Principal Chief of Tajane Ramoetsana and Pontšeng Ha Mohale as their marriage produced no male heir to succeed them in terms of **Section 10(1) and (2) of Chieftainship Act, 1968.**

[15] Mr. Maqutu KC for 1st Respondent submits, to borrow expression from Black's Law Dictionary, that a litigant of Appellant's type in relation to his late father Mopeli as a privy of blood because he is an heir to his father Mopeli. Mr. Maqutu further submits that there is an issue estopped in respect of Mopeli's legitimacy in respect of the chieftainship of Tajane, Ramoetsana and Pontšeng because there is a judgment in rem that is binding on the parties and their heirs who wish to claim the said position of Principal Chief. **Joubert et al The Law of South Africa 2nd Edition vol.9 @ Paragraph 651 @ page 400** puts the legal principle in the following manner:

"A judgment in rem which declares or determines the status of a person or thing, and is binding on everyone, not only those who were parties to the suit in which it was delivered or which in law are identified with the parties. Examples of judgments in rem--- are ---a judgment declaring a marriage to be void ab initio."

I agree with Mr. Maqutu KC. It seems to me that Appellant had inherited an issue estopped to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng on the grounds of his father's illegitimacy. This personal bar of Appellant's father creates a *non locus standi in judicio* situation for Appellant too in this case for the decision of the Court in '**Mamonica Mohale vs Mopeli Mohale** (supra) regarding the illegitimacy of Mopeli (Appellants father) became his impediment to be heir to Chief Nkhahle Mohale as a legitimate successor in title to that office after Nkhahle's demise. Following Chief Nkhahle's death in 1999 the Mohale family

recommended Chief Tlali Mohale younger brother of Chief Nkhahle to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng. As indicated earlier the recommendation was accepted by the King on the advice of the Minister and 1st Respondents father was appointed to that office and gazetted in his own right. See **Legal Notice 39 of 2001 Published on 20th July, 2001 in Gazette No.58**. Chief Tlali Mohale succeeded into that office in his own right as lawful successor to it.

[16] On the basis of material facts common to both parties on their pleadings, I have come to the conclusion that there was no need to for the Magistrate to refer to evidence any fact material to determination of the special plea of “lack of *locus standi in judicio* of Appellant. As the foundation of First Respondent’s title to the office of Principal Chief of Tajane Ramoetsana and Pontšeng is reliant on the lawful title of his father Tlali Mohale, who was the immediate previous incumbent in office of the office of Principal Chief of Tajane, Ramoetsana and Pontšeng there is no doubt in my mind that 1st Respondent (Thato Mohale) is the only lawful nominee to that office for appointment by the King to it in terms of **Section 10(7) of Chieftainship Act 1968**.

[17] I am fortified in this conclusion also by the decision of this Court in **Leihlo Lenono vs Moeketsi Lenono 1976 LLR 171** where Mofokeng J. held, in a situation to the present one, that:

“this vacancy had to be filled by someone with a better title – and a person with a better title is the first born male in the house of Moeketsi Lenono not in the whole Lenono’s family.”

In respect of Tlali Mohale the incumbent Principal Chief of Tajane Ramoetsana and Pontšeng Ha Mohale in his succession “a person with a

better title is the first born made in the house” of Tlali Mohali not in the whole of Mohale family to which Appellant may also belong even if that were the case. But as we have seen in the case of Appellant he is in an even worse position because he is the son of an illegitimate person in the Mohale family.

[18] Succession to the office of chief is legislated for in **Part III of Chieftainship Act No. 22 of 1968** as follows in **Section 10(1) and (2)**:

“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 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.”

In my opinion the reference to “the Chief” in **Subsection (2)** must be reference to the immediate past incumbent Chief to that office of Chief. In my view it cannot be a reference to any other person who was not immediate past incumbent in office and accordingly a reference in this subsection to a firstborn cannot be to any person other than the firstborn son of the immediate past incumbent Chief in office. See ‘**Meli Ntsoele vs ‘Mamolomong Ramokhele 1974/75 LLR 130** where the family had nominated a person who was not a direct descendant of the deceased incumbent chief in trying to put right what the family believed to be past mistakes in the occupations of the particular office of chief.

[19] I am satisfied that *ex facie* the plaintiff’s summons and declaration the right of plaintiff to sue was non-existent in that his right was founded on

the right of Mopeli (his father) to succeed Chief Nkhahle following Nkhahle's death. Chief Nkhahle and Chieftainess 'Mamonica were in fact succeeded by Chief Tlali, father of defendant and not Mopeli, father of plaintiff. As Mopeli had been declared illegitimate progeny of Chief Nkhahle and 'Mamopeli Posholi by the High Court in 1982 and had never in his lifetime succeeded Chief Nkhahle and as the present dispute is concerned with successor to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng Ha Mohale following Tlali Mohale's death, it is the lawful successor to Tlali who is in issue here. Defendant's Special Plea of lack of *locus standi in judicio* and its determination by the Magistrate without requiring extrinsic evidence was correct. The plaintiff's undisputed facts pleaded in plaintiff's summons in law pointed to plaintiff's lack of a direct personal right to succeed Chief Tlali, assuming the truth of every allegation made in plaintiff's declaration.

[20] **COSTS**

Mr. Maqutu for First Respondent asked that if First Respondent were to be successful in this appeal, he asked that costs against Appellant be on the scale as between attorney and client and that such costs should include costs consequent upon employment of two counsel. First Respondent contends that Appellant did not act in good faith when he brought present litigation for he ought to have known that he was estopped from succeeding to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng Ha Mohale basing such claim on the legitimacy of his father Mopeli as a legitimate son of Chief Nkhahle well knowing that courts of law have determined that his father was illegitimate progeny of Chief Nkhahle and 'Mamopeli. Mr. Maqutu KC submits that before this court at appeal stage Appellant belatedly raised

an argument of “*mala marriage*”. Mr. Maqutu KC contends that this was an abuse of the process of the court and vexatious for the Appellant to endeavour to obtain a retrial of an issue already decided, by simulating a different cause of action. As Appellant’s title to succeed was firmly based on the title of Mopeli who had been declared illegitimate, appellant was being vexatious in bringing present litigation, so contends Mr. Maqutu KC.

[21] It is quite correct that unnecessary litigation is undesirable. In **Royal Sechaba Holdings Pty Ltd vs Loote and Another 2014 (5) SA 562** it was said, and correctly so I might add:

“There should be finality in litigation and evidence of a multiplicity of litigation or conflicting judicial decisions on the same issue or issues.”

There are a host of other decisions of the courts to the same effect expressed in different words. But the essence remains the same. See for example, **Ramatekoa vs Ramatekoa 1980-84 LAC 47; Chieftainess Mankhahle Sebili vs Chief Leuta Mahao CIV/A/6/2003; Mopeli Mohale vs Tlali Mohale C of A (CIV) 21 of 2008** (unreported). Vexatious litigations connotes reckless litigation designed to harass the other party well knowing that there is no merit in bringing such litigation to court. In the present litigation I am not convinced that Appellant intended to be vexatious. I think he was motivated by a lack of appreciation and understanding of this area of the law than vexation.

I think he thought he had an opportunity to be understood better in circumstances where his own father and grandmother had not been understood by the Courts. Perhaps it was fuelled by the legal theory by

some that Chieftainship is an institution of customary law and therefore where a customary marriage follows a civil rites marriage the customary law marriage must not be viewed as void *ab initio* but that the resultant problem must be viewed as one of choice of law to avoid the customary law marriage being declared invalid from the onset. What this theory misses is the fact that **Marriage Proclamation No.7/1911** and its successor **Marriage Act No.10 of 1974** are statutory interventions of the legislature under the received law. The legal theory also fails to appreciate the legal and I might say plain, meaning, and import of **Section 18 of Marriage Proclamation No. 7 of 1911** as well as of **Section 29(1) read with Section 42 of the Marriage Act 1974**. I am of the view that costs on attorney and client scale are not warranted in these circumstances. I am of the view that the area of the law being traversed here is a fairly complex one and that the costs including costs consequent upon employment of two counsel is justified. Costs on party and party basis including costs consequent upon employment of two counsel will be sufficient in my determination.

[22] In the result the following orders are made:

22.1 Appellant's appeal from the judgment of the Mafeteng Subordinate Court in CC 05/15 is hereby dismissed with costs to 1st Respondent. Such costs to include costs attendant upon the employment of two Counsel.

22.2 Setting aside of the nomination of 1st Respondent as successor to the office of Principal Chief of Tajane, Ramoetsana and Pontšeng is hereby refused.

