

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/A/14/15  
CC 110/07 & CC 56/08**

In the matter between

**'MAMOSEKI MAHASE**

**APPELLANT**

And

**CHACHO KHOABANE**

**RESPONDENT**

Neutral Citation: 'Mamoseki Mahase v Chacho Khoabane [2021] LSHC Lan 45 (22 March 2022)

**JUDGEMENT**

**CORAM: BANYANE J**

**DATE OF HEARING: 15/12/20,16/02/22**

**DATE OF JUDGEMENT: 22/03/2022**

**Summary**

*Inheritance to land - claimed by a married woman over arable land allocated to her parents' house where there is no male issue - the male issue from the first house being nominated as heir - whether the ngala custom confers a right to a married woman to inherit her parents'*

*immovable property - whether a Form C2 and CC2 may validly be issued for arable land*

## **Annotations**

### **Cases cited**

1. Naidoo v Senti LAC (2007-2008)161
2. Thinyane v Mosooa C of A (CIV) No.66 of 2014
3. Ramatlapeng v Jessie C of A(CIV) 15 of 2016
4. Litsebe v Litsebe CIV/A/5/81
5. Maoeng v Maoeng C of A(CIV) 9/19
6. Mohapi v Monne and Other CIV/APN/313/92
7. Thabane v Thabane CIV/APN/329/92
8. Masilonyane v Masilonyane CIV/APN/24/2004
9. Khasake Mokhethe v Mosiuoa Khasake CIV/APN/73/13

### **South Africa**

10. National Employers' General Insurance Co Ltd V Jagers  
1984(4)  
SA 437

### **Legislation & subsidiary Legislation**

1. The Land Act No 17 of 1979
2. The Land (Amendment)Act No 6 of 1992
3. The Land Act No 8 Of 2010
4. The Land Regulations 1980

**BANYANE J**

## **Introduction**

**[1]** This is an appeal against the judgement of Berea Magistrates' Court delivered on the 15<sup>th</sup> April 2013. I must point out from the outset that the delay in finalization of this appeal is regretted. The following are the reasons that attributed to the delay. The typed record of proceedings from the court below, although certified correct, is in shambles. The evidence and submissions are not bound in a chronological order. For example, a portion of the closing addresses precedes the hearing of evidence and the other part appears at the end of the record. There are several blank spaces in the recording of evidence. This rendered it difficult to comprehend, and I had to figure out the missing words from the context.

**1.1** The record is incomplete in other respects. Documentary evidence germane to the issues raised by this appeal did not form part of the record when counsel submitted their written submissions in December 2020. This I realized in February 2021 when began drafting the judgement on the basis of the heads of argument submitted per counsel's request. Numerous requests through the office of my erstwhile clerk for submission of these documents by counsel were made. Regrettably, these were only given to me a year later (16/02/22) after I called both counsel to my chambers to establish why these have not been being forwarded to my office despite numerous requests. Fault, I must mention, was attributed to my erstwhile clerk. I need not, however, burden this judgement with my inquiry into the matter.

## **Description of the parties and nature of dispute**

**[2]** The dispute between the parties evolves around succession or inheritance of immovable property in the form of arable land (two fields situated at Likoung and Khoshane respectively) and a residential site situated at Marabeng, the property of the late Mamphasola Khoabane (the appellant's mother). Mamphasola passed on in 1995. She was the second

wife of the deceased allottee of these properties. She mothered Mphasola, Mamoseki(appellant) and Likeleli. The first wife mothered Tsosane Khoabane. Tsosane sired Chacho Khoabane.

**[3]** Litigation was initiated by Mamasoabi Khoabane, Tsosane's wife, in 2007 after her husband's demise. She claimed that her husband was nominated as heir to the disputed property, and that she in turn inherited it from her husband. Her case was further that following this nomination, certificates of Allocation (Form Cs) were issued in her favour during her husband's lifetime. She, as plaintiff, later substituted by her son, Chacho Khoabane(the respondent herein) after her demise in 2010, sued the appellant as defendant in the Berea Magistrates' Court under CC110/07 for ejection from the listed properties.

**[4]** Appellant opposed the claim on grounds that the form Cs were fraudulent and invalid, and that neither Tsosane Khoabane nor Mamasoabi were nominated as heir to her parents' property and conversely that she was appointed as heir by the family.

**4.1** To the summons and particulars of claim, the appellant excepted on grounds that they do not disclose a cause of action because the certificates of allocation (form Cs) issued for the plaintiff in relation to the disputed fields are null and void since they have been issued pursuant to a schedule of the Act that deals with issuance of form Cs for residential sites and not arable land, and for this reason they conferred no title to her.

**[5]** Her other complaint was that the plaintiff lacks *locus standi* because her title (if any) has been extinguished by sections 15 & 16 of the Deeds Registry Act of 1967 because she failed to register these form Cs in accordance with these provisions.

**[6]** These exceptions were dismissed after argument was presented by both counsel.

**[7]** In June 2008, (seven months after institution of CC110/07), Mamoseki(appellant), as plaintiff launched a claim for damages under CC 56/08 against Mamasoabi, allegedly arising out of wrongful harvesting of her crops on the disputed fields. She sought damages in the amount of M4 000 as ploughing and planting costs and M 16 000 as representing the value of the expected yield. This claim was based on the assertion of her ownership of the fields.

**[8]** This too was vehemently opposed. Although Mamasoabi admitted having harvested the fields, she contended firstly that the fields are hers and secondly that she planted her own seeds on these fields, over which Mamoseki planted her own. The two matters were consolidated and tried together.

### **The Judgement of the Court *a quo***

**[9]** Faced with the two-conflicting nominations of heirship, the Court at the conclusion of trial, considered who between the parties was properly nominated as the heir to the disputed properties. The court issued judgement in favour of Chacho Khoabane, having determined that his father Tsosane Khoabane was properly nominated as heir, as against Mamoseki, who by virtue of her marriage to Liphaka Mahase was not entitled to inherit property belonging to the Khoabane's but entitled to property of the Mahases. His reasons for the decision are as follows:

“Lets analyse the standings of both parties as regards the Khoabane family or the estate of the late Mamphasola. ‘Mamoseki Mahase, despite having childhood connections with the Khoabane family, is a member of the Mahase family. She is or was married by the Mahase family, hence the surname Mahase and not Khoabane. Her rights over the property or succession were extinguished once she was married to Mahase. She cannot claim rights over the property of Mahase and that of Khoabane. This is clearly and correctly captured in Exhibit‘E’ which says;

‘Mamoseki Mahase o nyetsoe ke ntate Liphaka Mahase. O tla ja lefa la ha Mahase eseng la Khoabane. Re tlatsa hore a tsoe lefeng la Khoabane (translated to mean “as for Mamoseki Mahase is married to Mr. Liphaka Mahase. She will inherit the estate of Mahase family and not of Khoabane. We support the decision that she should not be considered for succession of Khoabane’s estate”

**9.1** He continued;

The present plaintiff Chacho Khoabane, is the son of Mamasoabi Khoabane and a member of Khoabane family. The original owner of these two fields in question is the father of the plaintiff. When he died, his widow inherited these fields and the residential site.

As a result and being mindful of the stated law and decision above, the line of inheritance would be confined to family members where there is no will or any lawful act bestowing inheritance to another person or entity. So after his death, the family correctly allocated the fields and the residences to his wife, Mamasoabi Khoabane, the mother of the plaintiff.

After this allocation, Mamasoabi was granted form Cs relating to the two fields, one at Khoshane Marabeng and one at Likoung. She was able to enjoy possession of these fields just as her deceased husband had done for years. On the other hand, defendant has no form Cs to prove allocation of these two fields. It is true that Form C is not conclusive allocation of property like a lease but it cannot be ignored that the family council and not land allocating authority chose plaintiff as the heir. At the end of the day, the question is who was properly chosen by the family as heir? It is argued by the defendant that those form Cs are fraudulent. It is not enough to allege fraud without proving it. Defendant just alleged fraud and left everything to the court to decide in his favour”.

**Grounds of Appeal**

**[10]** Aggrieved by this decision, Mamoseki noted an Appeal in 2013. She impugns the judgement of the court below on a number of grounds. They are couched as follows;

The Court had misdirected itself in the following respects;

- a) In giving judgement basing itself on a form C which was not a *prima facie* evidence of allocation of the arable land on the face of it without giving evidence to support it.
- b) In relying on a Form Cs as proof of ownership over the fields in issue when the same had lapsed after a period of six months from the date of issue.
- c) In taking into account the issue of the surname of the appellant, giving judgement against her on the grounds that the said fields belonged to Khoabane family, despite the fact that no argument was made to that effect.
- d) In dismissing the counterclaim as it stood, yet evidence was tendered to support the counterclaim and it was not substantially challenged; and that at best a reasonable ruling in favour of the respondent would be absolution from the instance.

### **Issues for determination**

**[11]** There are three main issues that must be determined in this appeal.

They are;

- a) Whether the respondent's father was appointed as heir to the disputed properties in 1995?
- b) whether Forms Cs are valid and whether they are relevant documents in determining who between the parties was properly appointed as heir to the disputed properties?
- c) Did the court a quo err in taking the appellant's marital status into account in determining the rival inheritance claims?
  
- d) whether the claim for damages in the amount M 20 000 was proved on a balance of probabilities.

### **Was the respondent nominated as heir to the disputed properties?**

**[12]** It is common cause between the Parties that; a) Mamphasola died in 1995; b) a family meeting was held after her burial; c) the appellant was

invited to attend but refused. It is further common cause that at the material time, the appellant was married to Liphaka Mahase.

**12.1** The dispute revolves around matters discussed in that meeting. According to the appellant, no distribution of her mother's estate was made nor Tsosane Khoabane's nomination as heir. This issue must therefore be determined first because the issue relating to issuance and validity of the

Form Cs flows from the decision whether Khoabane was in fact nominated.

**12.2** To Determine this, recital of the evidence led in the court below is necessary.

### **Plaintiff's case**

**[13]** The plaintiff Chacho testified that when Mamphasola died in 1995, the appellant had already married into the Mahase family. The Khoabane family convened a meeting. At this time, Mamoseki lived at a house close to her mother's. She was invited to the meeting but did not come. His father was appointed an heir (a fact disputed by the appellant in cross-examination)

**13.1** He further told the Court that despite his father's nomination, Mamoseki interfered with the inherited property by selling a portion of the residential site to one Lichaba. Another act of interference was the ploughing of the field without his father's consent despite being warned against doing so by the chief.

**13.2** His evidence was further that in 2008, following his father's passing, the family nominated his mother Mamasoabi Khoabane as heir to his father's estate and in turn he was so nominated after her mother's demise. He handed in family resolutions made in meetings held in this regard as well as Form Cs for the disputed fields issued in her mother's names in 1995 and 99 respectively.



**[14] Seele Khoabane**, a Mosotho man aged 73 years testified as plaintiff's witness. He told the Court that he is the brother to Tsosane Khoabane. He corroborated the plaintiff's story that after Mamphasola's burial, a family meeting which Mamoseki refused to attend, despite invitation, was convened. He told the Court that he attended the meeting and the family therein resolved to "allocate" the disputed fields to Tsosane Khoabane so that he could take care of Likeleli (Mamphasola's unmarried daughter).

**[15] PW3 Malebo Khoabane** aged 53 also took the stand. His evidence corroborated Seele Khoabane's on the fact that after Mamphasola's passing, the family resolved to allocate the fields to Tsosane and that he was present in that meeting. Further that when 'Mamasoabi died, the plaintiff was appointed as heir.

**[16] PW4 'Maretseletsoe Khoabane** aged 64 also testified that she was present in the meeting. She confirmed that Tsosane was appointed as heir and later his wife.

### **The defendant's case**

**[17]** Mamoseki, aged 77 at the time also took the stand. She told the Court that she is the youngest of the three daughters of 'Mamphasola. She told the Court that after her mother's burial, one Khoabane Khoabane came to her house, apparently send by family members requesting her presence in a family meeting which was intended to reconcile differences between herself and Mphasola, her sister. She turned down the invitation. She testified that it cannot be true that her mother's property was allocated / distributed in that meeting because reconciliation with her sister was the sole item on the agenda of the meeting, so she was told.

**17.1** She further told the Court that after her mother's demise, she and her sister Likeleli continued to plough the fields in question.

**17.2** She denied selling a portion of her mother's plot and conversely testified that Mamphasola herself sold the portion to the said Lichaba.

**17.3** Crucially, she told the Court that in a meeting held by the family after the passing of her mother, she was allocated both fields as well as the residential home. She apparently handed a document in this regard. I say apparently because this document does not form part of the Appeal record. She stated that Mamasoabi's form Cs on whose basis, Chacho's claim is based, were fraudulent because Mamasoabi was never allocated Mamphasola's property.

**17.4** Under cross-examination, she told the Court that her nomination letter authored by the family was endorsed by the chief, but she did not secure title documents for these properties.

**[18] Mabomo Khoabane** aged 68 at the time also testified for the defendant. She told the Court that after Mamphasola's death the sole agenda item of the meeting was to fix the unsavoury relations between Mamphasola's daughters, nothing else. She stated that Mamphasola's estate was not discussed in that meeting.

**18.1** She further testified that when the dispute over these fields arose, the family resolved to allocate them to Mamoseki. This was after the cases in question had already been instituted.

**18.2** In cross-examination, she stated that they awarded property to Mamoseki because Mphasola was married.

**[19] Lebohang Hatasi**, Mphasola's son also testified. He told the court that Mamoseki is the younger sister to his mother. He told the Court that two items were on the agenda of the 1995 meeting, namely, the conflict between his mother and Mamoseki. He testified that the meeting was

adjourned because Mamoseki was not in attendance. He told the Court that the second item on the agenda was allocation of Mamphasola's estate. He however simply stated that the distribution of Mamphasola's estate was not made on this date but sometime in 2005 or 2006 after her mother's passing in 2004. Notably he was not in attendance of this meeting in which Mamoseki was nominated as heir despite an invitation to so attend.

**19.1** He further stated that in 2008 (clearly after institution of CC 110/07), a family meeting was held to resolve the rival claims of inheritance over the disputed property by Mamoseki and Mamasoabi but no resolution was reached and the matter was reverted to the Court for resolution.

**19.2** Under cross-examination, he stated that in the 1995 meeting, no minutes were prepared and signed. He further stated that his mother Mphasola attended the meeting although her name is not reflected on the list of attendees. It must be noted that under cross-examination Mabomo stated that both sisters did not attend the meeting and that Mphasola send her children to attend.

**[20] Maphutse Khoabane** also testified. He told the Court that he participated in the 2008 meeting held before the headman of the area. This was after these cases had already been filed. No solution was reached, and the matter was referred back to the lawyers.

**[21]** It is clear from the evidence led that parties gave mutually destructive versions on this aspect (whether Chacho's father was nominated as heir) .

**[22]** The general approach where the parties' respective versions are mutually destructive such as in this case, is to be found in **National Employers' General Insurance Co Ltd V Jagers 1984(4) SA 437**

quoted with approval in **Naidoo v Senti LAC (2007-2008)161 at 164.**

It was held that;

“where the onus rests on the plaintiff and there are two mutually destructive stories, he can only succeed if he satisfies the Court on the preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not, the Court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate credibility of a witness will therefore be inextricably bound up with a consideration of probabilities of the case and if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour plaintiff’s case anymore than they do to defendant’s, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his case is true and that the defendant’s version is false”.

**[23]** It is not disputed on the evidence adduced that the family council held a meeting after Mamphasola’s burial, to which the appellant was invited but refused to attend. According to the respondent, it is in this meeting that his father Ts’osane was nominated as Mamphasola’s heir. Despite non-attendance, the appellant disputes this. She called in the evidence of **Mabomo** who testified that the sole agenda for the meeting was reconciliation of the appellant and her sister Mphasola. She however does not deny that two witnesses on behalf of the plaintiff (i.e Seele (admittedly the head of the Khoabane family, Malebo Khoabane and ‘Maretselisitsoe Khoabane) also attended the meeting. She simply and barely refutes that the nomination was made. She does not tell whether distribution of Mamphasola’s estate was first discussed in 2008 after this litigation between the parties had commenced.

**23.1** This bare denial must be weighed against the respondent's two witnesses confirming Ts'osane Khoabane's nomination. Although it is not immediately clear whether the minutes handed in as proof of nomination were prepared the same date in the presence of attendees, the second set of minutes (2008) nominating the respondent's mother as heir to her husband's estate confirms that the decision to appoint the respondent's father as heir was made in 1995. In the light of the 2008 minutes (quoted in the judgement of the Court a quo), I am convinced that the probabilities favours the respondent's version in the Court below as true. The learned magistrate was therefore entitled to rely on the letter of family as proof that a resolution was made on the date in question to appoint the respondent's father as heir.

#### **Are the Forms Cs valid?**

**[24]** Having decided as I did above, I deal next with the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of Appeal. They are related and shall be considered together. The essence of the appellant's complaint under these grounds as I understand it is that the learned magistrate erred in relying on the form Cs, firstly because they have been issued pursuant to a schedule of the Act that deals with issuance of form Cs for residential sites and not arable land ; secondly they lapsed due to their non-registration with the Deeds Registry in terms of section 15 of the Deeds Registry Act of 1967. It is on this basis that she contends that the Form Cs conferred no title to the respondent's parents nor him.

**[25]** The respondent's counsel conversely contended that the provisions of the Deeds registry's Act under scrutiny were not applicable to the disputed land in question because it is situated in a rural area.

**[26]** In order to address the tenability of the respective arguments, I start from the premise that a distinction must be drawn between allocation of land following an application for grant of title on the one hand and inheritance to land on the other. The procedure for both methods of

acquisition of land rights is different. These procedures are governed by The Land Act 1979 and the Regulations made thereunder i.e Land Regulations of 1980(legislation applicable at the material time). They are discussed below.

**[27]** I start with allocation of land. The Act distinguishes between allocation of land in urban and rural areas. The composition of the committees vested with power to allocate land is also different, so are the documents issued upon approval of an allocation application. Part II of the Act applies to land in rural areas while part III of the Act deals with grants of title to land in urban areas. In terms of section 17 of the Act, A Form C1 is issued for non-registrable title in rural areas whereas a Form a C 2 is issued for registrable title in rural areas (see s5(4) and 17(1) of the Act). A Form C3 is issued for allocations in Urban areas (see s 5(4) and 27 of the Act). The Land (amendment Act) of 1992, introduced a new subsection to section 5. This section 5(5) provides that a Form CC2 shall be issued for residential allocation of land in rural areas.

**27.1** Registrable title is defined as follows under section 2 of the Act.

“registrable title” means title to land in a rural area which has been allocated for use\_

- a) For commercial or industrial purposes
- b) For purposes of ecclesiastical, benevolent, charitable or educational institution of a public character;
- c) For purposes of hospital, clinic or dispensary;
- d) For residential purposes;
- e) For such other purpose as the minister may, by order, declare

**[28]** The impugned Forms C reveal that in relation to the field at Likoung, a Form C2 was issued (apparently in terms of sections 5(4) and 17(1) of the Land Act 1979(for registrable title in rural areas), while for the field at Khoshane, a Form CC2 was issued in terms of section 5(5), 10A and 17(1) of the Act (for residential land in rural areas).

**[29]** With regards to the procedure for land inheritance, Regulations 7 and 8 of the land regulations 1980 are instructive. They read as follows;

“7. (1) Whenever any person dies within the jurisdiction of a given Land Committee leaving any allocated land referred to in section 8 of the Act, the nearest relative or connection of the deceased or in default of any such relative or connection, the person who at or immediately after the death has the control of the land formerly held by the deceased, shall within 12 months thereafter cause a notice of death signed by him to be delivered or transmitted to the Chairman of that Land Committee.

(2) The notice referred to in sub-section (1) shall show; -

(a) The date of the death of the deceased, his district and village of origin, his last place of domicile and his last place of residence;

(b) the relationship of the informant to the deceased;

(c) the name and sex of the heir of the deceased;

(d) whether the heir is the first male issue of the deceased or was designated as heir by the deceased or was nominated as heir by the surviving members of the deceased's family in the event of there being no first male issue heir or a designated heir;

(e) whether the allocated land is to be occupied by the spouse of the deceased and minor children of the deceased; and

(f) relevant particulars to identify the locality of the allocated land.

8. (1) Upon receipt of the notice referred to in regulation 7, the Chairman of the Land Committee having jurisdiction shall give notice so far as is practicable in the particular circumstances of each case, of all the information required by regulation 7(2) and shall therein; -

(a) name the place and fix the period at and within which claims and objections to claims may be lodged and such period shall not be less than six weeks;

(b) set the time and date thereafter when the hearing and examination of the evidence relevant to the disposition of the allocation will commence at the said place or any other place so specified.

(2) The Chairman shall publish the notice referred to in sub regulation (1) in such manner as he may consider reasonably adequate and most effective including the posting of the notice on the allocated land affected for the purpose of bringing it to the attention of all persons who may have claims or objections to claims and shall record the manner of such publication in records of the Land Committee's proceedings.

(3) An interested person may be given a reasonable opportunity to be heard, call and adduce evidence before the Land Committee having jurisdiction and such person may be heard either personally or through his agent deputed in writing for that purpose.

(4) Not later than seven days after the day of determination by the Land Committee having jurisdiction, the Chairman thereof shall publish the decision and endorse the register of the allocations accordingly."

**[30]** Mosito P in **Thinyane v Mosooa C of A (CIV) No. 66 of 2014** ably construed these provisions as follows (at para 14);

"14 the starting point is whether the present respondent, as applicant, has proved that he is the heir ab intestate. The case of the respondent as pleaded is firstly that he inherited the landed properties through family resolution. The law on procedure in cases of inheritance of landed property is clear. The land Regulations govern the situation where the landed properties are to be inherited. In such circumstances, appropriate notices have to be given. Where Regulation 7 and 8 procedures have been followed, then there can be no possibility of issuance of certificates of allocation in terms of either section 17 or 5(5),10A and 17(1) of the Land Act. What these forms clearly reveal is that the allocations were made to the respondent as an original allottee. It follows therefore that the two form Cs reflected as form CC2 and Form C1 could only be issued pursuant to an original allocation. An original allocation could only be made where



the allottee is allocated the piece of land otherwise than as a result of inheritance of rights and interests in the said land”.

**[31]** In the instant matter, the land is claimed on the basis of inheritance and not allocation. From the provisions referred to above, it is concludable that the issuance of the impugned Form Cs for the disputed fields is not sanctioned by the Law as correctly pointed out by the appellant’s counsel. This is because, they were issued under inapplicable provisions of the Act and could only be issued in relation to residential land. They are therefore invalid.

**31.1** I need not in the light of this conclusion decide the question whether they ought to have been registered in terms of the Deeds Registry Act because the view that I take of the matter is that their invalidity is not fatal to the appellant’s case regard being had to the fact that his nomination as heir is not disputed.

**31.2** To put it differently, the respondent’s inheritance cannot be impugned on the basis of validity or otherwise of the form Cs. I need not however venture into the question whether the procedure set out in these provisions had been followed because I have not been called upon to make that determination. I proceed next to the issue whether the appellant’s marital status has a bearing on the inheritance of the property in question.

**Did the Court below err in taking the appellant’s marital status into account when determining the rival inheritance claims?**

**[32]** In his written submissions Mr Nthloki contended that the appellant, having returned from an unsuccessful marriage and being the only surviving child in the junior house, she is entitled to inherit her parents’ property because the property had been allocated by the deceased to the junior house.

**[33]** Section 3(2) of the Land Act 1979 provides that *no person, other than the state, shall hold any title to land except as provided for under customary law or under the Act.* In terms of subsection 3, *where customary law is inconsistent with this Act, the Act shall prevail.*

**[34]** I have already set out the procedure for land inheritance under the Act. With regards to the customary law of succession, **Section 14 of the Laws of Lerotholi** provides;

(1) If a man during his lifetime allots his property amongst his various houses but does not distribute such property, or if he dies leaving written instructions regarding the allotment on his death, his wishes must be carried out, provided the heir according to Basotho Custom has not been deprived of the greater part of his father's estate.

(2) a widow who has no male issue in her house shall have the use of all the property allocated to her house. On her death the principal heir shall inherit the remaining property, but he must use the property for the maintenance of any dependants in such house; provided that no widow may dispose of any of the property without the prior consent of the heir.

**[35]** In the case of **Thabane v Thabane CIV/APN/329/92**, Mofolo J said; The law of succession in this country is based on customary law. Actually, irrespective of the type of marriage, in succession, customary law prevails. It is rather simple for succession is in the male line. The first son succeeds, failing which the succeeding son and so on until the entire house is exhausted. Where there is no male issue, brothers succeed, failing which their sons in order of preference and in descending order are preferred and failing these, collaterals succeed using the same method of precedence. Put simply, when a man dies without a male issue, his brothers or brothers' sons in their seniority succeed to the estate failing which uncles in the same line of succession.

**[36]** In **Litsebe v Litsebe CIV/A/5/81**, the plaintiff there also alleged that she inherited the fields from her parents. In concluding that the plaintiff a married woman belongs to the family in which she is married

and could not inherit anything from the Litsebe family, the learned Judge reasoned as follows;

the fact that the plaintiff may have been allowed to use the fields while her mother was still alive and shortly thereafter while the family was still persuading the rightful heirs to take their places, did not create rights for her by efflux of time. She is disqualified according to custom particularly because she is married to the Masupha family and according to custom she has no rights in the affairs of Litsebe family. If she was allotted the fields in her own right and proved that she has been emancipated as a minor, her argument would be understandable.

**[37]** As indicated earlier, there is no suggestion that the appellant was divorced at the material time. Mr Nthloki described her as a 'returnee' from an unsuccessful marriage. It is concludable therefore that she was estranged from her husband or *ngalaed* as it is commonly said.

**37.1** The authorities I could find on the subject (whether a woman who has *ngalaed* to her maiden home is entitled to inherit parental property), are not many nor was I referred to any by the appellant's counsel.

**[38]** Both the High Court and The Court of Appeal have had occasion to consider the question whether a woman who has *ngalaed* is entitled as of right, to benefit from parental property. In **Masilonyane v Masilonyane CIV/APN/24/2004**, where this Court unpacked the *ngala* custom as follows;

The *ngala* custom is a practice by which a wife goes to her maiden home to seek solace from ill-treatment by her husband. The husband would then be expected to follow her and discuss their issues for purposes of reconciliation.

**38.1** The Court held that to *ngala* or sulk is not a divorce for there is always a prospect of reconciliation. The woman belongs in the family to which she is married, and such a family does not have a right to disinherit

her of her marital property for she remains married to that family and it is of no moment whether the husband is dead or alive.

**[39]** In **Ramatlapeng v Jessie C of A(CIV) 15 of 2006[2016] LSCA 39**, citing **Masilonyane** above, the Court of Appeal went further to explain the effect of this custom on property rights of the married woman. It held that the *ngala* custom confers no right to live at the maiden home or seek maintenance from the estate of the late parents as of right.

**[40]** The above cases must be compared with **Maoeng v Maoeng C of A (CIV) 9/19**, clearly decided after promulgation of the Land Act 2010, (which introduced significant changes.eg section 10 addressing land rights in polygamous marriages). In this case, the deceased allottee also maintained two houses and in the like manner the land of one household (with no male issues) was inherited by the first-born male from the other house. A divorced woman who was divested of the property was nominated as heir and both the Land Court and Court of Appeal did not fault the nomination on grounds that being divorced, there was no impediment to her appointment as heir over her parents' estate.

**[41]** This decision (Maoeng) as I understand, apparently considered the fact that when a woman divorces, she reverts to her maiden family. **Mohapi v Monne and Other CIV/APN/313/92.**

**[42]** In the case of **Khasake Mokhethi v Mosiuoa Khasake, Makara J** also dealt with a question whether married women who sought to be declared as customary heiress to their parent's property was tenable. Although he left the issue open, he remarked as follows;

“It sounds illogical for the applicants to claim heirship of the homestead land and yet they are presumably married in community of property with their respective husbands. The result of the issuance of a declaratory order to that effect would be facilitate for the alienation of the land from the Khasake family to their matrimonial homes...”

**[43]** Reverting to the facts of this matter, it is clear in my view that, in nominating the respondent's father as heir, the family council applied the customary law of inheritance.

**43.1** No suggestion is made by the appellant that in the circumstances of this case, the customary law applied in the nomination of the respondent's father was in conflict with section 8 Land Act 1979(as amended) on land inheritance.

**43.2** In the light of these authorities and in the absence of any authority cited by the appellant on the subject, it is concludable that subsistence the appellant's marriage to Mahase was an impediment to inheritance of the disputed property, understandably because she has in terms of the same Act(section 8 as amended), equal rights to landed property which she acquired with the said Mahase and the fact that she *ngalaed* does not disentitle her of such rights. The position would clearly be different if she was divorced or unmarried. The learned Magistrate's finding that the appellant should not inherit property belonging to the Khoabanes' cannot therefore be faulted.

**[44]** I turn now to the appellant's claim of damages in the Court below.

### **The claim for damages**

**[45]** In relation to CC 56/08, Mamoseki's evidence was skimpy. She testified that she planted maize, pumpkins and beans on the field at Likoung in "2007/2008" but same were harvested by Mamasoabi and her son. On the field at Khoshane, she planted maize, in partnership with one Thipane. She told the court that when they harvested in June, Mamasoabi and her son had already harvested a substantial portion of the yield.

**45.1** She told the Court that she incurred expenses in the amount M 4 000.00 for buying seeds and planting both fields and a quotation in the

amount M16 000.00 for expected yield was prepared by Maqhaka resource centre.

**[46]** Chacho Khoabane however told the Court that his mother planted maize at Koung and the appellant subsequently planted her own seeds over theirs. During harvest time, they (with his mother) proceeded to harvest the maize they had sown there.

**[47]** Notably, appellant tendered no proof of purchase of the seeds. She relied on her own ipse *dixit*. In the absence of proof of the amount spent, the quotation (also not attached) could not in my view advance her case.

**47.1 Maphutse Khoabane** who also witnessed people harvesting and loading of the harvest into a truck, testified, that the truck did not ferry the harvest to Mamoseki's home. He could not however verify whether Mamoseki sowed over Mamasoabi's seeds.

**[48]** Important too is the fact that Mamasoabi herself did not in any way address the question whether at the time she planted her seeds on the disputed fields, she was the first to do so, or whether to demonstrate her protestation over Mamasoabi's heirship, she ploughed over her crops, in which case it would be impossible to sift her crops from Mamasoabi's or to decide which maize stalks belonged to which party or how the harvest was to be executed. No case was therefore made out for the relief sought. I cannot therefore fault the Court a quo for concluding that she failed to discharge the onus of proving her claim for damages and in dismissing it.

### **Order**

**[49]** For reasons set out above, it follows that the appeal cannot succeed both in both matters. It is accordingly dismissed with costs.

**P. BANYANE**  
**JUDGE**

For Appellant: Mr Nthloki KC

For Respondent: Advocate Tsenoli