

SOUTHERN AFRICA LITIGATION CENTRE

Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others: A Case Summary

Introduction

Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others challenged section 10 of Lesotho's Chieftainship Act No 10 of 1968 (Chieftainship Act), which denies all daughters the right to succeed to chieftainship. The applicant, Senate Gabasheane Masupha argued that by excluding her from succeeding to chieftainship solely due to her gender, section 10 of the Chieftainship Act violated her rights to equality and freedom from discrimination guaranteed under the Lesotho Constitution. The respondents, including relatives who believed that they were entitled to succeed to the chieftainship and the Attorney-General, argued in part that chieftainship is a customary law institution and thus the right to be free from discrimination does not extend to it. The Court upheld section 10 of the Chieftainship Act on the basis that it is a restatement of the customary law rules of succession in Lesotho, which though discriminatory are justified under the Lesotho Constitution.

Parties

The applicant, Senate Gabasheane Masupha, is the first-born child of the late Principal Chief David Gabasheane Masupha and his first wife, the late Chieftainess Masenate Gabasheane Masupha. There were eleven respondents, including relatives who wished to succeed to the chieftainship and the Attorney-General. The Southern Africa Litigation Centre (SALC) was admitted as *amicus curiae*—friend of the court—in this matter. The Women and Law in Southern Africa (Lesotho) and the Federation of Women Lawyers were also jointly admitted as *amicus curiae*.

Factual and procedural background

Senate Gabasheane Masupha is the first-born child of the late Principal Chief David Gabasheane Masupha and his first wife, Chieftainess Masenate Gabasheane Masupha. When Principal Chief Masupha passed away in August 1996, his first wife, Chieftainess Masupha became chief as provided for under section 10(4) of the Chieftainship Act. The Chieftainess passed away on 6 December 2008, leaving the position of chief open.

On 19 February 2009, a family meeting was held and Lepoqo David Masupha, the son of Principal Chief Masupha and his second wife was named as the successor to the chieftainship. The younger brother of Principal Chief Masupha, Sempe Gabasheane Masupha, challenged the appointment of Lepoqo David Masupha, and instituted proceedings in the lower court. Senate Gabasheane Masupha was neither cited in the proceedings nor given notice of these proceedings. However, she made an application for permission to intervene in the matter. Her application was denied leading her to file a constitutional challenge in the High Court arguing that section 10 of the Chieftainship Act was unconstitutional. In the meantime, the Magistrate's Court issued a judgment against Sempe Gabasheane Masupha who appealed the decision to the High Court. The parties agreed to consolidate the appeal from the Magistrate's Court judgment and the constitutional challenge into one case. However, on a later date due to the objection of counsel, the Court made an order separating the two cases. The High Court, sitting as the Constitutional Court, thus was tasked with solely determining whether section 10 of the Chieftainship Act was constitutional.

Substantive Legal Arguments

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196,
Johannesburg,
PO Box 678 Wits 2050

| T: 27 (0) 11 587 5000 | F: 27 (0) 11 587 5099

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The parties raised a number of procedural concerns, but the primary legal dispute was whether section 10 of the Chieftainship Act was unconstitutional to the extent that it denied daughters the right to succeed to chieftainship on the basis of sex.

The applicant argued that as the first-born child of a chief, she is entitled to be considered for succession to chieftainship in terms of section 10(2) of the Chieftainship Act read in light of the non-discrimination guarantees enshrined in the Constitution. She furthermore argued that at customary law there was no rule denying women the right to succeed to chieftainship. The applicant also argued that if section 10 was read to deny women the right to succeed to chieftainship, then it would violate the following provisions of the Constitution: section 4, guaranteeing fundamental human rights and freedoms; section 18, guaranteeing freedom from discrimination; and section 19, enshrining the right to equality and equal protection.

In response, the respondents argued that section 10(2) clearly prohibits women from succeeding to the chieftainship as it provides for the “first born or only son”. They argued that chieftainship is an institution of customary law. Thus, excluding women from succeeding to chieftainship is not unconstitutional because section 18 providing for the freedom from discrimination does not extend to matters involving the “application of the customary law of Lesotho”.

In its submissions, SALC argued that section 10(2), if interpreted to deny women the ability to succeed to chieftainship, violates the Lesotho Constitution as well as Lesotho’s international and regional obligations, including the rights to be free from discrimination and equality. In particular, SALC argued that section 10 is statutory law, not customary law and thus does not fall under the permissible exception to the prohibition of discrimination provided under section 18. Furthermore, SALC argued that the right to equality and equal protection guaranteed under section 19 of the Constitution and enshrined in the International Covenant on Civil and Political Rights provides for a broader protection against inequality than the prohibition against discrimination, and thus in this case regardless of whether section 10 is deemed customary law, it would still violate the right to equality.

Conclusion

On 16 May 2013, the High Court, sitting as the Constitutional Court, upheld section 10 of the Chieftainship Act finding that it did not violate the Lesotho Constitution. The judgment is expected to be appealed to the Court of Appeal.

A more detailed summary of the judgment can be found at <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/womens-rights/>

For further information regarding the case please contact:

Priti Patel, Deputy Director: prtip@salc.org.za
+27 11 587 5065

Melody Kozah, Project Lawyer: melodyk@salc.org.za

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196,
Johannesburg,
PO Box 678 Wits 2050

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