IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 29/2013

In the matter between:

SENATE GABASHEANE MASUPHA **APPELLANT**

and

THE SENIOR RESIDENT MAGISTRATE FOR THE SUBORDINATE COURT OF BEREA **1ST RESPONDENT**

THE SPEAKER OF THE NATIONAL ASSEMBLY **2ND RESPONDENT**

SEMPE GABASHEANE MASUPHA **3RD RESPONDENT**

LEPOQO DAVID MASUPHA **4TH RESPONDENT**

'MATUMAHOLE SEEMOLA MASUPHA **5TH RESPONDENT**

CHIEF OF HA MAMATHE **6TH RESPONDENT**

PRINCIPAL CHIEF OF HA MAMATHE THUPA-KUBU AND JOROTANE **7TH RESPONDENT**

DISTRICT SECRETARY **8TH RESPONDENT**

DIRECTOR OF CHIEFTAINSHIP AFFAIRS 9TH RESPONDENT

MINISTER OF LOCAL GOVERNMENT AND CHIEFTAINSHIP 10TH RESPONDENT

ATTORNEY GENERAL 11TH RESPONDENT

CORAM: SCOTT, AP
HOWIE, JA
THRING, JA
LOUW, AJA
CLEAVER, AJA

HEARD : 1 APRIL 2014
DELIVERED : 17 APRIL 2014

SUMMARY

Constitutional and customary law – entitlement of appellant, the daughter and only issue of a Chief by his first marriage, to succession to the Chieftainship – only son of subsequent marriage nominated as successor by the family – constitutionality of s 10 (2) of the Chieftainship Act in excluding entitlement of women to succeed by right of birth – whether appellant entitled to relief in terms of ss18 and 19 of the Constitution.

JUDGMENT

HOWIE, JA:

[1] The appellant is an unmarried woman member of the diplomatic corps of Lesotho, serving abroad. Her father was until his death the Principal Chief of Ha 'Mamathe, Thupa-Kubu and Jorotane. He was succeeded by his widow, the appellant's mother. Upon her death in December 2008 the office of Principal Chief fell vacant. In February 2009 a family meeting was held pursuant to which Lepoqo David Masupha, the then minor son and only issue of a subsequent marriage entered into by the appellant's late father, was named as successor to the chieftainship and a regent was appointed pending his majority.

[2] Various court proceedings concerning the succession ensued. The consequence was an application by the appellant to the High Court exercising its jurisdiction as the Constitutional Court of Lesotho. The relief she sought was an order declaring:

> (a) That s 10 of the Chieftainship Act, 22 of 1968 is unconstitutional to the extent that it purports to disentitle her to succeed to the principal chieftainship on the sole grounds that she is female, and
> (b) declaring that a female first born child of a chief is entitled to be considered for succession to a chieftainship.

(For convenience I shall refer to "the Act".)

The application was unsuccessful, hence this appeal.

[3] Of the eleven respondents in the Court below only two contested the appeal. They were Lepoqo David Masupha and the current Acting Principal Chief of Ha 'Mamathe, Thupa-Kubu and Jorotane.

[4] The material provisions of s 10 are these-

> "(2)When an office of Chief becomes vacant, the firstborn 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 the 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.
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> (3) If when an office of Chief becomes vacant there is no person who succeeds under the preceding subsection, the first-born or only son of the marriage of the Chief that took place next in order of time succeeds to that office, and so, in descending order of the seniority of marriages according to the customary law, that person succeeds to the office who is the first-born or only son of the senior marriage of the Chief or of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection.
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> (4) If when an office of Chief becomes vacant there is no person who succeeds under the two preceding subsections, the only surviving wife of the Chief, or the surviving wife of the Chief whom he married earliest, succeeds to that office of Chief, and when that office thereafter again becomes vacant the eldest legitimate surviving brother of the male Chief who held the office last before the woman, succeeds to that office, or failing such an eldest brother, the eldest surviving uncle of that male Chief in legitimate ascent, and so in ascending order according to the customary law."

[5] The appellant's constitutional challenge to s 10 is founded on ss 18 and 19 in Chapter II of the Constitution of Lesotho. The chapter is headed "Protection of Fundamental Human Rights and Freedoms" and consists of ss 4 to 24. Section 18 entitles every person in Lesotho to freedom from discrimination and s 19

entitles them to equality before the law and the equal protection of the law.

[6] Those rights are listed with others in s 4 (1) of the Constitution as fundamental rights and freedoms. The subsection concludes by stating that the listed rights and freedoms are protected by the provisions of the Chapter "subject to such limitations of that protectionas are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice … the public interest". (I shall call these quoted words "the proviso".)

[7] Section 18 provides, where relevant –

> "(1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.
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> …….
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> (3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
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> (4) Subsection (1) shall not apply to any law to the extent that that law makes' provision –
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> (a) …….
>
> (b) …….

> (c) for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law; ….”
>
> …….
>
> (8) The provisions of this section shall be without prejudice to the generality of section 19 of this Constitution.”

[8] The limitation in s 18 which is concerned in this case is that in subsection (4) (c). A corresponding subsection was contained in the 1965 Constitution (s 14 (c)) and the 1966 Constitution (s 17 (4) (c)). Being a limitation provision, s 18 (4) (c) must be strictly construed.

[9] The expression “customary law” in subsection (4) (c) is defined in s 154 (1) of the Constitution. It means

> “the customary law of Lesotho for the time being in force subject to any modification or other provision made in respect thereof by any Act of Parliament".

[10] It was accepted on all sides in this matter that the Lesotho customary law with regard to chieftainship succession as at the time of commencement of the Act was, in the main,that contained in the statement referred to in the Act as “the Declaration of Basuto Law and Custom known as Part I of the Laws of Lerotholi”. The declaration is not cited in the Act but is formulated by various leading authors and in reported Lesotho case law thus –

> "Succession of Chieftainship in Basutoland shall be by right of birth. That is, the first born male of the first wife. If the first wife has no male issue then the first born male child of the next wife in succession shall be heir to the Chieftainship…"

[11] It is nevertheless apparent from the High Court's 1943 judgment in **Bereng Griffith v 'MantseboSeeiso Griffith,** HCTLR 1926 – 1957 50 ("the Regency case") that women could by then at customary law succeed to chieftainship in their own right. However, the judgment is not authority for the proposition that the rule of male primogeniture was no longer universal. Indeed, no argument to that effect was advanced in support of the appeal. It must therefore be concluded that what was meant in the judgment was that women could become chiefs in their own right but not in conflict with the male primogeniture rule.

[12] What was submitted for the appellant was that s 10 (2) of the Act was not a statutory encapsulation of the Laws of Lerotholi but an entirely new provision independent of customary law. Support for this argument was said to be found in s 40 (2) of the Act, which reads:

> "The Declaration of Basuto Law and Custom commonly known as Part I of the Laws of Lerotholi is hereby revoked to the extent that it relates to succession to the office of a Chief …."

Counsel's submission was that the Laws of Lerotholiin the relevant respect having been revoked, they were incapable of

being applied by s 10 of the Act because the Declaration had ceased to have legal effect.

[13] That submission cannot be accepted. Section 40 is the last section in the Act and follows upon what the Act has said in s 10. Subsections (2) and (3) of s 10 plainly subsume the customary law as stated in the Laws of Lerotholi and add supplementary provisions. The result – to quote s 154 (1) of the Constitution – is that s 10 contains"modification or other provisions made.... by Act of Parliament." Having enacted s 10, the legislature proceeded to excise the Laws of Lerotholi (in the respect here relevant) from the body of national law. The explanation for the excision was simply that the material provision of customary law was now a statutory provision and the excised codification, as a written statement of the customary law, had no longer any reason for independent existence. There would have been no sensible purpose in the revocation of the declaration unless its essence, which was clearly intended to remain part of the Law of Lesotho, had already been securely retained.

[14] In addition, as shown by the Regency case, customary law had, long before the Act, developed to the extent that a woman could succeed to a chieftainship in her own right. Section 10 (4) subsumed that development. And in s3 of the Act there is reference to "customary law and Declaration of Basuto Law and Custom commonly known as Part I of the Laws of Lerotholi relating to the matter provided for in the Constitution and this

Act concerning the office of Chief…" Clearly s 40 (2) had no impact on customary law not stated in the excised Declaration.

[15] The conclusion is therefore inescapable that the Act, and s10 in particular,make provision– as stated in s 18 (4) (c) of the Constitution - "for the application of the customary law of Lesotho with respect to (chieftainship succession) in the case of persons who, under that law, are subject to that law."

[16] For the Southern Africa Litigation Centre (the third amicus curiae) it was contended that the exclusion by s 10 of first born (or only) daughters of chiefsfrom entitlement to succeed as chief is unconstitutional unless it can be said to be a limitation, "intended to ensure that the enjoyment of the said rights and freedoms does not prejudice the rights and freedoms of others or the public interest", the said rights and freedoms being listed in subsection 4 (1) and including, as already indicated, the right to freedom from discrimination. The concern in this case centre upon the words "prejudice of the public interest".

[17] The submission was that the limitation imposed by s 10 must accord with the proviso before it is saved by s 18 (4) (c), the reason being, so it was argued, that the latter paragraph is itself subject to the proviso.

[18] There is this essential fallacy in the argument. The question that must be answered is whether the provisions of s10 conform to the terms of s 18 (4) (c), not whether they conform to the terms

of the proviso. Had the framers of the Constitution intended that every limitation of the fundamental rights and freedoms had to be measured against the terms of the proviso they could simply have caused it to include such wording as "subject to any limitation imposed by or pursuant to a law designed to ensure or having the effect of ensuring…" It would have been unnecessary to specify limitations in the later sections of the Constitution. Every alleged limitation would have had to be judged on a case by case basis tested against the criteria in the proviso. Instead, the framers spelt out specific limitations which the Constitution declared to be designed to ensure absence of prejudice to, inter alia, the public interest. Accordingly the Constitution itself affirmatively disposes of the question whether s 18 (4) (c) constitutes a permissible limitation on the s 18 right.

[19] This conclusion is consistent with the dictum in paragraph [26] of this Court's judgment in **LesothoNational General Insurance Co.Ltd. v Nkuebe** LAC (2000 – 2004) 877 at 891. It was there held that the limitations in the Constitution were designed to ensure the absence of prejudice to, inter alia, the public interest and that the sections subsequent to the provisodescribe the nature, scope and meaning of the fundamental rights and freedoms having regard to the limitations. In other words, the public interest issue is decided, in the instances where there are limitations, by the Constitution, not by construing subservient legislation. I would accordingly respectfully disagree with those judgments relied upon by counsel for the first **amicus** in which Botswana courts have

appeared to construe provisions equivalent to the Lesotho sections 4 (1) and 18 (4) (c) as requiring that a limitation be measured against the proviso to assess **whether** it is in the public interest.

[20] The question whether s 10 of the Act conforms to s 18 (4) (c) must, for the reasons already given and applying the necessary strict construction, be answered in the affirmative.

[21] Counsel for the appellant finally sought assistance from Chapter III of the Constitution headed "Principles of State Policy" and consisting of sections 25 to 36. Section 25 states that the principles contained in the chapter shall form part of the public policy of Lesotho. Section 26 (1) provides that Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless, inter alia, of their sex. However, s 25 says that the principles set out in the Chapter are not enforceable by any Court. Reliance on Chapter III was accordingly misplaced.

[22] For the first and second **amici curiae** in the matter, the Federation of Women Lawyers in Lesotho and Women and Law in Southern Africa, reliance was placed on Lesotho's obligations in terms of various international instruments aimed at eliminating all forms of discrimination against women. These instruments, it is clear, are aids to interpretation, not the source of rights enforceable by Lesotho citizens. In the present matter there is no aspect of the process of interpreting s 10 of the Act which leaves its meaning exposed to any uncertainty, to the resolution of

which the instruments in question could contribute further than the considerations which have already been taken into account.

[23] I conclude that Section 10 of the Act, properly interpreted, does not infringe s 18 of the Constitution in the respect contended for by the appellant.

[24] In considering the case based on s 19 of the Constitution, one must begin by referring to the statement in s 18 (8) that the provisions of s 18 are without prejudice to the generality of s 19. The meaning of the subsection was the subject of some debate at the Bar. For the respondents it was submitted that the provision in question constituted a case of **generaliaspecialibus non derogant.** I think it rather tends towards the converse. At all events,as observed by this Court in **Nkuebe's**case, supra, at 885 [11]it is apparent from s 18 (8) that the equality provisions in s 19 have a wider connotation, and are to be given a more extensive application, than those of s 18. The subsection therefore meansthat a case alleging constitutional infringement which founders on a limitation in s 18 (4) can nevertheless be pursued in reliance upon s 19.

[25] The effect of s 10 (2) is that if the appellant's parents had had a second child who was a son he would have been entitled to succeed to the chieftainship to the exclusion of the appellant. This differentiation is the consequence of the customary law(and now the Act) having made a deliberate decision to apply a patrilineal system of chieftainship succession. It was said by counsel for the respondents to be "mere differentiation" (as to

which see **Nkuebe's** case at 887 paragraph [17]). In this regard counsel also relied on a minority judgment in **Bhe v Magistrate, Khayelitsha; Shibi v Sitole; SA Human Rights Commission v President of the Republic of South Africa** 2005 (1) BCLR 1 (CC). That case was concerned with the customary law rule of determining the eldest male in a family as the successor to the deceased family head, which rule had been taken up in legislation.

[26] The minority judgment explained (in paragraph [180]) that the rule's primary purpose was to preserve the family unit and ensure that a successor took over the deceased's responsibilities. There was therefore a need for certainty as to who that was without the involvement of lengthy deliberations consequent upon rival claims.

[27] The majority of the Court (at paragraphs [83], [89]) considered that the legislation in question no longer took account of developments in society which prejudiced "African widows (who) find themselves in changed circumstances" and that distortion of customary law had come to emphasise its patriarchal features and to minimise its communitarian ones.

[28] In this Kingdom, when it comes to determining the successor to a deceased chief, there is just as much a need for certainty. Obviously, but for the customary law rule, it would suffice to create such certainty if the first born **child** were designated without a preference for the first born son. It is not

apparent to what extent societal changes in Lesotho have resulted in the rule's prejudicing first born daughters and those communities subject to customary law. This is not a matter on which evidence was sought to be led or one on which we were addressed. One can therefore not saythat the differentiation in question was taken up in the Act in order as a matter of necessity to regulate the affairs of the communities which live according to customary law. This is thus not a case of "mere differentiation".

[29] Nevertheless it is not possible to escape the effect of the respect in which sections 18 and 19 overlap. The inequality of which the appellant complains is the result (unlike the position in cases such as that of **Bhe**) of a constitutionally sanctioned discrimination in s 18. In so far as adjudication of a s 19 dispute involves asking whether there is a rational connection between such discrimination and the legislative purpose in s 10, the constitutional sanction is enough to answer the question in the affirmative.

[30] As to the question, stressed by counsel for the third **amicus,** whether the s 10 (2) limitation serves a legitimate governmental purpose, the fact that the differentiation in issue is decreed by a statute whose provisions are saved by the Constitution is, again, sufficient to overcome the appellant's objection. The framers of the Constitution must be taken to have considered that it was in the public interest of the people of Lesotho that those communities living according to customary law be governed by the rules of that law.

[31] It follows that in so far as the appeal is based on s 19 it cannot succeed.

[32] It remains to say that development of the customary law rule involved in this case is, by reason of the revocation in s 40 (2) of the Act, no longer capable of being effected by communities subject to customary law. Modernising the rule is a matter for Parliament to consider, especially in the light of the issue raised by the appellant.

[33] As to costs, in keeping with the established approach to costs in litigation in which a citizen seeks determinationor enforcement of a constitutional right, no order will be made.

[34] The appeal is dismissed. No order is made as to costs.

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C.T. HOWIE

JUSTICE OF APPEAL

I agree

_____
D.G. SCOTT
ACTING PRESIDENT OF APPEAL

I agree

_____
W.G. THRING
JUSTICE OF APPEAL

I agree

_____
W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree

_____
R.B. CLEAVER
ACTING JUSTICE OF APPEAL

For the Appellant	:	Adv. K.E. Mosito K.C. Adv. M. Rafoneke
For the Respondents	:	Adv. M.E. Teele K.C. Adv. S. Ratau
For the first and second **amici curiae**	:	Adv. I. Shale Attorney K. Thabane

For the third **amicus curiae** : Adv. N. H. Maenetje SC
Adv. H. Rajah