Constitutional Case No.5/2010

IN THE HIGH COURT OF LESOTHO

In the matter between:

SENATE GABASHEANE MASUPHA	**APPLICANT**
AND	
HIS WORSHIP, SENIOR RESIDENT MAGISTRATE FOR THE SUBORDINATE COURT OF BEREA (MR KOLOBE)	**1ST RESPONDENT**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**2ND RESPONDENT**
SEMPE GABASHEANE MASUPHA	**3RD RESPONDENT**
LEPOQO DAVID MASUPHA (ALIAS LESENYEHO)	**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**
MINISTRY OF LOCAL GOVERNMENT AND CHIEFTAINSHIP	**10TH RESPONDENT**
ATTORNEY GENERAL	**11TH RESPONDENT**

JUDGMENT

Coram : **Monapathi ACJ,**
Mahase J
Molete J

Date of hearing : **29th August, 2012**
Date of judgment : **03rd May, 2013**

SUMMARY

Constitutional Law – Exclusion of unmarried women from Succession to Chieftainship Whether Section 10 of Chieftainship Act is uncostitutional for being discriminatory on the basis of sex – Principles to be applied being that of Customary Law – The Court in its discretion may overlook procedural impropriety and determine the Constitutional issue – The Constitutional provisions having provided Protection of Customary Law – Court must take into account the considered actions and deliberate policies of the executive in matters like these – No basis found to declare the section discriminatory and unconstitutional.

ANNOTATIONS

CITED CASES

T.L. Shilubana and Others V Nwamitwa 2008(9) BCLR 914 CC, 2009(2) SA 66(CC)

Bhe V Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae;) Shibi V Sithole and Others; South African Human Rights Commission and Another V President of the Republic of South Africa and Another: 2005(1) SA 580 (CC); 2005 (1) BCLR 1 (CC)

Bereng Griffith Vs Mantsebo Seeiso 1926 – 53 HCTLR 50

Alextor Ltd and Another V Richerveld Community and Others 2004(4) SA 460 CC; 2003 (12) BELR 1301 (CC)

Chikolongo V Attorney General of Trinidad and Tobago (No2) (1981) 1 WLR 106

Sole V Cullinan and Others 2000-2004 LAC 572

Majara V Majara 1990-91 LAC 130

LNIG Vs Nkuebe 2000-2004 LAC

Prisloo Vs Van der Linde 1997(3) SA 1012

STATUTES

The Administration of Estates Proclamation No 19 of 1935.

The Constitution of Lesotho 19

Chieftainship Act No 10 of 1968.

BOOKS

S. Poulter - Family Law and Litigation in Basotho Society – (Oxford 1976)
S. Poulter – Legal Dualism in Lesotho – Morija 1979.

[1] This matter raises a number of aspects which involve both the procedural and substantive law. It is to do with Constitutional rights against discrimination; as well as customary laws and practices of the Basotho Nation. Procedurally it is also to do with whether Applicant should have brought the matter by way of a Review Application to the High Court.

It is necessary to give a brief history of the case in order to fully understand the intricate connection between the various substantive and procedural aspects.

[2] The case is about the office of Chief of the 'Mamathe, Thaba-kubu and Jorotane. On the 6th December 2008, Chieftainess 'Masenate Gabasheane Masupha, the Principal Chief of the areas referred to, died. A vacancy was created in the office of Principal Chief which had to be filled by appointment of a Successor.

[3] On the 19th February, 2009 a family meeting was held at Ha 'Mamathe at which meeting Lepoqo David Masupha (also referred to as Lesenyeho) was named as the Successor to the Chieftainess, and Seemola Matumahole

Gabasheane Masupha was appointed to act as regent on behalf of Lepoqo David who was under age at the time.

[4] This appointment was challenged by Sempe Gabasheane Masupha in the Magistrate's Court for the district of Berea. In his papers, the plaintiff, Sempe Gabasheane challenged the appointment and objected to the nomination and presentation of the first defendant Lepoqo David and the Regent on the following grounds;

(a) The "inner members of the family of the late Chief Gabasheane Masupha in whose house death had occurred" were excluded when the appointment was made.

(b) The first defendant is the illegitimate son of the late Chief Gabasheane Masupha who was not lawfully married to first defendant's mother. He was therefore illegitimate and could not succeed as chief.

(c) The late Chief Gabashane David Masupha was legally married by civil rites to late Chieftainess 'Masenate David Gabasheane Masupha who consequently became chief in her own right after the death of her husband.

[5] The second defendant's nomination as acting Principal Chief on behalf of 1st defendant was objected to on the basis that she was not the legal wife of plaintiff's late brother as he was already married when

he purported to marry her. It however later became common cause that the parties were legally married.

[6] The 3rd to 8th Respondents were the Chief of 'Mamathe, Principal Chief of 'Mamathe, Thaba-kubu and Jorotane; District Secretary, Director of Chieftainship Affairs, Minister of Local Government and Attorney-General. The first four defendants entered appearance to defend the matter.

[7] The Plaintiff sought an order directing the Minister of Local Government to present his own name to the King as Lawful succesor to the vacant office of Principal Chief of the area and thus setting aside the nomination and presentation of 1st defendant and his proxies as successors to that vacant office.

The pleadings in the matter were filed and closed. The defendants pleaded specially that plaintiff lacked *locus standi in Judicio* and on the merits denied that Lepoqo David was illegitimate. They also stated that the meeting which appointed the 1st and 2nd Respondent was duly called and constituted. The decisions arrived thereat were fully legal and effective. The defendants pleaded that any nomination other than that of 1st defendant would have been unlawful and an invalid deviation from the line of succession under Customary Law.

[8] The result of this was that the parties in fact were ready to commence the trial in October 2009 when pleadings closed and a plea to the amended claim was filed. Heads of argument were filed on behalf of the parties, and pre-trial conference was held by Counsel parties in which the issues were

limited and the trial began under Magistrates Court Case No. CC21/09, before His Worship Mr Kolobe, the Senior Resident Magistrate.

[9] In the middle of the proceedings, the present Applicant, Senate Gabasheane Masupha applied to intervene in the proceedings as an interested party. The main relief she sought in the Application was as follows;

> *"1. Granting leave to the Applicant to intervene in CC21/09*
>
> *2. Permitting the said Applicant to file her papers within three (3) days of an order of intervention in CC21/09*
>
> *3. Staying delivery of judgment in CC21/09 pending final determination and intervention by Applicant."*

[10] The learned Magistrate having fully considered the matter made his ruling which could be summarised as follows:

(a) that the Application for intervention ought to be made seriously and should not be frivolous. The Applicant should have a direct and substantial interest in the matter.

(b) the Court concluded that under Lesotho Law female girls had no direct and substatial interest in matters of succession particularly where there is a son.

(c) the Application was found to be frivolous and not fit for adjudication by the Constitutional Court. The application for intervention was therefore dismissed.

[11] The Court then went on to dismiss the main action on the basis that it could not set aside the appointment nor that of 2nd defendant as acting Chief. It was held that for a decision of a functionary to be set aside it must be proved

that the decision was taken *mala fide*; illegally and was totally biased. The family had not deviated from the line of succession and did not have a free hand to decide the matter unilaterally but had to follow the line of succession. The plaintiff's case was therefore dismissed. This was on the 6th April 2010 and reasons were provided later on 12 April, 2010.

[12] On the 14th April 2010 the Applicant, Senate Gabasheane Masupha filed the present proceedings in the High Court. She sought various forms of relief against Respondents being the Senior Resident Magistrate of Berea, the Speaker of the National Assembly, Sempe Gabasheane Masupha, Lepoqo David Masupha (Alias Lesenyeho) and others.

[13] The Applicant; represented by Advocate K. Mosito, KC sought urgent relief accompanied by certificate of urgency against Respondents. The relief sought was for dispensation and further read as follows;

> *"2- Directing the 1st Respondent to dispatch record and/or decision therein relating to the Application for intervention by Applicant to the Registrar for review by this honourable Court within fourteen (14) days hereof.*
>
> *3 A rule nisi ----- be issued ----- calling upon respondents to show cause (if any) why;*

(a) *The first respondent shall not be interdicted from handing down judgment in the main case CC21/09 pending final determination of the present application.*

(b) *The decision of the 1st Respondent to refuse to refer the Application for intervention to the High Court for decision in terms of Section 128 of the Constitution of Lesotho shall not be reviewed and set aside.*

……

(d) *It shall not be declared that Section 10 of the Chieftainship Act is unconstitutional to the extent that it purports to disentitle Applicant to succed to the Principal Chieftainship of Ha 'Mamathe,Thaba-khupa and Jorotane on account only of her being female.*

(e) *It shall not be declared that a female first born child of a chief is entitled to be considered for succession to chieftainship"*

[14] The relief sought in the notice of motion was as set out above, but in the founding Affidavit the Applicant avers in Paragraph 5 that;

"---------- it would be in the interests of justice that I be permitted to intervene at this late stage ---------- I intend not only to contest the entitlements of 3rd and 4th Respondents but also to file a counter-claim for my own entitlement to become a principal chief. I pray that I am entitled to this honourable

Court should grant me leave to intervene on the following grounds namely that:

1. *Within three days of the permisssion to intervene I should file my claim and counter-claim.*

2. *That the judgment be stayed pending final determination of this Application and the determination of such issues as will be raised consequent upon the institution of my case."*

[15] The case of Applicant in the preceeding paragraphs was simply that; she is the first born daughter of the late Chief Gabasheane David Masupha and 'Masenate Gabasheane Masupha. That she is entitled to succeed to the office of Principal Chief after her parents demise. She was not cited in the proceedings of the Berea Magistrate's Court though she is an interested party. She further stated that according to Section 19 of the Constitution of Lesotho all persons are equal and entitled to equal protection of the law. That the Chieftainship Act on a proper construction does not prohibit a first born girl of a chief from succeeding to that office. In so far as it may be intepreted to prohibit her, it shoud be held to be discriminatory to her on the basis of her sex, and should therefore be declared unconstitutional and to that extent null and void.

[16] It will therefore become immediately apparent that the Application was a review application, in which an interdict was sought, and certain constitutional declarations and a determination of nullity to be made on Section 10 of the Chieftainship Act

[17] On the 14th April 2012 Mr Setlojoane appeared before Mofolo J and obtained the interim relief in the form of *a rule nisi* returnable on the 26th April 2010. The Magistrate was ordered to dispatch the record for review and was interdicted from handing judgment in the main case CC21/09 pending final determination of the Application. It seems that on that date the Magistrate had already delivered his judgment.

[18] The matter was continuously postponed and rule extended until it was placed before the present Panel of Judges to preside over it as a Constitutional case. Meantime the Southern Africa Litigation Centre had applied for admission as *amicus curiae* and it was accepted unopposed. Thus the SACC was admitted as *amici curiae* in terms of the Constitutional rules and was granted the right to submit written heads of arguments and to present oral argument at the hearing.

[19] It is significant to note that the Applicant did not appeal against the judgment of the Magistrate refusing her the opportunity to intervene in those proceedings that were initiated in the magistrate's Court. Only the Plaintiff Sempe appealed and grounds thereof as set out in his notice of Appeal and; Grounds of Appeal could be summarised as follows;

(a) That the magistrate erred in his finding that the marriage between the late Principal Chief and his wife Rachel Masenate was customary and not a civil marriage; and ignoring a judgment of the High Court as well as the spouses declaration that they were bachelor an spinster.

(b) That he misdirected himself in ignoring the gazettment of the late Chieftainess Masenate as substantive holder of that office and not as the acting principal chief of those areas.

(c) The learned magistrate it was also said erred in ignoring the effect of a civil law marriage had on the status of a customary law marriage.

(d) Also that he misdirected himself by disregarding the effect of a civil law marriage between the late Chief Koali Masupha and second respondent.

[20] It was this scenario that obtained when this matter first came before the Constitutional Panel of Judges on the 22nd February 2012. The matter as it stood reguired Counsel to clarify the intended and appropriate way to deal with the cases. It appeared that the matter had been resolved when counsel agreed that the Application be postponed to a date to be arranged on the conditions that;

(a) Applicant be permitted to intervene in the Appeal as co-respodent.

(b) The Appeal be transferred to the High Court sitting as a Constitutional Court and be consolidated with the present Application.

(c) That the parties be allowed to raise further issues as may be deemed necessary in respect of the Appeal.

(d) Costs be costs in the cause.

[21] The Agreement was made an order of the Court. That approach was however later objected to by Mr Mohau KC who was subsequently

appointed counsel of record for the 3rd Respondent; and Mr Mosito KC who was not signatory to the agreement. They submitted that it was necessary to separate the two cases. It was finally agreed that the cases should be heard separately; and that the Appeal should proceed independently; while the Constitutional Panel had to determine the Constitutional issue in the matter before it. Separation was ordered; and the matter proceeded. I think the separation was the best course as the former would have unduly complicated the matter. It then proceeded on 27th August, 2012 in this Court sitting as a Constitutional Court.

[22] The Respondents had raised preliminary points in limine relating to the defects in the Affidavit and lack of autheutication thereof. In the alternative that the Application was totally defective in that it sought a review of the magistrate's decision without showing any reviewable irregularity and that the application for review does not raise itself a Constitutional issue. The parties however agreed to abandon the preliminary points and to proceed with the Constitutional case.

The Court considered the matter and was of the opinion that there was a constitutional issue which it would be in the interests of justice to hear and determine in the Application, despite the numerous complications that arose because of the previous and other pending proceedings related to the matter. The resolution of this question is also in the public interest and therefore the issue required to be clarified.

[23] Mr Mosito on his part indicated that he would confine the relief sought to prayers (d) and (e) of the Notice of Motion. Prayer (d) sought a

declaratory order that section 10 of the Chieftainship Act[1] is unconstitutional to the extent that it denies Applicant the right to succeed to the Principal Chieftainship on account only of her being female. Prayer (e) also sought a declaratory order that a female first born child of a Chief is entitled to be considered for succession to Chieftainship.

[24] The Applicant; all Respondents and the Amicus Curiae filed comprehensive heads of argument for which they should be commended. It reflected their serious approach to this important constitutional matter. They have all been very helpful to the Court.

[25] It was argued on behalf of Applicant that as an only child she was entitled to succeed. As a citizen of Lesotho, she should be entitled to be considered for the succession to office of principal chief; and any attempt to exclude her would be discriminatory and therefore unconstitutional.

[26] The written submissions of Mr Mosito and Mr Maentje for the Amicus were geared towards supporting this main contention. The Court considered this extract from the case of **Shilubana and others v Nwamitwa**[2] as very important in approaching this matter because it was common cause that Customary Law is applicable to the case;

> *"As a result, the process of determining the content of a particular customary norm must be one informed by several factors. First it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules*

[1] Chieftainship Act No 10 of 1968

[2] Shilubana and Others V Nwamitwa 2008(9) BCLR 914 CC, 2009(2) SA 66(CC).

and norms that has developed over centuries. An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in Bhe[3]. Equally; as this Court noted in Richtersveld, Courts embarking on this leg of the inguiry must be cautious of historial records; because of the distorting tendency of older authorities to view customary law through the legal conceptions foreign to it"[4]

[27] Applicant's argument even went as far as to conclude that as Lansdown J decided in the regency case;

"-------the Lerotholi code is in no sense a written law. Its provisions, though reduced to print, do not emanate from any lawgiver. The problem immediately before us in respect of section 1 is whether the statement is that of a custom so well established that it has the force of law"[5]

In that case, Lansdown J then concluded that there were many women in Basutuland holding the office of chief in their own right and as regent for

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[3] Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005(1) SA 580 (CC); Lous (1) BCLR 1 (CC) Para 41.

[4] Alextor Ltd and Another v Richerveld Community and Others 2004 (4) SA 460 CC; 2003 (12) BELR 1301 (CC) at Para 51.

[5] Bereng griffith vs Mantsebo Seeiso 1926-53 HCCTR 50

their minor sons, and therefore it cannot be said that the provisions of section 1 of the Lerotholi code embodies a well established custom.

[28] At first glance it may appear that the learned judge was perhaps making the mistake referred to in the Shilubune case of failing to *"focus the enquiry on customary law in its setting rather than in terms of the common law paradigm"?* Equally might he have embarked on the inquiry without the caution of the *"distorting tendency of older authorities to view customary law through legal conceptions foreign to it?"*

[29] Whatever the case; the question before the learned Judge in the regency case was not the same as the constitutional inquiry before us. It was sufficient for him only to establish that women could hold the office of Chief, Sub-chief or Headman. He came to that conclusion after establishing it as a fact, through evidence adduced. This Court cannot dispute that. Indeed it is correct that the position has long changed and that under the prevailing custom women in the "Chiefly classes" or "Chiefly women" were and still are entitled to succeed according to Customary Law.

[30] The issue before us however, is different. It is whether the customary principles and practice of Male Promogenity are in conflict with the provisions of the Constitution; and whether they violate the principles therein with regard to freedom from discrimination and equality before the law as to render the customary law void to such extent and uneforceable. The inquiry is therefore different.

[31] It is convenient to deal with the submissions of Mr Maenetje for the *amicus cunae* at this stage. He followed the same pattern and submitted that Section 10 of the Chieftainship Act Precludes Applicant from succeeding on account of her being a first born daughter and not a first born son; it thus unjustifiably denies her equality before the law and equal protection of the law as contemplated in section 19 of the Constitution of Lesotho.

[32] The submission that the Chieftainship Act violated the provisions of the Constitution was made by reference to the Constitutional provisions, Lesotho's regional and international obligations and jurisprudence from comparable countries on equality and non-discrimination. This Court is of the view that jurisprudence from other countries on the law of succession in Lesotho can only be remotely if at all comparable. The Customary Law of Lesotho is unique in this respect. The arguments were however detailed and well reasoned in a logical manner.

[33] The Respondents as mentioned above raised points in limine; relating to the procedure adopted. They contended that the decision by the Magistrate refusing Applicant the right to intervene was not reviewable; and in addition that it did not raise a Constitutional issue, because the Applicant cannot rely on the provisions of Section 28 of the Constitution for the review sought in the Constitutional Court. What Applicant tried to do therefore was to attack the decision of the Magistrate using a constitutional motion, which is not permissible. The relevant cases cited in this regard were;

Chikolongo v Attorney General of Trinidad and Tobago[6],

[6] No2 [1981] 1 WLR 106

Sole v Cullinan and Others[7].

[34] The Judge in the Sole case in particular and in the context of Lesotho, noted at Page 594 that the Constitution of Lesotho

> *"especially authorises the use of the particular constitutional remedy for which S-22 provides. Notwithstanding this the proviso accords the High Court the discretion to decline its powers in this regard if satisfied that "adequate means of redress for contravention alleged are available"*[8].

This means the points were well taken; but as mentioned earlier, the Respondents did not pursue them. They preferred to rather let the Court to determine the constitutional issue and the court agreed to that request.

[35] Section 10 of the Chieftainship Act which is being challenged provides as follows;

> *10(1) "in this section a reference to a son of a person is reference to a legitimate son of that person.*
>
> *(2) When an office of the 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 the first – born or only son of the first and only marriage of a person who,*

[7] 2000-2004 LAC 572
[8] Sole V Cullinan and Others at P594

but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection".

(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 of incapacity, would have succeeded to that office in accordance with the provisions of this subsection.

(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 to the eldest legitimate surviving brother of the male Chief who held the office last before the woman, succeeds to that office, or failing which an eldest brother, the eldest surviving

uncle of that male Chief in legitimate ascent, so in ascending order according to the customary law"

[36] The provisions of the Act are an exact restatement of the Customary Law rules of succession contained in Section 2 of Part 1 of the Laws of Lerotholi. Although the Provisions of Section 2 of Part 1 of the Laws of Lerotholi were repealed; the Customary Law rules remain. Indeed as Mr Mosito argued following the regency case; the Lerotholi code is not a written law and its provisions do not emanate from any lawgiver in the sense of Parliament. However, in terms of the Basotho customary practices it remained the norm, until such time as it evolved to allow women to become chiefs. In effect it could be argued that the repeal of Part 1 of the Laws of Lerotholi was a nicety and superflous. Its main purpose was to provide certainty in the law applicable, and this was done through the provisions of the Chieftainship Act 1968, emanating from the legislature.

[37] Counsel for the 8th to 11th Respondents **Mr Putsoane** raised important and valid arguments as to the application for referral to the Constitutional Court. He submitted that the application for referral to the Constitutional Court was made before applicant could be a party to the proceedings, as she had just made application for intervention which was dismissed. The prayers 3 (d) and (e) are dependant upon the applicant being party to the case in CC21/09 and since there is no prayer before this Court challenging the decision of the Magistrate to dismiss the application for intervention; she has adopted the wrong procedure, moreso the relief sought in prayers 3 (d) and (e) are dependant upon Applicant joining proceedings which are now

on appeal of which she is not part of by choice. In other words the Application had to be dismissed for failure to establish a ground for review. The Applicant would remain with the remedy of joining the proceedings where the issues of entitlement to succeed to the office of chieftainship would be properly in issue in the appeal.

[38] It has been held that where it is possible to decide any case, civil or criminal without reaching a constitutional issue, that is the course that should be followed[9]. This Court however was within its rights when it elected to hear and determine the matter already before it.

[39] There is no doubt that the institution of Chieftainship is a customary institution governed by customary law[10]. The Applicant can therefore only claim a right of succession under and subject to the Customary Law. The Customary Law if valid and enforceable does have the force of Law in terms of the Constitution. In the Constitution itself in Section 18(4) (b) and (c) it is provided in effect that even if a rule of Customary Law may be discriminatory in effect, it will not be so if applied to persons who are subject to that Law.

[40] In Section 3(b) of the Administration of Estates Proclamation No 19 of 1935, which is still applicable law it is provided that the Proclamation shall not apply to estates of Africans which shall continue to be administered according to Customary Law, unless they have been shown to the satisfaction of the master to have abandoned tribal custom and adopted a

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[9] Khalapa v Commissioner of Police 2000-2004 LAC 151 @ 155.
[10] Majara v Majara 1990-94 LAC 130 at 136

European mode of life[11]. It remains part of our Law. It is doubtful whether the Applicant would qualify under this "mode of life" test. She is a single, educated career woman whose last or most recent job was representing the country as a diplomat in Rome. She may not fit the Customary Law mode of life test.

[41] Our Court of Appeal in the case of **LNIG vs Nkuebe[12].** Held that mere differentiation which is necessary to regulate the affairs of the community does not amount to discrimination. The South African case of **Prisloo vs Van der Linde[13]** was followed in that case. In **Prinsloo** the learned judge put it as follows:

> *"the essential notion of equality jurisprudence is that persons sumilarly circumstanced should be similarly treated. A mere differentiation of treatment, however arbitrary or irrational need not necessarily contitute an act of discrimination".*

[42] It therefore becomes necessary in our view for the Applicant in this matter to allege and prove the following in order to show that the differentiation of treatment amounts to discrimination based on sex or gender;

(a) That women or girls are not allowed to succeed to the position of Chief whether as regent or in their own right under any circumstances.

(b) That men; or boys; are permitted to be heirs to the chieftainship in all circumstances.

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[11] Section 3(b) – Administration of Estates Proclamation 19 of 1935
[12] 2000-2004 LAC P87
[13] 1997(3) SA 1012 at Para 23-24

(c) That there is no rational purpose served by that differentiation (though the Prinsloo case goes even further to suggest that even irrationality in differentiation may be allowed) and

(d) That the provisions of the Chieftainship Act 1968 in that regard are in conflict with the Constitution to the extent that they ought to be declared null and void.

[43] It is common cause, and well established in our law that married women do have a right to succeed to the position of chief. In this regard the distinction is between married and unmarried. However, a further requirement is that the married woman should be married to a chiefly family. It does not matter whether she be the first born daughter of a Chief or not, as long as she gets to marry into a chiefly family she will have the right to succeed, either in her own right or as regent. The regency case and subsequent authorities have resolved that aspect. It is to be noted that such a wife need not come from a chiefly background. In the circumstances the Applicant's position, and chances would improve if she got herself married into another chiefly family. To this extent it may be equally or more appropriate for her to claim discrimination on the basis of her status rather than her sex. Unmarried women cannot be chiefs under and circumstances while men do not have to get married to be chiefs. Furthermore, any woman married into a chiefly family could be a chief, while girls or unmarried women can never be because of their marital status.

[44] Both Mr Mohau KC for 3rd Respondent and Mr Teele KC for the 4th to 7th Respondents argued that the Chieftainship institution as practised in Lesotho

is not democratic at all. The so called commoners or people who neither have "royal blood" nor belong to the Chiefly clans, cannot be chiefs. That basically excludes the majority of Basotho people. In addition, illegitimate children are excluded; as well as second born children and all their younger siblings cannot gualify to be heirs to the chieftainship as their rights are limited in this respect to only where there are no older brothers. It is the exclusive right of first born males in descending order from the first wife's son to the first born children of the Chief's subsequent wives in the order they were married. Democratic principles have no place in the institution. Thus the customary law in matters of Chieftainship has little or no regard to the right to equality and non-discriminatory practices. It regards certain people in various categories as not being entitled to be chiefs under any circumstances. As pointed out it is in fact the majority of the people who are excluded and only a small percentage qualify.

[45] In argument Mr Mosito conceeded that Section 18 (1) is subject to that law. He however; argued that the interpretation of this Section should be in Consonance with the principle of State Policy on equality and justice that;

> *"(1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*[14].

[14] Constitution of Lesotho

This policy as such is not enforceable in any court, but is a guideline to the authorities to endeavour in the performance of their functions to achieve the full realisation of this principle. Mr Mosito also agreed on that.

[46] On the purpose and rationality of the Customary Law rule of male primogeniture, Ngcobo J expressed the following in the case of **Bhe v Magistrate, Khayelitsha Case at Page 57.**

> *"The primary purpose of the rule is to preserve the family unit and ensure that upon the death of the family head, someone takes over the responsibilities of the family head. ……. Successorship also carries with it obligation to remain in the family home for the purposes of discharging the responsibilities associated with heirship. From the family of the deceased, someone must be found to assume these responsibilities. There may be several conflicting demands. But there is a need for certainty in order to facilitate the transfer of the rights and obligations of the deceased without lengthy deliberations that may be caused by rival claims. The determination of the eldest male as the Successor was intended to ensure certainty"*[15].

The above applies with more force in the case of Lesotho and it is more entrenched in the Basotho customary practices. The conclusion that it is reasonable and justifiable as Ngcobo J held is even more valid in our case, *moreso* because it has to be considered in the proper context of the

[15] Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA 2005(1) BCLR 1 (CC) 27

principles of Customary Law rather than be distorted by being looked at through concepts of the Common Law.

[47] That case decided that the legislation had not kept pace with developments and that there are significant changes that had to be taken into account. **Langa DPJ** said the following at page 83;

> *"It is clear that the application of customary law rules of succession in circumstances vastly different from their traditional setting causes much hardship."*[16]

The question that arises is could the same be said to apply to Lesotho. It is our view that the deversification of South African Society with its eleven official languages and different cultures makes comparison with Lesotho to be inapproriate in this respect. Lesotho is a homogenous country with similar cultural values. It remains one of the very few Kingdoms that has maintained a significant role for the Monarchy and continues to respect its customary role even though it is governed through democratic principles. Indeed even the extent of the application of Customary Law in Lesotho is not comparable to South Africa for the reason that South Africa is a diversified multicultural society.

[48] In his book **Proffessor Poulter** puts is as follows at page 255;

> *"It is a cardinal feature of Sesotho law that the heir does not possess unfettered and absolute rights over the Estate. He has far reaching obligations towards other members of the family.*

[16] Ibid

The property he has inherited belongs not so much to him as to the family and he must administer it with the family's best interest in mind"[17].

That principle applies equally to the heirs and successors to chieftainship.

[49] The final inquiry is twofold, it is whether the law is discriminatory; and if so whether the customary law in this respect violates constitution to the extent that it ought to be declared invalid.

[50] This Court is of the view that Section 18 of the Constittion is clear in this regard. It is necessary to assess the authorities cited by applicant in their proper context. They are very helpful, none of them involved a situation like the present, where an unmarried woman seeks to be nominated principal chief in her own right. The preferential right given to first born legitimate sons of chiefs who belong to the first house as opposed to various other categories including the Applicant, is "mere differentiation" as opposed to "naked preferrence". The Customary Laws of succession have been in existence and followed in their unwritten form before the Laws of Lerotholi as well as the Act. The important points to note are that

(a) The Chieftainship Act is not exhaustive of the laws relating to succession.

(b) The Constitution of Lesotho saves the culture of Basotho, which in this regard is patriachial in nature.

[17] S. Poulter – Family Law and Litigation in Basotho Society Page 255

(c) The Customary Law excludes many categories of people from chieftainship not only in Applicant's position. It does not pretend to be democratic in matters of succession.

(d) Applicant must establish an infringment of a right to be successful and also show that such right is not nullified by the Constitution.

[51] The Respodnents argued that as far as Succession to the office of chief is concerned customary law applies, and it is recognised by the Constitution in Section 154 (1)[18] which defines customary law as;

> *"The Customary Law of Lesotho for the time being in force subject to any modifications or other provision made in respect thereof by any Act of Parliament"*.

The question that arises is therefore whether any modification that gives rise to conflict with the Constitution or any Act of Parliament can be found.

[52] There appears to be no such conflict. The Chieftainship Act in Section 10(2) and (3) is a restatement and codification of the Laws of Lerotholi and is in accordance with the Basotho Law and Custom applicable to succession to the office of chief. The Basotho Law and custom of succession in statutory form recognises the customary practice under Section 10(3) and (5).

[53] In the same way the Customary Law of Succession to the office of Chief as codified in Section 10 of the Chieftainship Act cannot be said to be in

[18] Constitution of Lesotho, Section 154

conflict with the Constitution because of Section 18 (4) (c) of the Constitution which provides that;

> *"Subsection (1) shall not apply to any law to the extent that that law makes provision 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"*[19].

Thus there is no conflict between the customary Law of Succession as codified in Section 10 of the Chieftainship Act, and the Constitution. Any doubts in that regard should be removed by the above section as it is undeniable and common cause that Chieftainship is an institution of the Customary Law. Indeed much could also be said about the equality or inequality aspects of polygamy itself; inheritence in general; and rights to succession to chieftainship. The Constitution is highly protective of the Customary Law rights relating to these practices. It is fair to say it may be time to move away gradually from the undesirable outcomes of customary law in this regard.

[54] It is significant to further point out that in acceding to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Government of Lesotho expressed its reservation and specifically excluded itself from the provisions of that convention or treaty in so far as it concerns the customary practices relating to succession to the throne and to chieftainship. Is the court supposed to ignore this for purposes of this case, or at all? In our view, it cannot. By so doing the court would

[19] Lesotho Constitution Section 18 (4) (c)

be failing to take into account the deliberate and considered view of the executive arm of Government and Legislature. This is not permissible in these circumstances.

[55] It is otherwise to be noted that Lesotho has performed well internationally in the campaign for gender equality. It has 58% women in local government which is more than the 50% requirement. It has also surpassed the initial 30% target for women in decision making bodies set by SADC. It is ranked number 40 globally in compliance.[20] Our judiciary is also suitably representative in both the Magistrates Court and the High Court.

[56] The interaction between the judiciary and the executive must be interactive and complimentary and unless there are good reasons to do with violation of Human rights or breach of democratic principles courts should not be too quick or disruptive in their approach to the policies of the executive. It should always be remembered that it is the Executive and Legislature who are the elected representatives of the people. It is both executive and legislature because our law is that a treaty will only be enforceable once it is passed as law by our legislature; and where a country has specifically excluded itself from portions of a treaty; it is clear that it will never be enacted into local law.

[57] In this regard, an example could be made of the preferred route and strongly expressed views of the Court of Appeal in the Lekhoaba (*citation*) case in

[20] Road Map to Equality – SADC Gender Protocol Report 2010

favour of dual citizenship rights between South Africa and Lesotho, the executive may be not able to implement those recommendations because of other pressing policy considerations and priorities. Should it be forced to do so regardless of its own policies?

[58] In the circumstances of this case; it is our view that the Applicant cannot be said to be discriminated against on the basis of her sex, but even if that were the case; it does not violate the constitutional provision to the extent that Section 10 of the Chieftainship Act may be declared uncostitutional. Indeed it is justifiable for a country to adopt policies; and enforce legislation which may appear to entrench inequality if historical circumstances so require. An immediate example is that of the South African Government Policy of Affirmative Action, now referred to as Black Economic Empowerement. It is meant to ensure that black people are given preferential treatment in the workplace and generally in accessing employment opportunities.

[59] If it coud be argued that Lesotho is in fact lagging behind in its policies of equality between the sexes, that may be a fair comment; but it has equally not abolished the death sentence on the basis of the right to life; neither does this country consider itself bound by the principles of the rights of gay people to the extent of allowing same sex marriages. Many countries in the world have not yet developed to that stage. This is not unique at all. It may be that the time will soon come to allow these developments and acceed to those principles as well, but the customs, culture and conceptions of the community must always be considered and each

country must be allowed to make its choices in this respect. This is the true meaning of independence and self determination of nations. It is the role of the other two arms of Government to see that is done without breaching the law.

[60] The scenario we have before us is therefore of laws (ie – Constitution and Chieftainship Act) that have been enacted with a view to protect each from conflict with the other, and a Government that has taken a conscious and deliberate policy that it should be excluded from the operation of a treaty in so far as succession to chieftainship is concerned. The rights and prerogative of the Legislature in that respect must not be infringed upon unnecessarily.

[61] As far as costs are concerned we consider that Applicant had a right to have the Constitutional principles and rights of people in the same position as her to be established. It would not be fair to order any costs against her.

[62] In the circumstances the Order we make is as follows:-

1. That the Application is dismissed.

2. There will be no order as to costs.

T.E. MONAPATHI
ACTING CHIEF JUSTICE

I agree

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M. MAHASE
JUDGE OF THE HIGH COURT

I agree

_____

L.A. MOLETE
JUDGE OF THE HIGH COURT

For Applicant	**:**	**Mr Mosito KC (with Mr Rafoneke), Mr Maenetje S.C (with Mrs Rajah) - 1st Amicus, Mrs Shale – 2nd Amicus**
For Respondents	**:**	**Mr Mohau KC – 3rd Respondent** **Mr Teele KC – 4th to 7th Respondents** **Mr Putsoane – 8th to 11th Respondents**