

# SOUTHERN AFRICA LITIGATION CENTRE

## MASUPHA V THE SENIOR RESIDENT MAGISTRATE FOR THE SUBORDINATE COURT OF BEREA AND OTHERS: SUMMARY OF JUDGMENT

On 16 May 2012, the High Court of Lesotho, sitting as the Constitutional Court in *Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea and Others*,<sup>1</sup> upheld section 10 of the Chieftainship Act No 10 of 1968 (Chieftainship Act) which denies all daughters the right to succeed to chieftainship. The case was brought by Senate Masupha, the first-born child of the late Principal Chief Gabasheane Masupha and his first wife, the late Chieftainess Masenate Gabasheane Masupha. Senate argued that section 10 of the Chieftainship Act denied her the right to succeed to chieftainship solely due to her gender in violation of her rights to freedom from discrimination and equality guaranteed by sections 18 and 19, respectively, of the Lesotho Constitution.

The case before the Constitutional Court was initially a consolidation of two cases, the first case which was filed in the Magistrate's Court between the son of Principal Chief Masupha and his second wife and Principal Chief Masupha's brother. Both the chief's son and his brother claimed that they should succeed to chieftainship. Senate Masupha was not cited in these proceedings as the Chieftainship Act prevented her from succeeding due to her gender. Senate's attempts to intervene in the matter before the Magistrate's Court were denied and she then filed the second case, a constitutional challenge arguing that section 10 of the Chieftainship Act was unconstitutional. However, in the meantime, the Magistrate's Court issued a judgment against Principal Chief Masupha's brother 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 Constitutional Court thus was tasked with solely determining whether section 10 of the Chieftainship Act was constitutional.

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<sup>1</sup> Constitutional Case No. 5/2010.

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The decision, signed on by acting Chief Justice Monaphathi, Justice Mahase and Justice Molete, held that section 10 of the Chieftainship Act did not violate the Constitution. The Court stated that section 10 in giving first-born sons of chiefs the right to succeed to chieftainship was mere differentiation as opposed to naked preference. In its discussion on differentiation, the Court referred to a Lesotho Court of Appeal case of *LNIG vs Nkuebe*<sup>2</sup> which followed the South African case of *Prinsloo vs Van der Linde*<sup>3</sup> and held that mere differentiation which is necessary to regulate the affairs of the community does not amount to discrimination. The Court further stated that in order to show that that the differentiation of treatment amounted to discrimination based on sex or gender the applicant had to prove the following:

- a. 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. men or boys are permitted to be heirs to the chieftainship in all circumstances;
- c. there is no rational purpose served by that differentiation; and
- d. the provisions of the Chieftainship Act in that regard are in conflict with the Constitution to the extent that they ought to be declared null and void.

In determining the first factor, the Court held that women married into chiefly families have a right to succeed to chieftainship either in their own right or as regent. The Court noted that the distinction is between married and unmarried women and thus it may be more appropriate for the applicant to claim discrimination based on marital status.

In considering the second factor, the Court noted that chieftainship itself is an undemocratic institution where not only daughters, but illegitimate sons, second-born sons, among others are not entitled to succeed. Thus, not all men or boys are permitted to succeed to chieftainship in all circumstances.

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<sup>2</sup> 2000-2004 LAC P87.

<sup>3</sup> 1997(3) SA 1012 at para 23-24.

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With regards to the third factor, the Court referred with approval to Justice Sandile Ncgobo's concurrence in the South African case of *Bhe and Others v Magistrate, Khayelitsha*<sup>4</sup> in which he noted that the primary purpose of male primogeniture had been to preserve the family unit and to ensure certainty in succession to avoid conflict within the family. The Court stated that this objective for the rule of male primogeniture applied with more force in Lesotho, especially given that Lesotho was a homogenous country where the population had similar cultural values. The Court thus concluded that the rule of male primogeniture was reasonable and justifiable.

In addressing the fourth factor, the Court held that the Chieftainship Act is a restatement of the customary law rules of succession and that it is not in conflict with the Constitution. The Court further stated that the Constitution is highly protective of customary law rights relating to practices such as chieftainship and referred to section 18(4)(c) of the Lesotho Constitution which provides that even if a rule of customary law may appear to be discriminatory in effect, it will not be so when applied to persons who are subject to that customary legal system. In reaching its decision the Court also stated that “customary law excludes many categories of people from chieftainship not only in the applicant’s position and does not pretend to be democratic in matters of succession”.<sup>5</sup>

In its submissions the *amicus curiae* had argued that the Chieftainship Act violated the provisions of the Lesotho Constitution with reference to Lesotho’s regional and international obligations and jurisprudence from comparable countries on equality and non-discrimination. However, the Court stated that the jurisprudence from other countries on the law of succession is only remotely, if at all, comparable to Lesotho and that the customary law of Lesotho is unique in this respect.

In its conclusion, the Court noted that it may be time to move away from “undesirable outcomes of customary law”<sup>6</sup> and further agreed that this decision may mean that Lesotho is “lagging behind in its policies of equality between the sexes”.<sup>7</sup>

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<sup>4</sup> (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

<sup>5</sup> Constitutional Case No. 5/2010, para 50.

<sup>6</sup> *Id.* at para 53.

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Justice Mahase wrote a concurrence in which she reasoned that though the Chieftainship Act does discriminate against the applicant not only as a daughter but also as an unmarried woman the Parliament left no ambiguity in its intention for male-only succession when it passed the Chieftainship Act and thus the legislature should be deferred to in this case.

The full decision of the High Court, sitting as the Constitutional Court can be found at <http://www.lesotho.li.org/ls/judgment/high-court/2013/9>.

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<sup>7</sup> *Id.* at para 59.