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Conflict of Laws: Analysis of The Rights of an Heir Under Lesotho Customary Laws and Common Law Prescripts

This paper discusses the rights of the heir under Basotho Custom. The paper depends on secondary data sources, namely the laws and status of Lesotho, statutes and academic literature as the main sources of data. Information derived from various sources was contextually analysed and presented in the form of logical arguments. Based on the data gathered, the general overview of the heir and the relevant authorities from which his rights are derived is discussed. The paper also discusses in depth the validity of written instructions or wills vis-à-vis the customs, traditions and practices of the people of Lesotho. This is followed by arguments about the determination of who becomes an heir under specific circumstances surrounding the facts given and lastly the rights of the heir against any imaginable parties is discussed.

Keywords: Heir, Inheritance, Customary Law, Lesotho, Will, Conflict of Laws

Introduction

This paper articulates what happens to a deceased's estate in the case of a situation where he dies without a child from a legitimate marriage but does have a son from one of his concubines. The imaginary case to be analysed and discussed in this paper is as follows: a certain man called Thabo (not real name) dies leaving his widow, named Teboho (not real name) who has no male child with him. He makes written instructions that his illegitimate son (Thato) who was taking care of him when he was sick should inherit his estate. When Thabo died, he had not paid Mokete (not real name) the native medicine man who treated him while he was sick a couple of cows for the medicine he gave to him, (*moriana oa sepeiti*) because his concubine Manto (not real name) had sold all his cattle and his estate.

Given the above, there appears to be confusion in contemporary Basotho society with regard to who specifically is the heir under Basotho custom? How valid is a written will *vis-à-vis* the Basotho customs and traditions with regard to inheritance? What rights does an heir have over other parties mentioned in this scenario? These contexts and situations are currently potent flashpoints for conflicts among family members and raise some questions that require the use of authorities and laws to determine who the heir of the deceased is and what are the rights of the heir under Basotho custom against all other authority. Against this backdrop this paper presents a detailed conceptualization of whom an heir is under Lesotho Laws and the rights of an heir over and against respective "others" in the inheritance practices of Lesotho.

Who is an Heir under Lesotho Law?

The Basotho custom follows a patrilineal tradition in relation to matters of inheritance and succession. Inheritance devolves from the father to his eldest

son, known as the heir. According to the Laws of Lerotholi,¹ the heir is the first male child of the first marriage. When there is no male child in the first marriage, the heir shall be the first born male child of the next wife married in succession. If there is no male issue, the successor shall be the brother of the deceased. If there is no male issue in any household, the senior widow becomes the heir and is expected to consult with the relatives of her deceased husband for advice.² In the event that the heir is a minor at the time the deceased passed away, Section 12(1) stipulates that a guardian will be appointed who is usually the widow. The guardian has a duty to keep the records of the estate and such records are open for discussion with relatives.

The heir, apart from inheriting the goods of the deceased also inherits the deceased's debts and obligations. Hence under custom he is called *moja-a-lefa*, meaning 'you eat and you pay'. This has resemblance to the Roman Dutch law in the sense that *mojalefa* is called 'Heres' who inherits both obligations and assets. In Basotho custom, the deceased's estate is treated as a single unit called *lefa*. This aspect of custom is also identical with the Roman estate law known as the *hereditas*. However, there is a difference between Basotho custom and Roman law due to the fact that under Basotho custom, there was only one heir who is the eldest son, whereas under Roman law, all the children of the deceased were automatically heirs.

The heir in Basotho custom is regarded as having stepped into the shoes of the deceased (*mojalefa o kena liteng tsa mofu*). He merges his own patrimony with that of the deceased. There is no separation between the assets of the two. The Basotho customary heir has duties summarised as follows:

- To acquire and take charge of the deceased's estate. This means that the deceased's property became the heir's property.

¹ Laws of Lerotholi Section 11(1) Part 1.

² Laws of Lerotholi Section 11(2) Part 1

- To bury and to make arrangements for the burial of the deceased. This is to be done in conjunction with the other members of the deceased's extended family; however, it is the heir that has the legal obligation.
- The heir has a right to the debts that were owed to the deceased and consequently had a duty to collect those debts.
- The creditors of the deceased had a right to claim payment of the deceased's debts.
- The heir who stepped into the deceased's shoes had a duty to look after the deceased's dependants and to discharge all the legal obligations that the deceased had.
- If the deceased allotted property among his houses and children and the heir came to know about this, the heir must carry out the deceased's wishes. (Maqutu 2005: 294-295).
- Having highlighted the position of the heir under Basotho custom, the validity of written instruction will now be discussed.

Validity of Written Instructions under Custom

Under Basotho custom, a person is permitted to specify in writing the person or persons to whom his own property should pass after his death. At common law the medium used is a will. The difference between the two systems lie mainly in the formalities required. A will normally must be signed at the end by the testator in the presence of two or more competent witnesses who are present at the same time, and these witnesses must have attested and subscribed the will in the presence of the testator. Written instructions on the other hand are probably sufficiently valid if they can be shown to be the authentic work of the testator by means of any reliable evidence (Maqutu 2005: 322). These dispositions are only valid if they do not deprive the heir

of the greater part of the estate.³ This provision according to Duncan (2006) was meant to refer only to polygamous families. It, however, appears to have extend to monogamous families. In *Mokorosi v Mokorosi*,⁴ it was held, in the case of a monogamous family, that ‘by section 14(1) of the Laws of Lerotholi, a will is recognised as valid provided that the heir is not deprived of the greater part of the estate.’ Another aspect of this provision is that it places a limitation on the freedom of testation as opposed to the 1873 Law of Inheritance Act which gives every man freedom to make a will.

According to Poulter (1999), the Law of Inheritance Act came originally from the Cape Colony and continued in force in Basutoland in 1884 when the *General Law Proclamation* was promulgated. Section 5 of the *Law of Inheritance Act* states

“every person competent to make a will shall have full power by will... to disinherit or omit to mention any such child, parent, relative or descendant without assigning any reason..., any law, usage or custom now or heretofore in force in Basutoland notwithstanding and no such will as aforesaid shall be liable to be set aside as invalid, either wholly or in part, by reason of such disinheritance or omission as aforesaid.”

This gives the impression that as long as a person executes a valid will (either under custom or common law) and was competent to do so, his wishes must be carried out regardless of any restrictions in Sesotho laws. Poulter holds the view that the Cape Law of inheritance has given every *Mosotho* freedom of testation. However, it has been argued that the phrase ‘competent to make a will’ provides a clear indication, that this Act is limited to persons who have abandoned a customary way of life and have adopted a European mode of living (Mosito 2008). In *Hoohlo v Hoohlo*,⁵ the decision was made on the assumption that the freedom of testation does not apply to *Basotho* who have

³ Laws of Lerotholi, Section 14(1) Part 1

⁴ 1954 H.C.T.L.R 24

⁵ 1967 – 70 LLR318

not abandoned the Sesotho way of life. Also in the Mokoosi case of 1954⁶ and the Thomas Mokoosi case,⁷ it was assumed by the courts that a *Mosotho* living a customary way of life has no freedom of testation.

The question whether a person has abandoned a customary mode of life and adopted a European way of living is a question of fact to be determined on the particular facts of each case. This 'mode of life' test falls within the purview of the Master or the High Court.⁸ The courts use some guidelines to determine whether someone has abandoned the customary way of life and embraced the European way of life. These elements were discussed in *Mokoroosi v Mokoroosi*,⁹ also in *Hoohlo v Hoohlo*.¹⁰ Poulter sums up the criteria as follows:

- i) living in a district headquarters or what used to be called a government reserve;
- ii) not having any land allocated by a chief for ploughing or having cattle grazing in the common pasture in the rural area;
- iii) earning a living from a profession, commerce, and industry or government service;
- iv) living in a European style house with several rooms;
- v) owning a motor vehicle;
- vi) wearing European clothes;
- vii) possessing a bank account or a life insurance policy;
- viii) adhering to the Christian faith;
- ix) being married by civil or Christian rites and committed to monogamy;

⁶ 1954 H.C.T.L.R 24

⁷ 1967 – 70LLR 1

⁸ Administration of Estate Proclamation. No. 19 of 1935.

⁹ 1967-70 LLR 1

¹⁰ 1967-70 LLR 318

- x) giving children a European education, not sending them to a circumcision school;
- xi) sleeping on a bed and eating at a table with the whole family;
- xii) consulting an attorney in various matters including the drawing up of a will.

These criteria have been criticised by some scholars as artificial, however they are used as a guide up to the present time in Lesotho judiciary.

In reference to facts of contemporary cases in Lesotho, one is not certain of the mode of life lived by deceased (Thabo) so as to ascertain whether the ‘mode of life’ test will be applicable. However applying the Basotho customary principles, the written instructions made by a deceased is permitted, but for it to be enforced the provisions of the *Laws of Lerotholi*¹¹ has to be applied, whereby the heir shall not be deprived of a greater part of the estate. This brings up the argument *as par* who is the heir in a situation where a man dies with a written will where he appointed an ‘illegitimate son’ to inherit his property.

Determination of the Deceased’s (Thabo’s) Heir under Lesotho Laws

By virtue of Section 11(2) of the Laws of Lerotholi which states as follows: “If there is no male issue in any house, the senior widow shall be the heir, but according to the custom, she is expected to consult the relatives of her deceased husband who are her proper advisers.” A childless widow under custom is the sole heiress of her late husband (Maqutu 2005:290). In chieftainship matters, Section 10 of the Chieftainship Act of 1968 provides that a childless widow becomes the heiress to her husband’s chieftainship. Also, the case of *Bereng Griffith v Mantsebo Seeiso*,¹² the plaintiff based his

¹¹ Section 14(4).

¹² 1926-55 H.C.T.L.R.50

claim on the belief that under Basotho custom a woman is incompetent to fill any administrative office, that she is not *sui generis* – that, whether as a maiden, wife or widow, she was entirely subject to the control of the male head of her family; that she can never become the owner and controller of property, that she has no *locus standi in judicio* and that all matters concerning her and the property of her house can only be transacted by the male head of her family. However, in passing the judgement, Landsdown J mentioned the frequent practice of women being the controller and administrator of the affair of her own house when her husband has passed away.

In Basotho custom, for purposes of succession, a house without a son is regarded as childless. Yet the marriage is not regarded as childless so long as she can still bear children with some other acceptable male relative of her husband in order, if necessary to ‘raise seed’ by her (Maqutu 2005: 219). Such children born are regarded as legitimate and are regarded as lawful successors to the deceased. This explains the reason why in the Bereng Griffith case, Lansdown J found it to be wrong to refer to the widow as the wife of the *mokeneli* (the person who marries his brother’s wife) when he is supposed to be just a ‘seed raiser’.

Apart from the chieftainship case, there are authorities that support the position of a woman assuming the head of her house. In *Mothebesoane v Mothebesoane*,¹³ a woman was found to be appropriate to be the head of the house where she was married to the head of the house. Also in *Mafoso v Moorosi*,¹⁴ a mother sued for her daughter’s seduction; *Likotsi v Masilo*,¹⁵ it was held that the widowed mother, not the father’s brother was responsible for the delicts of the child, finally in *Rantja v Rantja*,¹⁶ a man who sued for his widowed mother’s lands without her authority was found to have acted wrongly.

¹³ 1978 LLR 384

¹⁴ J.C 17/44

¹⁵ 1/44

¹⁶ 140/51

Based on the principles mentioned above, one can conclude that the widow of the deceased man is the appropriate heiress to the estate of her late husband. This should be the case notwithstanding the fact that her deceased husband has written instructions where he appointed his 'illegitimate child' a child born out of wedlock to inherit his property. In this case, his wishes however, cannot override custom (*Thabo v Makobela*¹⁷). Having determined the heir under Basotho custom, the right of the heir against each of the parties mentioned (the illegitimate child, the concubine and the native medicine man) are discussed below:

Rights of the Heir against the Illegitimate Son

Under Basotho Custom, there is a general rule that an adulterine or illegitimate child cannot succeed because they are not blood. This principle was demonstrated in *Rasethuntsa v Rasethuntsa*,¹⁸ where there was a dispute over property left by their mother for the two brothers, Bula and Tom. On appeal, it was held that as their mother had never married, the status of her children was that of minors in the Rasethuntsa family, her property is therefore to devolve on the Rasethuntsa heir. In a similar manner in *Thabo v Makopela*,¹⁹ the estate of one Seporo was disputed by his illegitimate grandson and his next junior brother. Before his death Seporo had stated that it was his desire was for his grandson to inherit his property. It was however decided that his desire could not override custom and that illegitimate children have no claim on estates.

An illegitimate child (child born out of wedlock) in Basotho custom belongs strictly to the mother's family. If the father subsequently married the child's mother, that does not change his position towards the child. In order for the child to be legitimised, the natural father must also enter into a special

¹⁷ J.C 360/47

¹⁸ J.C 216/1947.

¹⁹ J.C 360/47

agreement acknowledging the legitimacy of the child and there must be an agreement with the mother's parents for the transfer of the child to the natural father.

An ox or a cow, called *kheoma ea seotla* is given to the mother's parents for bringing up the child to the natural father's family. It is after all these rites are performed that the child becomes legitimised. In *Makotsoko Majara v Thelingoane*,²⁰ the issue of legitimacy of the last child *Kobela Majara* was raised by the plaintiff and it was held by the courts that there was a valid customary marriage performed by the parents and that the son was properly legitimized thereafter and therefore entitled to succeed.

Another angle to the perception of legitimacy under Basotho custom is a situation where the children born are not the biological offspring with their father. This happens in *lebota* (marriage to a fictitious person) and *lebitla* (marriage to a person already deceased) marriage. Such children are considered as legitimate because they are the seeds raised for the deceased person and they are accepted by his family. In *Melintsoele v Ramokhele*,²¹ it was held that a son born out of the *lebitla* marriage was entitled to succeed as the chief.

Applying all the principles stated, the adulterine child (Thato) has no right to succeed Thabo. The widow (Teboho) is not obliged to follow the written instructions of her deceased husband (Thabo). His wishes even though they ought to be respected cannot override custom. The adulterine child cannot therefore claim any inheritance or step into the deceased shoes.

²⁰ 1999-2000 LLR 164.

²¹ 1974-75 LLR130.

Rights of the Heir to Settle the Debts Owed to the Native Medicine Man (Mokete)

One of the obligations of the heir under custom is to settle the debts and obligations of the deceased. The common saying '*mojalefa ke moja-a-lefa* (the heir not only eats but has also to pay) applies over debt settlement. In *Ramochela v Sekouti*,²² the heir was held liable to pay his younger brother's *bohali* (bride price) despite the fact that he pleaded that his estate was small and he had not finished paying his own *bohali*. It was also stated that he could be assisted by members of his family.

Applying this principle to the present facts of the case, the widow, Teboho has the obligation to settle the debt incurred by her deceased husband, Thabo. She has the full responsibility for the cow owed in settlement of the debt even though it is apparent that she had no estate or cattle to inherit as the deceased's concubine has sold them. She can however seek the assistance of her husband's male relatives since they are supposed to be her natural advisers.²³ The implication of the above is that an heir is liable to both costs and benefits associated with the deceased who he/she has inherited.

Rights of the Heir against Manto (Thabo's concubine)

Manto was Thabo's concubine, whom she had sold his cattle and estate. It can be inferred from the facts that she had done this before Thabo's death as he was unable to settle the debt of the cow he owed to the native medicine man. The deceased had no property to inherit upon his death except for the debt incurred for his medicine. Teboho has no right of action against Manto, her husband's concubine. She can however once again seek counsel from her deceased husband's male relatives over the matter.

²² J.C 224/69.

²³ Laws of Lerotholi Section 11(2) of part 1.

Conclusion

The discourse critically analysed leads to conclusions on the determination of an heir and the rights of an heir in Lesotho laws. According to the laws and custom of Lesotho it is therefore concluded that the widow of a deceased man who died childless remains his heir apparent. The widow therefore has right over estates and property of the deceased and by implication liable to his debts. All these are based on her rights under the Basotho customary principles, which seeks to protect the heir from a situation where he or she is deprived of their legitimate rights. In practice, irrespective of the duality of laws in Lesotho, the customary laws override the common law prescriptions, especially with regard to traditional issues such as marriage and family. This is an advantage of customary laws over the common law system.

Reference

- Mosito, KE (2008). *Compilation on Succession and Administration of Estates*. Unpublished Manuscript. Roma: National University of Lesotho.
- Duncan, P (2006). *Sotho Laws and Customs*: Morija Printing Works, 2006.
- Poulter, S (1999). *Legal Dualism in Lesotho*: Morija Printing Works, 2nd Edition.
- Maqutu, WCM (2005). *Contemporary Family Law (The Lesotho Position)*: National University of Lesotho Printing House, 2005.

Table of statutes cited

- 1) Administration of Estates Proclamation, No. 19 of 1935
- 2) Chietainship Act, No. 22 of 1968
- 3) General Law Proclamation, No. 2B of 1884
- 4) Law of Inheritance Act, No. 26 of 1873
- 5) Laws of Lerotholi, Part I and II.