

Molapo Mojela - - - - - *Appellant*

v.

Thabo Lerotholi Mojela - - - - - *Respondent*

FROM

THE COURT OF THE RESIDENT COMMISSIONER FOR THE TERRITORY
OF BASUTOLAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH JUNE, 1928.

Present at the Hearing :

THE LORD CHANCELLOR.

VISCOUNT SUMNER.

LORD ATKIN.

[*Delivered by* THE LORD CHANCELLOR.]

This is an appeal from a judgment of the Resident Commissioner for Basutoland, which allowed an appeal from the Assistant Commissioner and restored the judgment of the Paramount Chief.

The question involved in the appeal is the right of succession to the chieftaincy of the Makhauta tribe of the Basutos, which had been held, until his death, by Chief Mojela.

It appears from the evidence that Chief Mojela had as his chief or first wife a woman named Mamakhobalo, as his second wife a woman named Mantlebe, and there were two other wives, none of whom had any male issue which survived the chief, and the fifth wife was Mathabo, the mother of the respondent.

In the Courts below an attempt was made to challenge the validity of the marriage of Mojela with Mathabo ; but that point was expressly given up before their Lordships' Board by Sir Malcolm Macnaghten, who, with his learned junior, has argued the case with the utmost fairness and discretion.

After the birth of the respondent, Thabo, it appears that an effort was made by the first or chief wife to adopt the respondent : but this was defeated by the objection of the second wife, Mantlebe. Thereupon, according to the evidence, Mamakhobalo desired to have a deputy wife taken by the Chief Mojela, who could, if possible, produce an heir who might be treated as her son and succeed to the chieftaincy. As a result of her importunities, the Chief Mojela married, as a sixth wife, Mamolapo, the mother of the appellant.

The question which arises is whether the marriage with Mamolapo was merely an ordinary marriage, in which case her son would rank as junior to Thabo, the respondent, or whether it was a marriage according to plan, which, it was suggested, would constitute Mamolapo a deputy wife for Mamakhobalo and confer upon the appellant the right of succession as heir to his father.

Questions were raised as to whether it was possible to carry out such a marriage according to plan, when there was already in existence a male heir. That question was left open by the Resident Commissioner and their Lordships do not think it necessary to deal with it.

The Resident Commissioner decided the case in favour of the respondent, on the ground that he was not satisfied that the formalities necessary to constitute a valid marriage according to plan had been carried out. Their Lordships have been carefully through the evidence, which has been fully reviewed before them, and they see no reason to differ from the opinion reached by the Resident Commissioner or to disturb his findings.

It was suggested on behalf of the appellant that the well known rule of law, of which the case of *Piers v. Piers* (2, House of Lords Cases, page 331) is an example, by which there is a presumption in favour of marriage and in favour of legitimacy, could be evoked to assist his case. In their Lordships' view that rule of law has no application to the present case. There is no dispute that the marriage between Mojela and Mamolapo was a valid marriage or that the appellant is a legitimate son of Mojela. Their Lordships see no reason for extending the presumption which exists in favour of a marriage and against concubinage, and in favour of legitimacy and against bastardy, to a case in which the validity of the marriage and the legitimacy of the offspring are admitted and where the only point is as to whether the marriage was conducted in such a way as to confer a particular status and precedence upon the offspring of the union.

In those circumstances their Lordships are of opinion that there is no ground for disturbing the decision reached by the Resident Commissioner and their Lordships will humbly advise His Majesty that the appeal should be dismissed.

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In the Privy Council.

MOLAPO MOJELA

v.

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DELIVERED BY THE LORD CHANCELLOR.

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