G.P.-S.918—1950-1—2,000. U.D.J. 219. 203/54

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE ~~Provincial~~ Division).
(~~Provinsiale~~ Afdeling).

CASE STATED

~~Appeal in Civil Case.~~
~~Appèl in Siviele Saak.~~

THE MINISTER OF NATIVE AFFAIRS Appellant,

versus

MONGALI MOROOA and (2) MOUNTANE MOONTANE ~~Respondent.~~

Appellant's Attorney
Prokureur vir Appellant [illegible]

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate
Advokaat vir Appellant H. Potgieter Q.C. with him Heeve.

Respondent's Advocate
Advokaat vir Respondent H.F. de Wet.

Set down for hearing on
Op die rol geplaas vir verhoor op Monday 7th March 1955

2.55 Before Schreiner, v.d. Heever et Hoexter JJ.A.

Mr Potgieter against [illegible] marriages. Mr. de Wet in favour.

9.45 am – 12.50
& 2.15 – 3.35 } – C.A.V.

Roster: 24/3/55. Judgment delivered:
First Question answered in affirmative, and Second Question, in both its parts, answered in negative. [illegible]

[illegible] } J.J.A.
24-3-55.

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter of :-

EX PARTE MINISTER OF NATIVE AFFAIRS IN RE

1.MAGADE MAGQABI v. SOLOMON MAGQABI, and

2.EDDIE MNQONJANE v. SAMUEL MNQONJANE

Coram: Schreiner, van den Heever et Hoexter, JJ.A.

Heard: 7th. March, 1955. Delivered: 24 - 3 - 1955

J U D G M E N T

SCHREINER J.A. :- This is a case, stated by the Minister of Native Affairs under section 14 of Act 38 of 1927, in which he asks this Court to determine certain questions of law arising out of the decisions of the Southern Native Appeal Court in the cases of Magadi Magqabi v. Solomon Magqabi, decided on the 17th. September 1952, and Eddie Mnqonjane v. Samuel Mnqonjane, decided on the 23rd September 1953.

The questions of law propounded are:-

"(i) Whether a son of a civil or Christian marriage has any right to succeed, in terms of the table of succession contained in the Third Schedule to Proclamation No.142 of 1910/.....

1910 (as amended) to land in a location held by his father in individual tenure upon quitrent conditions, in view of the meaning assigned to the expression 'house' in Section 35 of Act No. 38 of 1927;

(ii) If the decision to the first question is in the affirmative then -

(a) whether the son of such a marriage ousts the son of a prior customary union in respect of land acquired during the subsistence of such marriage; and

(b) whether the son of a second civil or Christian marriage ousts the son of the first civil or Christian marriage in respect of land acquired during the subsistence of the second marriage. "

The questions relate to the succession to land in locations in the Transkei held in individual tenure upon quitrent conditions. Such locations originated, so far as the Transkei is concerned, in Proclamation 227 of 1898, which in section 19 dealt with succession to the estates of deceased holders of quitrent allotments in such locations. The section dealt with the succession to all the property of such a holder, and recognised the threefold division which was elaborated in the later legislation to be mentioned presently. Immovable property, including the allotment, could nat be devised by will but was to be dealt with in terms of section 23. All other property, if not devised by a duly executed will, was to be distributed

according/.....

according to native custom.

Section 23 provides: "The allotment and other immovable property of every registered holder shall not be capable of being devised by will, but upon his or her decease shall devolve upon and be claimable according to the rule of primogeniture by one male person to be called the heir and to be determined by the following table....."

A proviso is here interpolated dealing with the case of an heir who is already the holder of an allotment, and who is given the right to elect which to keep; and there then follows the table of succession which, with minor modifications, is the same as that in force today.

These provisions of the 1898 Proclamation were repealed by Proclamation 142 of 1910, which amended the law of marriage and succession. Large parts of the latter are reproduced in Act 38 of 1927, corresponding appeals being effected by Proclamation 255 of 1934. The threefold division referred to above is represented by section 8 of the 1910 Proclamation and by section 23(1)(2) and (3) of the Act. In regard to succession to quitrent land section 23 (2) of the Act provides that it is to devolve in accordance with tables of succession prescribed under subsection (10). We were, however, informed by

counsel/.....

counsel that no such new tables have been issued for the Transkei, the tables scheduled to section 8(2) of the 1910 Proclamation having been left in operation. Section 8(2), which provides that immovable property of a deceased held under the 1898 Proclamation shall devolve on one male to be determined by the scheduled table, has been left unrepealed, together with sections 9 and 10, to the terms of which the provisions of section 8(2) are expressly made subject. Section 9 deals with what may be roughly described as the usufructuary rights of widows in respect of quitrent land and section 10 elaborates the 1898 provision governing election by an heir to a quitrent allotment who already has an allotment.

The 1910 table of succession, as amended up to 1926, reads :-

"In this table 'male descendant' shall mean a male descendant through males only.

1. His eldest son of the principal house or such eldest son's senior male descendant.

2. If the eldest son have previously died without leaving any male descendant, the next son or his male descendant, and so on through the sons respectively and through the several houses in their order.

3. If no senior male descendant of any son be living then the father.

4. If no father then the eldest brother of such deceased

person/.....

person of the same house or his male descendant, and so through the brothers of that house and their male descendants respectively.

5. If no brother or male descendant of any brother of the same house be living, the eldest brother of the allied house of higher rank or next rank, as the case may be, or his male descendant, and so on through the brothers of such allied house and their male descendants respectively.

6. If no brother or male descendant of any brother of such allied house as aforesaid be living, the eldest brother or his male descendant of the lefthand house (indlu yesekohlo), where such house is recognised, in case such deceased person be of the principal house (indlu enkulu), or in case he be not of the principal house, the eldest brother or his male descendant of the house of the higher rank, as the case may be, and so on through the brothers or their male descendants respectively of the lefthand house or of the house of the higher rank, as the case may be.

7. If no brother or male descendant of any brother of any house, the eldest brother of the father of such deceased person or his male descendant, and so on through the brothers of his father and their male descendants respectively.

8. Failing brothers or their male descendants, then to the grandfather or his male descendants.

9. If there be no male descendant of such deceased person competent and willing to accept transfer the Crown, which may dispose of such property, or the proceeds thereof, amongst the female members of the family of the deceased, if any, or their descendants, in such manner as the Chief Magistrate may deem fit.

10. Whenever the deceased person is a woman who acquired land by virtue of holding the status of a wife or widow

at/.....

at her husband's kraal, the land after her death shall devolve upon the heir according to native custom of the house to which she belongs and so on according to the order laid down in the preceding sections.

11. Whenever the deceased person is a married woman who after having from any cause left her kraal and returned to her own people had there acquired land such land shall descend to her heir under native custom."

I have set out the table in full because although the meaning of the first item is what is directly in issue some at least of the other items throw light upon that meaning. For the same reason it is necessary to recite the terms of section 9(1), which are as follows :-

"If any person to whom the provisions of this Proclamation apply shall die and leave surviving him any widow,whether of a marriage according to the law of the Colony or of a native registered marriage or of a marriage by native custom,who was either at all times the sole wife of the deceased, or, if not at all times the sole wife of the deceased, was his great or principal wife under native custom,such widow shall,until her re-marriage,or, in the event of her not re-marrying, then during her residence at the Kraal of her late husband or such Kraal as may be approved by her late husband's relatives,be entitled to the use and occupation of the immovable property belonging to the deceased and held by him under title granted under the provisions of Proclamation No.227 of 1898, subject to the obligations imposed by the conditions of title; and during such use and occupation the said immovable property shall remain registered in the name of the deceased."

Subsection (2) of section 9 deals with the position where the deceased's great or principal wife has predeceased him and passes the usufruct to wives in succeeding degrees of pfecedence, if there is no competent descendant of the house of the great or principal wife. Subsection (3) gives the heir in terms of the table the right to the property upon the death or re-marriage of the usufructuary widow.

It remains to mention the definition of "house" in section 35 of Act 38 of 1927 which reads, "the family and property, rights and status, which com-"mence with, attach to, and arise out of, the customary "union of each native woman."

The first question which we are asked to determine makes special mention of this definition, but in view of the fact that the table of succession with which we have to deal was not made under the Act but was made under the 1910 Proclamation the definition is strictly not applicable. While, therefore, there is no doubt that the definition is in accordance with the accepted usage that would prima facie apply to the interpretation of the word "house" in the table of succession scheduled to Proclamation 142 of 1910, no added difficulty in giving

that word a meaning that will embrace the estate arising out of a civil marriage is created by the existence of the statutory definition.

The way is now clear to a consideration of the first question, namely, whether the son of a civil or Christian marriage has any right to succeed under the table of succession to his deceased father's quitrent ~~plot~~ allotment. The difficulty in such a son's way is the obvious one that item 1 of the table speaks of the eldest son of the principal house, thereby prima facie referring to the great, chief or principal house as understood in native law and custom. The same notion is inherent in the word "senior", which was substituted for the word "eldest" which appeared in the 1898 table.

But there are weighty counter-considerations. In the first place it is to be observed that on any view the schedule is far from perfect. Item 2, for instance, provides for the case of the eldest son having previously died but does not mention the case where the principal house has failed to produce male issue at all. It could hardly be questioned that in such a case too the schedule impliedly passed the succession on to the eldest

son/.....

son of the next house. Item 3 puts the father of the deceased next in order of succession, on failure of descendants; there is nothing to indicate that the father must himself not have been married by civil marriage and every reason why he should not on that account be excluded. The same applies with even greater force to the grandfather who is brought in under item 8, for it seems absurd that the grandfather's right to succeed should depend on whether both his own marriage and that of his son, the father of the deceased, were civil or customary. Moreover item 8 is only reconcilable with item 7 if "brothers or their "male descendants" in item 8 refers to the brothers of the father of the deceased and their descendants, but this is not expressly stated. No provision is made for the brothers of the grandfather and their male descendants, nor are the great-grandfather and his brothers mentioned, though it seems very likely that they were intended to be included. The erratic drafting of the schedule is well illustrated by item 9, which passes the succession to the Crown "if there be no male descendant of such deceased "person competent or willing to accept transfer," quite regardless of the fact that items 3 to 8 had all been awarding the succession to persons other than male

descendants/.....

descendants of the deceased. The Crown under item 9 may dispose of the property among female members of the family but may not, on the view that excludes those who claim through civil marriages, give it to the deceased's eldest son if he was the issue of such a marriage. This has inherent improbability.

On my view, therefore, the schedule is not an instrument of precision. In the course of the argument mention was made of the case of succession to chiefs, some at least of whom in the Transkei appear to have the power to nominate a great or principal wife, not necessarily the first. The question then presents itself whether on the death of a chief who held a quit-rent allotment his eldest son by his first and only customary union would fall within item 1 of the schedule, if the chief died before nominating his wife as his principal wife. On the assumption, moreover, that eldest sons of civil marriages are to be excluded serious difficulties would present themselves in relation to sons born of customary unions that have been followed by civil marriages between the same parties. A son born before the civil marriage would succeed but if he died his brother born after the celebration of such marriage

presumably/.....

presumably could not. Another case that cannot easily be reconciled with the exclusion of the son of the civil marriage arises when lobola is given and the celebrations take place that herald the beginning of a customary union while at the same time a civil marriage is entered into. The position of sons born of native registered marriages before or after registration would provide similar conundrums the answers to which, if they excluded sons if they were born after registration but included them if they were born before, would certainly seem to be unreasonable.

The general principle, expressed in section 23 of Proclamation 227 of 1898 and inherent, it seems, in the later legislation, was primogeniture in the form of succession by males through males (cf.Sonti v. Sonti, 14 P.H. R 13). The principle was made subject to special treatment when there was competition between the male issue of more than one customary union; in such a case the order of the houses had to be followed. But where there was no such competition I can find neither reason nor authority for the exclusion of an eldest son merely because the deceased registered his marriage with the son's mother or married her by civil rights. Such a result would not

only/.....

only be unfair but would also I think be contrary to the general approach to the problem of reconciling the consequences of civil marriages and customary unions, so far as that approach can be ascertained from the current legislation and from the not invariably harmonious decisions. One can sympathise with the observations of VAN DER RIET A.J.P. in Makalina v. Nosanti (1926 E.D.L. 82) that "it is "well-nigh impossible to reconcile a recognition in law of a "system which admits polygamy and the allotment of property "to distinct houses, side by side with the common law of "monogamy and community of property." The common law, when it entered the field through a civil marriage, tended to override legitimate expectations flowing from customary unions; this tendency was prevented from going to extreme lengths by enactments dealing with marriage and succession. But I do not gather that the tendency was so far reversed as to prevent the progeny of civil marriages from sharing in the property left by their father.

An illustration of the legislative approach is to be found in section 4 of Proclamation 142 of 1910 which provided that, "no marriage according to the law "of the Colony or registered native marriage contracted

"during/.....

"during the subsistence of any marriage according to native "custom, shall in any way affect the rights of property "under this Proclamation of any wife of such marriage by "native custom or any issue thereof, and the widow of any "such marriage according to the law of the Colony or of such "native registered marriage and any issue thereof shall "have no greater rights in respect of the property of the "deceased spouse than she or they would have, had the said "marriage been a marriage by native custom." This was one of the provisions repealed ~~by~~ in 1934, its place having been taken by section 22(7) of Act 38 of 1927. It seems to be clear that the rights or reasonable expectations of wives by customary union and their issue in respect of the deceased husband's property were being protected, but the indication is that the rights of civil law wives and their issue were not being destroyed.

This brings me to section 9 (1) of Proclamation 142 of 1910, which has not been repealed and which is quoted above. It deals with the usufructuary rights of widows and expressly mentions the three types of marriage (civil, registered and customary) of which a widow might be a surviving spouse. The usufructuary rights

are/.....

are accorded to a widow "who was either at all times the "sole wife of the deceased, or, if not at all times the "sole wife of the deceased, was his great or principal "wife under native custom." In two respects this provision seems to assist in the interpretation of the table of succession and in particular of item 1.

In the first place, although the usufruct of the widow is something distinct from the succession to the property, it would be anomalous if the civilly married widow were to enjoy the usufruct of the quitrent property but that her son, being her husband's eldest or even only son, should be excluded from the succession to the property because his parents married according to the civil law; similar reasoning would apply where the parents registered their customary union.

In the second place, the portion of the subsection which I have requoted seems to throw more direct light upon the language of item 1 of the table. The three types of marriages are dealt with together in the subsection and the rights of a widow depend not on which type of marriage hers was but on whether she was the sole wife of the deceased or was a competitor with

other/.....

other wives. "At all times" creates difficulty but I do not think that it can mean that the surviving wife obtains no usufructuary rights if her deceased husband had previously been married to a woman who had died before his second marriage. I think that "at all times" means that there must at no material time have been two marriages or unions in existence side by side. In the latter case there is competition and the great or principal wife, if alive, takes the usufruct. Where a first wife dies and a second marriage of whatever type is entered into the second wife, if she survives her husband, takes the usufruct as having, so it seems to me, been at all times, i.e. at all material times, the sole wife of the deceased. For present purposes the significance of this part of the subsection lies in the fact that all widows, no matter what the type of marriage, stand on the same footing, but that where there can be competition, that is, where there are more than one wife by native custom, seniority by that custom is observed. The language is compressed, it not being stated in so many words that the preference accorded to the great or principal wife only applies where there is competition among more than one wife by native custom, the customary unions co-existing at the time of the deceased's death.

A/.....

A similar ~~comparison~~ compression of language is in my view a probable explanation of the ~~language used in~~ wording of item 1 of the table. Duly expanded the item might read something like this: " His eldest son, or in case of competitio "between the issue of co-existing customary unions, his eldes son of the principal house or such eldest son's senior male "descendant." The same result would follow from treating the word "house" as used in the item as including civil marriage estates or households. It is true that such usage has been disapproved of in certain reported cases decided in the Southern Native Appeal Court (see Tonjeni v. Tonjeni 1947 N.A.C. (C. & O.)8.). But although the term "house" prima facie applies only to a marriage by native custom some elasticity in this regard is not unknown to the law reports. So in Jeke v. Judge (11. S.A.C. 125) the plaintiff alleged a diversion of cattle belonging to the defendant's great house to "his Christian house or estate," and in giving the judgment of the court de VILLIERS C.J. spoke of the property having been apportioned between "the two houses", and concluded by saying that according to native custom "the "defendant had no right to divert the cattle from the 'great "house' to the 'second house' although his marriage with his

"second /.....

"second wife was one under Christian rights." This case was cited by SEARLE J. in giving the court's judgment in Pakkies v. Pakkies (1921 C.P.D. 508), and at page 513 he referred to the attempt by the defendant in Jeke v. Judge "to divert the stock which he had ~~been~~ assigned "to the first or great house to his Christian house or "estate." In Makalina v. Nosanti (supra) VAN DER RIET A.J.P. refers to earlier proceedings in which the testator in question "was interdicted from diverting property "allotted to the house of his ~~fir~~ wife by native custom "to the house of the wife then married to him by Christian "rites." I refer to these cases merely to show that some looseness of usage in regard to the term "house" is not unknown.

Bearing in mind the indications of careless drafting in the items of the table and the other considerations above referred to, I have come to the conclusion that the draftsman of the table of 1910, while taking it over substantially as it had been in 1898, must have thought either that the principal house applied only to cases of competition between the sons of competing customary unions (without affecting cases where there was no such competition), or that " the

"principal/.....

"principal house" in the context clearly meant no more than the first house and so would cover the households arising out of the civil marriages. But by whatever process of reasoning the form of the item was achieved, I am satisfied that it does not exclude the son of a civil marriage from succeeding to his father's quitrent property.

I turn now to the second question which consists of a pair of sub-questions raising the inquiry whether, when there have been successive unions or marriages, the date of acquisition of the quitrent property is a decisive or relevant factor. The first case in which this was affirmed appears to be Dlalo v. Ndwe 4 N.A.C. Reports page 189. It was approved in Tonjeni v. Tonjeni (supra) and was applied in the two cases the decisions in which led the Minister to initiate the present proceedings.

In Dlalo v. Ndwe (supra) the issue related to the usufructuary rights of two widows of one Samana who had married the defendant according to native custom and thereafter the plaintiff by civil rites. The plaintiff sought a declaratory order that she was entitled to the usufruct of Samana's quitrent land. She

succeeded/.....

succeeded in the court of first instance but lost on appeal. In reaching the conclusion that the date of acquisition of the property should decide which of the two surviving wives should have the usufruct the court found an analogy in a statement taken from a text book to the effect that "where "the testator was married at the time he made his will the "term 'wife', if used without indicating any particular "individual by name or description was held to apply to "the wife who was alive at the time of the execution of "the will, and not to any subsequent wife." It is sufficient to say that the analogy seems to be altogether too remote to provide any sound basis for the conclusion reached. The date of acquisition of the quitrent property in relation to the marriage or marriages of the deceased is wholly irrelevant. The position must be looked at as at the death of the deceased, the usufruct of his quitrent property being dealt with in terms of section 9 of Proclamation 142 of 1910 and the succession to the property itself in terms of section 8(2). There is no question of ouster by reason of the date of acquisition of the quitrent property, the person entitled to succeed being in case (a) the eldest son of the customary union alive at his father's death, and in case (b) the eldest son of the first civil marriage similarly surviving

The/.....

The answers to the questions posed by the Minister appear from the aforegoing. To sum up, the first question is answered in the affirmative; the second question, in both its parts, is answered in the negative.

O.D. Schreiner
23.3.55

van den Heever, J.A. }
Hoexter, J.A. } concur.