# Case note

## A judge in Lesotho digs into South African archives to take children's rights back to the stone age: *Masupha Lesala v Hlapase Lineo Morojele*

*Malebakeng Forere*[*]

***Abstract***

For a long time, children born of unmarried parents have not been accorded the same rights and benefits as children born of married parents. Today, the international community has unanimously condemned the discrimination against children born of unmarried parents (previously referred to as 'illegitimate children') through the adoption of the Convention on the Rights of the Child. To that end, Lesotho has joined those who addressed discrimination against children born to unmarried parents. However, the case of *Lesala v Morojele* decided by the High Court of Lesotho leaves much to be desired and has prompted this paper. In this case, the judge, relying on very old South African jurisprudence, ruled that an unmarried father has no rights to his child born out of wedlock. He ruled that it is not in the best interests of the child to keep contact with his father who is not living with the child's mother. This note seeks to analyse this decision critically by exploring the unmarried father's right of access to his child born out of wedlock, and the court's subsequent failure to grant an order of maintenance.

---

### INTRODUCTION

In March 2011, the High Court of Lesotho was called upon to decide whether an unmarried father has a right of access to, and the duty to pay maintenance for, his child born out of wedlock. This is a unique case for Lesotho, and the first to be decided by the Lesotho High Court where it is usually mothers who sue for maintenance. In addition, there is a general tendency in Lesotho for unmarried fathers to shun contact with their children. On the other hand, Lesotho being a patriarchal society, it is considered important for a male child to relate to his father's family, which is impossible

---

[*] BA Law, LLB (Lesotho); LLM (Essex). Lecturer: Faculty of Law, University of KwaZulu-Natal, Durban.

without a relationship with the father.

The case of *Lesala v Morojele* came before Nomncongo J in the High Court of Lesotho. It involved the minor male child, K, born after a relationship between Mr Lesala and Ms Morojele.[1] On K's birth Lesala, the applicant, rented a house for Morojele, the respondent, and K. Although he did not live with them in the house,[2] he did visit the child and sleep over from time to time.[3] K also visited Lesala at his home.[4] In addition, Lesala paid a monthly amount of R3 400 towards the Morojele and K's upkeep, as well as a salary for a child-minder.[5]

Morojele then formed a serious relationship with a French national and immediately denied Lesala access to the child and refused to accept maintenance, alleging that Lesala used maintenance to gain access to K and disturbed her private life.[6] Lesala therefore approached the court claiming access to K with a view to maintaining the relationship that he, as biological father had formed with his child. In addition, he asked the court to grant an order allowing him to pay maintenance towards the child's upbringing, school and medical fees, clothing and the child-minder's salary.[7]

The court held that the father of an illegitimate child has no right of access to his child, but that he may have such right, like any third party, if there are strong and compelling reasons for granting access.[8] Justice Nomncongo held further that it is not in the best interests of the child to keep contact with both parents who do not live together as that would leave the child confused.[9] On the issue of maintenance, Nomncongo J confirmed that Lesala had a duty to maintain K, irrespective of whether or not he had access to the child.[10]

In arriving at this decision, the court had to decide two issues, namely: the right of access and the issue of maintenance. With regard to the unmarried father's right of access to the child, the court distinguished two distinct issues. The first was whether or not an unmarried father has a right of access

---

1 CIV/APN/95/2011.
2 *Id* at 4.
3 *Ibid*.
4 *Ibid*.
5 *Ibid*.
6 *Ibid*.
7 *Id* at 1 – 3.
8 *Id* at 5.
9 *Id* at 11.
10 *Id* at 6.

to his biological child born out of wedlock. The second was whether or not it is in the best interests of the child to maintain contact with his biological father who does not live with the mother of the child.

On the basis of the above, this note critically discusses the court's decision in determining the unmarried father's right of access to his child born out of wedlock, the court's failure to grant an order of maintenance, and the judge's understanding of maintenance of a child born out of wedlock.

## LEGAL POSITION OF A CHILD BORN OUT OF WEDLOCK IN LESOTHO

Lesotho has a Constitution (1993 as amended), which contains the Bill of Rights in its Chapter Two.[11] Sections 18, 19 and 23 provide for freedom from discrimination on the grounds of, among other things

- social origin;
- birth or other status;
- the right to equality before the law and the equal protection of the law; and
- the protection of young children and young persons.

Lesotho also ratified the Convention on the Rights of the Child (CRC) on 10 March 1992,[12] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[13] and the African Charter on the Rights and Welfare of the Child (African Children's Charter) on 27 September 1999.[14]

Consequent to these ratifications, especially the CRC and the African Children's Charter, parliament passed the Children's Welfare and Protection Act with a view to, amongst others, domesticating the CRC and the African Children's Charter.[15] The Act was officially published in the *Lesotho*

---

11 The Constitution of Lesotho 1993 as amended.

12 CRC, Status of Ratification, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last accessed on 10 August 2011).

13 Status of Ratification, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last accessed on 10 August 2011).

14 Also referred to as the 'African Children's Charter'. List of Countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child, available at:http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf (last accessed on 10 August 2011).

15 Act 11 2011 s 2(1).

*Government Gazette* on 31 March 2011. The case was filed with the High Court on the 18 February 2011, and the application was heard on 11 of April 2011, that is, eleven days after the Act came into operation.

Before 31 March 2011, children's issues were governed by the Children's Protection Act 6 of 1980, and the Adoption of Children Proclamation 1 of 1952. Both these laws were repealed by the Children's Act with effect from 31 March 2011. Both laws were outdated and had nothing to do with children's rights and were not even referred to by both counsel or the Judge. Nonetheless, at the time that the case was heard, the applicable law was the Children's Welfare and Protection Act 11 of 2011.

In summary, the applicable laws in Lesotho at the time of the hearing of the application were the Constitution of Lesotho, the Children's Welfare and Protection Act 11, the CRC, the African Children's Charter, and CEDAW. With regard to the CRC, the African Children's Charter and CEDAW, it should be noted that Lesotho is regarded as a dualist state. The dualist-monist debate, however, remains unsettled.

> [T]he entire monist-dualist controversy is unreal, artificial and strictly beside the point, because it assumes something that has to exist for there to be any controversy at all – and which in fact does not exist.[16]

Rather, the state has the duty to carry out, in good faith, its obligations arising from the treaties which it has voluntarily ratified.[17] In addition, a state may not invoke its national laws as an excuse for failure to perform any treaty obligations in accordance with article 27 of the 1969 Vienna Convention on the Law of Treaties (VCLT). Significantly, with respect to the CRC, it has been ratified by all the United Nations (UN) member states, except the United States of America and Somalia, meaning it has attracted general acceptance by UN member states, thus becoming a law of general application in line with article 38(1) of the 1945 Statute of the International Court of Justice. The effect of the status of general application is that a country need not domesticate such law for it to be enforceable before national courts. See article 38 of the 1969 VCLT. It follows therefore that

---

16 Harris *Cases and materials on international law* (2004) 66–68. Monism refers to the idea that international law forms part of national law to while dualism refers to the idea that for international treaties to be applicable at national level, they have to be domesticated – that is, enacted into national legislation, see Harris at 66.

17 Vienna Convention on the Law of Treaties, 8 *ILM* 679 (1969), art 26 & 27; *US v GB* (Alabama Claims Arbitration) 1872 (1) International Arbitration 495 at 656.

irrespective of whether Lesotho has domesticated the CRC or not, the Lesotho courts are well within their material jurisdiction to apply and enforce the provisions of the CRC.[18] In any case, certain provisions of the UN and AU treaties, such as those relating to non-discrimination, cannot be suspended until the state concerned has domesticated the treaty in question, because they are not reliant on administrative and other resources for their implementation.[19]

Although Lesotho is an independent sovereign state, meaning decisions of other foreign courts are not binding, the Lesotho courts rely heavily on South African jurisprudence as is evidenced by the fact that the Lesotho High Court library contains only South African law reports, legislation and literature. It is understandable that Lesotho courts would consider South African precedents, given that both countries are common-law countries. As illustration of the dependence on South African jurisprudence, one hardly finds any case where a judge in Lesotho has not relied on South African materials,[20] as evidenced in the case under discussion by the judge's reliance on the 1977 publication of Boberg's Law of Persons; the 1987 decision in *Douglas v Meyers* which predates the CRC and any other contemporary law on children's rights; and the 1993 decisions in *S v S* and *B v S* (which also have been overtaken by events.[21]

## DISCUSSION OF THE CASE

### Right of access

The first issue to be considered is the unmarried father's right of access to his child born out of wedlock. As indicated in the introduction, the court looked at two sub-issues to determine whether the unmarried father has a right to access to his child born out of the wedlock.

*Does an unmarried biological father have a right of access to his child born out of wedlock?*

Both the CRC and the African Children's Charter provide for non-discrimination on the basis of sex, birth, marital and other status. These

---

18 *Ibid*.

19 For instance, art 2 of CRC binds member states to take all measures to fulfill the rights of the child enshrined in the Convention. Therefore, for some provisions, there are no positive measures in terms of resources that are needed, such as non-discrimination.

20 Although it is claimed that South African decisions are merely persuasive and not binding.

21 Boberg *The law of persons and family* (1977); *Douglas v Meyers* 1987 1 SA 910 (A); *S v S* 1993 2 SA 200 (W); *B v S* 1995 3 SA 571; respectively.

rights are also enshrined in the Constitution of Lesotho.[22] The common law position as enunciated in *S v S*, *B v S*, *Douglas v Meyers*,[23] and Boberg's *Law of Persons* (1977), was that an unmarried father has no parental rights or responsibilities – save for the duty to pay maintenance – in respect of his biological child born out of wedlock. However,

> the maternal preference of common law in the context of parental power over the extra-marital child has now to be weighed against the Bill of the Rights in the [Lesotho] Constitution, as also against [Lesotho's] new obligations under international conventions.[24]

In principle, to deny an unmarried father parental rights and responsibilities amounts to differentiation between the child's parents, which in turn is discriminatory against the child on the grounds of social origin and birth. It also violates the child's right to parental care in contravention of both the Constitution of Lesotho and Lesotho's international obligations.

As far as parents are concerned, this differentiation amounts to inequality before the law as well as unfair discrimination, contravening the equality clause enshrined in the Constitution of Lesotho.[25] The fact that Lesala was denied parental rights and responsibilities in respect of K, while these are granted to the respondent, is discriminatory on the ground of sex, as well as in violation of the equality clause, and hence unconstitutional. Equally, to deny K an opportunity to interact with his father by virtue of his parents' marital status is discriminatory and unconstitutional. On the basis of the constitutional and other international obligations that Lesotho has undertaken to adhere to, the author submits that the judge erred in denying the applicant a right of access to his biological child, K, born out of wedlock. In fact, based on the arguments advanced above, the applicant could as well have requested other parental rights, such as shared custody and guardianship, instead of narrowing his claim to the right of access to and maintenance of the child. In any event, section 20 of the Children's Protection and Welfare Act dealing with guardian/parental rights and responsibilities clearly indicates that parents, irrespective of whether they are married or not, shall

---

22 Convention on the Rights of the Child, 28 *ILM* 1456 (1990), art 2(1); African Charter on the Rights and Welfare of the Child, OAU Doc.CAB/LEG/24.9/49 (1990), art 3; Constitution on Lesotho n 2 above, s 18. It is also important to note that the Constitution of Lesotho is the supreme law of the land as the South African Constitution.

23 1993 2 SA 200 (W); 1995 3 SA 571(A); 1987 1 SA 910 (A) respectively.

24 Van Heerden *et al* (ed) *Boberg's law of persons and family* (2ed 1999) 331.

25 The Constitution of Lesotho n 11 above, s 19; Heaton *The South African law of persons* (3ed 2008) 69.

not deprive the child of his welfare. Thus, in alienating the applicant from K's life, K is being deprived of his welfare contrary to the Children's Protection and Welfare Act.

Further, the CRC provides for the child's right to know his or her parents and the right of the child to maintain family relations.[26] Also, both the CRC and the African Children's Charter provide for the child who is separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis, except if this is contrary to the best interests of the child.[27] This brings us to the concept of 'the best interests of the child' with a view to determining whether or not it is in the best interests of K not to maintain contact with the applicant as the judge ruled.

*Is it in the best interests of the child for him to maintain contact with his biological father who does not live together with the mother of the child?*
This question is open to two interpretations. It is not clear what the judge meant by 'parents who do not live together'. A literal interpretation of this phrase is that it refers to parents who do not live under the same roof. This could lead to the absurd situation where a child born of married parents who live in different places because of work commitments, cannot have contact with the parent with whom he does not reside. The second, and more feasible interpretation, is that the judge was referring to parents who are not married to one another. Whatever interpretation is adopted, this ruling conflicts with the CRC, CEDAW and the African Children's Charter, all of which provide for the right of the child to maintain contact with both parents, unless it is not in his best interests to do so.

The judge did no more than mention 'the best interest of child'. It is therefore unclear what he understands the doctrine to mean. However, it appears from the judgment that the best interests of the child doctrine, according to Justice Nomncongo, means care and guilt. This is based on the judge's ruling that he could not grant the father right of access – despite his wish to strengthen ties with his child and contribute to its upbringing – unless it could be shown that the mother did not care for the child properly or was guilty of any misconduct. Of course, this is a highly misconceived understanding of this doctrine that has been clearly elaborated by scholars and judges the world over. For example, in South Africa, some of the factors that need to be taken into account in determining the best interests of the child, include, among

---

[26] CRC n 22 above, art 7.
[27] *Id* art 9(3); African Children's Charter n 22 above, art 19(2).

others, the nature of the relationship between the child and the parents; the attitude of the parents towards the child; exercise of parental rights and responsibilities in respect of the child; and the gender of the child.[28] It is important to mention that not only is the best interests of the child principle a statutory provision in South Africa, it has been entrenched in section 28 of the 1996 South African Constitution. As a result, it is a very important principle to which the courts must give effect.

As in South Africa, Australian law has among other demands in respect of the best interests of the child, requirements similar to those of South Africa.[29] In particular, section 60(CA) and 60(CC) of the Australian Family Law Act provide that in determining the best interests of the child, the court must consider, among others, the sex of the child; the attitude of each parent to the child and the responsibilities of parenthood; the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent, and the benefit to the child of meaningful relationships with both parents. Clearly, the judge ignored the relationship that K and the applicant had already established, and the care, including support and maintenance (parental responsibilities) that the applicant had shown in respect of K.

Even in the United States – notorious for not having joined the CRC – the courts in various states apply the doctrine of the best interests of the child in much the same way as the rest of world. For example, the state of Delaware prohibits courts from assuming that one parent, because of his or her sex, is better qualified to act as a custodian or primary residential parent.[30] Further, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, North Dakota Ohio and others, consider, among other factors, the emotional ties and relationships between the child and his or her parents when determining the best interests of the child.[31] If judges in many states in the United States of America appreciate the contents of the doctrine of best interests of the child and seek its guidance in making decisions involving children, it becomes difficult to understand that the judge in Lesotho failed to appreciate the scope of this doctrine.

---

28 Children's Act 30 2005, s 7(1)(a)(I), (b) & (g).

29 Family Law Act 1975.

30 Del Code Ann Tit 13, s 722.

31 Child Information Gateway, 'Determining the Best Interests of the Child: Summary of State Laws,' available at: http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm (last accessed 7 August 2011).

It is now trite that one of the core elements of the best interests of the child doctrine is that the child should know and have contact with both parents. To this end, it is in the best interests of the child, K, to know his biological father and to maintain contact with him. In the end, the judge erred in ruling that it is not in the best interests of K to maintain contact with both parents by ruling that the applicant should sever any relationship with K. In fact, the judge ignored any parent-child relationship that the applicant and K had already established, and the emotional and psychological impact that his judgment would have on K and the applicant. Overall, it is not in the best interests of K to grow up not knowing his father with whom he has already formed a relationship.

Another point to note is that, when looking at the contents of the best interests of the child doctrine and how it is applied in other jurisdictions, the gender of the child is an important aspect which the judge did not consider. As pointed out in the introduction, Lesotho is a patriarchal society deeply embedded in male blood relations. As a result, the judge could have – and in fact should have – taken K's gender into account and against the backdrop of the Lesotho culture, shown some sensitivity to the social alienation to which he would be subjecting the child by cutting family ties between K and his father.

The new Child Protection and Welfare Act has also not met the expectations raised at the time of its adoption. Thus, its failure to elaborate on the meaning and content of the best interests of the child will continue to be a problem which can only be remedied by progressive courts, which, as evidenced from this present case, is a serious challenge in Lesotho.

**Maintenance**

Turning to the second issue – maintenance – Justice Nomngcongo considered the applicant to be an 'ordinary third party' concerning K, yet 'this ordinary third party' is expected to pay maintenance towards the upbringing of K. Ironically, the judge affirmed that it is the responsibility of the applicant to maintain K, yet made no order in this regard. It is not clear why the judge dismissed the entire application (including maintenance of K) that Lesala made to the court. It makes no sense for the judge (correctly) to acknowledge that an unmarried father has a right to pay maintenance for his child born out of wedlock, but then to ignore this in the judgment. It is therefore submitted that the judge erred in turning a blind eye to an order of maintenance

requested by the applicant. Consequently, the judge compromised K's right to maintenance from his biological father.

It is also not clear from the judgment of Justice Nomngcongo that he appreciates the legal definition of 'maintenance'. Maintenance is defined under common law as not limited to necessities of life such as clothing and shelter, but also extends to education and care in sickness and other essentials required for a child's proper upbringing.[32] Thus, in the case of *Ex Parte Pienaar*, Judge Galgut stated that the duty of support/maintenance may involve the duty to afford the child university education.[33] It makes little sense that the judge dismissed the entire application, considering that Lesala, the applicant, indicated that he would pay K's school fees; or that as maintenance includes clothing, shelter, and medical expenses, he refused these too, including the child-minder's salary and other expenses regarding K's upbringing. On the basis of the absence of an order of maintenance, this judgment highlights other missing factors. The judge seems to have been so keen to grant the respondent's wishes, that he ignored the valid points that he himself identified regarding the duty of the applicant to contribute to the maintenance of K.

While maintenance is a shared duty between the parents of the child, the judge in effect placed an 'undue and unfair burden' on Ms Morojele to bear all maintenance costs in relation to K's upbringing. This could also be challenged on constitutional grounds as being discriminatory on the grounds of sex if Ms Morojele has to pay all the costs relating to K. Most importantly, the CRC obliges state parties to ensure that both parents have a common responsibility for the upbringing and development of the child.[34] Equally important, the CEDAW, to which Lesotho is a party, obliges state parties to ensure that men and women have the same parental rights and responsibilities irrespective of their marital status,[35] so avoiding the discrimination and stigma attached to children born of parents who are not married to one another. In addition, the Lesotho Children's Protection and Welfare Act enjoins parents to exercise joint responsibility for raising their child.[36] The judge erred here too by denying the applicant the same rights and responsibilities that he granted the respondent.

---

32 *Oosthuizen v Stanley* 1938 AD 322, 328; *Hawthorne v Hawthorne* 1950 3 SA 299 (C); *Glicksman v Talekinsky* 1955 4 SA 468 (W).

33 1964 1 SA 600 (T).

34 CRC n 22 above, art 18(1).

35 CEDAW n 13 above, art16(d).

36 See s 20(2)(d).

Overall, while granting Ms Morojele's wishes to waive the rights of K to care, maintenance and other benefits from his biological father, the judge overlooked one important aspect, which is that circumstances might change in the respondent's life, compelling K to seek out his father whom the judge had effectively excluded from his life. This position was set out in *Shields v Shields*, which involved a pregnant mother who wanted to waive the rights of her unborn child to maintenance from its father.[37] The mother expressed a written wish not to see the plaintiff if he were to return to Cape Town and undertook, when once the child had been born, to assume full responsibility for it exemptioning the biological father from any contribution towards its support. The court noted that although she was a wealthy woman, circumstances could change. While she might be willing to undertake responsibility for the support of the child, this should not affect the father's responsibility. Consequently, the court ruled that it could not consent to an agreement that the biological father would not be obliged to maintain his child being made an order of court – the child's position had to be considered.[38] In the same manner, Justice Nomncongo ought to have taken the position of K into consideration; instead, he was distracted by the respondent's position and her new love-life.

## CONCLUSION AND RECOMMENDATIONS

This case is a very unusual one for Lesotho, in that it involves denying a man not only the opportunity to have access to his child born out of wedlock, but also his wish to pay maintenance and contribute to its upbringing. The judgment completely ignores contemporary law on children's rights and parental responsibilities. Equally, it has been an extraordinary judgment in which Lesotho's international obligations have been blatantly ignored.

Indeed, in terms of the old law, a child is being punished for the sins of the parents – for being 'illegitimate' – but this position has since changed as we no longer refer to children as 'illegitimate' but children born of married or unmarried parents. The second edition of Boberg's *Law of Persons*, published in 1999, emphasises that it makes little difference today whether a child is born out of wedlock.[39] Children are now treated equally, irrespective of their parents' marital status, to the extent that a child born out

---

37 1946 CPD 242.
38 *Id* at 243.
39 Van Heerden n 24 above at 332.

of wedlock can inherit intestate from his or her biological father.[40] According to the common law, children born out of wedlock can even claim maintenance from their paternal grandparents.[41] Had the judge read the 1999 publication of Boberg's *Law of Persons*, and consulted cases on children's rights heard after the adoption of CRC, instead of digging into the South African archives and outdated sources, he would have realised that the law in respect of children born out of wedlock has changed significantly world-wide.

The judge was clearly misguided in dismissing this application, More importantly, he has revived the discrimination against children 'born out of wedlock' and from which they have been freed in most parts of the world. In so doing, he has violated the constitutional rights of both the biological father and the child to freedom from discrimination, equality before the law and equal protection of the law enshrined in the Constitution of Lesotho and international treaties to which Lesotho is party. The judgment does not serve the best interests of the child, K; rather it serves only the interests of the mother. In conclusion, it is in the best interests of the child to grow up with the love and care of both its mother and father, who do not necessarily have to be married. Parentage is, after all, not dependent on marriage.

From the applicant's point of view, there is a need to take the case on appeal, since the Lesotho High Court is not the highest and final court, but the Court of Appeal is. Alternatively, since the case raises constitutional issues, the applicant can lodge an application with the Chief Justice of Lesotho to convene the Constitutional Court to re-examine this matter.

For future developments, there is a serious need to expose Lesotho's judiciary to continuous training if individuals are to enjoy the rights and receive the protections enshrined in the national laws and international laws that the country has ratified. However, such training should be coupled with resources, such as an up-to-date library (which must include subscriptions to various databases) and access to the Internet for judges. As it stands, the Lesotho High Court library is not equipped with recent information. Human resources, such as researchers to assist the judges, are equally important.

---

40 *Makholiso v Makholiso* 1997 4 SA 509 (Tk).
41 *Davies v R* 1909 EDC 149 at 155.