

IN THE HIGH COURT OF LESOTHO

In the Application of :

PAKI MOAKI

Applicant

v.

MOJABENG MOAKI
RETSELISITSOE MOAKI
MATHEAME MOAKI

1st Respondent
2nd Respondent
3rd Respondent

J U D G M E N T

Delivered by the Hon. Acting Chief Justice
J.L. Kheola on the 17th day of June, 1986.

On the 9th June, 1986 the applicant brought an application
ex parte and sought an order in the following terms:

1. The respondents are hereby ordered to vacate the applicant business premises and to handover the keys of the said premises to the Deputy Sheriff of this Honourable Court;
2. The respondents are ordered to handover to the Deputy Sheriff of the Honourable Court the vehicles belonging to the applicant with registration Numbers B 1173, B 0316, B 0270 and B 0180 and that the Butha-Buthe police are hereby ordered to keep the aforesaid vehicles safely until the determination of this application;
3. The respondents are hereby interdicted from assaulting and/or harassing the applicant in any manner whatsoever and or threatening to kill the applicant;

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4. The respondents are hereby interdicted from going and/or visiting the applicants businesses.
5. The RULE NISI hereby issued calling upon the respondents on the 23rd June, 1986 why
 - (a) The aforementioned orders cannot be made absolute.
 - (b) The respondents should not be ordered to pay the costs of this application.
6. Prayers 3 and 4 should operate with an immediate effect.

The order was granted as prayed and the return day was fixed as the 23rd June, 1986. The respondents anticipated the return day in terms of Rule 8 (18) of the High Court Rules, 1980. The matter was argued before me on the 17th June, 1986. Having heard both counsel I came to the conclusion that the matter was very urgent because the first respondent and her minor children had been ejected from what is a matrimonial home for the applicant and the first respondent who are husband and wife. The first respondent and her minor children had no where to live as a result of the interim order of this Court. I issued a short oral judgment and discharged the rule with costs. I intimated to the parties that my written reasons for judgment would follow at a later stage. What now follow are my reasons for that decision.

It is common cause that the applicant and the first respondent are married to each other according to Sesotho law and custom. The applicant states that the first respondent is his junior (second) wife and at the moment he is living with his senior wife at Tsime in the Butha-Buthe district. The first respondent denies that the applicant is lawfully married to the woman he is presently living with at Tsime.

/She.....

She says that the woman is his concubine. It seems to me that for the purposes of this case there will be no need for me to decide the validity of that marriage.

It is common cause that the applicant is the rightful owner of the immovable property situated at Butha-Buthe from which he asks that the respondents be ejected. He is the lawful owner of the vehicles mentioned in prayer (2) of the Notice of Motion.

In his founding affidavit, he states that on the 4th February, 1986 the respondents jointly assaulted him with firearms during which incident he sustained three bullet wounds when the second respondent fired shots at him. At that time the first respondent was holding him from behind and the two shots fired by the second respondent wounded him and went through his arm and injured the first respondent. As he was powerless after he was shot, the second and third respondents started kicking him all over the body until he became unconscious. He was taken to the hospital by the respondents and after treatment he decided to go to Tsime with his senior wife because he is afraid that the respondents might kill him.

The applicant deposes that he considers the matter as extremely urgent in view of the fact that he is suffering a tremendous pecuniary loss when he is not carrying his businesses..

On the anticipated return day the respondents raised a number of points in limine and asked that the application be dismissed without going into the merits. In her opposing affidavit the first respondent stated that the applicant has displayed a lamentable lack of good faith in that he had not taken the Court into confidence that proceedings almost identical to the present proceedings were brought by applicant before the Resident Magistrate of Butha-Buthe in C.C. 10/86. On the 25th March, 1986

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the rule was discharged with costs. In discharging the rule the learned Resident Magistrate stated, inter alia, that there was a substantial dispute of fact. The respondents were bound over to keep peace in terms of section 341 of the Criminal Procedure and Evidence Act, 1981. Mr. Kolisang, for the respondents argued that non-disclosure of this important matter is a sign of manifest lack of good faith on the part of the Applicant. He argued that if this material fact had been disclosed the Court might have refused the application.

In the case of De Jager v. Heilbron and others, 1947 (2) S.A. 419 (W) at 419 Roper J. stated:

"It has been laid down, however, in numerous decisions of our Courts that the utmost good faith must be observed by litigants making ex parte applications, and that all material facts must be placed before the Court. (See eg In re Leydsdorp and Pietersburg Estates Ltd 1903 TS 254; Crowley v. Crowley 1919 TPD 426). If an order has been made upon an ex parte application, and it appears that material facts have been kept back which might have influenced the decision of the Court whether to make the order or not, the Court has a discretion to set aside the order on the ground of the non-disclosure (Venter v. Van Graan 1929 TPD 435; Barclays Bank v. Giles 1931 TPD 9; Hillman Bros. v. Van den Heuvel 1937 WLD 41). It is/necessary that the suppression /not of the material fact shall have been wilful or male fide"

I respectfully agree with this statement of the law. In the present case the applicant was asking this Court to eject his own wife from what he calls business premises. The truth is that the so called business premises is the matrimonial home of the parties. The respondents and other minor children live in those premises because the applicant has not built any residential house for his family. Again the applicant deliberately failed to disclose this material fact.

If in his founding affidavit the applicant had disclosed that he had previously brought almost identical proceedings before the magistrate's

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court, I would have undoubtedly refused the application and ordered him to appeal against the discharge of the order with costs against him. It is true that the former application was brought against the second and third respondents only. The first respondent was not a party. It was still the duty of the applicant to disclose this material fact. The applicant obtained the order ejecting the first respondent and her children from what is her only home. In other words, he succeeded in obtaining the order the effect of which is to throw his own wife and children into the street without providing a suitable alternative accommodation.

If he had disclosed that he has built no residential house for the first respondent the court would have made sure that before it granted the ex parte application suitable alternative accommodation had been provided for the first respondent. By failing to disclose this material fact the applicant abused the court process to have his wife ejected from their matrimonial home when there was no alternative accommodation provided. In his replying affidavit the applicant admitted that he has built no residential home for the first respondent. Now the question one may ask is: where did he expect the respondent and her minor children to go when he deceitfully obtained an order ejecting her from what is, for all intents and purposes, her only home? Why did he not disclose this in his founding affidavit?

On the grounds of non-disclosure of material facts and utter lack of good faith, the rule nisi was discharged with costs to the respondents.

J.L. KHEOLA
ACTING CHIEF JUSTICE

30th June, 1986.

For Applicant - Mr. Mphalane
For Respondents - Mr. Kolisang.