CIV/APN/338/98

IN THE HIGH COURT OF LESOTHO

In the matter between

RAFIC ISSA	1st Applicant
MOKHETHI PAULOSI (Boy-Boy) MOSIA LETSIE	2nd Applicant

and

MOHALEROE SELLO & CO.	1st Respondent
THE DEPUTY SHERIFF	2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 6th day of November 1998.

This is an application for interdict and other ancillary prayers. In order to fully appreciate the issues that arise for determination in this matter it is convenient, I think, to begin at the beginning, that is to say with Civ/Apn/310/96 in which this Court gave judgment in favour of the late Thabo Zacharia Letsie (the 2nd Applicant's father) as against the 1st Applicant and one Mafonyoko Letsie (Thabo Zacharia Letsie's father) in a matter involving, ***inter alia***, ejectment. In sum the final order of Court was to the following effect:

1. The purported sale by the said Mafonyoko Letsie to the present 1st Applicant was set aside. That sale related to the

disputed business premises situated on a certain site at Ha Motjoka, Teyateyaneng in the Berea district registered in the name of Thabo Zacharia Letsie in the Deeds Registry Office, Maseru under number 5921 on the 11th July, 1968.

2. The present 1st Applicant was interdicted from letting, collecting rent from tenants in the said premises or interfering in any manner whatsoever with Thabo Zacharia Letsie's rights of ownership of the same save by due process of law.

3. Any agreement that might have been entered into between Mafonyoko Letsie and the present 1st Applicant with respect to the said premises was set aside.

4. The present 1st Applicant was specifically ejected from the premises in question.

It is also important to bear in mind that in making the order referred to above, this Court also dismissed Mafonyoko Letsie's counter application for an order that Thabo Zacharia Letsie be interdicted and restrained from interfering in any way whatsoever with Mafonyoko Letsie's occupation of the disputed site.

It is further pertinent to bear in mind that in granting the above

mentioned order in favour of Thabo Zacharia Letsie this Court specifically made a finding that the present 1st Applicant and the said Mafonyoko Letsie had in fact colluded with each other and acted in bad faith in their attempt to sell the disputed premises to the 1st Applicant herein. That order was never appealed against.

I should mention that Thabo Zacharia Letsie was duly represented by the 1st Respondent in the said Civ/Apn/310/96.

Now it is common cause that pursuant to the above mentioned final order of this Court and on the 20th March 1998 Thabo Zacharia Letsie's attorneys namely the 1st Respondent herein issued out a Warrant of Ejectment with this Court the effect of which was to put the attorneys in question into possession of the said premises by removing therefrom the present 1st Applicant. Apparently this was because Thabo Zacharia Letsie himself lived in the Republic of South Africa and indeed this is common cause.

Meanwhile the parties are on common ground that the present 1st Applicant has never complied with the order of the Court referred to above. It is indeed not denied that he has "resisted" all attempts by the Deputy-Sheriff to eject him. In this regard it is necessary to refer to paragraph 3.4 of the answering affidavit of Khalaki Sello wherein he states as follows:-

> "3.4 I aver that 1st applicant has never complied with the said ejectment order but has, on the contrary, resisted all

attempts by the deputy-sheriff to eject him. I respectfully submit that the purported lease agreement between the applicants is but a further attempt to frustrate the said judgment a copy of which is annexed hereto marked "KS3" (sic)."

The purported lease agreement referred to in this paragraph was apparently entered into by and between the Applicants in respect of the same disputed site on the 1st day of January 1998 notwithstanding the aforesaid Court Order.

Now it is against the above mentioned background that the Applicants have applied to this Court on a certificate of urgency for an order in the following terms:

"1. That a **RULE NISI** be issued calling upon the Respondents to show cause, if any, on a date and time to be determined by this Honourable court why:-

(a) The 1st Respondent shall not be interdicted forthwith from interfering with Applicants occupation of site **No.368** situated at **HA MOTJOKA TEYATEYANENG** in the district of Berea.

(b) The writ of Ejectment issued on or about the 23rd

Day of March, 1998 shall not be set aside as an irregular process.

(c) The 2nd Respondent shall not be interdicted from Executing (sic) the said writ pending the determination of this application.

(d) The Respondents shall not be ordered to pay costs of this application in the event of any opposition.

(e) Applicants shall not be granted further and or alternarive (sic) relief.

2. That prayer 1(c) operates with immediate effect as an interim interdict.

3. Dispensing with the normal mode of service as prescribed by the rules of Court regard being had to the Urgency of this matter."

I should like to say at the outset that this Court is deeply concerned about the attempt by the Applicants to render its order as fully set out above, nugatory. The circumstances of this case have led me to the inevitable conclusion that the failure to comply with the Court Order was indeed deliberate and premeditated in line with the 1st Applicant's "collusion"

referred to above coupled with the undenied fact that "the purported lease agreement between the applicants is but a further attempt to frustrate the said judgment.....". Hence I find that the 2nd Applicant has himself joined the collusion to defy the Order of this Court. Indeed, to be more precise, I find that the Applicants' actions amount to contempt.

Nor is it disputed that the contempt by the Applicants as stated above has never been purged. It is continuing to date and in this regard I have attached due weight to the uncontroverted averment of Khalaki Sello in paragraph 4 of his answering affidavit to the following effect:-

> "It will be submitted that the application herein is but a continuation of the said attempt to defraud the deceased's estate."

Now it is trite that the Court will usually refuse to hear a person who has disobeyed an order of court until he has purged his contempt.

See for example **DI Bona v DI Bona and Another 1993(2) S.A. 682 at 688**

It follows from the particular circumstances of this matter as fully set out above that this is a fit case, I think, where the Court has a discretion to be exercised judicially and not arbitrarily or capriciously to refuse to entertain Applicants' claim on the ground that their contempt is continuing as it

admittedly is and on this ground alone this application further falls to be dismissed with costs. Indeed the Court needs to send out a warning to litigants that its orders cannot be cynically defied with impunity as this case amply demonstrates.

If the conclusion at which I have arrived so far is right there is no need to go further but it seems to me there is no harm in going further if only to do justice to Applicants' case as a whole.

What has happened in this case is that Thabo Zacharia Letsie has since the aforesaid final order of this Court sadly passed away. The Court has however not been told when exactly this was. Be that as it may his estate is admittedly being administered in the Republic of South Africa and Khalaki Sello of the 1st Respondent firm represents that estate's assets in Lesotho. The 2nd Applicant does not dispute that he is "fully aware" of this state of affairs, nor does he deny Khalaki Sello's damaging allegation in paragraph 4 that "it is mischievous of him to try and content otherwise." I accept Khalaki Sello's uncontroverted version relating to the administration of the deceased's estate and the role he plays in it.

Indeed as I read the Applicants' founding papers I am appalled to note that nowhere has the 2nd Applicant disclosed this material fact that the deceased's estate is being administered in the Republic of South Africa and that Khalaki Sello of 1st Respondent's firm in fact represents the estate in Lesotho. As the deceased's heir, the 2nd Applicant must have known about

this state of affairs at the time he launched the application.

In my view this is material non-disclosure and on this ground alone the Court is entitled to dismiss the application for indeed it is trite that in ***ex parte*** applications the applicant must display the utmost good faith and disclose fully and fairly all material facts known to him failing which the Court, in the exercise of its judicial discretion may dismiss the application on this ground alone.

See **Trakman NO v Livshitz and Others 1995(1) S.A. 282 at 288.**

Nor do I think that it helps for Adv Qhobela to argue as she did on behalf of the Applicants that no letters of administration have been filed in this country. This is a factual submission which is not based on the papers before me. What counsel submits therefore is tantamount to giving evidence from the bar which is totally unacceptable.

In any event I accept Mr. Sello's submission on behalf of the Respondents to the effect that strictly speaking the question whether or not letters of administration have been filed is a matter for the Master. The issue can indeed be raised with the latter as a party in separate proceedings. For the moment I am satisfied, as I have stated earlier, that the deceased's estate is being administered in the Republic of South Africa and that Khalaki Sello of the 1st Respondent firm represents that estate's assets in Lesotho. Annexture "SK1" is the certificate of appointment of Vernon Hilson Neumann as the executor of the estate in the Republic of South Africa and he has in turn

signed special power of attorney "SK2" in favour of Khalaki Sello to represent the estate in Lesotho.

Lastly it has been submitted on behalf of the Applicants that the deceased's estate falls to be administered in accordance with Sesotho law and custom. It was then sought to persuade the Court that the 2nd Applicant being the heir to the deceased had the final say regarding the disputed site.

In my view this contention loses sight of the fact that the estate in question is being administered in the Republic of South Africa in terms of the laws of that country. In any event the contention further loses sight of Section 3(b) of the Administration of Estates Proclamation 19 of 1935 which provides as follows:-

> "3. This Proclamation shall not apply -
>
> (a) .....
>
> (b) to the estates of Africans which shall continue to be administered in accordance with the prevailing African law and custom of the Territory: Provided that such law and custom shall not apply to the estates of Africans who have been shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life, and who, if married, have married under European law."

I consider that in order for the Applicants to succeed in their contention it would have to be shown on the facts that the deceased had led a customary mode of life and had not adopted a European way of living. Although these issues have not been canvassed in this case I am inclined to the view that the fact that the deceased's estate is admittedly being administered in the Republic of South Africa in terms of Section 4(1) of the Regulations framed under the provision of Section 23(10) of Act 38 of 1927 is indeed a strong indication that the deceased had abandoned customary mode of life and had adopted a European way of living. This is the most reasonable inference to be drawn from the history of the matter as for example the fact that the deceased was registered owner of the disputed site situated in an urban area. The name Zacharia also suggests that he was a Christian.

At any rate, even if I may be wrong in the view that I take of the matter, what has given rise to the deepest perturbation and grave concern in my mind is the fact that the 2nd Applicant should apparently bless or at the very least acquiesce to the administration of the deceased's estate in the Republic of South Africa but at the same time resisting attempts by the executor of the estate to get hold of the estate's assets in Lesotho. This, I consider, is tantamount to syphoning off the assets to the prejudice of the creditors. It is the duty of the Court to prevent this.

In all the circumstances of the case therefore I think there is right in refusing this application.

Accordingly the Rule is discharged and the application dismissed with costs.

M.M. Ramodibedi
JUDGE
6th day of November 1998

For Applicants : Adv Qhobela

For Respondents : Mr. Sello