

**IN THE HIGH COURT OF LESOTHO**

**In the matter between:**

**MAPITSO ELSINA SEMAHLA**

**Applicant**

**and**

**RAMONATE KOENAESELE JOSEPH LEPHOLE**

**Respondent**

**JUDGMENT**

**Delivered by the Honourable Chief Justice Mr. Justice  
J.L. Kheola on the 4<sup>th</sup> day of January, 2000**

This is an application for an order in the following terms:

1. Interdicting Ramonate Koenaesele Joseph Lephole, the respondent herein, from in anyway, except by due process of law, interfering with the applicant's rights of ownership and occupation of or any person deriving the same from the applicant of certain residential premises lately the property of Mafereka Semahla, since deceased, situate at Qoaling, Ha Seoli in the Maseru urban area.

2. Restraining the respondent from going onto the premises for any purpose whatever that detracts from the applicant's right to the said property and, more particularly, letting out any portions thereof for hire and collecting its rent or interfering with any tenants placed thereat by the applicant.
3. Ejecting forthwith the respondent and all persons occupying the said premises by act or deed of the respondent from the same.
4. Granting the applicant the costs of this application.
5. Granting the applicant such further or alternative relieve as to this Honourable Court may seem just.

It is common cause that the applicant is the widow of the late Mafereka Semahla. They lived at Levy's Nek in the district of Leribe where they had a home. In 1965 her late husband came to live here in Maseru. During his stay in Maseru he lived as husband and wife with a certain woman who used to state that her name was 'Mateboho Alina Mokhali and she said that she was married to one Tlhoriso Nchepe.

During his stay in Maseru her husband (the deceased) built a four roomed house which constituted his residence, three single and one double roomed structure let out to tenants. The applicant alleges that she used to collect rent of these rooms since the deceased's death without let or hindrance. The trouble started in 1996 when the respondent expelled all her tenants from the rooms and substituted them with his own tenants from whom he collected rent for his own benefit.

The applicant alleges that the respondent is the husband to the sister of the woman who she has averred used to live with the deceased. The respondent's aforesaid conduct emanates from his claim of right based on this relationship. She respectfully submits that this is untenable, insupportable and merely provocative. She further submits that the respondent is taking advantage of the fact that she is single and an old woman aged seventy-eight years.

In his opposing affidavit the respondent gives an entirely different story from that of the applicant. He avers that the woman referred to above by the applicant was the second wife of the deceased. Her name is 'Mateboho and her eldest son is Teboho. The respondent has filed supporting affidavits of people who know that the deceased and 'Mateboho were lawfully married to each other

by customary law. Their marriage was blessed with three children, namely:

- (a) 'Matseliso, a girl born in 1963.
- (b) Teboho, a boy born in 1967.
- (c) Mpho, a girl born in 1980.

According to the respondent Teboho as the only son in the second house of the deceased is the heir in that house. The applicant is the senior wife of the deceased in the first house. Her son, Pitso, is the heir in the first house. In 1994 in CC 86/94 of Matala Local Court Teboho sued Pitso for ejectment from the site which is the subject matter of the present application. That case was decided in favour of Teboho and Pitso was ordered to vacate the site as it was found by the court that it was Teboho's parental home. The court found that Pitso had his parental home at Leribe ha Nkhasi. That is where the deceased had his home for his first house.

The judgment of Matala Local Court in CC 86/94 is annexed to these proceedings as Annexure "A". It seems that Pitso was not happy with that decision and applied for review by Chief Magistrate on the 13<sup>th</sup> September, 1994. The learned Chief Magistrate confirmed the decision of the President of Matala

Local Court. That decision is Annexure "C" to the present proceedings.

The respondent avers that during 1995 Teboho fell ill and authorised him (respondent) to follow up the execution of CC 86/94. Annexure "B" is a document signed by Teboho authorising the respondent to represent him because of ill health and work. Annexure "B" was made in terms of section 20 of the Central and Local Courts Proclamation No.62 of 1938. In 1996 Teboho passed away leaving orphans who also appointed the respondent as their representative in litigation. Annexure "D" is a document made by the orphans. He denies that he uses the rent for his own benefit but avers that he duly passed it to the minor children.

In her supporting affidavit 'Mantsane Amelia Mokhali avers that she is the mother of 'Mateboho who was married to the deceased by customary law in 1967 and that about eighteen head of cattle were paid as "lobola". She confirms that one Charles Mofeli was sent to her family to engage 'Mateboho on behalf of the deceased. She accepted the engagement but insisted that the marriage should be solemnised in church because she was a Christian.

In his supporting affidavit Charles Dabende Mofeli avers that the deceased

was his cousin. In 1967 the deceased married 'Mateboho by Sesotho law and custom. He was personally present and thirteen head of cattle were paid as "lobola". In 1968 the deceased and 'Mateboho were allocated a residential site at Maseru Lower Seoli. He avers that he knows that as a matter of fact because he used to stay with the deceased and 'Mateboho. The said site was allocated to them by Chief Jobo Seoli Matsoso.

In her supporting affidavit 'Matsoso Margaret Lephole avers that during 1967 her sister 'Mateboho married the deceased. At the time of his death the deceased had already paid eighteen head of cattle as "lobola".

The last supporting affidavit is made by one Matsoele Matsoele who avers that the deceased is his brother-in-law as he is married to his sister 'Malikhapha. He knows as a matter of fact that the deceased married Mateboho and paid eighteen cattle as "lobola". He even contributed an amount of five hundred maloti for his marriage.

In her replying affidavit the applicant avers that she is unable to deny that her late husband paid "bohali" for 'Mateboho. What she does submit is that such purported "bohali" could not result in any marriage whatsoever inasmuch as when

it was allegedly paid "Mateboho was still lawfully married to one Tlhoriso Nchepe.

The last concession made by the applicant that she is not in a position to deny that her late husband paid "bohali" for the marriage of 'Mateboho settles this matter. Her late husband was a polygamist with two wives. The applicant was the senior wife whose home was in Leribe. 'Mateboho was the second or junior wife with her home at Seoli's here in Maseru. The applicant's submission that the "bohali" that was paid by her late husband for the marriage of 'Mateboho could not result in a marriage inasmuch as when it was paid 'Mateboho was still married to one Tlhoriso Nchepe is without any substance. The applicant has failed to call Tlhoriso Nchepe as her witness to prove that 'Mateboho was his wife at the relevant time when the deceased purported to pay "bohali" for her marriage. This is the second time that the applicant has failed to call Tlhoriso Nchepe as her witness. On page 49 of the record in CC 86/94 the Local Court President remarked that her heir (Pitso) failed to call this star or very vital witness in his case. The evidence by the respondent and his witnesses is to the effect that 'Mateboho was still unmarried when the deceased married her. It is their evidence that she already had some children when the deceased married her but he took her together with them. Teboho and Mpho were born after the marriage. What is of

utmost importance is whether there was a valid marriage between the deceased and 'Mateboho. I have found that there was a valid customary marriage between them and that the applicant has failed to prove any marriage between 'Mateboho and Tlhoriso Nchepe.

Another aspect of this case which is causing me some serious concern is the fact that as long ago as 1994 the two widows of the deceased already had heirs who were already majors. Teboho is the son of 'Mateboho. He instituted an action against Pitso who is the son of the applicant. He wanted to have him ejected from the same site which is the subject matter of the present application. The case is CC 86/94 which is Annexure "A". Teboho won the case and Pitso was ejected. The Chief Magistrate confirmed that judgment on review.

There has been no appeal against that review order. The applicant has changed the forum and has come to the High Court to have the respondent ejected from the said site. His son Pitso is still alive and is her lawful heir who lost a similar case against Teboho. What is clear from the record is that the marriage of 'Mateboho was found to be a lawful one. How can the applicant again raise the question of the validity of "Mateboho's marriage again when her heir has already lost that case? It can be argued that the case is not **res judicata** because the



applicant and respondent are different parties. I agree with that. However Pitso is the applicant's heir and has already lost the case in which the validity of 'Mateboho's marriage was well canvassed and was found to be in order. The respondent is merely a representative of the minor children of 'Mateboho.


The **locus standi** of the applicant also arises in this application. Section 11 (1) of the Laws of Lerotholi provides:

“(1) The heir in Basotholand shall be the first male child of the first married wife, and if there is no male in the first house then the first born male child of the next wife married in succession shall be the heir.

(2) If there is no male issue in any house the senior widow shall be the heir, but according to the custom she is expected to consult the relatives of her deceased husband who are her proper advisers.”

The applicant's heir is Pitso and therefore she has no **locus standi** to have brought this application. Her heir was previously sued by Teboho and was ejected from the said premises.

In the result the application is dismissed with costs.

  
**J.L. KHEOLA**  
**CHIEF JUSTICE**

**4<sup>th</sup> January, 2000**

**For Applicant - Mr. Sello**

**For Respondent - Mr. Mafantiri**