CIV/APN/58/99
IN THE HIGH COURT OF LESOTHO

In the matter between

ANNA MALETSATSI SEKONYELA	1st APPLICANT
ALEXIS RANKUENYANE SEKONYELA	2nd APPLICANT
CLEMENT OFOMANE SEKONYELA	3rd APPLICANT
and	
'MAKATLEHO SEKONYELA	RESPONDENT

JUDGEMENT

Delivered by the Honourable Mrs Justice K. GUNI on the 23rd day of June, 2000.

The applicants' case before this court is to this effect:

The respondent's husband was a businessman. Amongst other businesses which he ran, there was a transport business. He had a fleet of buses and other motor vehicles. There are eight motor vehicles which are registered in the names of these applicants in that fleet. It is argued for these applicants that in terms of the Road Traffic Act No.8 of 1981, these applicants are the owners of those vehicles which are registered in their names. The owner in the said Act is described as including

co-owner. In the case of the vehicles bought under hire purchase agreement, the possessor of such vehicle is a co-owner. In their papers these applicants do not claim openly in simple terms the ownership of the property they are claiming. They claim delivering to them of those vehicles simply because the vehicles are registered in their names.

These applicants are not claiming as co-owners. They do not claim that they bought those vehicles. The respondent has averred that the vehicles belong to her late husband. He used those vehicles in the fleet, referred to by applicants in the Founding affidavit, as his and for his own benefit together with his wife [and children if they have any]." These applicants do not claim to have enjoyed any rights or benefit of any kind from the fact of the registration of those vehicles in their names.

The 1st applicant is in addition claiming the ownership of the unnumbered residential site at HA THAMAE. She alleges that it is hers. It was developed by her late son the respondent's husband for her. Form C is attached as annexure 9 to the Founding affidavit. It bears her name and particulars of the piece of land so allocated.

The respondent's case is that her late husband operated as alleged by these

applicants the fleet of buses, including the buses registered in the names of these applicants. She adds that he did so for himself. The buses belonged to him. Their earnings were exclusively for the benefit of the deceased and his wife -respondent herein. These applicants have never had possession of those vehicles nor their papers relating to their identity and the owner's title. The vehicles were registered in these applicants' names for the purpose of

evading the department of traffic's policy of avoiding to grant monopoly of one route by the single bus operator. These applicants do not know or care to know the reason why the deceased registered his vehicles in their names.

As regards the unnumbered residential site at HA THAMAE, that too belongs to the respondent's late husband. He developed it for himself. He collected the rent from the tenants he had put on the property for himself. The 1st applicant was never given that site nor the money from the rent collected from the tenants at that property. She neither alleged, nor proved anything to that effect. 1st applicant was maintained by the respondent and her late husband. 1st applicant was bought everything she needed by them. She did not live from those rents there collected. There is noway she can miss what she never had. The respondent has also attached a form C bearing her late husband's name.

On the 11th February 1999, the applicants in this matter approached this court by way of an ex-parte and urgent application. In the said application they sought and obtained a court order against the respondent in the following terms:-

IT IS ORDERED THAT:

1) The Rules of Court concerning forms, notices and services of process are hereby dispensed with on account of the urgency of this matter;
2) A Rule Nisi is hereby issued returnable on 22nd February 1999 at 9.30 a.m. or so soon thereafter calling upon Respondent to show cause if any, why the following order shall not be made final:

a) Directing respondent to handover to the Deputy-Sheriff of this Honourable Court for save custody the vehicles mentioned in paragraph 5 of First Applicant's Founding affidavit pending finalisation of this matter;
b) In the event of this Honourable Court finding that the vehicles aforesaid are the properties of Applicants, respondent and/or the Deputy-Sheriff be directed to hand them over to Applicants;
c) Respondent be restrained from collecting and appropriating to herself all income derived from the rentals of the premises situated on First Applicant's site at HA THAMAE, MEJAMETALANA, MASERU, LESOTHO;
d) Directing Respondent to pay the costs hereof;
e) Granting Applicants further and/or alternative relief.

3) Prayers 1, 2(a) and (c) operate with immediate effects as interim orders.

The background to this dispute shows that the parties began to have problems

immediately when the respondent's husband PAUL SEKONYELA, the eldest son of the 1st applicant herein, died. The deceased's estate has not yet been dissolved and finally distributed. At least when this application was heard that was the position. The subject matter of this dispute is only a portion of that deceased estate although the size of the estate is not mentioned in the papers before me. The subject matter of the dispute includes both movable

and immovable property. It appears that the deceased was a loving, caring and very generous person. With the concurrence and support of the respondent, his wife, they made generous donations to their close relatives and workers.

For example, the respondent has alleged in paragraph 3.3. of her Answering Affidavit, that there are two motor vehicles in the fleet of fare-paying passenger motor vehicles, whose earnings were banked into the 2nd applicant's account. Those two vehicles belong to the respondent's late husband. They are registered in the respondent's late husband's name. But the respondent and her late husband have decided to donate the earnings from the business of running those two vehicles to the 2nd applicant. That was for the 2nd applicant's exclusive benefit. The 2nd Applicant has admitted this fact. Maintenance and support of 1st applicant as a parent was an obligation fulfilled by the respondent's late husband and the respondent is happily continuing to perform that duty of support of their parent.

5

To show their appreciation or lack of it, those applicants came to court and obtained undeserved but very prejudicial court order behind the respondent's back while the respondent was, according to our Sesotho tradition still in mourning for the death of her late husband. The court order sought and obtained by these applicants is a mandatory order. The respondent is directed to take out and remove from the fleet of transport vehicles operated by her late husband and presently by her, at least eight motor vehicles [seven of which are buses] which are listed in paragraph 5 of the Founding affidavit. Those buses and Toyota Corolla, respondent is ordered to hand them over to those applicants.

That court order I have described as undeserved and highly prejudicial because it was made before the respondent was given an opportunity to present her case. The respondent's rights were invaded and violated by the order made on the unsubstantiated claim by the applicants. There was no urgency. They are not the owners. They are not the possessors. The applicants alleged that the motor vehicles they are claiming are registered in their names but at all time those motor vehicles have been in the possession of the respondent's husband. There was never a single time in their lives [the applicants] when those items of property claimed by these applicants were in their [actual or constructive] possession.

6

An interdict is a form of procedure which is resorted to in order to maintain a status quo which is threatened with disruption or to restore the status quo where violation has already taken place. It may be presumed that after the death of her husband, respondent must have been continuing the operations of their various businesses because there is nothing alleged to the contrary in these papers. Why, then do these applicants seek to disrupt the operations of these buses as conducted by this respondent?

These applicants must have been in no doubt that this application will be opposed. As appears from the notes, made on the record cover by His Lordship the Honourable Mr PEETE J. before making the order sought, these applicants made a special request -not to consolidate the two applications. But nevertheless they proceeded and obtained ex-parte the court order they wanted. They must have known that there was already a pending application where the very same parties are involved. The two applications were to remain separate because the relief sought in one was alleged to be different from the relief sought in the other. What

causes me concern is not separation of the two applications. I am concerned by the method of approach to this court by the applicants, with the full knowledge of the dispute the parties were already involved in. It was mischievous of these applicants to surprise the newly widowed respondent with the court order which

7

directs her to dismantle and take out portions of the deceased's estate before such estate is wound up and distributed.

As expected, AN INTENTION TO OPPOSE was filed. This opposition came as no surprise because in the first place, as I have already mentioned the deceased's estate of late PAUL SEKONYELA had not been dissolved and finally distributed. Secondly, the RULE NISI was issued on the basis of insufficient and vigorously disputed facts which these applicants must have been fully aware of. As shown in the Founding affidavit the vehicles and all documents identifying them together with the original certificates of registration, were in the possession of respondent. These applicants have nothing in their possession which they can use to support their claim. It is so alleged in their affidavits that all documents relating to the title and identification of those vehicles are in the possession of the respondent.

This court is called upon to determine finally the right of the parties to the property they are claiming. The facts relied on are not sufficient to support the court order they obtained. They have not spelled out any rights which they have on the property they claim.

The reasons, why these applicants came to court and in this fashion are expressed

8

in paragraph 8 and 9 of the Founding affidavit as follows:-

8

"Respondent has effectively excluded and denied the two co-Applicants and I from making any contribution on the administration of the estate or laying any claim on our assets as more fully described in paragraph 5 and 6 above. She has done so in full knowledge that the assets aforesaid do not form part of the estate of deceased, PAUL SEKONYELA

9

Respondent's action aforesaid is wrongful and unlawful. It amounts to self-help and unlawful appropriation of those assets with resultant prejudice and harm to the two co-Applicants and I."

It seems the applicants wanted to take part in the administration of the deceased's estate. In their papers they do not make any mention of the kind of the contribution they want to make on the administration. They do not say exactly what claims they were desirous to make on the deceased's estate. They allege that the respondent effectively excluded or denied them those opportunities. They are not asking this court to compel the respondent to give them the opportunity to administer the estate nor to lodge their claim.

The applicants have distributed to themselves some property which they claim to be theirs and they accused the respondent of misappropriating it.

9

How was the property misappropriated? They have said nothing to support their allegation.

According to these applicants the property they claim has been in the possession of the respondent's late husband at all the time . They have never ever benefited from the registration of those vehicles in their names. The vehicles have remained in the fleet where they have been all the time. There is no misappropriation.

In the most important case in this kingdom, as far as the determination of rights of parties are concerned, there are very material factors to which a great attention must-be paid. That was in the matter between ATTORNEY GENERAL & ANOTHER V SWISSBOURGH DIAMONDS MINES (PTY) LTD & OTHERS C OF A 1995 LLR AND LEGAL BULLETIN 1995, 1996 at Page 173. The Honourable President of the Court of Appeal [As he then was] the late Judge MAHOMED had this to say "It is important in determining whether to grant.... relief to have regard to both the quality of their rights, the vigilance with which they have both pursued and sought to protect such rights as well as their conduct".

When were these vehicles registered in their names? The copies of the licences or

10

clearance certificate attached is common knowledge that they are renewed annually. So exactly when did the respondent's late husband register the said vehicles for the very first time , in the names of those applicants. It is also in the common cause that those vehicles have at all times been in his possession in the fleet which he operated. What kind of right did these applicants have on the property they claim? What quality is the right they claim? To all these questions the applicants have no answer.

What steps did these applicants take to protect the rights which they are to-day asking this court to protect? The misappropriation was being committed by the deceased when he kept those vehicles in the fleet after registering them in the names of these applicants. To-day many years later, these applicants cannot be heard to complain about the fact which they ignored and endure for these years. For that matter, they proceed urgently and ex-parte without alleging and proving that they fear the respondent will frustrate the court order sought

This matter is not the type that can be determined on affidavits alone. The applicants should have proceeded by way of an action. The complaint that the buses are running and are being used by the respondent for her benefit to their prejudice is the hypocrisy to the superlative degree. Do these applicants mean to

11

say that for the years these buses were being used by the deceased, there was no wear and tear or any kind of deterioration?

All the property claimed, and the documents of title and identification of the same are in the possession of the respondent. This fact by itself add some weight to the claim of the possessor, of those that the property belongs to him or her. Were these applicants just gambling? They should, at least have placed their bets or bought a lottery ticket. They should have something which entitles them to a mere hope of winning. They have done absolutely nothing that can be regarded as giving them a right to claim those vehicles.

As far as the unnumbered residential site in dispute is concerned, in the opinion of this court the rights of the parties therein cannot be finally determined on these papers alone. 1st applicant has a form c certificate in her name to support her claim. The respondent has a form c in her late husband's name to support her claim too. It has been held, that form c certificate is a prima facie evidence of title. Both parties have the evidence of allocation to each of them, of the same piece of land. MAJARA V SEBAPO 1981(1) LL R page 150. Which of those two papers [form c certificates attached to Founding and Answering Affidavits] should this court believe? Which evidence of allocation, should this court reject? Why? This

12

matter cries out for a full blown trial. This application cannot succeed.

No proper basis has been alleged nor proved, which would justify interference with the respondent's legitimate conduct of her business by extracting those vehicles claimed by these applicants from the fleet where they have been engaged for an indefinite period. ANGLO AMERICAN CORPORATION V SIEPUTOWSKI 1973(3)SA 709 at 715-B.

On this ground alone this application for a mandamus sought must fail.

Urgency

The procedure adopted by the applicants in this matter, is governed by rule 8 (22) (a) (b) (c) of HIGH COURT RULES, Legal Notice No. 9 of 1980. The relevant
portions of that rule reads as follow:-

a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure as the court or judge may deem fit.
b) In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be

13

afforded substantial relief in an hearing in due course if the periods presented by this Rule were followed.

c) Every urgent application must be accompanied by a certificate of an advocate or attorney which sets out that he has considered the matter and that he bona fide believes it to be a matter for urgent relief.

In its last sitting THE COURT OF APPEAL OF LESOTHO, must have dealt mostly with civil appeal which originated in the HIGH COURT in the form of interdicts and other orders. His Lordship the Honourable GAUNTLET, JA, in the matter between THE COMMANDER OF THE LESOTHO DEFENCE FORCE, ATTORNEY GENERAL AND MATS'ELISO MATELA 1999 C of A (CIV) No 3 of 1999 (unreported), pointed out that "the frequency with which interdicts and other orders are sought by counsel, and granted by the High Court, without notice to parties cited as respondents is a matter for concern". It is not all matters which commence at the High Court that finally end up at The Court of Appeal.. What caused their Lordships a concern is just the tip of the iceberg because only a small fraction of the matters dealt with by the High Court goes on appeal. Some legal practitioners who bring their matters to be dealt with by THE HIGH COURT, seem to know, no other way of approaching this court except by ex-parte and urgent application. In some instances, they approach the court in that fashion with total disregard of the rules of this court - prescribing that procedure.

14

In our present case, the required certificate of an attorney, which sets out that he has considered the matter and that he bona fide believes it to be a matte for urgent relief, has accompanied this application. What considerations the attorney has made is his secret. Were there any considerations made in fact? That too is his secret. This is totally unsatisfactory. THE COURT OF APPEAL in the COMMANDER OF THE LESOTHO DEFENCE FORCE case [supra] required that the grounds for urgency must be stated briefly on the certificate issued by the advocate or attorney in terms of Rule 8 (22) (c). That in a way will give the court an opportunity to assess for itself the bona fide beliefs of the attorney or advocate who has issued the certificate. In our present case, no grounds for urgency were alleged and proved, briefly in the attorney's certificate, nor in detail, on the Founding Affidavit.

This frequency of adopting this procedure of approaching the court on ex-parte application has always been found completely unsatisfactory as long ago as 1971. In the case of REPUBLIC MOTORS (PTY) LTD V LYTTON ROAD SERVICE STATION (PTY) LTD 1971 (2) SA page 516 - BECK J (as he then was) had this to say:- "The procedure of approaching the court ex-parte for relief that affects the rights of other persons is one which, in my opinion, is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is

15

only temporary in nature , it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard, and to that extent, a negation of the fundamental precept of audi alteram partem. It is accordingly a procedure that should be sparingly employed and carefully disciplined by existence of factors of such urgency". [my underlining]. The courts have always urged legal practitioners to exercise some restraint, when considering to adopt this approach which is to interfere with the lawful conduct of the other person without first giving that person an opportunity to be heard.

Here in this Kingdom that procedure is not employed frequently. It seems to be the only way known to most legal practitioners who do not stop to think even for a minute that there could be another and better way. At times it may even be deliberately resorted to purely to punish or inconvenience the opponent when one has no good case nor hope to succeed in the matter. Take the applicants in this present case. They know that the buses they are claiming belong to

the deceased. They proceed to distribute those items of property to themselves before the estate can be dissolved and distributed. They do not learn for the first time that they do not have anything to prove their claims. They came to court without that prove well aware that they do not have it.

16

That relief they obtained was not temporary. The respondent was to be permanently dispossessed. They obtained the court order on the 8th February, 1999. That court order is being discharged on the 23rd June, 2000. For a period of over a year , the respondent's rights had been violated. The court orders obtained in this fashion before this court, are, frequently extended and their final confirmation postponed for many times. The cumulative effect of the said extensions of the rule nisi sometimes runs into years. MAHLOMPHO NTSETSELANE vs KEKETSI NTSETSELANE CIV/APN/217/94 [unreported]. The Rule Nisi in this case was extended for the periods totalling over four years. The freedom of action in this respect is not invaded for the time being. Considering that the respondent is running a transport business, the removal of seven buses from the fleet must have caused the great inconvenience and unthinkable financial loss. Thank goodness, there was a misunderstanding and breakdown of communication between lawyers and client and the order was not properly explained nor did the respondent appear to understand exactly what it meant. Neither the deputy Sheriff nor the applicants appeared to the respondent and demanded the delivery of the said buses to them.

His Lordship, the Honourable Mr Justice Beck in the case cited above, pointed out that the procedure should be used sparingly and only when there is urgency. Mr

17

Justice GAUNTLET JA in MATELA'S CASE (cited above) elaborated to some detail that the procedure should be resorted to only where there is "extreme urgency or the need to prevent the order from being frustrated where any prior notice could well have that effect".

The applicants herein had no such extreme urgency. They have alleged it but respondent has denied that there was such urgency. The vehicles had been registered in their names - not for a few days but could have been for many years. They have not specifically alleged the exact dates. The copies of registration certificates attached show varying dates - from months to years.

All the time, those vehicles were being used. They were deteriorating. Their deterioration is not brought about by the death of their owner. They proceeded ex-parte. There are no averments as regards their fears for the likely frustration of the court order by the widow if she was served with the notice of this application. This was a total abuse of the process. Moreso because even in the contempt proceedings instituted by these applicants, the respondent still maintains that if she was served with the court order - directing her to handover the vehicles, she would have complied. Therefore there was neither the urgency nor fear of frustration of that court order.

18

For these reasons the application must fail. As a result the Rule Nisi issued is discharged with costs at attorney and client scale. Such costs being paid by the attorney. As it has been pointed out by Mr. Justice Gauntlet J A in The Commander of Lesotho Defence Force [Supra] in appropriate circumstances, the attorney who elected to approach the court in this fashion, should expect the order of costs de bonis propriis. The attorney in our present case, is an expert who should have advised his clients as to which is the best way of handling and proceeding with their matter. As appears in the notes - made by the judge before whom an ex-parte application was placed, the attorney appeared alone. It was the attorney who made the special request of separation of the two applications. The decision to proceed to obtain the ex-parte order was entirely the attorney's. The whole responsibility lies with the attorney, not the clients. This most unsatisfactory practice must be harnessed at the source. It is the legal practitioner who must be restrained from frequent and unnecessary recourse to this procedure. The determination of the method of approach to the court is the responsibility of the legal Practitioner who merely advises the client about the measures he (the legal Practitioner) has decided to adopt.

The court has power to award costs at attorney and client scale even where there

19

is no express prayer for such costs LESOTHO UNIVERSITY TEACHERS AND RESEARCHERS UNION and NATIONAL UNIVERSITY OF LESOTHO C of A (CIV) No.13/98. This type of award is often used by the court to mark its disapproval of some conduct which should be frowned upon. KOE TSIER vs S A COUNCIL OF CAPE TOWN AND REGIONAL PLANNERY 1987(4) SA 735 (W) at page 744-J.

Looking at the applicants' case alone, there was no urgency because, according to them, the vehicles they are claiming have always been in the possession of the respondent's husband for an indefinite period, to be used solemnly for his own benefit.There was no urgency in those circumstances. The overall picture of their case shows without doubt, that the dispute of fact was bound to arise because on their papers, applicants do not claim to be the owners nor possessors. They do not claim any right at all on the property nor could they support any such claim. That by itself still made the procedure chosen, the most inappropriate. Having elected to proceed in this fashion, there were further and more irregularities committed by total disregard of the prescribed procedure in terms of Rule 8 (22)(b) High Court Rules (Legal Notice No.9 of 1980). It is the responsibility of the expert to see to it that the Rules of the procedure adopted are, at least in spirit, followed. The failure to comply with the rules is the responsibility that must lie with the expert,

20

in this case, the attorney. That is why, in these circumstances, it is appropriate to make such costs payable by the attorney.

CONTEMPT

The court order - directing the respondent to hand over to the deputy-Sheriff the buses and the Toyota Corolla mentioned at paragraph 5 of the 1st applicant's Founding Affidavit in CIV/APN/58/99, was served upon the respondent's attorneys. According to secretary of the

respondent's attorneys the court order was served upon her by the clerk of the applicants' attorneys.

It would appear that there was a telephone conversation between the respondent and her attorney who advised her to comply with the court order. Perhaps to the respondent's surprise no deputy Sheriff came to take the delivery of the said buses and Toyota Corolla. The applicants also did not go to take the delivery of the said vehicles.

In The LESOTHO UNIVERSITY TEACHERS AND RESEARCHERS UNION AND NATIONAL UNIVERSITY OF LESOTHO C of A (CIV) No. 13/98 (unreported as yet), the honourable Mr.Justice Leon J A expressed disapproval of the conduct

of the party who institutes contempt proceedings purely to harass the other party. The applicants herein, have behaved in exactly, that unbecoming fashion. No one went to the respondent to serve the court order and take the delivery of the vehicles as ordered. Respondent, who had been advised to comply with the same court order if and when served upon her by the deputy sheriff, is still waiting. Nobody has come to her to take the delivery she is ordered to make. She cannot be in contempt. This contempt proceedings are merely to harass her. This type of behaviour of harassing the other parties must be frowned at by the court.

K.J.GUNI
JUDGE

For Applicants: Mr Ntlhoki
For Respondent: Ms Tau