CIV/APN/378/99

IN THE HIGH COURT OF LESOTHO

In the Application of :

'MAMOELELI LETSEPE **Applicant**

vs

LEFA LETSEPE **Respondent**

J U D G M E N T

Delivered by the Hon. Mr Justice M L Lehohla on the 12th day of February, 2001

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The applicant obtained an Interim Court Order granted by my Learned Brother Ramodibedi J on 7th September, 1999.

The matter had been brought by way of urgency seeking that respondent be restrained from

(b) threatening to assault the applicant by use of a knife;

(c) denying applicant entry into certain rentable premises situate at Thoteng, Linotsing in the Mohale's Hoek urban area as such premises had been made over to the applicant by a Resolution of the Letsepe family;

(d) threatening tenants with expulsion for not paying rental to him;

(f) threatening to set the rentable premises on fire should he be evicted therefrom;

Further that

(e) respondent be evicted from premises he forcibly occupied, and that he be directed to return to his own household situate at Thoteng Mohale's Hoek;

(g) the respondent was also to pay costs of the Application.

Prayers (a) as to modes and periods of service (b) (c) and (d) were to operate with immediate effect.

The applicant, a 69 year old female adult at the time of settling her founding affidavit avers that she is the mother of her late daughter Maleshoane Letsepe who died single and childless. Maleshoane is said to have died in February 1996 leaving behind rentable premises situate at Thoteng Linotsing in Mohale's Hoek urban area held under a Form "C" a copy of which is annexed to the founding papers marked "A".

The applicant further avers that after Maleshoane's death she (the applicant) was appointed heiress and successor to the deceased's estate at a family conference. A copy marked "B" whose translation is marked "BB" is attached to the founding papers. The conference is said to have been held on 30-03-1996 while the chief's date stamp reflects that this important issue was only brought to the attention of the administrative authority on 16th August, 1999 as legitimising what the family had resolved almost three years and five months earlier.

The applicant goes further to indicate that the respondent is her 5th child and that as a member of the Letsepe family he is fully aware of the family resolution and finally that as a married man he has children of his own and his own household situate at Thoteng in Mohale's Hoek.

The applicant complains that since the death of Maleshoane the respondent has :

1. threatened to assault the applicant with a knife and saying he would kill her;
2. Moved from his own household and forcibly stays at the applicant's rentable premises thus denying applicant entry into the said rentable premises to which she has been given lawful authority to run as hers by

the Letsepe family;

3. forcibly collected rental from the tenants threatening them with expulsion if they don't pay rental to him;
4. threatened to set the rentable premises on fire if he is ejected from the said premises.

The applicant finally states that the respondent is in unlawful occupation of the said premises harassing her and the tenants unless they pay rentals to him direct.

She thus prayed for urgent relief following the constant fear of attack by respondent as set out above. The relief came by way of the interim order as indicated earlier.

In reaction to the foregoing the respondent in his answering affidavit denies the truthfulness of some of the applicant's averments.

He indicates that from a young age he stayed with his late sister at rented premises of the Roman Catholic Church in Mohale's Hoek.

He emphasises that he and the deceased amassed funds and built the rentable

premises in question at Thoteng consisting of 16 complete units and 8 half-complete units (meaning they have not yet been roofed).

The respondent avers that he stayed with the deceased in the disputed premises until her death. He avers further that the deceased and he were in informal partnership running a shop as well as being hawkers. They used the proceeds from these business ventures to develop the said premises and maintain themselves.

The respondent avers that when the deceased died he took full and exclusive responsibility for her funeral.

The respondent stresses that being a person who was closest to the deceased during the latter's life time and immediately prior to her death he was the only person better able to administer the deceased's estate properly.

He states that he is a married father of five children and has to use the rental from four rooms for maintenance of his family while the rest is used by the applicant.

The respondent denies that there was ever a family conference in which his

nother was made heir and successor to the deceased's estate. He relies for support on Sello Letsepe and Lefa Letsepe's supporting affidavits. The two are the respondent's close relative and uncle respectively.

But it appears that Sello has signed Annexure B which appointed the applicant heir and successor to the deceased's estate. He avers that he was tricked into signing this believing it was merely an invitation to family meeting. Sello pleads that because he is semi-illiterate he was thus easily tricked by his eldest brother Moeleli Letsepe.

The respondent is adamant that a conference could not have validly been held without his being invited as not only a member of the Letsepe family but one who is an interested party in the matter, regard being had to the fact that he contributed towards the development of the estate in question.

The respondent's mother in her reply denies that the respondent stayed in any Roman Catholic Mission premises with his late sister. She denies that the respondent amassed any funds jointly with his late sister at all. She avers that the late sister started her hawker business selling soft goods till building the premises in question on her own. She denies that the respondent was in partnership of any kind with his

late sister. She charges that the respondent budged in unilaterally to take control of the premises in open defiance of the Letsepe family.

The applicant further states that the late Maleshoane's burial was conducted by Moeleli the applicant's eldest son. She states that Moeleli was assisted in the burial by the respondent's elder brothers Poko and Tlhopho. She thus denies that the respondent could ever have been the only one to bury the deceased at all and administer her estate.

She is emphatic that the respondent and Sello Letsepe were present at the family conference whereas Lefa was never involved in any of the discussions leading to a conference because he had not attended the funeral in the first place. The applicant is supported in this regard by Poko who stresses at the family conference were present, the following persons -

1. Poko himself
2. the applicant
3. the respondent
4. Moeleli the eldest brother
5. Tlhopho

and 6. Sello all of whom are members of the Letsepe family.

Poko explains that Lefa was absent from the funeral, from the post-funeral resolution, even from the Chief's place where annexure "A" was written and attested.

Poko supports his mother in all material respects regarding her appointment by the Letsepe family as the heir and successor to the deceased estate in terms of the resolution bearing among others the signature of Sello Letsepe who is in the unfortunate position of either riding on two horses at once or in fact of running with the hare and hunting with the hounds.

However in attacking the applicant's case *Mr Mda* for the respondent indicated that the applicant's case is flawed in that her founding affidavit does not contain the essential averments such as indicating the jurisdiction of the Court.

Paragraph (C) at pg 78 of **the Civil Practice of the Superior Courts in South Africa** by Herbstein and van Winsen 3rd Ed. under the heading Contents of Affidavits - Essential Averments sets out that

> "If the Court is not satisfied on the facts stated in the application that it has jurisdiction it will not entertain the proceedings".

Mr Mda emphasised that necessary allegations must appear in the founding

affidavits, for the court will not, save in exceptional circumstances, allow the applicant to make or supplement his case in his replying affidavit. I agree with this true statement of the law which is another way of saying an applicant must stand or fall by his founding affidavit. See **Herbstein & van Winsen** above at pp 75 and 76.

Having set out the above background *Mr Mda* dutifully submitted that there are no averments showing that this matter could not competently be dealt with at the Magistrate's Court.

I accept that on the facts this matter could competently be dealt with by the Magistrate's Court.

Therefore because it is within the Magistrate's Court's jurisdiction, *Mr Mda* submits that it has irregularly been brought before the High Court in total disregard of the mandatory provisions of the High Court Act 1978 section 6 reading -

> "No civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court) shall be instituted in or removed into the High Court, save -
>
> (a) by a judge of the High Court acting of his own motion; or

(b) with the leave of a judge upon application made to him in Chambers, and after notice to the other party".

Mr Mda submitted accordingly that because on the facts there hasn't been any compliance with provisions of the enactment *loc cit* this Court should rule that there are therefore no jurisdictional facts entitling the applicant to the relief sought.

Learned Counsel continued to enthral the Court with his sound submissions by emphasising the well worn theme of heeding the importance of complying with the Rules of Court as repeatedly harped on by the superior Courts of this Kingdom.

I agree entirely with the submission that the Rules of Court are an important element in the administration of justice. Further that failure to observe such Rules can lead not only to the inconvenience of immediate litigants and of the Courts, but also to the inconvenience of other litigants whose cases are delayed thereby. (See ***Swanepoel vs Marais and Ors*** 1992 NR 1. HC at 2 J.

It cannot be over-emphasised that Rule 8(22)(b) appears to be one of the most disregarded Rules. This is a Rule which appears to be observed more in the breach than obedience. It provides that an applicant in an urgent application is required to

provide reasons why he cannot be afforded substantial relief in a hearing in due course if the periods presented by the Rules were followed. Many causes have been lost merely for the failure to observe this Rule. Indeed as far back as 27th February, 1989, this Court in ***Masoabi vs Moiloa & 2 Ors*** CIV/APN/420/87 (unreported) at pp 2 and 3 strongly warned that :

> "It is the essential part of this rule that when an application is moved in terms of which directives given in the rules are disregarded a proper application for dispensing with the rules must first be sought by the party and granted by the Court. Failure to observe this rule may result in the dismissal of the application on the basis that if forms are neglected causes are lost. .....c/f C. of A (CIV) No. 16 of 1984 ***Kutloano Building Construction vs ;'Maseele Matsoso & 2 Ors*** (unreported) at pg 7 where [Schutz P] said :
>
> > 'But forms are often important and the requirements of the sub-rule are such.' "

It was not without cause that in applying the dictum in ***Luma Meubel Vervaardigers (Edms) BPK vs Makin and Anor (t/a Makin's Furniture Manufacturers*** 1977(4) SA 135 W at 137 F by Coetzee J, Muller AJ in ***Salt & Anor vs Smith*** 1990 NR 87 (HC) at p 88 said :

> "Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down".

I may just catalogue the great lengths to which the Courts have gone in an attempt to show their intolerance of the disregard of Rule 8 (22)(b).

In ***Pentagon Fibreglass & Plastics (Pty) Ltd & Ors vs Hennie (Pty)Ltd*** 1978(3) SA 5887 where "the respondent had applied on a matter of urgency for a perpetual interdict restraining the appellants from infringing its design" the Full Bench of the Transvaal Provincial Division held that the permanent interdict should not have been granted in the Court below because the respondent had failed to comply with the requirements of Rule 6(12)(b) [our Rule 8(22)(b)] by showing that it could not be afforded substantial redress at a hearing in due course.

In ***Salt*** supra at 87 failure to meet the requirements of Rule 6(12)(b) which is on all fours with our Rule 8(22)(b) resulted in the dismissal of the application. Muller A.J. put it neatly at p.88 as follows :

> "This Rule entails two requirements, namely the circumstances relating to urgency which have to be explicitly set out and, secondly, the reasons why the applicants in this matter could not be afforded substantial redress at a hearing in due course".

Mr Mda demurring at the fact that none of the two requirements set out above has been met urged that the application be dismissed on the ground alone that the

applicant has not at all in her papers addressed the requirement imposed by the Rule.

He went further to question the fact that the application was moved *ex parte* thus rendering the applicant's situation irredeemable in view of the fact that it is trite law that an *ex parte* application is used -

(a) when the applicant is the only person interested in the relief sought;

(b) where the relief sought is a primary step in the proceedings e.g. an application to sue by edictal citation;

(c) where, though other persons may be affected by the Court's Order immediate relief is essential because of the danger of delay or notice may precipitate the very harm applicant is trying to forestall. c/f C. of A. (CIV) NO. 18/91 ***Khaketla vs Malahleha & Ors*** (unreported) at 5 to 6 where it is stated:

"The principle of *audi alteram partem* ought not to be subverted, even when granting a *rule nisi*, by ordering the rule (or any part thereof) to operate as an interim order if such interim order affects the rights of another party, unless such interim order can itself be justified by the exceptions above referred to".

The exceptions referred to were cases where :

(a) Statute or the Rules of Court sanction such departure; or

(b) the relief sought does not affect any other party.

See also Herbstein & van Winsen 2nd Ed. p 58.

Mr Mda's submission is not without a basis when attacking the fact that the

applicant has not even attempted to justify why she obtained an interdict *ex parte* against the respondent thus in violation of the fundamental principle of *audi alteram partem.*

He thus rammed the point home when he indicated that the conduct complained of on the part of the respondent has been going on since 1996 after the deceased's death and nothing took place for upwards of three years when at the end thereof and rather suddenly on 7th December 1999 the applicant approached the High Court *ex parte* and on the basis of urgency.

The procedure in applications of this nature where the nature of the conflict involved cannot be resolved on papers such as where the Court is not able to tell which type-writer to believe where it is on the one hand alleged that the deceased's estate was solely developed by the deceased and on the other hand where the respondent says he also contributed to its development is governed by ***Plascon Evans Paints vs van Riebeeck Paints*** 19984(3) SA 623 A at 634-5

The dictum in that Authority is as follows :

"Where there is a dispute as to the facts a final interdict should only be

> granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ..... where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted".

A phrase that should not be overlooked however appears at p 34 paragraph I. It is as follows :

> "In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see .....***Room Hire Co (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd*** 1949(3) SA 1155 (T) at 1163-5".

CORBETT JA proceeds fruitfully as follows :

> "If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court ..... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. ..... Moreover, there may be exceptions to this general rule, as, for example where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.....".

I am strengthened in my view that the deponent Sello in his attempt to support the respondent by denying that when he appended his signature to the family resolution to appoint the applicant as heir and successor to the deceased's estate his denial is merely farcical because even if he were to be believed that he signed the

resolution thinking it meant he was being invited to a family meeting; the fact is that all those who signed did so in a family meeting for the purpose set out in the paper which was a summary of what had been discussed in his presence namely that applicant was being appointed heir and successor. That the respondent didn't find it necessary to exercise his right to apply for the opposing deponents to be called for cross-examination is an omission that he would have to learn to live uncomfortably with because as it is the Court is satisfied as to the inherent credibility of the applicant and her witnesses.

The respondent's stance is also compromised at a point which to me matters most with regard to what appears to be spoliation in this proceeding. He avers that the deceased's estate consists of 16 units; four of which he uses while the rest are used by the applicant. Given that all these fell to be inherited by somebody somehow after the deceased died it boggles one's mind that the respondent should blithely say that the applicant uses the rest of these units without saying on what authority she does so. This failure on the respondent's part, in my view, strengthens the applicant's version that her authority derived from a resolution emanating from a family conference. The respondent's denial of the existence of such a conference and the authority it conferred on the applicant is thus vain and futile. In fact evidence

showing he was a participant therein is acceptable as a statement of the truth before this Court.

As for the respondent his wild allegations that the burial of the deceased was his sole responsibility simply strains credulity. I am of the view that it is not only far-fetched but untenable. It is hard to believe his story that even though he has elder brothers who were present at their sister's burial he can brazenly hope to convince this Court that he alone shouldered the responsibility for the burial. It is this type of claim that justified the Court's feeling that the desire to gain is all that is behind such wild claims as he is making.

The weaknesses in the applicant's case have been ably highlighted by *Mr Mda*. But I regret to say it seems to me that the fault lies squarely with the applicant's legal advisor.

This Court cannot overlook a plea by a parent for protection against an attack on her with a knife by a son.

Although her case has been badly presented it seems to me that she approached

this Court to seek summary restitution in the form of spoliation order.

From the papers it became clear to me that the applicant sought an order to restore possession into which she had been put by the Letsepe family which had such right. The interim order she obtained ensured that the respondent did not dispose of the possession of property which the applicant had previously been in possession of. It behoved the respondent if he were to succeed to show that the taking was not a spoliation because of any of the following factors :

(a) it was done by consent, or

(b) under lawful warrant e.g. by virtue of a judicial decree, statutory powers or other paramount authority.

Mr Mda raised an important point in his submission that waiting for over three years does not justify moving the Court *ex parte* and on an urgent basis.

But ***Nienaber vs Stuckey*** 1946 AD 1059-1060 is authority for the view that "mere delay in application will not defeat a claim for the remedy....." C/f **Classen's Dictionary of Legal Words and Phrases** Issue S-90. Furthermore and assuming I am correct in regarding this application as one for spoliation, the authority

of ***Meyer vs Glendinning*** 1939 CPD p 94 at 96 shows that possession need not be exclusive (see ***Nienaber*** *supra*) which decision shows also how far constructive holding can go. Furthermore according to Classen above ***Meyer*** at 96 clarifies the position pertaining to spoliation by indicating that

> "to obtain a writ thereof the common practice is to make an *ex parte* application for a *rule nisi* calling upon the respondent to show cause why he shall not be ordered to restore possession, the rule to act as an interdict preventing the respondent from parting with the possession until further order".

Without being specific as should have been the case the applicant's papers in a rather rambling fashion traversed the important factors necessary for granting of a spoliation order nonetheless. To that extent I think it barely fits the bill.

If applicant proves previous possession and his dispossession by the respondent the rule stands a good chance of being made absolute.

In ***Setlogelo vs Setlogelo*** 1914 AD p 221 at 222 the court held that

> "the interdict ought to have been granted, inasmuch as the fact of the disturbance of a *bona fide* possession was not denied, and, as no fact was adduced to show that the trespasser had or believed that he had a right equal to or better than the occupiers".

Mr Mpopo appealed to the Court to look at the substance as opposed to procedural and technical breaches and sought salvage under Rule 59. But I am of the view that Rule 59 is not there to encourage slackness in going about the litigation business. Moreover ***Kutloano*** (above) LAC 1989-1989 pp 99 at 103 H authoritatively preserved Schutz P's invaluable dictum for practitioners and Courts as follows :

> "I am afraid that my decision may smack of the triumph of formalism over substance. But forms are often important and the requirements of the sub-rule are such".

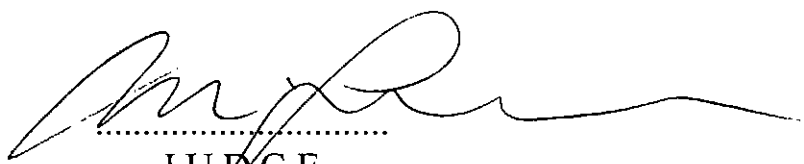
Mr Mpopo further submitted that the remedy sought had also a form of specific performance which is not available in the Subordinate Court. I shall assume in his favour that this is so.

But the fact remains the case was clumsily handled. This should be reflected in the award for costs.

The Rule is granted in terms of prayer 1(b) (c) (d) (f) and (g) as to costs which because of the remarks made above should only amount to 65% of the applicant's costs. With regard to prayer (e) the Court is not disposed to grant any order the

nature of which would be entirely up to the respondent whether he wishes to comply in the event he wants to stay elsewhere than where he is stopped by order from staying. Otherwise the order for his eviction is granted.

It is so ordered.



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J U D G E
12th February, 2001

For Applicant : Mr Mpopo
For Respondent : Mr Mda