CIV/APN/218/2000

IN THE HIGH COURT OF LESOTHO

LEBEKO TSAPANE — **1ST APPLICANT**

VS

MAHLOLI CHABA — **1ST RESPONDENT**
LESOTHO HIGHLANDS WATER AUTHORITY - LHDA — **2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.L. Lehohla on 10th December, 2001

On the basis of urgency the applicant has approached this Court by way of motion proceedings seeking a **rule nisi** to be issued and returnable on a date to be determined by this Court calling upon the respondents to show cause why

(a) The 2nd respondent shall not be restrained and interdicted from making payments to the 1st respondent out of the funds due to the **late Maseoli Tsapane** pending the finalization of an action for cancellation of a **Will**

purportedly executed by the late **Maseoli Tsapane** and such action to be

instituted within **30 days** of the final order herefrom.

(b) The 1st respondent shall not be restrained and interdicted from receiving any moneys from the 2nd respondent paid out of funds due to the **late 'Maseoli Tsapane** pending the finalization of an action for cancellation of a certain **Will** purportedly executed by the **late 'Maseoli Tsapane** and such action to be instituted within **30 days** of the final order herein;

(c) The rules as to form and notice shall not be dispensed with on account of urgency;

(d) The respondents shall not be ordered to pay costs hereof only in the event of their opposing this application;

(e) The applicant shall not be granted further and/ or alternative relief.

2. That prayers 1(a) (b) and (c) operate with immediate effect as an interim order.

The applicant relies on averments contained in an affidavit to which he has deposed. From the applicant's affidavit can be distilled the following facts:

The late Chief Mapheelle predeceased his wife Chieftainess 'Maseoli who also died years later on 12th December, 1999.

The applicant is the brother of the late Chief Mapheelle. He is also the uncle of 'Masepiriti the mother of the 1st respondent. 'Masepiriti is the daughter of the late Chief Mapheelle by his deceased wife 'Maseoli. Of importance is to observe that the late Chief Mapheelle Tsapane and his late wife 'Maseoli died without leaving any male issue.

Their daughter Masepiriti was married into the Cheba family. It is in that family that the 1st respondent Mahloli Cheba was born.

The applicant who is the late Chief's brother is thus the rightful successor to that late Chief in accordance with provisions of the Chieftainship Act in respect of Molikaliko Ha Tsapane.

NATURE OF DISPUTE BEFORE COURT

The nature of the dispute has by and large been highlighted by the applicant in respects pertaining to both his and the 1st respondent's case. I need only indicate at this stage that the 2nd respondent has undertaken to abide the decision of the Court.

In brief then, the dispute arises out of a certain resettlement scheme by the 2nd respondent (LHDA). In terms of the scheme the 2nd respondent acquired certain fields or lands and residential areas around Mohale Dam. Acquisition of these areas was a necessary factor in the construction and development of works carried out by the 2nd respondent towards achieving its purpose of building the dam and rendering it sustainable.

Some of the fields falling within the affected area belonged to the late Chief Mapheelle.

Under the said scheme the 2nd respondent periodically effects payments as compensation for their loss to people whose residential rights and fields were taken away for the benefit of the LHDA.

It is this compensation which falls due periodically in respect of the late Chief Mapheelle's fields which is the subject matter of the instant proceedings.

On her part the 1st respondent in order to assert her rights to the proceeds arising from the compensation scheme, relies on a certain written instruction or **Will** allegedly executed by the late Chieftainess 'Maseoli Tsapane the wife of the late Chief Mapheelle and grandmother to the 1st respondent.

The applicant's case is that the **Will** and or written instructions are a fake, null and void ; and thus cannot be relied upon by the respondents or indeed anybody.

The applicant asserts that by virtue of being heir to the late Chief and Chieftainess he is entitled to compensation arising out of this scheme.

The applicant has thus approached this Court for relief in the form of a temporary (as opposed to a permanent) interdict **pendente lite** in terms of which he seeks an order ensuring that the **status quo** as regards the funds in question is maintained till such time as when the determination has been made in a trial proper on the validity or otherwise of the **Will** and or the written instruction repeatedly

referred to above.

In response to the above summary of averments the 1st respondent admits that the applicant is the successor to the late Chieftainess 'Maseoli Tsapane the widow of the late Chief Mapheelle of Molikaliko Ha Tsapane by virtue of the decision of the Tsapane family. (See also head 2.1 of Mr. Molapo's submissions).

On being affected by the resettlement scheme the late 'Maseoli was resettled by the 2nd respondent at Ha Matala in Maseru.

It is common cause that during her lifetime as a result of this scheme the late 'Maseoli periodically received compensation from the 2nd respondent.

It is asserted on behalf of the 1st respondent that after 'Maseoli's death she presented to the 2nd respondent a **Will** in terms of which the 1st respondent was appointed heiress to the deceased's movable and immovable property. See Annexure LTI to applicant's founding affidavit.

It is stated that it was on the basis of this **Will** that the 1st respondent received

part of the compensation from the 2nd respondent.

Mr. Molapo for the 1st respondent took Mr. Phafane to task in respect of an aspect that Mr. Phafane did not pursue or raise in addressing this Court namely that the applicant seeks the relief, *inter alia*, on the grounds that the said **Will** is fraudulent and that since the testatrix was a Chieftainesss, her estate should be governed by customary law.

Quite frankly if this aspect of the matter is to be entertained at all it should be in a trial proper and not in a case where consideration is focussed on whether or not a **temporary interdict** should be granted. It may well be fitting to raise it where a final and permanent interdict is sought but definitely not in case such as the instant one.

Mr. Molapo argued further that the applicant's case is flawed on the basis that no **prima facie** right has been established or shown to exist. On this basis, it was argued that the Court was being persuaded not to entertain the application as in any case the purported right to inherit is lacking.

The learned counsel for the respondent submitted that it would be wrong to grant the relief sought simply because the applicant says he has a prima facie right. Learned counsel stressed that the applicant has only been appointed a successor to the Chieftaincy of Molikaliko and not heir.

The learned counsel further submitted that succession relates to status while inheritance relates to devolution of property. I agree but would hasten to indicate that the applicant averred that he is also heir to the deceased estate of the late Chief and Chieftainess.

It is thus factually wrong to criticise the applicant as having contented himself with what he said in his founding affidavit without saying more in reply; despite a direct challenge by the 1st respondent in her answering affidavit. Indeed at page 32 of the replying affidavit in paragraph 4.2 **ad para 5** the applicant avers that "over and above the fact that the family made the decision that it did in my presence, I am the heir by operation of law and I did assume all the duties of an heir including taking care of 'Maseoli until her death".

The 1st respondent took issue with the applicant regarding the fact that the

applicant has not informed the Court whether he buried the deceased regard being had to the fact that the right to inheritance goes hand in hand with the responsibility to take care of and bury the deceased. The learned counsel for the 1st respondent submitted that this is a material fact on which inheritance under customary law may be based. Court was referred to Mokhethi vs Mokhethi 1974-75 LLR 404 at 413.

THE LAW AND ITS APPLICATION IN RELATION TO TEMPORARY INTERDICTS.

I have already indicated in passing that the approach adopted by law in respect of temporary interdicts differs from that adopted in respect of permanent and final interdicts.

In the instant matter the applicant has come seeking a temporary interdict pending an action for cancellation of the alleged **Will.**

The order sought is for maintenance of the **status quo pendente lite**.

I find the argument persuasive and founded on sound legal ground that

cancellation of a **Will** in the circumstances can only be properly done by way of trial action. The applicant's fear seems to be well founded that by the time the action is concluded the funds constituting the subject matter of this application will have been exhausted and thus the effort to restore the **status quo** will have been thwarted.

I am inclined to view with favour the submission that the Court is not presently being asked to delve into issues pertaining to the validity or otherwise of the **Will.**

The issue for determination sticks out commendably as being simply whether the applicant has made a case for a temporary interdict.

It is thus prudent to take heed lest the simple object for determination be confused with other issues which should properly be dealt with in the action for cancellation of the **Will** as they can only be relevant then.

Thus I accept the invitation to decide whether in the circumstances presented by the facts of this application the applicant was or was not entitled to the protection afforded by the law in the form of temporary interdict **pendente lite.**

The pre-requisites for granting a temporary or interim interdict are neatly set out in **Setlogelo vs Setlogelo** 1914 AD 221. In the case of an interlocutory interdict such as the instant one the requirements are summarised as follows:-

1. A prima facie right, [as opposed to a clear right relating to permanent interdicts]

(ii) A well grounded apprehension of irreparable harm.

(iii) A balance of convenience in favour of granting the interim relief.

(iv) Absence of any other satisfactory remedy.

While it is stimulating to observe that **Setlogelo** above has gained support in a multitude of cases dealing with temporary interdicts it is rewarding to observe in **Attorney General & Anor vs Swissbourgh Diamond Mines (pty)** Ltd & Ors 1995-96 LLR & LB page 173 at 182 that our Court of Appeal has re-stated the requirements set out above and highlighted the importance of these requirements and

of the approach advocated in cases where a Court is called upon to issue interdicts **pedente lite. Prest** is cited with approval where he neatly puts it as follows : (at page 255 of his works styled *The Requirements for the Grant of Interlocutory Interdicts in South African Law - A Dissertation for a Degree of Doctor of Laws at the University of Stellenbosch*)-

"The interim interdict is an essential part of the South African legal system. The problem lies, not in its existence, but in its application. If the aims and objects of the remedy can be achieved by simple and ready application, then it retains the vitality of its intended role. If its application becomes cumbersome and laborious, or its aims and objects can be defeated by manoeuver, ruse or stratagem, it loses its effectiveness and becomes pedestrian and pedantic. It cannot be overemphasised that its strength lies in its flexibility and ability to produce a speedy answer to a pressing problem".

In **Superior Court Practice** by Erasmus et al @ E8-1 to E8-2 there is reference to **American Cyanamid Co vs Ethicon** Co [1975] 1 ALL ER 504 (HL) and the learned authors observe and give the following caution i.e. "The new rule of practice laid down by the House of Lords has been held not to be *in accordance with our law*

in South Africa and should not be followed. The practice of our courts has been rather ambivalent : in cases such as **Eriksen Motors (Welkom) Ltd vs Protea Motors, Warrenton** the 'sliding-scale' test as propounded in **Olympic Passenger Service (Pty) Ltd vs Ramlagan** is applied: the stronger the prospects of success (i.e. the strength of the applicant's case), the less need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance to favour him".

I accept Mr. Phafane's submission that in a case of interlocutory interdict such as the one under consideration the **threshold test** has with development of our law shifted from **prima facie right** that it used to be. **The balance of convenience** has since been elevated to being **the core test**. See **Erasmus et al** above. See also **Swissbourgh** above at 183.

A critical look at the requirements to be satisfied before an application for a temporary interdict can be granted presents one with amazing though educative revelations. For instance with regard to **prima facie** right that should first be satisfied before the relief can be granted, it is further stated that the Court will be enjoined to grant the relief sought *even if such a right is open to some doubt.* See **Ferreira vs**

Levin NO & ORS & **VRYENHOEK and Ors** vs POWELL NO & ORS 1995 (2) SA 813 at 825 - A where it is stated as follows:

"The test enunciated in **American Cyanamid Company vs Ethicon** Ltd [1975] 1 ALL ER 504 (HL) should be recognised as of equal validity with the '*prima facie* case ..... open to some doubt' test when deciding whether interim relief should be granted in constitutional cases.

On this ground alone and in view of the fact that the applicant is admittedly the heir and successor of the late Mapheelle and therefore a beneficiary under the scheme run by the LHDA the submission seems well grounded that this requirement has both been established and met. Established and met in the sense that the 1st respondent says of the applicant "you have only succeeded to Chieftainship of the late Mapheelle but not to his property". In view of the principle espoused by the authorities just considered above this may create some scruples in the sense that the applicant's right may be said to be open to some doubt, but the truth of the matter based on principle stated would make his case pass muster in my humble view.

With regard to the requirement relating to injury I have been referred to

Minister of Law & Order Bophuthatswana & another vs Committee of the Church Summit of Bophuthatswana & Ors 1994 (3) 89 at 98 H - I where it is stated "The phraseology 'injury' means a breach or infraction if the right which has been shown or demonstrated and the prejudice that has resulted therefrom..... It has also been held that prejudice is not equivalent to damages. It will suffice to establish potential prejudice". On this score it cannot be dismissed out of hand as baseless fear the applicant's apprehension that by the time the trial is concluded there would be nothing left in the "kitty". Indeed the applicant has already suffered prejudice and without curial intervention he would continue suffering more and more of that. I accept the submission that prejudice in the context of the instant case should be understood not in the narrow but broad sense of fear of potential prejudice. It does not allay my own fear for the prejudice the applicant has expressed by reference to the fact that the 1st respondent is a person of straw, when instead of stating what the values of her property amount to she contents herself with merely saying she in not a person of straw as she has property. If she has, it would be worthwhile if she named it. But she hasn't. On this ground alone again it seems a case has been made for granting the relief sought.

In **Erasums vs Afrikander Proprietary** Mines Ltd 1976 (1) SA 950 at 965 -

D where it was felt by the court that the remedy insisted upon by the applicant was wrong that court felt that

"The appropriate remedy in such a case, would be an application for an interdict **pendente lite** , to safeguard any interest the applicant may have in coal actually mined....." instead of an interdict restraining the respondent from commencing and carrying on mining operations.....

See also **Nestor & ors vs Minister of Police & ors** 1984 (4) SA 230 at 244 H - I where it is emphasised that there has to be reasonable apprehension by the applicant and that the basis for such apprehension must be objectively established.

With regard to irreparable harm or injury I was referred to **Ebrahim & Anor vs Georgoulas** & another 1992 (2) SA 151 at 153 H - 155 C. This is authority for the proposition that the applicant is not required to establish that the injury feared is absolutely irreparable. He ought to succeed if he has only shown that it will be more difficult and costly to restore the **status quo** at a later stage i.e. after the trial.

Thus it would not do for the respondent to adopt the attitude that indeed the

applicant has suffered injury but the respondent is prepared to compensate him in damages anyway. Account is to be taken of the costliness of litigation. Thus it would be very unwise of the applicant to sit down and fold his arms, with the hope that after the **Will** has been cancelled he would then institute proceedings for recovery of money in the possession of the respondent if lucky in the sense that such money would still be available. One has to reckon with the real possibility that at that time such money might have been spent elsewhere such that it might no longer be available in whole or in substantial part.

With regard to availability or otherwise of adequate remedy the authorities seem to point in one direction in support of the view that damages will not be considered to be an adequate remedy where there is a continuing wrong and/or where the applicant is unlikely to recover those damages by reason of the fact that the respondent is a man of straw and/or where the value of an award of damages will be rendered inadequate by reason of inflation dealing a detrimental blow on the value of currency through long passage of time.

The learned counsel for the applicant adequately illustrated that here the wrong suffered is continuous in the sense that the 1st respondent continues receiving monies

which otherwise should properly be received by the applicant if his case stands that the **Will** be cancelled as a fake notwithstanding any doubts attendant on the **prima facie right** upon which his search for relief is based.

See **LUBBE vs DIE ADMINISTRATEUR ORANJE** -VRYSTAAT 1968 (1) SA III at 115 D - E where the court refused an application for a permanent interdict because the applicant had not shown on a balance of probabilities that the only other remedy, namely an action for damages, would not suffice to protect his rights.

See also **Harchris Heat Treatment Ltd vs Iscor** 1983 (1) SA 548 at 555 D-G where **O'Donovan** J aptly said : " The remedy under the **lex Aquilia** in cases of unlawful interference with the business of another is not confined to competitors in trade. Loss will, at least *prima facie*, be occasioned by the unlawful deprivation of the owner of a trade secret of the right to exploit it, whether by attracting custom, or in other ways.

Alternatively, it is argued on behalf of the defendant that an interdict should not be granted if a remedy in damages is available to the plaintiff. *In my view,*

however, the plaintiff has established that it is entitled to the interdict which it seeks. The defendant has misappropriated intellectual property belonging to the plaintiff, and is continuing to use it when it is not entitled to do so. This is a situation justifying the grant of an interdict.....

An order is accordingly granted:

(a) interdicting the defendant from using or otherwise dealing with the furnace

described by it as the ZD furnace;

(b) .....

(c) .....

(d) ....." (Emphasis supplied by me).

See also **Boiler Efficiency Services CC vs COALCOR** (CAPE) (PTY) Ltd & Ors 1989 (3) SA 460 at 475 G where Howie J succinctly rammed the point home

by saying:

"The value of damages award in several years' time is of questionable adequacy in these inflationary times when in law one cannot obtain pre-judgment interest on the damages. When one considers, in conclusion, that refusal of an interdict will amount to a licence to appellant to carry on infringing respondents' right unrestrictedly, and one has regard to appellant's evasive response regarding its financial capability, there can be no doubting that the grant of an interdict was the right and proper course".

In like manner in the instant matter the applicant says the 1st respondent is a person of straw. The 1st respondent reacts thereto by denying that; without more. So hers is a bare denial. At paragraph 14 of the founding affidavit (page 8) the applicant avers "I intend instituting an action for cancellation of the purported will aforesaid. But I have grave apprehension that by the time that action is heard to finality, the 1st respondent will have exhausted the funds held by the 2nd respondent under the re-settlement scheme aforesaid. Should she do so, as it seems evident that she will, I will suffer an irreparable harm - inasmuch as the 1st respondent is a person of straw who cannot restore **status quo ante"**

In response thereto the 1st respondent at page 19 paragraph 10 without taking the Court into her confidence and giving it information as to the type and value of property she claims she has merely contents herself by boldly averring that :

"The applicant was solely making this application to prejudice me in that until now he has not instituted the alleged action which I verily believe he does not have any prospects of succeeding in it (sic). *I deny that I am a person of straw as I have enough property within the Jurisdiction of this Honourable Court*" (Emphasis supplied by me).

Furthermore in averring that the application is merely embarked on to prejudice her as no purported action has been instituted by the applicant her train has clearly left the metals and she shows that she has misconstrued the operative prayer that the action be instituted within **30 days.**

She further misconstrues the nature of the proceeding going on here by saying the applicant has no prospects of success for surely prospects of success is no requirement for determination whether or not the relief sought should be granted. The list of requirements has adequately been shown and dealt with *seriatim* above

with the exception of one remaining to be treated immediately in the next paragraph below. Nowhere has there been included in that list " the prospects of success" test.

With regard to balance of convenience i.e. the "core-test" the question to determine is twofold in nature i.e. does balance of convenience favour the granting or refusal to grant the remedy.

In going about this determination the Court weighs up the likely prejudice to the applicant if the temporary interdict is refused and the refusal is later shown to have been wrong on the one hand.

Consideration above for this likely prejudice to the applicant is weighed up against the likely prejudice to be suffered by the respondent if the temporary interdict is granted and the granting thereof is later shown to have been wrong on the other hand.

Mr. Molapo sought to wriggle out of this real problem by adopting a simplistic view that in criminal trials if a man is wrongly convicted then the presiding officer can scarcely be blamed for exercising a judicial function.

In the instant matter the law offers a reasonable approach to adopt between the two sets of possibilities resulting in prejudice to one of the parties when one or the other of these possibilities is adopted. The test is: *of the two evils which is the lesser and therefore which should be opted for while the other is opted out.* I am afraid in the criminal case example cited by Mr. Molapo this convenient way of dealing with the problem does not readily or at all offer itself commendable as otherwise appears to be the case in civil matters.

See **Matiso vs Commanding Officer Port Elizabeth Prison & another** 1994 (3) SA 899 at 902 J-903 B where Melunsky J in giving effect to the illustration of the above sets of possibilities had this to say :

"I turn to consider whether I should order the release of the applicant pending the Constitutional Court's decision. The balance of convenience in this regard is clearly in her favour for if she is not released now it will be cold comfort to her if the Constitutional Court eventually decides the matter in her favour. On the other hand, the 2nd respondent will not be unduly prejudiced if the Constitutional Court eventually decides the case against the applicant for in that event she will in all probability have to serve the remainder of the sentence imposed upon her by the

Magistrate. Therefore, I propose to order the immediate release of the applicant."

Applying the above approach as means of/ solution to the instant matter the question to ask is what prejudice does the applicant suffer if he is refused the interdict and he later sues successfully for the cancellation of the will but finds that because the money was released from the custody of the second respondent to the first respondent who has squandered it all. Surely the success in the cancellation of the will without accompanying proceeds which should have accrued to him amount to more than cold comfort to the applicant. It is simply frigid!!

On the other hand if the interdict is granted resulting in money being in the hands of the 2nd respondent meanwhile, and later it appears granting the interdict was a wrong move to adopt what prejudice does the 1st respondent suffer if the cancellation of the **Will** is refused. Clearly none. All she would do would be to march to the offices of the 2nd respondent and collect her money intact.

Mr. Molapo submits that inflation shall have reduced what was due to her Maybe so maybe not. Either way greater evil is avoided if the money is kept in neutral hands pending finalisation of the trial action relating to cancellation of the

Will. In any event such a loss as may likely be suffered by the 1st respondent in the most extreme set of circumstances cannot nearly match the extent of prejudice likely to be suffered by the applicant were it to be discovered at the end of the day that he is in possession of an empty judgement which made his victory amount to no more than an undesirable pyrrhic victory.

I am enamoured of the dictum by Holmes AJ in **Erikson Motors Ltd vs Protea Motors & Another AD 1973 (3)** SA 685 at 691 where in his characteristically terse lucidity that distinguished Learned Judge after giving consideration to the requisites set out in **Setlogelo** above said at (F):

"The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicants' prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole and the interrelation of the foregoing considerations, according to the facts and probabilities: **see Olympic Passenger Service (Pty) Ltd. vs Ramlagan**, 1957 (2) SA 382 D at page 383 D - G. Viewed in that light, the reference to a right which, 'though **prima facie** established, is open to some doubt'

is apt, flexible and practical, and needs no further elaboration.".

I have no doubt that on the balance of probabilities the balance of convenience favours the granting of this application.

COURT'S DISCRETION

Relying on **Knor D'Arcy Ltd & others vs Jameson & others** 1995 (2) SA 579 at 639 G - 1 Mr. Phafane submits that in the final analysis the question whether or not to grant a temporary interdict is in the discretion of the Court. He urges that in exercising its discretion the court should have regard to factors such as equity and fairness **inter partes.** I agree with this submission.

Holmes J A above at letter E says "In exercising its discretion the Court weighs, *inter alia,* the prejudice to applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted." This more than suffices to persuade me to the view that the balance of convenience favours the granting of the temporary interdict.

To sum up then it seems in the 1st respondent's affidavit and in turn in her counsel's submissions a misconception is discernible that a **prima facie** right is a right that is indisputable and unassailable. That is not the test. The body of authority cited should suffice to disabuse both counsel and his client of this much mistaken view. In fact the applicant's right may very well be disputed and proved to be invalid at the end of the day. Hence the statement given in unison by authorities that in respect of a temporary interdict notwithstanding all the controversy, it may well be granted. This is in part precisely the reason for the distinction between a *clear right* in permanent interdicts and a **prima facie** right in regard to temporary interdicts.

The application succeeds and is granted in terms of prayers 1(a) (b) and (c). Costs naturally should follow the cause. And it is so ordered.

M.L. LEHOHLA

JUDGE

10th DECEMBER. 2001

For Applicant : **Mr. Phafane**

For 1st Respondent : Mr. Molapo

For 2nd Respondent : No appearance