CIV/APN/442/00

IN THE HIGH COURT OF LESOTHO

In the matter between:-

NTHABISENG MAPHEPHA	APPLICANT

and

BOIKI TSIETSI	1ST RESPONDENT
LIKOLOBE TSIETSI	2ND RESPONDENT
'MAGANDA TSIETSI	3RD RESPONDENT
'MAMOEKETSI	4TH RESPONDENT
SEEMANE TSIETSI	5TH RESPONDENT

JUDGEMENT

Delivered by the Honourable Mrs Acting Justice
A.M. Hlajoane on the 11th Day of February, 2002

This was an *ex parte* Application for an interdict framed as follows:-

That a *Rusi Nisi* be issued calling upon the Respondents to show cause (if any) on a date to be determined by the Court why:-

1. (a) The period of service as provided for by the Rules of Court should not be dispensed with on account of urgency of this matter.

(b) The Respondents should not be interdicted and or restrained from interfering with Applicant's rights over property listed at page 2 of Annexure "A" to Applicant's founding affidavit safe by due process of Law.

(c) The first Respondent should not be interdicted from holding himself out as heir to the estate of the late Patrick Tšepiso Maphepha.

(a) The Respondents should not be ordered to pay costs herein.

(b) Applicant should not be granted further and or alternative relief.

2. That prayer (1)(a) and (b) operate with immediate effect as an interim order of Court.

Rule nisi was granted as prayed.

It is common cause that the Applicant is the daughter of the late Patrick Tšepiso Maphepha who passed away during April/May, 1999. The first

Respondent is the younger brother to the Applicant whilst the rest of the Respondents are relatives to the Applicant. Maphepha and Tsietsi is the same family name. Applicant is a divorcee.

The following points of Law in *limine* were raised:

(a) Dispute of fact

(b) Lack of urgency

(c) Requirements for interdict.

Dispute of Fact

It is worth mentioning at this point that from the record it would seem that with the exception of 1st Respondent, the rest of the Respondents do not oppose the Application, indicating that they will abide by whatever decision the Court will make.

The first Respondent therefore raises a clear dispute of fact which he calls a foreseeable dispute, in that they as Respondents did not know about the will. There is nowhere in the papers showing that the will was ever made known or brought to the attention of the Respondents in terms of Section 34 of the

Administration of Estates Proclamation 19 of 1935.

Section 34 (1)

> "The Master shall cause to be published in the gazette and in such other manner as he thinks fit a notice calling upon the ..... heirs, Legatees and creditors of the deceased to attend before him ....."

Though the record show that Respondents were aware of the will, nowhere does the record show that the Master ever called the relevant people before him, being the Respondents. Instead counsel for the Applicant called the Respondents before him through the chief of Ha Matala, but they failed to attend. In terms of the above quoted Section of the Administration of Estates, Counsel had no such authority. What the Section means is that, where the will has mentioned no specific person as Executor, the Master, after consulting the heirs, the legatees and creditors of the deceased will appoint the Executor dative. The Master never called the first Respondent before appointing the Executor. In our case the Executor was first appointed and an attempt to call the Respondents was after. **Fairbairn's Handbook for Executors and Administrators 4th edition at pages 7 to 8.** When a dispute of fact arises in motions proceedings the Court assumes the correctness of Respondent's version **Supreme Furnishers vs Molapo 1995-96**

LB 377.

Lack of Urgency

Respondents say that the Applicant has made a blanket claim on certificate of urgency without showing any justification for having approached Court *ex parte*. Applicant on the other hand avers that in fact the matter was urgent as facts placed before Court clearly showed an infringement of a clear right.

In his affidavit, the Applicant has alleged that she is in possession of a will and the Testator to that will passed away during April/May 1999. She further alleges that the Respondents started tempering with her rights as early as October 1999, also in July, 2000 and October 2000, but only approached Court in November, 2000. The Applicant has not given any reasons for the delay.

In **S.A.R. & H vs ILLOVO Suger Estates 1954 (4)** S.A. 425 (n) the Court pointed out that the delay in bringing an Application to Court could be condoned considering the complexity of a particular case. But in our case where Applicant alleges a clear right by virtue of being in possession of a will, there is nothing complicated which needed much of any preparation for approaching the Court for a relief.

Requirements for Interdict

On the authority of **Moabi vs Moabi** and Others , 1980 (2) S. A. 407, the Respondents averred that the Applicant has failed to satisfy the requirements of interdict being:

(a) A clear right on his part

(b) An injury actually committed or a well founded apprehension that the injury will be committed by the Respondents

(c) Absence of alternative remedy.

As was said in Moabi's case [Supra] this is an Application for a permanent interdict, not a temporary interdict. A permanent interdict will seldom be granted on Application, as the proper procedure is going by way of an action, where a clear right must not only be alleged but must also be proved, **Beukes vs Crous 1975 (4) S.A. 215.** Absence of alternative remedy must be shown. **Setlogelo vs Setlogelo 1914 AD 221**. The Court is left to speculate as to when the bequeath was handed over to the Applicant after the death of the testator and the appointment of the executor. Applicant has only shown that the testator died during April/May 1999 but has not shown as to when the property, subject matter of the bequeath was ever handed over to her.

Alternatively, the Applicant could have approached Court for an interim interdict pending an action to be instituted as there was obviously a foreseeable dispute of fact.

The Applicant has rightly conceded that as recognized by our Courts, Rules governing Application Proceedings show that affidavits constitute not only evidence but also pleadings, so that the answering affidavit by the Respondents must have contained what would be set out in a plea. The Respondents have thus complied with these provisions of the law.

Because the Respondents have succeeded on all the points raised in *limine* I therefore find it not necessary to deal with other points that were raised as to the validity or otherwise of the will. The rule is accordingly discharged with costs

A.M. HLAJOANE
ACTING JUDGE

For Applicant: Mr Hlaoli
For Respondents: Mr Mahase