CIV/APN/42/2002
IN THE HIGH COURT OF LESOTHO

In the matter between

TS'EPO QEFATE NKUEBE	1st APPLICANT
'MALESHOBORO MONICA NKUEBE	2nd APPLICANT
And	
HLABATHE NKUEBE	1st RESPONDENT
THABO NKUEBE	2nd RESPONDENT
JOSHUA MAKHAOLA SEMPE NKUEBE	3rd RESPONDENT

RULING

Delivered by the Honourable Acting Mrs. Justice A.M.

Hlajoane on 27th August. 2002

The Application was moved ex-pane and Applicants prayed for a final order in the following terms.

a) Dispensing with the Rules pertaining to service and form on the grounds of urgency of the matter.

b) Respondents to be interdicted and/or restrained from interfering with Applicants' rights over a house currently used as an office of the Chief of Sebapala in the Quthing district.

c) Respondents to be interdicted from expelling or evicting 2nd Applicant from the premises mentioned in (b) above pending finalization hereof.

d) Respondents to pay costs in the event of opposing this Application.

e) Further and/or alternative relief.

In this Application the subject matter is a house. The first Applicant claims the house to be his whilst the third Respondent also claims the same house as his. Both these litigants claim each to have inherited the same house from their respective fathers.
In filing their opposing papers, the Respondents instructed their Attorney to take the following points in limine.

a) That since the Application, in terms of Section 18 (1) of Subordinate Courts Order NO.9 of 1988, falls within the

Jurisdiction of the Subordinate Court, it ought therefore to have been lodged with the Subordinate Court.

a) That there is no order under Section 6 of the High Court Act NO.5 of 1978 which has been made by any judge of the High Court in terms of Section 6 of the High Court Act.

c) That there is no urgency in this matter.

I will only confine myself to the points in limine that have been raised without going into the merits of the case as these points were raised in the opposing affidavits before the Replying stage. On the basis of such points raised the Respondents are praying that the Application should be dismissed with costs.

JURISDICTION:
Allow me to give an extract of the Section relied upon by the Respondents.

Section 18(1) of Subordinate Courts Order 9 of 1988.

> "Subject to the limits prescribed by this order, the court may grant against persons and things, orders for arrest tanguam suspectus de fuga, attachments, interdicts and mandamenten van spolie. "

The above section gives the Subordinate courts jurisdiction to deal with matters including amongst others interdicts. Indeed Subordinate courts have power to entertain and grant interdicts, but the moot question is whether they have a right to grant permanent or final order of interdict bearing in mind the fact that permanent interdicts in effect stand in Pari materia with orders for perpertual decrees of silence. In granting a final interdict therefore all the relevant circumstances are to be taken into account, and factors to be considered would amongst others be the hardship which an interdict if granted would inflict upon the Respondents and also hardship upon the Applicants the refusal of such interdict would inflict.

The court therefore under the circumstances expresses the same sentiments as were expressed by my brother Lehohla J in

the case of Ts'ehlo v Nts'asa CIV/APN/229/94, in that it would seem only natural on account of the exigency of the remedy being sought that Applicants did well to approach the only court where his plea if sustainable would fetch a permanent relief.

ORDER UNDER SECTION 6 OF HIGH COURT ACT 1978.

It has been the Respondents case that Applicants have not sought for an order under Section 6 of the High Court Act 5 of 1978.

Section 6 of High Court Act 1978 reads as follows:-

> "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 on 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. "

Even on this point I still express the same sentiments as in the previous one, that considering the nature of the relief sought

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it was only fair and reasonable to have approached the High Court for permanent relief. In fact, this point cry out the same echoes as the first one.

ON URGENCY

Respondents are saying that the matter is not urgent regard being had to the fact that the dispute over the said house dates as far back as 1970. The fact that the dispute over the house is of a long standing nature is not denied by the Applicants as shown at 3.3.3 of their heads of arguments. On numerous decisions, the Court of Appeal has advised that orders should only be granted without notice to the other side where that is vigorously justified, Commander LDF v Matela 1999-2000 LLR & LB 13.

In our case therefore, could it be said that prior notice to the other side would have frustrated the order that the court would give, no. Being a dispute over a house both sides had first to be

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heard before granting an order of whatever nature. On those many ocassions, the court has shown concern in that, as a general rule basic considerations of fairness and the need to prevent the administration of justice being brought into disrepute require appropriate notice to be given. Counsel who disregards these requirements may well lend to a dismissal of his application and appropriate order as to costs. I have no doubt that this is one such a case as this matter involves the question of rights over the premises.

NON DISCLOSURE

It is trite law that a litigant who seeks ex parte relief must in drawing his papers, disclose all material facts, that is, not only facts that he considers relevant, but all other facts which may possibly influence the court in coming to a decision. This is the uberrima fides rule. Nts'olo v Moahloli 1985-89 LAC 307. He must make full and accurate disclosure of relevant facts.

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The third Respondent is saying that in fact the house subject matter of this case was in fact built for his father Makhaola who used it till his death and refused 1st Applicant use of it during his lifetime. The dispute started a long time ago during the lifetime of their father. It only came out from the Respondents that 3rd Respondents' father in fact is also the son of Sempe Nkuebe, so that 3rd Respondent and 1st Applicant are the grandchildren of the same father, Chief Sempe Nkuebe. They are half brothers. It was therefore necessary for the

Applicants, especially the First Applicant , to have briefly given the family tree of the Nkuebe family so that the court could be in a position to know as to how the parties relate to each other. This is a very material fact.

It is indeed trite law that, in the event of the court being appraised of the true facts which had been withheld from it by the Applicant, the court has a discretion to dismiss the Application on account of non-disclosure. I consider therefore that this point in limine has well been taken.

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DISPUTE OF FACT

Respondents here content that the Applicants ought to have been aware that since there has always been a dispute over this house, that they were taking the risk in approaching the court by way of an Application. Applicants on the papers have not denied, in fact are admitting that there has always been such a dispute.
It is our law that where the court considers that in launching

his Application, the Applicant ought to have realised that a serious dispute of fact was bound to develop, the court may dismiss the application with costs. It was stated in the case of Van den berg v Rand Water Board 194S AD 691 that, a final interdict may be claimed by way of Application provided that (my own emphasis) the Applicant does not forsee a material dispute of fact in which event trial procedure should be used. Applicants for instance conceded that other issues were a matter of evidence yet they choose to go by way of Application. Applicant says it is a matter

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of evidence that Makhaola refused him the use of the house. Since it has not been denied that ownership of the house subject matter of this dispute is a long standing matter, I consider also that this point in limine has well been taken.

Consequently therefore, the court considers that it had jurisdiction to deal with this matter but that the matter was not urgent. Also that there has been material non-disclosure of relevant facts and to the extent that there is a dispute of fact which in fact was foreseeable. On the question of ownership to the house and also to the extend that Applicants are seeking for a final relief in motion proceedings, it follows therefore that on the authority of Plascon Evants Paints v Van Riebeck Paints 1984 (3) SA 623 the Respondent's version must be accepted.

On the authority of Adbro Investment Co. Ltd v Minister of the Interior 1956 (3) S.A.345, Applicants should have known that it would be impossible for a court on motion proceedings to

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grant a declaration of rights, and for that also the Application ought to be dismissed, and it is so dismissed.

A.M. HLAJOANE
ACTING JUDGE

For Applicants' - Mr. Molapo
For Respondents' - Mr. Khauoe