

IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU

C OF A (CIV) 30/2020
CIV/APN/502/1999

In the matter between:

‘MAPHUNYE ‘MAMONYANE BOHLOKO
THE ESTATE LATE MATISETSO MONARE
MONARE FAMILY TRUST

1st APPELLANT
2nd APPELLANT
3rd APPELLANT

AND

SEGOATI MONARE
ELIAS NONE MONARE TRUST
(TD2019/0050)
THE REGISTRAR OF DEEDS
LAND ADMINISTRATION AUTHORITY
THE EXECUTRIX- M.G THABANE
MASTER OF THE HIGH COURT
ATTORNEY- GENERAL

1ST RESPONDENT

2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT

CORAM: P.T DAMASEB AJA
 DR P. MUSONDA AJA
 N.T MTSHIYA AJA

HEARD : 13 APRIL 2021

DELIVERED: 14 MAY 2021

SUMMARY

Civil procedure- *Application for contempt failure to prove requisite elements, particularly proof beyond reasonable doubt where committal is prayed for, fatal to the application. Appeal dismissed.*

JUDGEMENT

MTSHIYA AJA

INTRODUCTION

[1] This is an appeal against the Judgment of the High Court, wherein on 18 August 2020, it dismissed the appellants application with costs. In the dismissed case, the appellants had sought the following relief:

1. That the Rules on modes and periods of service be dispensed with on the grounds of urgency.
2. That a Rule Nisi be issued calling upon the Respondents to show cause if any, on a date to be determined, why the following Order shall not be made absolute.
 - a. That the 1st Respondent, SEGOATI MONARE, be ordered to appear before this Honourable Court on any day to be determined by this Honourable Court to show cause why he shall not be held in contempt of the Honourable Court's Order made against him on the 7th February 2000 under CIV/APN/502/1999 granted by HIS LORDSHIP W.C.M MAQUTU.

- b. That the 1st Respondent be Committed to prison for contempt of Court Order granted against him on the 7th February 2000 under CIV/APN/502/1999 by HIS LORDSHIP W.C.M MAQUTU
 - c. That the 1st Respondent purge the contempt of Court Order by being restrained and interdicted him from setting a foot, interfering, stalking and/or being in the vicinity of the deceased's properties outlined in the Court Order under CIV/APN/502/1999 granted by HIS LORDSHIP W.C.M MAQUTU on the 7th February 2000 with immediate effect.
 - d. Finding that the 1st Respondent must comply with an Order of Court by withdrawing his claim over the properties outlined in the Court Order under CIV/APN/502/1999, lodged in the Land Court under LC/APN/010/2020, with immediate effect and must offer costs thereof on Attorney and client scale in favour of the Respondents who opposed that matter.
 - e. Finding that a Resolution of the Monare Family made on the 4th May 2019 to be contemptuous, unlawful and *void ab initio*.
 - f. Finding that the 2nd Respondent, ELIAS NONE MONARE TRUST- (TD2019/0050), was found and registered as a result of intentional misrepresentation and therefore unlawful and invalid.
 - g. Ordering the 3rd Respondent to de-register the 2nd Respondent, ELIAS NONE MONARE TRUST- (TD2019/0050), within seven (7) days of granting of this prayer.
 - h. Ordering the 6th Respondent to recall and cancel Letters of Administration of the late None Elias Monare, appointing Segoati Monare, as Co-Executor of Estate No. E1196.
3. That prayer 1 operates as an absolute and prayers 2 (a) operate with immediate effect.

4. Costs of suit on Attorney and client in the event of opposition;
5. Granting further and/or alternative relief as the Court may deem fit in deterrence of disobeying the Court Orders in promotion of justice.

[2] On 15 September 2020, following the dismissal of the application for contempt by Makara J, the appellants then filed this appeal citing the following grounds:

1. The Court a quo erred and misdirected itself by finding that the 1st Respondent is not in contempt of the Court Order of W.C.M Maqutu granted on the 7th of February 2000 without calling him to show cause why he cannot be held in contempt of Court Order.
2. The Court a quo erred and misdirected itself by not granting ancillary prayers 2(c), 2 (d), 2 (e), 2 (f) and 2 (g) on the basis that the 1st Respondent was not personally served with the Court Order because it was served upon his mother.
3. The Court a quo erred and misdirected itself by not finding that the alleged family resolution made or dated on the 14th of May 2019, the None Elias Family Trust and Letters of Administration issued in favor of the 1st Respondent's co-executor with the 2nd and 3rd respondents are invalid *ab initio* and should be cancelled.
4. The Court a quo erred by not finding that the 1st respondent continued to defy the Court Order granted by W.C.M Maqutu on the 7th of February 2000 by praying for ejectment on the 3rd Appellant's estate's tenant, Engen Lesotho (Pty) Ltd, through an Application lodged in the Magistrate's Court on the 10th of July 2020 after the said Court Order was made known to him on the 1st July 2020 through the contempt proceedings in the court a quo.
5. The court a quo erred and misdirected itself in not finding that the 1st Respondent ought to have challenged the court order granted by W.C.M Maqutu on the 7th of February 2000 before he continues to seek ejectment of Estate's tenant and therefore interfering with the Estate's property in conflict with the said Court Order.
6. The court a quo erred and misdirected itself by disregarding circumstantial evidence informing that the order was known to the

1st respondent because he immediately complied with it since the year 2000 until after the death of the Appellant in the main application, 'Matiisetso V. Monare, who passed away in February 2019.

7. The court a quo erred by dismissing the Appellant's Application for Contempt and all ancillary prayers and awarding costs in favor of the 1st Respondent who failed to comply with the Order of Court and also continued to defy it.

8. The Appellants reserve the right to raise further grounds of appeal upon availability of written reasons.

BACKGROUND

[3] This appeal is based on inheritance disputes between the children of the late Elias Khosi None Monare. The children were born of different mothers and have since 1995, when the said Elias Khosi None Monare died, been fighting over his estate. The estate is registered with the Master of the High Court for administration. The final distribution of the estate is still pending.

[4] After the death of Elias Khosi None Monare, the late 'Matiisetso Monare, whose estate is cited herein as 2nd appellant, was appointed as the executrix of her late husbands' estate. That was from 1996 until 2017 when Mrs Thabane, the 5th respondent herein, was then appointed executrix. Upon the death of her mother, the said 'Matiisero Monare, the 1st appellant, 'Maphunye 'Mamonyane Bohloko (nee- Monare), was appointed executrix of her late mother's estate.

[5] Following a dispute over the properties, the 1st appellant and her late mother obtained a High Court order. The High Court order, issued by Justice W.C.M Maqutu on 7 February 2000

interdicted the 1st respondent and others from interfering with the properties of the late Elias Khosi None Monare. That is the order that the appellants claim was disobeyed by the 1st and 2nd respondents and hence the application for contempt of court that was then filed against them.

[6] The order alleged to have been disobeyed reads as follows:

[7] It is ordered that:

A. **RULE NISI** is hereby confirmed in the following terms:

1. Rules of Court concerning forms and service of process are dispensed with.
2. 1st, 2nd and 3rd respondents, jointly and severally, are hereby restrained and interdicted from setting foot on the properties presently administered by Applicant for any purpose whatsoever, and in particular not to represent themselves as entitled to enter into tenancy agreements and to collect rent from present and future tenants or sublessees of the said properties, to wit:
 - i. Site No. 13281-636 situate at Motimposo in the Maseru urban area;
 - ii. Site No. 13282- 733 situate at Motimposo in the Maseru urban area presently occupied by ENGEN LESOTHO (PTY) LIMITED, (PROPERTY) as sublessees thereof;
 - iii. Site No.96 Cathedral Area, ,Maseru urban district presently occupied by Applicant and her offspring;
 - iv. Site No. 97 Cathedral Area, ,Maseru urban district;
 - v. Site No. 788 situate at Mafeteng Township next to L.D.A.
 - vi. SITE No. 997 situate at Hospital Area, Mafeteng Township;

- vii. Site No. 66 situate at Thoteng, Mohale's Hoek;
- viii. Site No. 538 situate at Thoteng, Mohale's Hoek Reserve under Title Deed No. 9243;
- ix. Site No. 129 situate at Teyateyaneng Reserve;
- x. Unregistered site at Teyateyaneng next to the former Agricultural Bank property, sometimes referred to as Moletsane's site;
- xi. Unregistered site at Mphaki in the Quthing district;

3. Respondents are to pay the costs of suit.

[8] It is the above order that led to the application for contempt of court filed in the high court by the appellant on 1 June 2020.

The appellants' case.

[9] The 1st appellant avers that her late mother was the executrix in her late father's estate and that upon being appointed executrix of her late mother's estate, she automatically became the executrix of her late father's estate.

[10] The 1st appellant also avers that a family meeting was held to decide on the distribution of her late parent's estates and the nomination of the 1st respondent as heir and successor to the above estates. The 1st appellant further alleges the said meeting was illegal because it ignored the fact that the estate of the late Elias Khosi None Monare was under a lawfully appointed executrix. To that end, the estate was under the control of the Master of the High Court through an executrix.

[11] The 1st appellant and her late mother had earlier obtained a court order that the 1st and 2nd respondents are alleged to have disobeyed. The respondents demonstrated their disregard of the order of Justice Maqutu of 7 February 2000 through various actions which amounted to interference with the properties of the late Elias Khosi None Monare. The order actually interdicted the 1st and 2nd respondents from interfering with the property of the late Elias Khosi None Monare. This therefore, led to the application for contempt against the 1st and 2nd respondents.

[12] The 1st appellant submits that although the court order by Justice Maqutu was served on the 1st respondent through his mother, he, however, eventually got to know of the existence of the order. The grounds of appeal are largely anchored on that submission.

The respondents' case

[13] The respondents argued that the order of Justice Maqutu was never personally served on the 1st respondent and that being the case the respondents were never aware of the existence of the court order. [14] The respondents said if they had knowledge of the court order, they would not have acted in the manner they did. They therefore argued that they were not in contempt of the court order which they were never aware of.

[15] The grounds of appeal reproduced herein at page 4 of this judgement, are centered on the appellants' argument that the order was served on the 1st respondent. The 1st respondent rejects

the contention. To that end the 1st respondent, in part, made the following submissions:

(5) We submit that contempt of Court is understood as the commission of any act or statement that displays disrespect for the authority of the Court or its officers acting in an official capacity¹. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful Court orders². In this matter in question, the return of service demonstrates in clear terms that 1st Respondent was never served with the Court order because he was absent and that the return itself is a prima facie proof that 1st Respondent was not aware of the order. Further, 1st Respondent did not resist the lawful Court orders as alleged³. It can further not be said that, 1st Respondent was in contempt of the said Court order in following process of the law over his late father's estate.

(6) It is 1st Respondent case that he was ignorant of an order and above all he was not even aware of the application itself, hence the order was granted by default and the return of service shows that he was never served with the order as he was absent. Therefore, cannot be in contempt of the order of W.C.M Maqutu. He only became aware of the order when the ensuing application was filed in *court a quo*.

Issues for determination

[16] I shall adopt the issues as spelt out by the 1st appellant. These are:

- a. Whether or not 1st respondent is in contempt of this Honourable Court's order.
- b. Whether *court a quo* erred and misdirected itself for not entertaining and granting orders in the ancillary prayers and amplified in the grounds of appeal.
- c. Whether the 1st respondent should pay costs on Attorney-client scale.

The law

[17] At page 1109 of **The Civil Practice of the High Courts of South Africa**, Volume 2, authors Herbstein and Van Winsen state as follows:

An applicant for an order of committal must show-

- a. that an order was granted against the respondent
- b. that the respondent was either served with the order or informed of the grant of the order and could have no reasonable ground for disbelieving that information: and
- c. that the respondent has either disobeyed the order or neglected to comply with it.⁹⁸

[18] The authors go on at page 1110 to state:

In general, all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside.⁹⁹ Accordingly, once it is shown that an order was granted and that the respondent has disobeyed it or neglected to comply with it, wilfulness will normally be inferred and the respondent will bear the evidential burden to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide¹⁰⁰ The court will commit a person for contempt of court only when the disobedience of the order is due to wilfulness.

[19] The above are, in the main, the guiding principles of law to be taken into account when dealing with an application for contempt of court. A deviation from the above principles will lead to breaches of the law.

[20] It is common cause that *in casu*, the appellant also prayed for the relief of committal. Consequently it becomes very important for this court to take that fact into account when

analysing the legal requirements for contempt of court.

Analysis: Whether or not 1st respondent is in contempt of this Honourable Court's order.

[21] I approach this matter with the understanding that if the court below had found for the appellant, there would have been no need for repeating the prayers that were granted in the judgment that the respondents are alleged to have disobeyed. The respondents would in that case have been ordered to purge their contempt by doing that which they ought to have done under the order in question. Furthermore, in the event of the application being dismissed, my view is that the order of 7 February 2000 remains extant and enforceable. It would therefore, be up to the appellant to enforce the order, more so now that the respondents have been made aware of its existence.

[22] We are, *in casu*, directing our attention to the allegation that the respondents wilfully disobeyed a court order issued by the High Court on 7 February 2000 (civil contempt).

[23] **In Kelebone Ratsiu and Principal Secretary- Ministry of Forestry and Another, C of A (CIV) NO. 9/2017**, where the issue of contempt of court arose, this court reasoned as follows:

(12) In the circumstances, bearing in mind that the application in the court a quo was a contempt application, it is difficult to see how it could be said that the appellant discharged the onus placed on his shoulders, of showing that indeed the 1st respondent was guilty of contempt beyond a reasonable doubt.

[13] The contemporary approach to applications for contempt of court was stated in the oft-quoted decision of **Fakie No v CCII**

Systems (PTY) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para. 42 wherein Cameron JA said:

1. The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
2. The respondent in such proceedings is not an accused person', but is entitled to analogous protections as are appropriate to motion proceedings
3. In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and willfulness and mala fides) beyond reasonable doubt.
4. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to willfulness and mala fides; should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and mala fide, contempt will have been established beyond reasonable doubt.

[24] As spelt out in the quoted passages from **The Civil Practice of the High Courts of South Africa**, the above case authorities place the onus on the appellant to prove that the 1st respondent's contempt of the said order was wilful and mala fide. The appellant has the evidentiary burden to prove that 1st respondent, with full knowledge of the order prohibiting him to interfere with the properties of the late Monare, acted contrary to the order. *In casu*, appellants simply alleged that the 1st respondent had knowledge of the order served through his mother. However, if one's freedom is at stake, this court cannot therefore accept unproven allegations. The appellants admit that there was no personal service on the 1st respondent. Personal service would have ensured that the 1st respondent was presented for examination

before the court in terms of law. That, regrettably, never happened.

[25] Application to this case of the principles referred to in both paragraphs 12 and 14 above prevent me from forming the opinion that the appellant indeed managed to prove contempt beyond a reasonable doubt as would be required in the circumstances of this case. The 1st respondent's evidence that he had no knowledge of the said order and therefore acted in the manner he did in ignorance of the existence of the order was never rebutted. In fact the appellants admitted that no personal service of the order in question was ever effected on the 1st respondent. It was therefore submitted that any actions contrary to the order of court were not wilful and deliberate.

[26] Notwithstanding admission that there was never any personal service of the order on the 1st respondent, the appellants continued to argue that the court order dated 07 Feb 2000 was brought to the 1st respondent's attention. This, however, was as late as 01 June 2020.

[27] Committal has much to do with the limitations of one's freedom and thus it would be reckless of any court to grant a civil imprisonment order based on mere allegations. We have already seen that in the notice of motion, under paragraph 2(b), the appellant indeed makes the following prayer:

b. That the 1st Respondent be Committed to prison for contempt of Court Order granted against him on the 7th February 2000 under CIV/APN/502/1999 by HIS LORDSHIP W.C.M MAQUTU.

[28] Given the above and the full circumstances surrounding this case, my view is that proof of service ought to have been beyond reasonable doubt. The mere assumption that because service was effected on his mother, cannot be conclusive enough in order to satisfy the requirements of law.

[29] It is therefore my finding that the *court a quo* correctly held that the 1st respondent had no knowledge of the court order. Accordingly, the allegation of contempt of court could not be sustained.

[30] As I have already indicated herein under paragraph 13, I do not see any value in repeating the prayers already granted in the order of 7 February 2000 which is still in force.

COSTS

[31] The respondents have asked for punitive costs. I disagree. This is a long standing family dispute, where if possible the parties should be encouraged to find each other. This cannot be achieved through the award of punitive costs. To that end, I think it is only fair that each party bears its own costs.

[32] I therefore order as follows:

- a. The appeal is dismissed.
- b. Each party shall bear its own costs of this appeal.



**N.T MTSHIYA,
ACTING JUSTICE APPEAL**

I agree



**P.T DAMASEB,
ACTING JUSTICE OF APPEAL**

I agree



**DR P. MUSONDA
ACTING JUSTICE OF APPEAL**

FOR APPELLANTS: MS. M. LEPHATSA

FOR RESPONDENTS: ADV B. SEKATLE

