



**LESOTHO**

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO 26/2023**

**LC/A/04/2020**

In the matter between:

**MORAPELI BOROTHO  
APPELLANT**

AND

**LEBOHANG SETHATHI**

**1<sup>ST</sup>**

**RESPONDENT**

**'MAMPOI MAJARA**

**2<sup>ND</sup> RESPONDENT**

**KANANA COMMUNITY COUNCIL**

**3<sup>RD</sup> RESPONDENT**

**LAND ADMINISTRATION AUTHORITY**

**4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL**

**5<sup>TH</sup> RESPONDENT**

**CORAM:**

SAKOANE, CJ

CHINHENGO, AJA

VAN DER WESTHUIZEN AJA

**HEARD:**

16 APRIL 2024

**DELIVERED:**

3 MAY 2024

## **SUMMARY**

*Appellant sued by 1<sup>st</sup> respondent in District Land Court for cancellation of appellant's registered lease of land. Appellant lodging a counter claim in same court for eviction of 1<sup>st</sup> respondent; District Court finding against appellant in both the main application and counter-application;*

*Appellant appealing to Land Court, succeeds in main application but fails in counter-application - Land Court granting order of absolution from the instance on the counter-application;*

*Appellant further appealing against order of absolution;*

*On appeal Land Court decision ordering absolution is set aside, and order granted for eviction of 1<sup>st</sup> respondent and payment costs in all three courts*

## **JUDGMENT**

**CHINHENGO AJA: -**

### **Introduction**

[1] This is a second appeal from a judgment of the Land Court after the appellant partially succeeded in an appeal from a decision of the District Land Court for the District of Berea.

[2] The appellant was sued by the 1<sup>st</sup> respondent in the District Land Court. As a result of that suit, the 1<sup>st</sup> respondent was granted an order cancelling the appellant's registered lease over a piece of land located at Marabeng, (Lease No.

15264/14), issued to him by the 4<sup>th</sup> respondent. The District Land Court's order in favour of the 1<sup>st</sup> respondent reads as follows:

*“(1) That the 4<sup>th</sup> respondent being the Land Administration Authority is hereby ordered to cancel and expunge 2<sup>nd</sup> respondent's name in its records with regard to lease no.15264 -014.*

*(2) The 4<sup>th</sup> respondent being the Land Administration Authority is hereby ordered to cancel the lease no. 15264-014 issued in favour of the 2<sup>nd</sup> respondent.*

*(3) The 4<sup>th</sup> respondent being the Land Administration Authority is hereby ordered to issue a lease in favour of the applicant after following due process of the law.*

*(4) No order as costs.*

*Further the Court orders thus:*

*(5) The applicant's counter-application in the Counter-application and 2<sup>nd</sup> respondent in the main application is hereby dismissed. No order as to costs”<sup>1</sup>*

[3] The further order was made because the appellant had, in the same suit, counterclaimed against the 1<sup>st</sup> respondent for an order that –

*“(a) The 1<sup>st</sup> respondent is ejected from Plot No. 15264-014.*

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<sup>1</sup>This order appears at p 117-118 of the record. It is signed by the magistrate and appears at the end of the judgment. There is another order apparently prepared by the clerk of court and signed by the magistrate but not materially different from the first order. It reads-

*“It is ordered that: -*

*(a) 4<sup>th</sup> respondent to cancel and or expunge 2<sup>nd</sup> respondent's names in its records in respect of Lease No.15264/14.*

*(b) 4<sup>th</sup> respondent to cancel Lease No. 15264/14 in favour of 2<sup>nd</sup> respondent.*

*(c) 4<sup>th</sup> respondent to issue a lease in favour of applicant and this after following due process of law.*

*(d) Counter application is dismissed.*

*(e) There is no order as to costs.”*

*(b) The 1<sup>st</sup> respondent is ordered to remove any of his belongings from Plot No. 15264-014, failing which the messenger of this court is directed with the help of the Lesotho Mounted Police Services (LMPS) when necessary to remove 1<sup>st</sup> respondent's belongings from Plot 15264-014.*

*(c) The 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent [Thabiso Khoali] are interdicted and restrained from in any manner interfering with the applicant's possession and use of Plot No. 15264-014.*

*(d) The 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent are directed to pay costs of this application jointly and severally on the attorney and client scale."*

[4] The appellant's appeal against the District Land Court decision came before Banyane J in the Land Court. The learned judge upheld the appellant's appeal on the 1<sup>st</sup> respondent's claim and made an order of absolution from the instance in respect of the counterclaim. The learned judge's order reads:

*"[45] In the result, the appeal succeeds, and the order of the Magistrate is set aside and replaced with the following:*

*a) The main application is dismissed.*

*b) An order of absolution from the instance in the counter-application is issued.*

*c) Each party to bear their own costs."*

[5] The effect of the learned judge's order, as I show in detail later, is that she did not accede to or confirm either 1<sup>st</sup> respondent or appellant's title to Plot No. 15264-014. By granting an order of absolution in the counter application, the practical result is that 1<sup>st</sup> respondent remains in occupation of

Plot No. 15264-014 even though his right to do so has not been established.

### **Brief facts of case**

[6] The facts of this case are summarised very well at beginning of the judgment of the Land Court. I reproduce that summary:

*“[1] The dispute between the parties concerns a certain piece of land, now registered in the names of appellant (Mr Borocho) under Lease No. 15264-014. The 1<sup>st</sup> respondent in this appeal (Mr Sethathi), lays claim to this land on the grounds that he concluded a sale agreement with the owner of the property, Mr Khoali, who had acquired rights thereon through inheritance. Mr Borocho’s converse claim is that he was allocated this piece of land after submission of his application for grant of title and issued a Form C. He subsequently registered it in his names. Mr Sethathi as applicant sued Mr Borocho for cancellation of his lease challenging rigorously, the validity of his Form C on grounds that it was fraudulently and irregularly issued. His complaint is that the Form C was signed by two members of the allocating authority, instead of three. Mr Borocho filed his counterclaim and sought among others, ejectment of Mr Sethathi.”*

### **Second appeal**

[7] The appellant was dissatisfied with the order of absolution and, following the granting of leave to do so, he appealed to this Court on three grounds:

*“1. The learned judge in the court a quo erred and misdirected herself in issuing an order of absolution*

*from the instance against appellant who admittedly holds title (Lease No.15264-014) over the disputed land; the lease has not been cancelled and revoked and therefore remains valid which makes an order of absolution from the instance unjustifiable.*

*2. The learned judge in the court a quo erred and misdirected herself by not granting a relief sought in the counter-application by the appellant in the District Land Court, for the District of Berea under CIV/DLC/BRA/22/2019. The counter-application was geared towards enforcing rights of the appellant as a leaseholder to the relevant plot in question.*

*3. The learned judge in the court a quo erred and misdirected herself when declining to grant the relief sought in the counter-application, the Honourable Court failed to appreciate that the proceedings before it being civil proceedings should have been determined on the basis of scale of proof on the balance of probabilities, whereby the applicant failed to make a case for cancellation of appellant's lease, the ripple effect should have been the granting of the relief sought in the counter-application on the basis that the appellant had made out a case for the granting of such relief on the balance of probabilities."*

[8] The 1<sup>st</sup> respondent did not appeal against the order in the main application, nor did he counter-appeal against the decision in the counter-application. This means that the appeal is confined to the issues raised by the appellant only. In the heads of argument, the 1<sup>st</sup> respondent is almost on point in delineating the issue for decision by this Court:

*"The issue for determination by this Honourable Court is whether the court a quo was correct to issue an order of absolution from the instance against the appellant and decline a relief sought in the counter-application by the appellant. Another issue for determination is whether the appellant's allocation which resulted in issuance of the lease was lawful."*

[9] I say that the 1<sup>st</sup> respondent was almost on point because his addition of the second issue in the quoted paragraph was not before the lower courts in that fashion. It was the 1<sup>st</sup> respondent who approached the District Land Court seeking the cancellation of the appellant's registered lease and it was incumbent upon him to prove on a balance of probability that appellant's title was defective and that he was entitled to remain on the piece of land. He failed to discharge the onus on him, hence the decision of the Land Court dismissing his claim. Whether or not the allocation of the land to appellant was lawful is a matter that was put to rest as against the 1<sup>st</sup> respondent by the decision of the Land Court in respect of the 1<sup>st</sup> respondent. There was no direct frontal attack on the lawfulness of appellant's title because had it been so, Thabo Khoali should have been joined as a party to 1<sup>st</sup> respondent's application as an interested party who had a lot to lose if, as it turned out, 1<sup>st</sup> respondent's right to be on the land did not succeed and that lack of success opened Thabo Khoali to a claim for a refund of the purchase price he had received from the 1<sup>st</sup> respondent. The appellant properly joined Thabo Khoali to the counter-application for him to defend the interests of the 1<sup>st</sup> respondent and his own. As submitted by appellant Thabo Khoali did not bother to enter the fray and did not oppose the proposed eviction of the person to whom he had sold the land. The only issue before this Court as ably articulated by the appellant in his heads of argument is whether it was proper for the Land Court to issue an order of absolution in the circumstances of this case.

## **Argument of parties on propriety of absolution**

[9] The appellant supports, as obviously he should, the Land Court decision dismissing 1<sup>st</sup> respondent's claim in the District Land Court, incorporating as it does, a finding that the 1<sup>st</sup> respondent was not the right person to sue for the cancellation of appellant's lease. He submitted that 1<sup>st</sup> respondent accepts as correct the Land Court decision, hence he did not appeal against it. Dealing with Thabo Khoali's failure to oppose the counter-application, appellant argues that his only chance for doing so was availed to him by the counter-application and he cannot, as suggested by the learned judge *a quo* at paragraphs [38] - [42] of the judgment, have another chance to contest appellant's lease. This point is made in these terms:

*"It is significant to state at this stage that the alleged heir, Thabiso Khoali was cited as the 2<sup>nd</sup> respondent in the counter-application, with certain orders being sought against him. It therefore stands to reason that the alleged heir has actually waived any rights he could have had over the site in dispute. The contents of paragraph [41] of the judgment of the court a quo, cannot therefore be sustainable regard being had to the fact that Thabo Khoali was fully aware that his alleged rights over the relevant property were being claimed by someone else, and that such person was claiming those rights against him. He clearly cannot have another chance to fight for his rights over the relevant property."*<sup>2</sup>

[10] I do not entirely agree with the submission that Thabo Khoali cannot have another chance to fight for his rights to the property because the possibility to do so is dependent on other

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<sup>2</sup> Para 2.2 of appellant heads of argument



considerations, including whether his right to proceed against the appellant has prescribed and whether, after hearing argument thereon a court is satisfied that he indeed waived his right to do so.

[11] Next, appellant addresses the Land Court's finding that he himself had not established, on the basis of satisfactory evidence, that his allocation of the land was lawful, a conclusion deriving from the court's finding that appellant did not call members of the land allocating committee to testify on the allocation of the land to him, and that there is no signature of a third member of that committee on appellant's Form C, which was signed only by the chairperson of the Committee and one member of the committee. The criticism is levelled particularly at a paragraph where the learned judge says-

*"Regard being had to the fact that the applicant's claim was based on allocation of an allegedly vacant land contrary to the assertion that it is a portion of land already allocated to the Khoali's , I conclude that when testing the validity of the Form C against the requirements of the Land Act 1979 (as amended), read with Local Councils Act 1991 which established Development Councils and also deals with the issue of quorum in their meetings, the appellant's testimony coupled with that of his witnesses was materially lacking to establish lawful allocation of the land to him and therefore valid registration of title. Form C, without more, is not conclusive of lawful allocation."*<sup>3</sup>

[12] Appellant observes that despite the above conclusion of the Land Court, which one would have expected to have resulted in the setting aside of the allocation and cancellation

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<sup>3</sup> Para [30] of judgment

of the lease, the Land Court did not go that far and thus left appellant's Form C and Lease intact. Appellant then wonders why the Land Court did not enforce his rights as leaseholder of the land as against the 1<sup>st</sup> respondent "who absolutely had no right to occupy the land in dispute", when at paragraph [42] of the judgment the court was able to say, in relation to Thabo Khoali-

*"Mr Khoali could not validly conclude a sale agreement without first seeking cancellation of the lease. In my view, he is the proper person to have sued for cancellation of the lease and not the [1<sup>st</sup>] respondent. I say this because the seller alleges that the land belongs to his parents. In his capacity as heir, he would in my view be entitled to reclaim the land from the appellant by seeking cancellation of the lease. It is in those proceedings that he would have to satisfactorily prove that the land belonged to his family and consequently the appellant's allocation was invalid for that reason."*

[13] Appellant surmised that the Land Court must have thought that Thabiso Khoali will sue for cancellation of appellant's lease, for without such thinking, there was no basis, going by the court's own reasoning, why appellant's rights could not be enforced as against 1<sup>st</sup> respondent.

[14] As I understand the case, appellant's contention is that the main application and counter-application in the District Land Court called upon the court to ultimately decide who between the appellant and 1<sup>st</sup> respondent had the lawful title to be on the disputed land. Whereas the District Land Court's decision provided clarity in this regard, that of the Land Court left the matter in abeyance when it did not evict the 1<sup>st</sup>

respondent from the land in circumstances where he had failed to establish his right to remain in occupation thereof.

[15] The foundation of 1<sup>st</sup> respondent's case in the District Land Court is analysed by the appellant on appeal. He submits that his case is that appellant's Form C was fraudulently obtained through 'Mampoi Majara, the 2<sup>nd</sup> respondent herein. That assertion or allegation is not only refuted by the appellant, but it is also one on which no satisfactory evidence was adduced by 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent alleged that the appellant obtained his rights from 'Mampoi Majara, who had no rights in the land at all but acted fraudulently by issuing the appellant with the Form C.

[16] The evidence of 'Mampoi Majara, as appears in the record of proceeding in the District Land Court, was a total denial of her having acted in the manner alleged. To the contrary it was Majara's evidence that the allocation was made by the allocating authority then in place.

[17] The appellant submitted that it was not the foundation of 1<sup>st</sup> respondent's case in the District Land Court that the appellant's lease ought to be cancelled because the Form C lacked one signature of the allocating committee members. The issue of the signatures on the Form C had not been pleaded by 1<sup>st</sup> respondent in her papers or in answer to the counter-application. It came up for the first time in cross-examination of appellant's witnesses. It was not even part of the issues for determination agreed upon at the pre-trial conference in the

District Land Court. Thus the 1<sup>st</sup> respondent ambushed the appellant at the trial, completely against the rules of pleading as articulated in *Frasers Lesotho Ltd v Hata-Butle (Pty) Ltd*<sup>4</sup>, *Minister of Safety and Security v Slabber*<sup>5</sup> and *Becks Theory and Principles of Pleadings in Civil Actions*.

[18] It was submitted for the appellant that the result of dealing with an issue not pleaded in 1<sup>st</sup> respondent's papers was that the District Land Court "*ended up raising issues which were not before it and which neither of the parties was prepared to answer, in terms of collecting the necessary evidence to address them... 1<sup>st</sup> respondent should have been held to his pleadings and the case should have been determined on the basis of the complaint that had been raised in the pleadings against the validity or otherwise of the lease held by the appellant*". If that had been done the court would have found that the alleged fraud had not been proved.

[19] Regarding the Form C, appellant's argument is that it is common cause that Form was signed by the chairperson and a member of the allocating committee or relevant council. There

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<sup>4</sup> (1995 -1999) 698 at 702 where the court said-

"It has been stated often enough that the requirement of a rule such as this is to enable each side to come to trial prepared to meet the case of the other (see *Benson and Simpson v Robinson* 1917WLD 126), and to enable the court to isolate the issue it is to adjudicate upon (*Robinson v Randfontein Estate Gold Mining Co. Ltd* 1925 AD 173 at 198). The cause of action or defence must appear clearly from the allegations made (*Dun and Bradstreet (Pty) Ltd v South African Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 244). It is wrong to direct the attention of the other party to one issue and then attempt to canvass another (*Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107-108."

<sup>5</sup> 2010 (2) ALL SA 474 (SCA) 478 at para 11

can be plausible explanations as to why one signature was missing on the Form. If there was an error in signing the Form C that error could not possibly be attributed to the appellant and cannot, in any event, detract from the fact that a decision to allocate the land to appellant was made regularly by the authority concerned. There was no proven basis for the allegation that the Form C was fraudulently issued or acquired.

[20] It seems to me that the issue of the number of signatures required on a Form C was not exhaustively addressed. There appears to be a lack of appreciation and clarity of the difference between a quorum of the allocating authority and the number of persons required to sign a Form C. A quorum is merely the minimum number of persons of a body, in this case the land allocating committee, that must be present at any of its meetings to make the proceedings of that meeting valid. A quorum has nothing to do with the number of signatures required on a document evidencing the decision of a body making it. Section 17(1) of the Land Act 1979 referred to in the judgments of the courts below and in written submissions provides that the chairperson of a land allocating committee which grants title to land shall issue or cause to be issued to the allottee a Form C. Where the chairperson causes the Form C to be issued, it means he will direct some person or persons to sign the form. In the judgments of the courts below, no statutory provision or regulation is cited as authority that the signatures of the chairperson and two other members of the allocating committee are required for the validity of a Form C. I

think that the Form C given to the appellant cannot be invalidated simply because, after the decision to issue it was made by a quorate committee, the Form was signed by less than the number of committee members required by practice or law.

[21] The appellant bolstered its submissions by referring to s 35(1) of the Land Act 2010 which provides that -

*“A lessee shall be entitled-*

*(a) subject to any statutory conditions or other conditions attached to the lease-*

*(i) to the exclusive possession of the land leased;*

*(ii) to encumber the land leased by mortgage;*

*(iii) to provide for inheritance of the lease in the event of death, except that where such disposal is to a non-citizen, a lessee shall obtain the Commissioner’s consent.”*

[22] The contention advanced based on s 35(1) is that since the appellant’s lease has not been cancelled by order of a competent court and remains valid and enforceable, the leaseholder should enjoy the rights conferred by the said section, including the right to eject another person from the land or interdict him and others from interfering with appellant’s rights of possession. Where the court is called upon to enforce the rights under the said s 35, it must determine the validity or otherwise of the lease and, if no sufficient evidence is adduced for its cancellation, as in this case, uphold the lease and enforce the leaseholder’s rights.

[23] Another basis of contesting the learned judge's decision is that she did not properly apply the standard of proof in civil matters. Proof on a balance of probabilities engages the court in a comparative exercise whereby it examines the evidence tendered by the disputants to prove their respective claims or defences and incline towards the party that has brought more compelling evidence and weighing the probabilities. Appellant submitted that in a case such as this, where the appellant holds a lease, his title alone must be viewed as strong evidence against the evidence of the 1<sup>st</sup> respondent who possesses a Form C given to him long after the appellant's rights to the land were granted in 1999 and a lease registered. If, as in this case the person who challenged the title of the other fails to prove that such title should be cancelled then the holder of the title must, on balance, succeed and be entitled to an order ejecting the other party. Appellant sums up the position thus-

*"The order of the Land Court has the effect of ensuring that the 1<sup>st</sup> respondent who has been found to be having no right to the disputed land remains in occupation and uses the land in issue, against the appellant who has title registered in his names. That ... cannot be justified in law."*

[24] Appellant acknowledges that in most cases it has been found that a Form C does not constitute irrefutable proof that the allocation has been made lawfully and this normally is the position in double allocation situations. The present case is not a double allocation but one in which the 1<sup>st</sup> respondent was unable to prove a lawful allocation to him or even to the

person, Thabo Khoali, who purported to sell the rights in the land to him. He submitted that *Thabiso Thibeli v Makhosholo Khosholo*<sup>6</sup> has put the question of the onus to rest in a case such as the present. At paragraph [23] in that case, the court said-

*“It is clear to me that in challenging the decision of the learned judge, the appellant misconstrued on who the burden of proof lay. The 1<sup>st</sup> respondent was already the holder of a lease agreement given to her by the relevant authority. It was the appellant who was challenging the validity of the issuance of the lease. Accordingly, it was incumbent upon him to place satisfactory evidence before the court showing that the Form C or the alleged allocation to him of the plot had been in compliance with the law and therefore superseded the lease registration, and not be content with the mere fact that he held a Form C in his hand.”*

[25] Appellant also referred to the *Malefane v Roma Valley Cooperative Society and Others*<sup>7</sup> in which the title holder was able to prove its case in the absence of a Form C, which is comparable to the situation of the appellant here where conclusive proof of the lawful allocation was not placed before the court mainly because of the way 1<sup>st</sup> respondent’s case was pleaded.

[26] The 1<sup>st</sup> respondent’s submissions revolve around the lawfulness of the allocation of the land to appellant, and do not directly address the point in issue. Without any proven right to the land, as found by the Land Court, 1<sup>st</sup> respondent has no basis for remaining in occupation and use of the disputed land.

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<sup>6</sup> C of A (CIV) 33/2020

<sup>7</sup> LAC (2016-2016) p 620



His argument is to a very large extent weakened by the lack of interest shown by Thabo Khoali, the person who purported to sell the land to him. The issues he has raised in relation to the allocation of the land to the appellant have been exhaustively and properly addressed by the appellant. In the end, without answering the question whether the judge *a quo* was correct in granting absolution, the impression is left uncontested that his interest is to remain on the land which the Land Court has determined he is not entitled to do.

### **Disposal**

[27] In disposing of this appeal, I am persuaded that the appellant has made a good case for a finding in his favour. As earlier alluded to, I consider that the only issue for decision is whether the Land Court was correct to issue an order of absolution. Its issuance created an *impasse* or deadlock from which the appellant may not otherwise be able to move away from. After dismissing the 1<sup>st</sup> respondent's claim, the dispute between the two parties, appellant and 1<sup>st</sup> respondent was *ipso facto* resolved, and no justification existed for not making an order evicting the 1<sup>st</sup> respondent. If the appellant's title is defective for any reason, it is for someone else to take up the cudgels against appellant. The proceedings between the appellant and the 1<sup>st</sup> respondent in the counter-application and the order ensuing therefrom are *in personam*, the judgment is merely *res inter alios acta* and not binding against the whole world. It is not a judgment *in rem*. Therefore, when the Land Court determined that the 1<sup>st</sup> respondent had not acquired any

rights to the disputed land, it had no option but to evict him leaving it to whosoever could challenge the appellant's title to remain on the land to do so. Notably the learned judge *a quo* did not determine that the appellant had no right to be on the land even though his title may be open to question.

[28] On the issue of costs, I accede to appellant's prayer therefor. The 1<sup>st</sup> respondent has not succeeded in the District Land Court or Land Court or this Court. Costs must follow the event.

[29] In the result the decision of this Court is the following -

(a) The appeal against the order of absolution from the instance is set aside.

(b) The order of the District Land Court is substituted with the following order-

“(i) The main application is dismissed.

(ii) The applicant be and is hereby evicted from Plot No. 15264-014 and is further ordered to remove his property from the Plot, failing which the messenger of the court shall take all necessary steps to remove him and his property therefrom, and applicant shall not either by himself or through any person acting on his

instructions or on his behalf, interfere with the appellant's possession and use of the plot.

(iii) The applicant shall pay the 2<sup>nd</sup> respondent's costs."

(c) The 1<sup>st</sup> respondent shall pay the appellant's costs in the Land Court and in this Court.



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**MH CHIHENGO  
ACTING JUSTICE OF APPEAL**

I agree:



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**SP SAKOANE  
CHIEF JUSTICE**

I agree:



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**J VAN DER WESTHUIZEN  
ACTING JUSTICE OF APPEAL**

**FOR THE APPELLANT:** ADV PJ LEBAKENG

**FOR THE RESPONDENTS:** ADV P NTSENE