CIV/APN/475/96

IN THE HIGH COURT OF LESOTHO

In the matter between

'Mabataung Moletsane **Applicant**

and

David Mohapi Moletsane **Defendant**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On 11th day of February, 1997.

On the 31st day of December, 1996 the Applicant obtained a Rule Nisi from this Honourable Court calling upon the Respondent to show cause why:-

"1. (a) the two children of 'Mabataung Moletsane, namely Bataung and Moletsane should not be handed over to her.

That prayer 1 (a) should operate with immediate effect as an interim court order."

The matter was argued before me on the 9th day of January, 1997 and after having heard submissions from both counsel in the matter I discharged the Rule and dismissed the application with costs. I intimated that reasons would follow. These are the reasons.

At the commencement of the hearing before me Mr. Mosito for the Applicant raised four (4) points of law in limine as follows:-

(1) That the replying affidavit of the Applicant 'Mabataung Moletsane does not comply with the Oaths and Declarations Regulations 1964 in that it is not made under oath.

(2) That Applicant is guilty of "delinquent non-disclosure" and yet she moved this application ex parte.

(3) That Applicant has no locus standi to sue unassisted by her husband.

(4) That Applicant ought to have foreseen that there would be a serious dispute of fact in this application and that consequently she ought not to have proceeded by way of motion.

I proceed then to determine these points in limine in the sequence in which they are tabulated above.

(1) That the replying affidavit of the Applicant 'Mabataung Moletsane does not comply with the Oaths and Declarations Regulations 1964 in that it is not made under oath.

Indeed I do observe that the said replying affidavit is written in a form of an ordinary plea and mostly in the third person. What is more, there is not a single sentence in which the Applicant 'Mabataung Moletsane avers that what she states therein is being made under oath. Nor does the Applicant make any attempt to say that what is stated in the replying affidavit is true and correct.

Now Section 3 of Oaths and Declarations Regulations 1964 provides thus:-

"3. Except where otherwise provided by any other law an affidavit shall be made on oath unless the person desiring to make the same is not able to understand the nature or recognise the religious obligation of an oath or has religious or conscientious objections to taking an oath, in any of which cases the affidavit may be made on affirmation.

4. (1) The form of words to be used in an affidavit which is sworn on oath shall be -

"I---------- of ----------(setting out the name, address and description of the deponent) make oath and say as follows-----."

The use of the word shall in both sections clearly indicates that it is mandatory to make an affidavit on oath.

I further observe that the Applicant omits to say that she has personal knowledge of the facts deposed to both in the founding affidavit and in the replying affidavit.

In Lawrence Matime and two others v Arthur Vincent Moruthoane and Another C of A (CIV) No. 4 of 1986 Schutz P remarked on a similar situation in the following words:-

> "The next difficulty that I have with the application in the High Court is that the deponents who purported to give evidence did not say that they had personal knowledge of the facts deposed to. It is true that in respect of some of the facts it appears from the affidavits themselves that knowledge is estalished. But when one has regard to the basic facts that had to be established there is a lack of admissible evidence to make the simple case that was sought to be made."

I respectfully agree with these remarks.

Faced with the problems highlighted above Mr.Lesuthu for the Applicant then belatedly made an application from the bar for "condonation that the mistakes that both counsel made in drawing the affidavits should not prejudice applicant."

After having heard argument from both counsel on the matter I dismissed the application for condonation with costs as I felt it was not only novel and devoid of merit but also vexatious and it amounted to abuse of court process. Moreover not only was the application unsubstantiated but it was also most irregular for Mr. Lesuthu to make an application on behalf of his Learned Counterpart in the absence of authorization thereto by the latter.

In the circumstances I came to the conclusion that point (1) in limine was well taken and that the replying affidavit of 'Mabataung Moletsane was fatally defective. The effect of this therefore was that the court would only attach weight to it to the extent that it was corroborated by that of the Respondent.

(2) That Applicant is guilty of "delinquent non-disclosure" and yet she moved this application ex parte.

The term "delinquent non-disclosure" has caused me a lot of concern as it is not apparent to me what is the motivation behind the use of such an expression. I am prepared however to assume that the Respondent and his counsel meant "material non-disclosure."

Indeed it is trite law that a litigant who approaches the court ex parte has a duty to make a full and honest disclosure to the court of every material facts which might influence the court in deciding to grant or to withhold the relief sought. That is known as the uberrima fides rule.

See Seth Lieta v Semakale Lieta C of A (CIV) No. 5 of 1987;
Philimon Ntsolo v Muso Moahloli C of A (CIV) No.8 of 1987.

It is also 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 the non-disclosure.

See also Phillimon Ntsolo v Muso Moahloli (supra)
Herbstein and Van Winsen: The Civil Practice of
The Superior Courts in South African: 3rd Edition at page 81.

I turn then to examine the alleged non disclosures in this case.

In paragraph 4 (a) of his opposing affidavit the Respondent David Mohapi Moletsane states as follows:-

"(a) Eversince, the children in question have been staying with me at Hills View, eversince they were born."

The Applicant's response to this allegation is contained in paragraph 4 of her replying affidavit in the following words:-

"4

AD PARA 4 (a)

> This paragraph is denied. Children were not staying with Respondent by themselves. The entire family was staying at Hills View until the husband of Applicant expelled her in January, 1996."

It is thus clear to me that the Applicant admits for the first time in the replying affidavit that the children in question have actually lived with the Respondent ever since they were born. I am of the view that this is a material fact which ought to have been disclosed to the court when the application was moved ex parte. I am further satisfied that this fact might have influenced the court in deciding to withhold the relief sought ex parte on the ground that it was not in the best interests of the children to uproot them from the environment in which they have lived since birth.

In paragraph 5 of her replying affidavit the Applicant admits that on 14th day of December 1996 she went to Respondent's house in the latter's absence and took away the two minor children. She further admits that she "disappeared" with them until the children's father namely Respondent's son who is Applicant's husband set out with the Respondent to look for the children in the company of Respondent's daughter Lesimole. Yet Applicant did not disclose this material information to the court in her founding affidavit.

Then Respondent deposes in paragraph 4 (c) of his opposing affidavit:-

> "I and the other two members of the family just referred to, he (sic) went to report to the police the disappearance of the children with the Applicant, as she was nowhere to be found. I must inform this Honourable court that she used to come to the House to ask for the

children and later return them. It was only when she did not return them that we set out to look for them. The message of the whereabouts of the children was broadcast over Radio Lesotho on the 19th December 1996."

Significantly the Applicant admits these allegations in paragraph 6 of her replying affidavit where she states in part:-

"6

AD PARA 4(c)

This paragraph is admitted."

Once more it is significant that she withheld this material information from the court that she was in the habit of coming to Respondent's house "to ask for the children and later return them." I find that had the court been told of this fact when the application was moved ex parte it might have refused to grant the interim relief sought.

Then the Respondent deposes in paragraphs 4 (d) and (e) of his opposing founding affidavit:-

"(d) On the 19th December as I was driving along the airport Road in Maseru Seapoint, I saw the children walking along the road with applicant.

(e) I stopped and told applicant that I was looking for the children and that we had been to the police about the issue. I told her to come with me to the airfield police station in Maseru. She came along with me. The police intervened

> and said that the kids should be returned to me where they have been staying until the issue would have been negotiated over by the family. applicant agreed and released the children to me."

Amazingly the Applicant admits these allegations in paragraph 7 and 8 of her replying affidavit in the following words:-

"7

AD PARA 4 (d)

> This paragraph is admitted. Save to add that my children had to cling to me when they saw him stop the car.

8

AD PARA 4 (e)

> This paragraph is admitted save to add that he called me a bitch and threatened to assault me and drive me to the Field Police Station. While I was being interrogated by the police about my children he took away my children by force. I never released my children to him."

Well I do not think it helps the Applicant to blow hot and cold in this matter as she appears to be doing here. The point is that she admits that the police intervened and as a result thereof she "agreed" to release the children and did release them to the Respondent.

In any event on the principle laid down in Plascon Evans Paints Ltd. v Van Riebeck Paints 1984 (3) S.A. 623 (A) I assume the correctness of the Respondent's version on this issue.

See also National University of Lesotho Students Union v National University of Lesotho and 2 others C of A (Civ) No.10 of 1990 at p 19 (unreported); Supreme Furnishers (Pty) Ltd. and Another v Letlafuoa Hlasoa Molapo C of A (Civ) No. 13 of 1995 at p 6 (unreported).

Accordingly I find that the Applicant is once more guilty of material non-disclosure in as much as she withheld from the court the fact that she had personally released the said children to the Respondent. I have no doubt in my mind that this is such a material fact that the court might have refused to grant the interim relief sought ex parte if it had been appraised of it.

In the circumstances I am satisfied that the point in limine on non-disclosure is well taken and that this application falls to be dismissed on that account.

(3)That Applicant has no locus standi to sue unassisted by her husband.

It is common cause that the Applicant is a married woman. She is married to Respondent's son Limpho Moletsane who has filed an affidavit in support of Respondent's opposition to this application. It is further common cause that the said marriage still subsists. It is a customary marriage.

It is common cause further that the Applicant has brought this application unassisted by her husband. In conceding this point Mr. Lesuthu has tried to justify this strange and novel action by informing the court that his client and himself "knew" that they would get no cooperation and assistance from Applicant's husband. Well Mr. Lesuthu should know that in such a situation a married woman should first apply to the court for leave to sue unassisted.

It is trite law that a married woman who is subject to her husband's marital power has no locus standi in judicio to sue unassisted by her husband. This is more so in Sesotho Law and Custom where a married woman is virtually regarded as a minor under the guardianship of her husband and as such she cannot sue unassisted by her husband.

See Poulter: Family Law and Litigation in Basotho Society at pages 179 -180.

The only exception where a married woman may sue unassisted is in disputes against her husband for maintenance and divorce.

W.C.M. Maqutu (as he then was) states as follows on page 283 of his invaluable book: ***Contemporary Family Law of Lesotho:***

> "Custody of children an aspect of parental power. Our society is patrilineal. It is therefore not surprising that by virtue of marriage the father has paternal power over his children. It is from this paternal power that the father is by law guardian of his children.....during the subsistence of the marriage, the rights of

> the father are superior to those of the mother. Consequently the High Court has no jurisdiction where no decree of divorce or judicial separation has authorised the mother to have custody to deprive the father of custody of the minor children."

I entirely agree and observe that this principle was followed in E.M. Ramabooa v P.S. Ramabooa 1967-70 LLR 90.

In the circumstances I have come to the conclusion that the Applicant was ill advised to sue unassisted by her husband and that she has no locus standi to sue without such assistance.

In view of the decision at which I have arrived in this matter it is unnecessary for me to deal with the Respondent's 4th point in limine.

There is however one aspect that I should mention as guidance for the future. It is this.

At the commencement of the hearing of the matter before me I inquired from both counsel why they had not filed heads of argument in the matter. Mr. Mosito promptly apologised and undertook to file heads of argument in future.

Mr. Lesuthu's response however left me dumpfounded and shocked. He informed the court that he has never known that heads of argument are filed in civil cases. He added that he has always been under the impression that heads of argument are only filed in criminal cases.

What was shocking was that as I looked at counsel he appeared genuinely ignorant. I immediately worried over whether this might be a reflection of the standard of our legal profession.

It must never be forgotten that judges depend largely on the Bar and the Side Bar for assistance in dispensing justice. That is how it should be. But regrettably at the rate things are going it would appear that the converse will soon be the case unless something dramatic is done. The Law Society cannot afford to sit back, fold its arms and watch standards degenerate daily.

It is for this reason that those erring legal practitioners should seriously reflect on whether they made the right decision to join this noble profession for such is the demanding nature of the legal profession that complete dedication and professionalism are called for. There is no place for people who do not take their work seriously in this type of calling.

I cannot see therefore how counsel could ever be of any assistance to the court unless he prepares and files heads of argument in the matter in which he is appearing be it criminal or civil.

In future therefore counsel are warned to file heads of argument in all contested matters appearing before the High Court.

The case before me was slackly presented and counsel for the Applicant obviously made no effort to familiarise himself with the law and procedure pertaining to the matter. This is inexcusable to say the least.

I also find that the Applicant was guilty of non-joinder of her husband in the matter and again her counsel must obviously shoulder the blame.

As I see it counsel faltered and defaulted in every conceivable direction in this matter. That is deplorable indeed.

As earlier stated the Applicant's husband does not only hold the marital power but he is also the custodian of the minor children. Accordingly, he is the one who has a direct and substantial interest in the matter. It is therefore inexcusable that he was not joined as a party in these proceedings.

See Lawrence Matime v Moruthoane and Another
C of A (Civ) No. 4 of 1986.

See also David Masupha v Paseka 'Mota
C of A (Civ) No. 12 of 1983.

Nor is this court amused by the fact that this matter which is clearly within the jurisdiction of Central and Local Courts in terms of Section 8 (1) of the Central and Local Courts Proclamation No. 62 of 1938 was brought before this court without leave of the court in as much as it involves a Sesotho law marriage.

I should mention that the only reason why the court reluctantly decided to hear the matter was that there was no objection raised and the interests of the minor children were involved; consequently the court as the upper guardian of minor children could on that account reluctantly hear the matter.

In the result the Rule was discharged and the application dismissed with costs.

M.M. Ramodibedi

JUDGE

For Applicant : Mr. Lesuthu

For Respondent : Mr. Mosito