CIV/T/598/95

IN THE HIGH COURT OF LESOTHO

In the matter between

LESOTHO HIGHLAND DEVELOPMENT AUTHORITY **PLAINTIFF**

and

MASUPHA EPHRAIM SOLE **DEFENDANT**

RULING

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

On 16th day of June 1997.

This is an application by the Plaintiff made in terms of Rule 30 of the High Court Rules. The Plaintiff seeks an order striking out the affidavits of Mr. M.J. Ficher and Mrs. S.R. Rudman put up by the Defendant in opposition to the Plaintiff's application on Notice of Motion dated 26th May 1997.

A brief background to this application is the following.

On 30th October 1996 the Chief Justice ordered the Defendant to make available for inspection and copying, inter alia "All defendant's bank account records for the period 1 January 1988 to date."

I observe straight away that this order was not restricted to defendant's local bank account records only. The order was certainly broad enough to include defendant's bank account records in foreign banks as well.

In any event this Court has itself repeated the Chief Justice's order. In fact on the 16th April 1997 this Court specifically ordered the defendant to produce the records of any accounts held by him at the Union Bank in Zurich, Switzerland and in A/C No. 48431370 at Standard Bank in Maitland Street in Bloemfontein on or before the 9th May 1997 failing which to show cause on the 12th May 1997 why he shall not be held to be in contempt of court.

The defendant has since the said Order of the Chief Justice as well as the Order of this court consistently resisted making full disclosure as ordered by the Court notwithstanding a contempt application that was brought by the Plaintiff during the course of and within the trial of the matter before me. What has then happened is that the Defendant has embarked on piece meal disclosures before me while always undertaking to get in touch with his banks in order to make full discovery. It was for this reason that the court made a ruling that the trial proceeds and that the question of contempt or otherwise resulting from Defendant's non disclosure would be dealt with at the end of the trial.

I should mention that following Defendant's failure to make full disclosure and obviously as part of its evidential material the Plaintiff has called witnesses in

support of its claim and it is significant to mention here that some of those witnesses are the above mentioned Mr. M J Ficher and Mrs. S R Rudman who gave evidence before me as PW10 and PW11 respectively.

It is important to note that the evidence of these witnesses was completely unchallenged despite the fact that the defence legal team knew very well that such evidence was going to be given. In fact I should mention here that indeed the defence legal team took a well calculated and deliberate decision not to participate during the testimony of those witnesses. This much had been made abundantly clear to the Court and to Plaintiff's legal team. In the circumstances, I consider that the defence deliberately waived its right to cross examine the witnesses. I am drawn to the reasonable inference therefore that they admitted such evidence.

What has then happened is that despite the fact that the defence legal team has allowed the evidence of the aforesaid witnesses to go in completely unchallenged they have annexed affidavits of the very same witnesses to Defendant's opposition to Plaintiff's application dated 26th May 1997. The effect of these affidavits is to turn against what the witnesses told this court in viva voce evidence.

What is a matter of grave concern to the Court is that the defence legal team approached the said witnesses secretly without having notified the Court or the Plaintiff's legal team. This means therefore that the Court does not know the circumstances under which these witnesses were made to "switch" sides and whether they did so freely and voluntarily or whether pressure was brought to bear upon them to change their evidence or indeed whether the affidavits and the signatures therein are genuine at all.

I have no doubt in my mind that the rule of etiquette frowns upon the behaviour of the defence legal team to the extent that they would secretly go to the lengths as shows above without involving the Court or their counterparts. I am of the view that if such an underhand practice is allowed it would lead to miscarriage of justice. It is worse that the affidavits in question amount to perjury and this Court is appalled that its officers would be a party to such a set up.

In S v Hassim and others 1972 (1) S.A. 200 James JP had occasion to deal with a similar situation of counsel interviewing and taking statements of witnesses for the opposing side without recourse to the court or counsel for the other side. This is what the Learned Judge President said at page 201 :

> "The rule of practice dealing with the interviewing of State witnesses is contained in the rules of professional conduct and etiquette which are set out at p 867 of Swift and Harcourt's Law of Criminal Procedure, 2nd ed. The rule is laid down in the following terms:
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> > "4. Interviewing witnesses (a) State witnesses: Subject to what follows, it is improper for the legal representatives of an accused person to interview witnesses for the prosecution. No general exception to this practice should be formulated but any deviation should be dealt with on its particular merit as and when it arises. Applications to interview State witnesses should be made to the prosecutor concerned or to the senior public prosecutor or Attorney-General as the case may be. Such applications are dealt with having regard to
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> > (a) the person making the application;
> > (b) the reason given for the request;
> > © the nature of the case and
> > (d) the particular witness whom it is sought to

interview.

With these considerations in mind the application is either refused or appropriate safeguards are imposed."

I refer also to similar passages in May, South African Cases and Statutes on Evidence, 4th ed., p 376.

I have no doubt whatever that the rule as formulated applies not only to a State witness before he has given evidence but also to that same witness after he has given his evidence right up until the time that verdict has been given. Even if a witness has been released from further daily attendance after he has given his evidence, he remains the witness of the side that calls him and he remains liable to be recalled for re-examination at any stage before verdict by the Court, either on the application of the defence or the State or by the Court *meru moto* if the Court considers that it is essential for the just determination of the case. See sec. 210 of the Criminal Code. If an accused's legal representative had the unrestricted right to interview a State witness in private once he had completed his evidence, and was thereby given the right to try to persuade him to alter the evidence he had already given or to obtain admissions from him or to add to that evidence, the abuses which would inevitably follow would turn the whole trial procedure as we know it into a mockery. The accused's legal representatives have an unrestricted opportunity of testing the truth of the evidence of a State witness by cross-examining him in open Court but I have no doubt that they do no have the right, over and above this, to interview the self-same witnesses subsequently in private in an endeavour to

persuade them to alter their story. Such interviews would, of necessity, be conducted in circumstances of the defence's own choosing and hidden pressures might be applied to the witness. I am quite satisfied that such a course could not be tolerated. If the defence received information which leads it to believe that a witness has not been telling the truth or can throw additional light upon a matter relevant in the case, then the defence would be fully justified in applying to the Court for permission to cross-examine the witness further, but the defence certainly does not have the right to cross-examine the witness in private in the hopes of persuading him to change his mind or to add to his story and thereafter base an application for the recall of the witness on the information thus obtained. I have no doubt that the general rule of conduct, that the accused's legal representatives cannot interview State witnesses, extends until verdict and that the rule thus expressed is one of long standing and has been well understood and observed for a great many years. Neither I nor those of my senior Brethren who I have been able to consult in this matter have ever heard of a contrary contention being advanced in Court or, until now, of any advocate not respecting this general rule."

I respectfully agree. Although these remarks were stated in the context of a criminal case they apply with equal force to a civil case such as the one before me. This ought to be so in my view as a matter of principle and of common sense.

Indeed May : South African Cases and Statutes on Evidence 4th ed, p 281 at para 541 states the following remarks with which I respectfully agree :

"Once a witness has begun his evidence it is highly undesirable for either party in either civil or criminal cases to interview that witness - this statement of the law was approved in R v Matshaken 1960 (2) S.A. P.H.H. 360 (E)."

Mr. Hoffman S.C. for the Defendant argues that the two witnesses in question in this matter gave evidence in a separate hearing from the present one in which their affidavits are sought to be used and that consequently there is nothing wrong with the manner in which the defence has approached the matter. This submission is with respect disingenious and far removed from the reality of the matter before me. As earlier stated the witnesses in question gave unchallenged evidence before me during the same trial that the Defendant owns certain bank accounts with foreign banks. If the defence felt unhappy about this evidence it was open to them to apply for the recalling of the witnesses for cross examination in open court and not in private at a secret venue and in circumstances unknown to the court and the Plaintiff's legal representatives. This court disapproves of such untoward conduct in the strongest possible terms. It smacks of corruption. I consider therefore that the affidavits in question have been obtained by improper and/or irregular means. They thus constitute an improper step within the meaning of Rule 30 of the Rules of Court.

In the circumstances therefore the application in terms of Rule 30 is hereby granted as prayed with costs including the costs of two (2) counsel.

M.M. RAMODIBEDI

JUDGE

16th June 1997

For Plaintiff : **Mr. Penzhorn S.C.** (Assisted by **Mr. Woker)**

For Defendant: **Mr. Hoffman S.C.** (Assisted by **Mr. Fischer)**

CIV/APN/169/96

IN THE HIGH COURT OF LESOTHO

In the matter between

ᵐMatšepiso Elizabeth Mahlatsi	**Applicant**
and	
ᵐMatumelo Mahlatsi	**1st Respondent**
ᵐMatšehla Mahlatsi	**2nd Respondent**
Principal Chief of Butha Buthe	**3rd Respondent**
Lesotho Bank Manager	**4th Respondent**
District Administrator	**5th Respondent**
Claurina Nthabiseng Mahlatsi	**6th Respondent**

Judgment

Delivered by the Honourable Mr. Justice M.M.Ramodibedi
On 4th day of March 1997

On the 15th May 1996 the Applicant moved and obtained a Rule Nisi before this Honourable Court for an order in the following terms:-

> "1 a) THAT the Sheriff of this Court or his deputy be and is hereby authorized to remove and keep in his custody, pending the outcome of this application, 1 x 1993 Nissan Van, Registration B0094 and that First and/or Second Respondent should release this vehicle to the Sheriff or his Deputy.

b) THAT a copy of this order as well as the application be served on the Principal Chief of Butha Buthe by the Sheriff or his Deputy and that the Principal Chief of Butha Buthe must make a recommendation as to the appointment of a heir in the estate of the late John L Mahlatsi within 14 (FOURTEEN) days of the service of the papers on him by the Sheriff or his Deputy.

c) THAT a copy of this order be served on the Manager of Lesotho Bank, Butha Buthe and that the bank manager should refrain from paying out any monies or allow any debits against the accounts held at the Lesotho Bank, Butha Buthe Branch in the name of the late John L Mahlatsi pending the return date of this application.

d) THAT a copy of this application as well as the Court Order be served on the District Administrator, Butha Buthe.

2. THAT the Respondents should furnish reasons, if any, on the 10th day of JUNE 1996 why this order should not be made final and why the First and Second Respondents should not pay the costs of this application.

3. That paragraph 1(a) & (c) will operate with immediate effect."

After several extensions of the Rule the matter which is opposed by First, Second and Sixth Respondents was finally argued before me on the 13th December 1996. I then discharged the Rule and dismissed the application with costs to those Respondents who had opposed the matter. I intimated that reasons would follow. These are the reasons:

I should mention straight away that I was struck by the novelty of prayer 1(b) to the effect that the Principal Chief of Butha Buthe must make a recommendation as to the appointment of an heir in the estate of the late John L. Mahlatsi despite the

fact that the said Principal Chief is not a member of the deceased's family. Appointment of an heir according to Sesotho Law and Custom is pre-eminently a matter for the family council in which the chief has no role to play other than perhaps to put his stamp on the family decision itself. I find therefore that this claim is misconceived and that on that ground alone it ought to be dismissed.

In her founding affidavit the Applicant alleges that she is the "wife" of the late John L. Mahlatsi. She makes no attempt to substantiate this allegation nor does she give any particulars of her said relationship with the deceased - whether she was married to him by customary rites or in accordance with civil law. I observe that she only tries to prove her marriage to the deceased in the replying stage when it is too late for the respondents to react thereto. She has annexed a copy of an agreement to the marriage in question Annexture "A" which is dated the 28th August 1988.

The Applicant's greatest problem in the matter is that on 28th August 1988 when Annexture "A" was executed the deceased was already married to the sixth Respondent (who has intervened in these proceedings) by civil rites. Indeed this is common cause and a marriage certificate to that effect was duly handed in by the Sixth Respondent. The marriage was solemnised on the 17th September 1973. It is true that the Sixth Respondent and the deceased had previously been married according to Sesotho Law and Custom in 1966 but the said marriage was dissolved by a decree of divorce in 1972. Hence the parties remarried in 1973 by civil law.

This court subscribes to the principle that a person married according to civil rites cannot marry another person during the subsistence of the civil marriage. Accordingly I find that the Applicant's so called marriage to the late John L.

Mahlatsi is null and void ab initio.

See **Mokhothu v Manyaapelo 1977 LLR 218.**

What is more the marriage between the deceased John L. Mahlatsi and the Sixth Respondent produced a son called Lehlohonolo who is now a major. Accordingly I find that the said Lehlohonolo is the rightful heir to the deceased's estate. Yet surprisingly he was not joined in these proceedings despite the fact that it is his inheritance which is at stake and that accordingly he had a direct and substantial interest in the matter.

In my judgment therefore this application further falls to be dismissed for non joinder.

In David Masupha v Paseka 'Mota C of A (Civ.) No.12 of 1983 Wentzel JA had this to say:-

> "At the commencement of the appeal the court mero motu raised the question whether Mrs. Masupha ought not to have been joined as a party by the Respondent. It is her marriage which is at stake and any order as to its validity is one in which she has a direct and substantial interest."

I find that these remarks are apposite to the case before me in which I accordingly took the point of non joinder mero motu.

Nor could First Respondent's alleged marriage to the deceased change the position as far as the Sixth Respondent and the said Lehlohonolo are concerned in as much as First Respondent's marriage took place during the subsistence of the aforesaid civil marriage between the deceased and the Sixth Respondent.

In the result therefore the Rule was discharged and the application dismissed with costs to First, Second and Sixth Respondents.

M.M. Ramodibedi

JUDGE

4th day of March 1997

For Applicant : Mr. Snyman

For First and Second Respondents: Mr. Mathafeng

For Sixth Respondent: Mr. Kolisang