CIV/APN/240/2008

IN THE HIGH COURT OF LESOTHO

In the matter between:

KHETLA T.J. RAKHETLA	**1st APPLICANT**
MAKHOTSO RAKHETLA	**2ND APPLICANT**
AND	
LEBOHANG ALDEIA (born RAKHETLA)	**1ST RESPONDENT**
ESTATE OF THE LATE MATHABO A. RAKHETLA	**2ND RESPONDENT**
METROPOLITAN LESOTHO	**3RD RESPONDENT**
MASTER OF THE HIGH COURT	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice T. Nomngcongo
on the 12th day of May 2009

On 21st July 2008, Mr Molati moved and obtained an order on an urgent basis orders in the following terms:-

1. That the rules of this Honourable Court pertaining to normal procedural formalities, modes and periods of

service and time limits be dispensed with on account of urgency hereof.

2. That a *rule nisi* be and it is hereby issued returnable on 11th August 2008 at 9.30 am. calling upon the respondents to show cause, if any, why an order in the following terms cannot be made final to wit.

   (a) That the 1st respondent be and is hereby interdicted and restrained from holding out herself as the executrix and/ or the heiress of the estate of the late 'Mathabo A. Rakhetla and from collecting rentals from House no.243 Constitutional Road (Maseru Central) with lease no.12284-029.

   (b) That the 2nd applicant herein is the heiress to the estate of the late 'Mathabo A. Rakhetla.

   (c) That it is hereby declared that the 1st respondent has no right of inheritance from the estate of the late Mathabo A Rakhetla by virtue of here (sic)

being not a member of the Rakhetla family but a member of Alediea.

(d) That applicants should ensure that Thabang Thacker (born Rakhetla) (currently residing at 10, Oackwood Grove, Alderbury, Salisbury England, SP5 3BN) is served with the interim court order hereof and the founding papers herein by International Courier services and the proof of service be filed by the applicants on the return date.

3. That 1st respondent should pay costs at attorney and client scale in the event of unsuccessful opposition hereof.

4. That applicant be granted such further and/or alternative relief (sic).

5. That prayers 1, 2, 2(a) and (d) operate with immediate effect as interim relief.

This application is opposed and answering affidavits and replying affidavits were duly filed. I must point out right away that the 1st respondent in her answer raised several points in limine. I will avert to them in due course.

It is common cause that 1st applicant is the father of 1st respondent who has since married. The 2nd applicant is the widow of 1st respondents illegitimate son. The 1st applicant regards the son as his own in terms of Sesotho law and custom by which there are no illegitimate children, instead such children belong to the child's mother's parents. 1st applicant thus considers the 1st applicant as his own daughter in law.

The 1st applicant got married some time in 1957. He divorced from his wife on the 4th March and re-married her on the 17th April 1991, just short of a month and a half later. The marriage was by ante-ruptial contract. The contract gave the wife substantial property and excluded marital power.

She died intestate sometime during 2006 leaving behind her husband and two daughters, a son having predeceased them without issue. When she died the family of Rakhetla then decided to bestow all her property to 1st respondents son declaring him a sole heir to it. He was introduced as such to the authorities. This son died but survived by his widow, the present 2nd applicant who claims her right to the 2nd respondent (the estate of the late 'Mathabo A Rakhetla) derives from being the wife of the said son.

The first point raised in limine was that there was no urgency has been addressed by this court and more importantly by the court of appeal in a plethora of cases (sec. Commander Lesotho Defence Force v Matela 1999 – 2000 LLR & LR 13 (LAC); Molapo Qhobela v BCP 1999 – 2000 LLR & LB 243 (LAC); Sea Lake (pty) Ltd v Chung Hwa Enterprises Co. (Pty) Ltd 1999 – 2000 LLR & LB 391 (LAC); Vice Chancellor of NUL and Another v

Matsobane Putsoa C of A (Civ) N0. 28 of 2002 (unreported). In the latter case Gauntlet J.A. remarked as follows:

> "The decision to allow an application to be heard on an urgent basis requires a discriminating exercise of judicial discretion. Important in that regard is the insistence by the court of first instance on a proper case for urgency being made out in the founding papers and that the certificate of urgency states grounds".

In the instant case the applicants' certificate of urgency simply states that the 1st Respondent is holding herself out as the executrix and/or heiress of the estate of the late 'Mathabo Rakhetla and is unlawfully taking inventory and administering it to the prejudice of the applicants. It is claimed there is no alternative remedy by which to pre-empt the 1st respondent.

There is one reference in the founding affidavit of the 1st applicant at par.7 where he says:

> "I further submit that we have been legally advised that the 1st respondent's conduct tramples on my rights and those of the 2nd applicant to ensure due and lawful administration of the 2nd respondent and that any conduct that tramples on a question of rights calls for urgent judicial intervention. This is moreso when the 1st Respondent (sic) conduct amount to continuing illegality or unlawfulness which justifies urgent approach and seeking of intervention of this Honourable Court to pre-empt the involved self-help.

I gather from this rather garbled averments that the deponent was advised that if <u>any</u> conduct tramples on rights it justifies an urgent approach to the court and that if such conduct is continuous it becomes even more urgent. Beyond that I do not comprehend what is meant by "seeking of intervention …. to pre-empt the involved self-help." I pose here to remark that all too often one meets this kind of depressing reading from practitioners which is by no means limited to the younger, inexperienced ones, where words are thrown into sentences without proper regard even to basic grammar, rendering them incomprehensible in the end. It is

best in my view to organize one's idea around short sentences; in that way it is easy to make sense out of them and to detect any possible errors.

Be that as it may, that is all that the applicants put forward for approaching this court urgently and ex parte. Surely everyone approaches court because, to use applicants' rather emotional words, they believed their rights have been" trampled" on by someone's conduct. That does not mean, obviously that everyone has to approach court urgently. There must be more than that. The court must be told why an applicant cannot so to speak wait in line with other litigants to obtain redress. To say that a violation of one's rights is continuing cannot *per se* be a justification of adopting this approach to court. In the present case the applicants do not even say for how long the conduct complained of has been continuing. Gauntlet J.A. remarked as follows in the Vice Chancellor of Nul and Another (supra).

> "Too often inadequate notice is given with a vague and general reliance on urgency. All this is harmful to the proper functioning of the courts, and unfair on those practitioners and litigants who seek to adhere to the rules."

In my view such is the case here. Only very vague reasons have been given why this matter is urgent. In my view both the certificate of urgency and the founding affidavits have not established any urgency here. That is not the end of the matter.

The 1st Respondent has charged that the 1st and 2nd applicants have no clear right and as I understand her, therefore no locus standing.

Throughout the founding affidavit the 1st applicant does not lay claim to the estate of his late wife (2nd respondent herein) which is at the heart of this application. Nor, indeed, can he do so as the surviving spouse of his late wife to whom they had been married out of community of property. (see Corbett, Hahlo, Hofmeyer and Kahu; The law of succession in South Africa p.588). 1st applicant

does claim the estate of behalf of 2nd applicant whom he refers to as his daughter in law. The 2nd applicant incorporates this averment in her own affidavit and adopts it.

This brings me to another point raised by the 1st respondent, that of choice of law. It is alleged that the 2nd applicant is the daughter-in-law of the 1st respondent by virtue of the adoption by 1st applicant of her late husband. This would be according to Sesotho law and custom. Now the estate in dispute was hatched by ante-ruptial contract between 1st applicant and his late wife. This makes it clear that they arranged their affairs under the common law as there is no such concept under Sesotho law and custom. The first applicant seems to take the view that for one purpose, that of adoption he is governed by customary law and for another, that of his matrimonial affairs, by the common law. This is clearly untenable.

The 1st respondent objected to the applicants' resorting to customary law in her answering affidavit. All the applicants could say was that legal argument would be made to the court. They said so in their reply. The heads of argument repeated that and went no further. Neither did I hear any argument in this respect during addresses. All I have before me is the applicants' demonstrated partiality for the common law.

That being the case, the 2nd applicant's late husband could never have been appointed sole heir to the estate of her grand-mother. He was under the common law an illegitimate child entitled to take *ab intestato* from its mother and mother's relations. (see The Law of Succession in South Africa supra at p.586). Now even if the alleged adoption, admittedly under Sesotho law and custom of 2nd applicant's husband were to be given any effect under the common law, his wife does not succeed to his estate *ab intestato*, much less to that of his parents (at p. 588 par. 2) at common law.

The applicants have in the circumstances failed to establish any right in the estate and are therefore unsuited.

The application is dismissed with costs.

T.NOMNGCONGO
JUDGE

For Applicants : Adv. Molise
Adv Molati

For Respondents : Adv. Macheli