IN THE HIGH COURT OF LESOTHO

CIV/APN/193/2013

In the matter between:

MANTHABISENG LEPULE **APPLICANT**

And

TEBOHO LEPULE **1ST RESPONDENT**

MARETSEPILE LEPULE **2ND RESPONDENT**

MAKHAUTA MOKHITLI **3RD RESPONDENT**

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 12 - 13 June, 2013
Date of Judgment : 6 August, 2013

Summary

The applicant who is a widow applying for a vindicatory and eviction order against the respondents – The latter being the children of their late father born from his 1st late wife – The 1st respondent being the 1st male child of their deceased's parents – The late father after being pre-deceased by the 1st wife marrying the applicant who is actually the respondents' biological aunt – Contestations over the rights to the estate – The High Court deciding this in favour of the 1st respondent as a customary heir – The Court of Appeal deciding otherwise and declaring the applicant as the heir – The respondents refusing to abide by the Court of Appeal decision, forcefully taking over the estate and

expelling the applicant from it – Hence the present application – The 1st respondent mounting a constitutional application asking for an order declaring the decision of the Court of Appeal unconstitutional and for the staying of its judgment pending finalization of the constitutional matter – Refusal of the court to grant the order for stay – Question of the jurisdiction of this court when sitting as a Constitutional Court to declare the decision of the Court of Appeal as being unconstitutional – The vindicatory order granted – The eviction held in abeyance pending the exploration of the Restorative Justice avenues.

ANNOTATIONS

CITED CASES

Teboho Lepule vs Manthabiseng Lepule, the Master of the High Court & Attorney General CIV/APN/600/2011
Manthabiseng Lepule vs Teboho Lepule C. of A. (CIV) 5/2013
Teboho Lepule vs Manthabiseng Lepule & Ors Const. Case No.4/2013
Mokhutle No vs MJM (Pty) Ltd & Ors 2000 – 2004 LAC 186
Minister of the Interior & Anor vs Harris & Ors 1954 (4) SA 769 @ 780-781
Nedcor Bank Ltd vs Kindo & Anor 2002 (3) 185 @ 187
Van der Wald vs Metcatch Trading Ltd 2002 (4) SA 317 (CC)
Setlogelo vs Setlogelo 1914 AD 221
Webster vs Mitchell 1948 (1) SA 1186 (w)

STATUTES

Land Act 1979
Court of Appeal Act 1978
The Constitutional Litigation Rules 2000

BOOKS

None

MAKARA A.J

[1] This is a civil case in which the applicant has, on urgent basis brought on notice to the respondent, an application which finally after the interlocutory rulings and the consequent amendment projected, that it is seeking for a vindicatory relief in terms of which

the respondents are to be ordered to forthwith restore onto the applicant the possession of the properties and the keys pertaining to the Lepule's residential house at Lower Moyeni, Mountain Side Hotel,Aiskop Public Bar (Aiskop Off Sales), Lower Moyeni Public Bar (Mountain Side Hotel) and alternatively that the respondents be ejected from the stated premises. It is within the context of the applicant's amended papers, that he is in his application for vindication asking that the respondents be directed to restore to her the *ownership* of the properties referred to in the amended version of the application rather than the *possession* of same.

[2] The motion proceedings before the court originate from the uncontroverted background here presented. The late Thomas Lepule had firstly married 'Mateboho Lepule on some unspecified date and year. The latter pre deceased her husband in 1987 leaving the 1st respondent who is their first son, the 2nd respondent who is their 1st daughter and the 3rd respondent being their last child.

[3] It is common cause that during the lifetime of Thomas Lepule and her late wife Mateboho, they had started a business enterprise since the were owning and operating the Aiskop Off- Sales.

[4] Following the death of Mateboho Lepule, her late husband Thomas Lepule married the applicant Manthabiseng Lepule who is a younger sister of his deceased wife. The marriage was in community of property and was concluded on the 9th December,

1987. It was this subsequent marriage that the applicant and her husband became recognizable entrepreneurs by reason that the family diversified its business ventures beyond the Aiskop Off Sales and demonstrated a successful progress. The developments included the acquisition of several developed residential and commercial sites, bottle stores and a hotel.

[5] The applicant's husband Thomas Lepule passed away on the 6th February 2006 and thereby leaving her as his widow. In consequent of this event, the family council met to designate an heir to the estate since the deceased had died interstate. It accordingly appointed the applicant in that capacity. It is of significance to mention that the 1st respondent was one of the members of the family who constituted the council that advanced the name of the applicant as a successor to the estate of the family of the late Thomas Lepule. The impression which the family radiated was that she was so appointed in recognition of her enormous contribution to the estate. On the land dimension of the estate, her designation as the heir happened to be inconsonance with the dictates of **sec 5 of the Land Act 1979** which amended sec 8 of same by providing that upon the death of the husband, the widow shall be the heir to the family land rights. The amendment 'revolutionirized' the earlier legal regime in which a natural male heir would, in accordance with the Customary Law, assume the heirship during the lifetime of the mother.

[6] On or about the 6th December 2012, the 1st respondent brought before this court an application bearing the citation **CIV/APN/600/2011 Teboho Lepule v Manthabiseng Lepule, The Master of the High Court and The Attorney – General.** He in that, mainly sought for a declaratory order in terms of which he is pronounced as being in essence, a customary heir to the estate of the late Thomas Lepule and Mateboho Lepule. The 1st respondent had in particular claimed successory rights to the developed residential site at Lower Moyeni, Mountain Side Hotel, Alwynskop Off - Sales and Mountain Side Off – Sales. It should suffice to be stated that during February 2013, the application was granted as prayed and, therefore, that he assumed the heirship of the estate of his deceased biological parents.

[7] Two days later, after this court had decided in favour of the 1st respondent, the applicant filed an appeal against he decision. This was in **C of A (CIV) No.5/ 2013 Manthabiseng Lepule v Teboho Lepule** and simultaneously on the same date, brought an urgent application for a stay of the execution of the stated judgment. The latter matter is still pending before the High Court.

[8] The applicant had at all material times after the death of her husband enjoyed a peaceful and undisturbed occupation and management of the properties of the estate. A supervening evil suddenly struck on the 20th February 2013, when according to her the respondents acting in concert and with a common purpose forcefully took possession of the properties belonging to joint estate

of her late husband and herself. She laments that in the process they seized the keys and in some instances changed the locks. It would appear that the 1st respondent and his sisters had simply exploited the judgment which had pronounced the 1st respondent as the heir of the estate. In any event, there had been no High Court order staying its execution pending the appeal. In those disturbing developments, the applicant tells the court that she sought for refuge at her maiden's home in Upper Moyeni where she has to date stayed with her children.

[9] The Court of Appeal upheld the applicant's appeal against the judgment of the High Court. This was done in **C of A (CIV) 5/13 'Manthabiseng Lepule v Teboho Lepule.** The judgment in paraphrased and summarized terms stated that it had escaped the wisdom of the High Court to have realized that the applicant had resuscitated the house of her late sister Mateboho Lepule instead of establishing a separate house, had during the lifetime of her husband contributed immensely in the expansions of their family business enterprises, she had by operation **sec 8 of the Land Act 1979,** became the heir to the land allocated to her husband and the heir to the estate. It for these reasons, disqualified the applicant from prematurely assuming the customary law heirship during the life of the applicant. The learned President of the Court of Appeal had in support of his determination regarding the 1st respondent's premature claim for the heirship of the estate in the circumstances of the case, relied upon the decision in **Mokhutle No v MJM (Pty) Ltd**

and Others 2000 – 2004 LAC186. There it had been reasoned that, despite the fact that a customary heir has the expectation or a *spes* by virtue of his birth as the eldest son, that is not a conclusive basis for conferring a clear right since the estate would only vest in the heir upon the death of the deceased.

[10] In consequence of the decision by the Court of Appeal, the applicant has drawn to the special attention of the court that the respondents have ever since their forceful take over of the business premises, been mismanaging the personnel and the financial affairs of the Mountain Side Hotel to the detriment of its goodwill. She has against this charge, asked for an order directing the trio, to present a comprehensive account of all the business transactions throughout their take over period.

[11] A resultant foundation of the current applicant's urgent application is that the respondents haven't hitherto restored the ownership of the properties of the estate referred to in the judgment despite them being fully aware of the decision. It is in this connection that she prays for an order of vindication against the respondents and commensurately for their eviction from the residential and business premises which have throughout featured as the subject matter in the proceedings before the High Court and in the Court of Appeal. The understanding would be that under normal circumstances, the case would be regarded as having

reached the finality especially when the apex court of the land has pronounced itself on the issues involved from the High Court.

[12] The developments in the case took a rather unprecedented turn in that the 1st respondent reacted to the application in a *sui generis* manner. This manifested itself in that he interjected the proceedings by suddenly launching a constitutional case bearing particulars **Constitutional Case No.4 2013 Teboho Lepule vs Manthabiseng Lepule and Others.** He subsequently traversed the merits of the application for a vindicatory order against the respondents and for their eviction from the premises. In the comprehension of the court, the contextual technical effect of the constitutional case brought is to advance a constitutionally based justification for the respondent's non compliance with the judgment of the Court of Appeal.

[13] On the constitutional terrain, the 1st respondent has in a nutshell, initially asked this court to make an order staying the said judgment of the Court of Appeal in **C of A (CIV) 5/ 2013 Manthabiseng Lepule and Teboho Lepule** pending finalization of the constitutional case; secondly, that this court struck down **sec 20 of the Court of Appeal Act 1978** for being unconstitutional and void to the extend of its inconsistency with section 22 of the constitution of Lesotho; the judgment of the **Court of Appeal in C of A (CIV) 5/ 2013** be set aside to the extend that it violates the Fair Trial Rights under sec 12 (8) of the constitution and that the same be done to the judgment

for its violation of the provisions of sec 4(1) read in conjunction with sec 19 of the constitution. it is further his implied case that the Court of Appeal may have inadvertently misinterpreted the question of the *retrospectivety* or the *retroactivity* of the applicability of sec 8 of the Land Act 1979. In the same vein, he asks the court to exploit its constitutional jurisdiction to effectively reinstate the High Court judgment which has been set aside by the Court of Appeal. The 1st respondent's bedrock reasoning in seeking for the constitutionally premised remedies is that this court while sitting as a Constitutional Court would be competent to make findings on the constitutionality or otherwise about the decisions of the Court of Appeal notwithstanding the latter's standing as the highest court in the Kingdom.

[14] The 1st respondent's counsel Adv. P R Thulo, has in his proposition that this court while sitting in its constitutional capacity has a jurisdiction to test the constitutionality of the Court of Appeal decisions by fortifying that with reference to a number of decisions which according to him elucidate the jurisprudence. He from the onset relied upon the postulation of the law in the celebrated case of **Minister of the Interior and Ano. v Harris and Others 1954(4) SA 769 @ 780 – 781where Centlivres CJ** (as then was) stated:

> To call the rights entrenched in the constitutional guarantees and at the same time to deny the holders of those rights any remedy in law would be to reduce the safeguards enshrined in sec 152 to nothing. There can to my mind be no doubt that the authors of the constitution intended that those rights should be enforceable by the courts of law. They could never have

> intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right *ubi jus, ibi remedium*.

[15] He further referred the court to **Nedcor Bank Ltd v Kindo & Another 2002(3)185 @187** where it was reiterated that furthermore it is generally accepted principle of South African law that 'where there is a right there is a remedy.' The principle is expressed in the maxim *ubi ius ibi remedium*. And further submitted that it transpires from the judgment in **Van Der Wald v Metcatch Trading Ltd 2002 (4) SA 317 (CC),** that the only instance where the Constitutional Court cannot interfere with the final decision of the Court of Appeal is where such court properly or *bona fide* exercised discretionary powers as against in the present instance where it was determining the substantive rights of individuals.

[16] It should perhaps suffice to have it stated in a summarized version that the respondents had raised a number of technical points against the application. These included its lack of disclosure of the material facts in that the applicant has not for instance stated that at the time the respondents assumed the control of the estate, they were armed with a High Court judgment delivered in **CIV/APN/600/2011 T Lepule v M Lepule and Others** which had bestowed upon the 1st respondent the customary heirship rights over the estate. He cited the case of Ntsolo v Moahloli (1985 -89) LAC 307 @310 in support of the position that a material disclosure of a fact regardless of its effect on the party's case, is necessary. The respondents had further raised the issue of *lis pendense* arguing

that at the time the present application was brought, there was already a pending spoliation case which has not been decided upon. They also contested the form in which the application had been brought before the court. The court ruled that considering the cases as a whole, the points raised were not of a significant nature and, therefore, that the merits of the application for a vindicatory order and eviction be interrogated by the counsel.

[17] The court made its interlocutory ruling on the technical points advanced by the respondents in pursuit of a merit based justice and a reaching of a finality in the case after its protracted dimensions. This notwithstanding, the court is conscientious of the applicant's manifestation of uncertainty regarding the most appropriate and effective relief which she could from the onset, have resorted to, after obtaining the judgment of the Court of Appeal. This is attested to by the fact that she brought an application for an interdict, then for spoliation and lastly for a vindicatory order. This has definitely contributed to the protraction of the case and in a delay to have it concluded earlier and thereby economized on the costs involved.

[18] In responding to the merits of the applicant's case as presented in her relevant founding affidavit, the 1st respondent has in his answering affidavit proceeded from the premise that he has high prospects for success in the constitutional application and that as a result, this court should appreciably grant a stay of the

execution of the judgment of the Court of Appeal. This should according to him, obtain pending the finalization of the constitutional case by this court. He has in the same thinking, expressed optimism that the court while exercising its constitutional sitting authority discover that it is imperative for it to set aside the Court of Appeal judgment in **Manthabiseng Lepule v Tebeho Lepule C of A (CIV) No.5/13** on account of its alleged glaring unconstitutionality.

[19] Advocate Thulo submitted that the 1st respondent has by virtue of the persuasive merits in the constitutional application, satisfied the requirement for an interim interdict *pendente lite* as they had been propounded in the classic formulation made in **Setlogelo v Setlogelo 1914 AD 221**. These requirements being:

a. A prima facie right, though open to some doubt;
b. A well grounded apprehension of irreparable injury, if the interim relief is not granted and the ultimate relief is eventually granted;
c. The balance of convenience favours the granting of the relief;
d. The applicant has no other satisfactory remedy;

[20] He further in support of his proposition that in the interim, the execution of the judgment of the Court of Appeal should be stayed pending the decision of this court on the constitutional application, by seeking reliance upon the decision in **Webster vs Michell 1948 (1) SA 1186 (W)** where it was held that;

> In an application for temporary interdict applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant would on those facts obtain final relief at trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant he should not succeed.

[21] A coincidental paradox in this case is that Advocate Mda KC for the applicant also relied upon the principles set out in Setlogelo v Setlogelo *(supra)* in support of the applicant's prayers for the court to make a vindicatory order against the respondents and in *sequelae* order for their eviction from the premises of the estate in consideration.

[22] The court fully appreciates the fact that there is a merit in the proposition of the law as advanced by Adv Thulo that the Court of Appeal should analogously to all State institutions, operate in recognition of the supremacy of the constitution. This he rightly argued is dictated under sec 2 of the constitution. He has in precise terms charged that the Court of Appeal has this notwithstanding, assigned to **sec 8 of the Land Act 1979**, an interpretation which conflicts head-on with sec 17 of the constitution and consequently transgresses the constitutional rights of the 1st respondent and thereby rendering such a decision unconstitutional. It is exactly upon this basis that the counsel expressed his seemingly convictional optimism that there are high prospects that the

constitutional application will succeed and therefore that the court should realize the imperative of staying the main application for a vindicatory and eviction order against the respondents.

[23] An intriguing assignment before the court is a realization that the 1st respondent's counsel is proceeding from a logical premise that the fact that the constitution is a supreme law of the land. From there he propounds a view that since the court can sit as a Constitutional Court, it is indicative that it could, while sitting in the latter capacity, commands a jurisdiction to *inter alia* entertain the cases in which the constitutionality or otherwise of the decision of the Court of Appeal decision on the question that may impact adversely against the aggrieved litigant's rights. He had hastily supported this proposition of the law with reference to **Van Der Wald v Metcatch Trading Ltd 2002 (4) SA 317 (CC)** where it was qualified that the only instance where the Constitutional Court cannot interfere with the final decision of the Court of Appeal is where such court properly or *bona fide* exercised discretionary powers. The counsel cautioned that this should be contrasted with the present instance where it was determining the substantive rights of individuals and in the process inadvertently and or incorrectly compromised the respondents' rights. In the same connection, he advised that sec 22 of the constitution gives the High Court the jurisdiction to hear the matter since it is founded upon the complaint that the secs 4 to 21 constitutional rights have been violated or likely to be. His emphasis was repetitively on a note that the legislature cannot give

a right without simultaneously providing for a remedy in the event that it is being breached.

[24] In deciding on the validity or otherwise concerning the law advanced by the 1st respondent in the constitutional application, the court finds that sec118 of the constitution makes the Court of Appeal to be the highest court of the land. Sec 129 (1) entrusts it with the appellate jurisdiction which is expressed in these terms:

> (a) ..... an appeal shall lie as of right to the Court of Appeal from decisions of the High Court in any civil or criminal proceedings on questions as to the interpretation of this constitution, including any such decision made on reference to the High Court under sec 128;
>
> (b) Final decisions of the High Court in the determination of any question in respect of which a right of access to the High Court is guaranteed by sec 17 of this constitution and final decisions of the High Court under sec 22 of this constitution.
>
> (2)
>
> (3).....

[25] On the other hand, Sec 130 of the constitution provides that:

> In addition to the supervisory jurisdiction on a reference conferred on the High Court by this constitution, the High Court shall have such jurisdiction with regard to appeals from the decisions of any subordinate court, court – martial or tribunal as may be conferred by Parliament.

[26] The presented constitutional scheme clearly maintains the Court of Appeal as the apex court in the hierarchical structure of the Judiciary and that it has the final decision

making authority over all the courts including the High Court in particular.

[27] It should, perhaps, be stated that Parliament hasn't yet legislatively established a Constitutional Court. **The Constitutional Litigation Rules 2000** have simply been introduced as a procedural instrument governing constitutional based litigation on either vertical or horizontal based complaints. The initiative has simply exploited the existing unlimited jurisdiction of the High Court including hearing of constitutional matters, to facilitate for it to assume a constitutional sitting. This could simply be regarded as a special sitting arrangement dedicated for dispensation of justice in the province of the law which is recognized as being sacrosanct and of paramount significance in the existence of humankind. The court, nevertheless, remains the High Court. It thus, cannot have a jurisdiction to preside over a case in which the constitutionality of the decision of the Court of Appeal is a subject of the litigation before it.

[28] Irrespective of the court's determination its constitutional standing and the parameters of its jurisdictional authority in relation to the Court of Appeal, there is a due recognition attached to the fact that the 1st respondent has procedurally mounted a constitutional case in this court. He is therein seeking for a constitutional redress against the decision of the Court of

Appeal which he impugns that it is unconstitutional in that it effectively facilitates for the infringement of his constitutional rights. The case is **Constitutional Case No. 4 /13 Teboho Lepule v Manthabiseng Lepule and Others.**

[29] The court having studied the papers in the constitutional application and considered the strongly articulated representations made by the 1st respondent's counsel in persuading it to find that the 1st respondent has good prospects for success in the constitutional application, thinks strongly otherwise about that stated optimism. The reasons for its skepticism have already been analytically presented. It is therefore, held that the 1st respondent's prayer in the constitutional application that the proceedings in the present application be stayed, pending the finalization of the constitutional matter, would not meet one of the requirements in the famous **Setlogelo v Setlogelo *(supra)*** which has been heavily relied upon by both counsel. Such a requisite condition is that an applicant for a temporary interdict must show that he has prospects of success at the end of the hearing.

[30] On the side of the current application, the court from the onset proceeds from the basic fact that the Court of Appeal has already in the clearest terms pronounced itself that the applicant is the rightful heir to the estate in issue. This *per se,* has a clear telling that the applicant has the ownership rights over the estate

and that she is, in that respect, protected against the whole world in the enjoyment of those property rights. In the meanwhile, there has been an established fact that the respondents have irrespective of the Court of Appeal decision in the matter, continued to unlawfully and forcefully deprived her of the rights in consideration. It is not conceivable that the applicant could recover her property rights from the respondent other than through seeking for the vindicatory intervention from this court and for the eviction of the respondents from the premises. The facts upon which the applicant has relied upon in her application, satisfy all the essentials in **Setlogelo v Setlogelo *(supra).***

[31] The application finally succeeds as prayed save that the dimensional prayer for an order directing that the respondents be evicted from the premises and the one relating to costs should be held in abeyance for a period of three (3) months commencing from today to enable the parties negotiate some workable settlement. The deferment of the eviction order is justified by the fact that the case hinges upon the family relational impasse and a challenge ahead for the parties to realize the wisdom in maintaining the family unity. This is definitely imperative considering the future strategic positions which the applicant and the 1st respondent respectively hold in the family. It transpires that it would be in the future best interest of the applicant's children to have healthy family relationship with the

1st respondent as their senior brother. The court has been impressed by the indicated willingness of the applicant to discharge her traditional motherhood obligations upon the respondents and to consider accommodating the 1st respondent into the Kingdom of her estate as far as it would be practically possible.

[32] The court considers this case to present a typical social scenario in which the adversarial system of justice should accommodate the Restorative Justice Interventions.[1] This would be in an endeavor to restore the family relationship to its original position and to inject a *spirit of botho* (*humanely thinking*) into the justice of this case.

[33] In the premises, the court accordingly reserves its right to address the deferred matters after the stated three (3) months period and to make a deserving consequential order.

E.F.M. MAKARA
ACTING JUDGE

For Applicant : Adv. P.R. Thulo
For Respondent : Adv. Z. Mda K.C

[1] Restorative Justice is a traditional way of healing the broken social relationships. It is in this background also known as Relational Justice. The Paradigm is founded upon the parties willingness to genuinely reflect on their conflict and to be helped to resolve it through a physical or spiritual restoration. The main focus in the instant case should be on the family unity and its future rather than on purely legal technical considerations.