IN THE HIGH COURT OF LESOTHO

CIV/APN/113/2013

In the matter between:

'MATHIBELLO MAKHOHLISA **1ST APPLICANT**

And

PAKALITHA JOHANNES MAKHOHLISA **1ST RESPONDENT**

STANDARD LESOTHO BANK **2ND RESPONDENT**

FIRST NATIONAL BANK **3RD RESPONDENT**

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 13 June, 2013
Date of Judgment : 22 August, 2013

SUMMARY

The applicant filed an urgent application for the respondent with whom they are married in community of property to be restrained from alienating the family properties to his alleged several mistresses to sustain the affairs with them - The relief being sought pending the divorce action between the applicant and the respondent - The applicant failing to satisfactorily on the balance of probabilities to prove her husband's extra marital relationships and, therefore, that her fear that he would alienate the family assets to his concubines is reasonable – The application consequently dismissed with no order on costs.

ANNOTATIONS

CITED CASES

Mathibello Makhohlisa v Pakalitha Johannes Makhohlisa CIV/T/176/13.
Mamosiako Athalia Molise v Philemon Mokalake Molise CIV/APN/116/1981 p7
Tregea and Ano v Godart and Ano 1939 AD 18
Pillay v Krishna and Another 1946 AD 946
Setlogelo v Setlogelo 1914 AD 221
Kolo Mine Workers Diamond (Pty) Ltd CIV/APN/2/ 08(unreported)
Kabi Monnanyane v SOS Children's Village & Others 2005- 2006 LAC 416
Tsehlana v National Committee of the Lesotho Congress for Democracy and Another 2005-2006 LAC 267.
Room Hire Co. V Jeppe Street Manson 1949 (3) SA 1155(T)
Mamosiako Athalia Molise v Philemon Mokalake Molise CIV/APN/116/1981 p7
Pretorious v Pretorious 1948 (1) SA 250
Pickles v Pickles 1947 (3) 1947 SA 175.

STATUTES

The Legal Capacity of Married Persons Act No. 9 of 2006

BOOKS

Halsbury's Law of England (vol. 13)

MAKARA A.J

[1] The court was here seized with an application in which the applicant had on urgent basis approached it seeking for an order restraining the 1st respondent from alienating and or disposing off the properties forming part of her and the 1st respondent's joined estate and directing the 1st respondent to keep safely all the documents of title to their estate pending the final determination of a divorce matter between them. The case which she is referring to is

The applicant has further asked for the issuance of an order directing the 1st respondent to refrain from assaulting her or threatening her personal liberty and also that 2nd and 3rd respondents be directed to refrain from allowing the 1st respondent to access the accounts which are opened in his names without the applicant's concern.

[2] The applicant has endeavoured to present a foundation of her case in her founding affidavit and has further sought to elucidate it in her replying affidavit. It would be primarily from the perspective of her averments in the founding affidavit that the court would be enjoined to determine whether or not she has initially made a *prima facie case* to satisfy the basic requirement for the motion proceedings approach which she has initiated and subsequently in consideration of the counter papers advanced by the 1st respondent, decide if she has proven it on the balance of probabilities proven her case.

[3] It is considered to be worthwhile to first traverse the applicant's averments which have at the end of the day been projected by the parties as being of a common cause nature. These commences with the acknowledgement that the applicant and the 1st respondent have since 9th May 1992, been married to each other in community of property. The family has ever since acquired properties a white truck bearing registration numbers M7565, a

white Toyota twin cab with registration numbers CF 448, a black jeep which bears registration numbers FCS 609 FS, a white ford bantam of registration numbers FCS 604 FS and a residential house in which the applicant is presently residing at Ha Mathata in the district of Leribe. The impliedly admitted fact is that the husband is not staying at the matrimonial home since that has not been controverted and there has been no indication as to where he is staying currently.

[4] It further appears not to be in dispute between the parties that they have son by the name of Nako Makhohlisa and that he has a number of vehicles registered in his names. They are a polo classic reg. No: CE969, white truck reg. No: DYZ852 FS, blue and white tractor reg. No: CK646 and a white golf reg. No: CF6. The registration of the vehicles in the son's names appears to be a fact and it would be something else to interrogate the question of their source.

[5] The urgent application and its corresponding prayers for the 1st respondent to be restrained as prayed is premised upon the applicant's expressed fear that her husband is likely to alienate the properties of their joint estate and yet she had already instituted the divorce proceedings against him. She has lamented in her papers before the court that she would otherwise suffer an irreparable harm in that at the conclusion of the divorce action, there might be nothing meaningful left for the court to divide between the parties. There seems to be some recognisable optimism

on her part that the court will grant the divorce and ultimately in addressing the ancillaries, get to a point where it would have to divide the estate between them. It should suffice to indicate that the applicant has presented in a list form what could be likened to the family property inventory. This appears under Annexure "A" of her founding affidavit.

[6] In seeking to give substance to her case and therefore demonstrate to the court that she deserves the expedient intervention which she is asking for, the applicant has grounded her apprehension upon her charge against the 1st respondent that he has physically deserted her in that he has left their matrimonial home and that he has thereafter embarked upon an adulterous lifestyle. She has illustrated that by accusing the man of having some multiple love affairs with three women and named them as being 'Maitumeleng, 'Mamosiuoa and another woman with whom he has fathered a boy child. She has averred that her husband once informed her that he has fathered a boy with that other woman and that his name was Tumelo Makhohlisa. It is basically against the background of the alleged adulterous mode of life adopted by the 1st respondent that the applicant maintains an apprehension that he could alienate the family properties in favour of his several mistresses and consequently occasion her an irreparable harm in that should her divorce case succeed, there would be nothing left in their estate for the division between them.

[7] Besides basing her fear on what could be described as the allegation that the husband, acting with impunity, transgresses the 6th Commandment and therefore has a proclivity to buy love using the assets of the estate, she has endeavoured to reinforce her fear by telling the court that he has started the alienation process by already having given their son Nako Makhohlisa some of the vehicles belonging to their joint estate. She complained that this had been done without her consent. The vehicles she is referring to are those which are registered in their son's names save to be mentioned in passing that that the 1st respondent has, as it would latter emerge advanced his counter response to this assertion.

[8] It should be highlighted that the applicant has, in addition to the properties which have already been identified as being common cause that they are part of the estate, extended the list to include the vehicles which have undisputedly been registered in the names of their son, a residential house at Katlehong in Maseru, a fifteen (15) roomed house situated at Matwabeng Senekal in Free State in the Republic of South Africa, a business site at Maputsoe near the Community Primary School and a company called Translec Consulting Engineers (PTY) LTD.

[9] She has further in her papers presented a scenario that the conflict between her and her husband had at some stage culminated in the incident where the husband shot her and that as a result she sustained a leg injury. In support of this statement, she

has averred that there is a criminal charge has been preferred against the 1st respondent in the Leribe Magistrate Court and that it is **CR: 106/13.** She has complained that as a result of the injury she is no longer able to work.

[10] The applicant's counsel had in the endeavour to persuade the court that in the circumstances of this case, the wife's fear that the husband has a propensity to alienate the properties of the estate is anchored in law, relied upon the decision by Kheola CJ (as then was) in **Mamosiako Athalia Molise v Philemon Mokalake Molise CIV/APN/116/1981 p7.** In that case, the facts which constituted the basis for the application for an interdict against her husband were analogously and relatively similar to the ones upon which the present applicant is asking for a similar relief against the 1st respondent. In that case, it was found that the applicant had proven that her husband was engaged in an extra marital relationship with another woman. The court had taken a view that the fact that the adultery had been proved warranted the order restraining the husband from disposing of the properties of the family estate.

[11] A further legal based argument which her counsel advanced was with reference to **sec 5 of the Legal Capacity of Married Persons Act No. 9 of 2006.** He drew it to the special attention of the court that the section provides for the equal capacity of the spouses married in community of property and mandatorily obliges them to consult

each other where there is an intention to dispose of the assets of the joint estate, contract debts for which the joint estate is liable and in the administration of the joint estate. In the appreciation of the court, the impression given is that there is a contextual founded fear that the 1st respondent's alleged multiple romantic affairs with several women is highly likely to overwhelm him to a degree that that he would disregard the provisions in the section and simply go on to unilaterally give asserts of the joint estate to his mistresses.

[12] The 1st respondent has systematically responded to her wife's allegations about his adulterous life and to her disclosed apprehension about his propensity to transfer the family assets to his several mistresses to circumvent a possible ancillary order from the impending divorce action that there be a division of the estate. He has reacted likewise to the additional properties which the applicant has averred in her founding affidavit that that they fall within their joint estate. His counter explanation even addresses the legal position regarding the exclusive right of a husband or a wife to the bank account held by each of them. The approach has seemingly been calculated at demonstrating that the applicant's accusations are foundationless, devoid of prove and sheer speculative. It is in this context that he has, from the onset, pursued a preliminary view that the application ought not to have been brought on agent basis and that it doesn't qualify for the redress prayed for.

[13] The husband has in advancing the merits of his defence proceeded from a statement in which he vehemently denies that he is involved in any extra marital relationship, that he has admitted it to the applicant that as a result of one such affair, he has fathered a son, that he has deserted her by leaving their matrimonial home and that the applicant has a genuine fear that he is likely to alienate the properties of the joint estate. He has, instead, counter charged that he left their home on account of her wife's adulterous life with several men notably one Letsika with whom they publicly parade their romantic friendship and that when he talks to her to stop that, she demonstrates her commitment to that adulterous companionship.

[14] Regarding the joint estate property inventory which the applicant has presented before the court per Annexure "A" to the founding affidavit, the 1st respondent has basically categorized the properties listed in the annexure into four. The first comprises of those which have been identified as being common cause that they belong to the estate; the second are those which he maintains that they belong to their son Napo and the third constitutes of those which according to him belong to the Translec Consulting Engineers (PTY) Ltd; the last are those which he denies their existence. The classification of the properties is calculated to demonstrate to the court that those which belong to Nako and to the company would not qualify to be considered as part of the parties' estate

[15] The 1st respondent's counsel Adv. Tšenoli, has argued that the applicant hasn't against the backdrop of the materially conflicting versions between the parties succeeded to prove the primary basis of her case. He maintained that she hadn't proved her allegation that the 1st respondent was having multiple adulterous relationships and that as a result, she had *bona fide* fear that he could be in the process of alienating their estate properties to his concubines. He emphasised that the court should take cognisance of the legal position that considering the 1st respondent's denial of the allegations about his extra marital relationships, it automatically became incumbent upon the applicant to prove that. He then submitted that she hasn't discharged that burden by proving the corner stone of her case which is that her husband is leading an adulterous life with women and that he has even admitted it to her that he has an adulterine child named Tumelo Makhohlisa with one of his many mistresses.

[16] It was further contended by the 1st respondent's counsel on the subject of the onus of proof, that the applicant has failed to prove that the husband has already given any of the asserts of the estate to any one the women in question. He pointed out that it is wrong and misleading for her to claim that the properties which belonged to their son Napo and to the company were part of the estate and, therefore, in the event of the divorce being granted, be a subject of a consequent possible order the division of their estate.

The position which he maintained in this respect was that the registration certificates of the vehicles belonging to the son were a testimony of the fact that they belonged to him and not to the estate. As for the other properties which the 1st respondent denied their existence such as the house in the Republic of South Africa, it was charged that the applicant has failed to prove that they belonged to their estate. In this background, Adv. Tšenoli advised the court that that the applicant bears the legal burden of proof in this case and that this remained with her without ever shifting throughout the trial. He warned that a distinction should be drawn between the legal burden and evidential one and stated that in the instant case, the applicant was settled with the legal burden which she failed to discharge. In support of that proposition of the law, he advanced a plethora of the decisions on the subject starting with that of Standford J in **Tregea and Ano v Godart and Ano 1939 AD 18** where reliance was made on a passage from **Halsbury's Law of England (vol. 13, para 612)** where it was postulated that:

> In applying the rule, however, a distinction is observed between the burden of proof as a matter of substantive law or pleading (that is, the burden of proving an issue or issues sometimes termed the legal burden) and the burden of proof as a matter of adducing evidence(during the various stages of the trial). The former burden is fixed at the commencement of the trial by the state of the pleadings of their equivalent, and is the one that never changes under any circumstances whatsoever, and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him.

[17] The counsel further referred the court to the statement of the law enunciated in the Corpus Juris:*Semper nessecitas probandi*

incumbit illi qui (D. 22. 3.21). this indicates that if one person claims something from the other in a court of law, then he has to satisfy the court that he is entitled to it; and to **Pillay v Krishna and Another 1946 AD 946 @ P951- 952.** Here it was stated that the onus is on the person who alleges something and not on his opponent who merely denies it.

[18] Having presented the 1st respondent's case and reinforced it with reference to the above authorities specifically to demonstrate that the applicant has failed to prove her case and therefore that she qualifies for the relief sought against the husband, the counsel logically interfaced that with the requirements for an interdict as were authoritatively explicated in **Setlogelo v Setlogelo 1914 AD 221@227** in these terms:

> a) The applicant must have a clear right in terms of substantive law;
>
> b) The applicant must demonstrate that the respondent has infringed upon this clear right unlawfully and on continuing basis, or that there is a reasonable expectation that the respondent will do so in future, and that the applicant will suffer damage as a result of the infringement;
>
> c) No other effective remedy is available by means of which the applicant can protect his right.

[19] It has on a different terrain been argued for the 1st respondent that the applicant has wrongly approached the court by doing so through an application. The basis of the attack was firstly that the besides the applicant's failure to have demonstrated her clear right in the matter, she should have realized that there would be a

dispute of fact and secondly that there was an alternative route for her to obtain the relief. In this regard he relied upon the direction detailed in **Kolo Mine Workers Diamond (Pty) Ltd CIV/APN/2/ 08(unreported)** that:

> An interdict is an extra ordinary remedy which should be employed only under extremely exceptional circumstances..... To say there was no alternative remedy is not genuine and the essential requirements of a well grounded apprehension of irreparable harm had not been sufficiently and satisfactorily established. On these grounds the application for an interdict falls to be dismissed and the rule accordingly discharged.

[20] The above stated position of the law regarding applications for an interdict was reiterated in **Kabi Monnanyane v SOS Children's Village & Others 2005- 2006 LAC 416** and in **Tsehlana v National Committee of the Lesotho Congress for Democracy and Another 2005-2006 LAC 267.** Here it was clarified that:

> It is well settled that a litigant who proceeds by way of notice of motion as opposed to action runs the risk of having his case dismissed simply on the ground that he should reasonably have foreseen that a material dispute of fact would arise in the matter.

[21] The impression which the court gathers from the representations by the 1st respondent's lawyer is that the applicant ought to have realized that there was bound to be a dispute of fact on the allegations about the man's extra marital multiplicities of women lovers and that he had a predilection to alienate the properties of their estate to them. This is well foreshadowed in the 1st respondent's denial that he has such relationships and that this would appreciably rhyme with his rejection of the wife's claim that

she entertained a reasonable presentiment that he would act so irresponsibly about their family assets.

[22] It has also been the reaction of the 1st respondent that **sec 7(5)(b)(i) of the Legal Capacity of Married Persons Act No. 9 of 2006** sanctions a spouse married in community of property to alienate, cede or pledge without the consent of the other spouse a deposit held in his or her name in the insurance company or bank. In the same connection, it was pointed out that the section provides for a relief in respect of a spouse against whom the exercise of the power may have an adverse effect. The response sought to specifically attack the applicant's prayer for the 1st respondent to be interdicted from accessing the savings and or the current accounts opened by him in his names in the 2nd and 3rd respondent's banks. The court holds a view that the **sec 7** based power is subject to its constractual meaning. Its understanding is that in the exercise of the liberty under the section, a spouse must do so in the best interest of the family after consulting with the other spouse.

[23] The court recognises the fact that it is a difficult task for one to prove an adulterous relationship between the adults who would not agree that they are involved in such a usually secretive and clandestinely maintained relationship. The same reality has prevailed in the instant case. It should suffice to directly and for the sake of certainty state that the court upholds the view that the applicant has evidentially on the balance of probabilities failed to

prove the extra marital affairs between her husband and the other women. It is rather inconceivable that she could in the circumstances of this case satisfactorily attain that within the conspectus of her papers before the court.

[24] Notwithstanding the finding that the applicant has failed to prove the relationship, the court is not persuaded that the applicant has wrongly approached it through an urgent application. Her failure to have proven the relationship would not necessarily be conclusively indicative that given the factual scenario in its totality, she was not justified to have sought for the relief by launching an urgent application. It appears imperative that the court should consider it if the applicant's approach cannot be satisfactorily justified upon other grounds which she has presented in her papers. The thinking is inspired by the exposition of the law on the subject in **Room Hire Co. V Jeppe Street Manson 1949 (3) SA 1155(T)** where it was cautioned that:

> It is necessary to make a robust common sense approach to a dispute on a notice of motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so.

[25] In the understanding of the court, the above statement extracted from the **Room Hire Co. case *(supra),*** details that as a dispenser of justice it has the judicial discretion to determine if a technical point raised against a notice of motion approach is, of such a significance that even considering other material factors, the

technical stratagem would justify the court to dismiss the application and, therefore, refuse to have the merits traversed. The emphasis seems to be on the proposition that the court must be holistic minded in its consideration. Thus, the court in adhering to the principle stated in the decision, realizes that in the instant case, it is not in dispute that the 1st respondent has left the matrimonial home which is something abnormal. Among the Basotho, it is extremely abnormal for a man to *ngala* from home. It is women who instead do so as an indication of a protest and as a search for a relief from the collaboration between her matrimonial family members and those from her maternal side. The court without speculating that he rendered himself to be under the temptation of establishing extra marital relationship, expresses its scepticism about the impression he portrays that he has throughout remained snow white pure in that regard. Be that as it may, this doesn't dispense with a legal burden for the applicant to prove her case that her husband has several love affairs with women.

[26] The court remains sceptical about the true source of the fleet of vehicles including trucks which are registered in the names of the parties' son Nako who is only aged 23. It visualizes a possibility that he could have given them to the son as a way of defeating the stated possible ancillary order for the division of the joint estate. This, nevertheless, doesn't advance the applicant's case since its foundation is that the feared alienation of the family assets is inter

related with the alleged extra marital love affairs between the husband and the several women.

[27] The court states it in passing and without being strictly judgmental on the subject that the applicant could be using the Translec Consulting Engineering Company to facilitate for the alienation of the properties since there is no indication that the wife is being appraised about the affairs of the company. The understanding being that she had an interest in its financial gains. Again, however, this doesn't assist the applicant's case.

[28] It should towards the conclusion of the case, be recalled that the success or the failure of the application depends upon whether or not the applicant has demonstrated that her fear is reasonable for her to obtain the relief she is seeking for. Guidance has on this subject been provided in **Mamosiako Athalia Molise v Philemon Mokalake Molise CIV/APN/116/1981 p7 in** these words:

> I am of the opinion that the assets of joint estate should be protected as far as possible from unlawful disposition by the husband. I am not saying that the wife should be given a free hand to dispose the assets of the joint estate pendent lite. She must also be restrained from disposing of the assets which are in her possession.

[29] Kheola J (as then was) had in the above decision in **Mamosiako Molise (supra)**, cited with approval the decision in **Pretorious v Pretorious 1948 (1) SA 250** where it was held that a wife married in community of property is entitled to an interdict against her husband where a reasonable apprehension is shown that pending

an action for divorce on ground of adultery the husband will make donations to his concubine. The learned Judge had further aligned himself with the same position that had been maintained in **Pickles v Pickles 1947 (3) 1947 SA 175.**

[30] The present case should be clearly distinguished from that of **Mamasiako Molise *(supra).*** There the applicant who is the wife had successfully proven her husband's extra marital relationship and that he had already constructed a house for his concubine. Here, the applicant hasn't in the discharge of her legal burden demonstrated that on the balance of probabilities.

[31] On the strength of the judicial pronouncements in the **Mamosiako Molise's case *(supra),*** the court conscientiously of standard of the burden of proof which the applicant is enjoined to discharge, finds that she has dismally failed to prove it on the balance of probabilities that her husband is involved in any extra – marital relationship. This renders her fear that he would as a result, alienate the family assets to sustain those affairs to collapse.

[32] The application, is consequently, dismissed with no order on costs.

E.F.M. MAKARA

ACTING JUDGE

For Applicant : Adv. T.J. Mokoena
For Respondent : Adv. P.V. Tšenoli