IN THE HIGH COURT OF LESOTHO

CIV/A/37/2012

In the matter between:

MAKHOBALO SEKHOBE **APPELLANT**

And

LEPOLESA SEKHOBE **RESPONDENT**

JUDGMENT

Coram : Honourable Mr.Justice E.F.M. Makara
Dates of Hearing : 27th February, 2014
Date of Judgment : 27th February, 2014

Summary

An appeal against a decision of the Mafeteng Magistrate Court which dismissed the Appellant's case for the ejectment of the Respondent from a site. The basis of the decision being the Appellant's non joinder of a customary law heir to the proceedings and his failure to satisfactorily demonstrate that he is qualified to inherit the land. The High Court guided primarily by a record of the proceedings from the Court *a quo,* upheld the judgment of the Trial Court on materially the same grounds. The Appeal dismissed without an order on costs.

CITED CASES
Rex vs Dhlumayo 1948 (2) SA677.
Lepule v Lepule C of A (CIV) No. 5 of 2013.
Matime and Others v Moruthoane and Another 1985 – 1989

Makara J

[1] The Appellant (who was the Plaintiff before Mafeteng Magistrate's Court) has lodged an appeal against the dismissal of

the case which he had instituted in the Court *a quo* for the ejectment of the Respondent.

[2] A foundation of the appeal is presented in the grounds for appeal which are that:

1. The Learned Magistrate erred and misdirected himself by holding that the Appellant has failed to establish a clear right to a residential site at Ha Seeiso Matelile in the district of Mafeteng.

2. The Learned Magistrate erred and misdirected himself by holding that a document written and signed by the late Tumisang Sekhobe conferring his rights to a residential site at Ha Seeiso to the Appellant was invalid and unlawful.

3. The Learned Magistrate erred and misdirected himself by rejecting "Exhibit B" as a document properly giving Appellant rights in the site in question despite the fact that its authenticity was never challenged in court.

4. The Learned Magistrate erred and misdirected himself by holding that Appellant rights in the said site vested in 1994 when his father died and therefore ought to have vindicated by rights against Respondent in 1995 when he started building thereat.

5. The Learned Magistrate relied on contradictory evidence as a result of which he came to contradictory conclusion.

6. The Learned Magistrate erred and misdirected himself by holding that Exhibit B was invalid in that it purported to allocate to Appellant what not permissible in law in that he was not the first male child.

7. The judgment of the Learned Magistrate is wholly against the weight of the evidence tendered in Court and therefore cannot stand in law.

[3] This Court has in considering the appeal primarily sought for guidance from the record of proceedings in the Court of the first instance. This is against the backdrop that the question as to whether the Learned Magistrate had misdirected himself or

otherwise would be dictated by the revelations advanced before him and duly augmented by the corresponding arguments.

[4] It has to be emphasized that this Court must be inclined to recognize the advantaged position of the Magistrate in that he had the benefit of a direct hearing of the evidence and the determination of its veracity, credibility of the witnesses and their demeanour. This position has *inter alia* been advocated for in **Rex vs Dhlumayo 1948 (2) SA677.**

[5] The Court has in navigating through the grounds of appeal determined that it should, primarily, consider the correctness or otherwise of the decision of the Learned Magistrate to have dismissed the appellant's claim **upon the reasoning that he has not exhibited the requisite credentials to have instituted the case**. In this regard, a view adopted by this Court is that, it transpires from the record that the Appellant is not the first son of the parties' parents and, therefore, by the dictates of Customary Law is not a customary heir. The record instead reveals that one `Neko Sekhobe is the first son and consequently a customary law heir.

[6] The Customary Law status which this Court has assigned to the said `Neko is indicative that **he may mostly likely have a direct and substantial interest over the land in dispute and about the final inheritance of the rights thereon.** The Court should have been placed into a clear perspective regarding his personal position and about his views concerning the instructions executed on the authority of the family since he is its head. Procedurally, therefore, `Neko

should have, from onset, been joined as one of the Respondents in this case. The joinder would also have been of a material significance in assisting this Court on the question of authenticity and the correctness of the written instructions executed by the parties' late mother, `Manneko. This is recognized against the background that besides being the first son, he is simultaneously a head of the family in the nucleated sense.

[7] In any event, the procedural imperative that there should be a sufficiency in the citation of the parties, holds irrespective of the Appellant's background personal knowledge that Ńeko or any one of the qualifying parties is not interested in the litigation and its outcome. The Court would, nevertheless, require the legal basis for deciding the case directly or indirectly against him. Such an occasion would *inter alia* present itself where despite the service of the summons on him, Ńeko or any such a person conveniently decides not to contest the case. The Court would, otherwise, be enjoined to entertain a possibility that the man could have entered the arena of the contestation if the challenge was extended to him through being joined into the proceedings by being made a party thereto.

[8] This Court has further realized a technical deficiency in the citation in that **whoever is the head of the parties' family in the extended sense has also not been joined**. This person would be in a reliable and strategic position to elucidate the position of the family regarding the first instruction allegedly written by the deceased

father and the subsequent one inscribed by the widow regarding the devolution of the site.

[9] Whilst the Court has recognized the concern raised by the Appellant's Counsel that it was incumbent upon the Respondent or the Trial Court to have raised the question of the non-joinder, it holds that it is qualified in the circumstances to take judicial notice of the non joinder and its adverse fatal consequences to the case of the Appellant.

[10] The indispensability of the correctness and sufficiency of the parties to be involved in a case has been acknowledged in **Lepule v Lepule C of A (CIV) No. 5 of 2013** at para [20] where it was detailed:

> There cannot be the slightest doubt in my mind in the foregoing circumstances, therefore, that the appellant's eldest son is an interested party in the matter. He has a direct and substantial interest in the disputed property. In my view, he ought to have been joined. I should stress that this Court has repeatedly deprecated non-joinder of interested parties. Thus, for example, in **Matime and Others v Moruthoane and Another 1985 – 1989 LAC** 198 and 200 the Court expressed the point in the following terms:-
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> This [non-joinder] is a matter that no Court, even at the latest stage in proceedings, can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who have had no opportunity to present their case.

[11] In the premises the decision of the Court *a quo* is upheld on the basis of the non joinder of a person who has been demonstrated to have a direct and substantial interest in the case

before the Magistrate Court and a failure by the Appellant to exhibit his credentials to inherit the land. This being a family matter, there is no order on costs.

E.F.M. Makara
JUDGE

For Appellant : Adv. Khatala instructed by
K.M.T. Thabane Attorneys

For Respondent : Adv. Kao-Theoha instructed by
T. Hlaoli & Co.