

**IN THE HIGH COURT OF LESOTHO  
(Commercial Division)**

In the matter between:

**NTHONGOA NTHONGOA  
MAPHUNYE QOCHA  
MATHISETSO NTHONGOA  
LIMAKATSO NKONE  
JM NTHONGOA TRUST**

**1<sup>ST</sup> APPLICANT  
2<sup>ND</sup> APPLICANT  
3<sup>RD</sup> APPLICANT  
4<sup>TH</sup> APPLICANT  
5<sup>TH</sup> APPLICANT**

**AND**

**HAPE NTHONGOA**

**RESPONDENT**

**JUDGMENT**

**Coram : L. Chaka - Makhooane J  
Date of hearing : 5<sup>th</sup> February, 2015  
Date of Ruling : 16<sup>th</sup> April, 2015**

**Summary**

*Application for interdict - Applicants and Respondent being siblings – Issues of who is entitled to “Bojalefa” central to determination of application – Commercial Court having no jurisdiction to hear matters of Sesotho Customary Laws on “Bojalefa” – The same issues having been*

*raised in another matter pending in the High Court – Application dismissed*  
*– No order as to costs.*

## **ANNOTATIONS**

## **CITED CASES**

1. Bereng Griffith v ‘Mantsebo Seeiso.
2. Khatala v Khatala (1963 – 66) HCTLR 97.
3. Makhutla and Another v Makhutla and Another LAC (2000 -2004) 480.
4. Malefane v Selebalo JC 191/49.
5. Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A).
6. Sekhoane v Sekhoane LAC (2005 – 2006) 264.
7. Setlogelo v Setlogelo.

## **STATUTES**

1. High Court Rules, 1981.
2. Laws of Lerotholi or Sesotho Customary Law

## **BOOKS**

S Poulter, Legal Dualism in Lesotho (1979)

P Duncan, Sotho Laws and Customs, (1950 – 52)

[1] The applicants approached the court seeking an order in the following terms:

1. *That the rule Nisi be issued and returnable on the date and time to be determined by this Honourable Court calling upon the respondents to show cause if any why the following orders shall not be made final.*

- (a) *The rule of this Honourable Court pertaining to the mode of service and prescribed periods shall not be dispensed with due to the urgency of this matter.*
  - (b) *That the respondent be interdicted and restrained from threatening and harassing, and confusing, tenants of the applicant with expulsion, pending finalization of this matter and also a matter in CIV/APN/392/13.*
  - (c) *That the respondent be interdicted and restrained from collecting rentals from all the tenants of the applicants in the following rented places;*
    - (i) *Eight singled(sic) flats at Lekokoaneng, Berea*
    - (ii) *Five duplex flats at Ha-Mokhothu in the district of Berea*
    - (iii) *An open site at Berea town where there are eleven (shacks) this place is best known as Sekoting.*
    - (iv) *Two roomed house at Motimposo Maseru*
    - (v) *Three (3) Duplex flats at Upper Thamae, Maseru, two roomed, single room (sic).*
    - (vi) *Residential units at Moshoeshoe II Maseru, No 246 together with other properties turned into offices.*
    - (vii) *Refrigeration and Applicance (sic) Industrial Area Maseru Plot No 12281-047*
    - (viii) *Three (3) flats at Teyateyaneng next to Lioli Garage.*
  - (d) *That the 5<sup>th</sup> applicant be declared the lawful landlord of all the above mentioned tenants pending finalization of this matter, and the other in CIV/APN/392/13 in the High Court.*
2. *That prayers 1 (a), (b) and (c) operate with immediate effect as an interim relief.*
  3. *That applicant be awarded costs of suit.*
  4. *Further and / or alternative relief.*

[2] The application is opposed in its entirety. It is common cause that apart from the 5th respondent the parties are siblings and the respondent is the eldest male issue. The Court, at the outset encouraged the two sides to try and settle the matter amicably and/or out of Court. When it seemed as if the negotiations for a settlement had failed, the Court referred the matter to mediation. As a result the matter was postponed twice for those reasons, before it was actually heard. Unfortunately even mediation failed, not because the parties could not resolve their issues, on the contrary, it was because the respondent simply refused to attend mediation. Even though the court was disappointed that its order was ignored willy-nilly, it turned out that the hearing of the matter was inevitable.

[3] The applicants formed and registered a Deed of Trust (Family Trust annexed as NN1) for the purpose of *inter alia* collecting rentals from the immovable properties that belonged to their late parents, namely;

- a) flats at Lekokoaneng, Teyateyaneng near Lioli Garage, Ha Mokhothu and Sekoting in Berea
- b) a house at Motimposo
- c) flats at Upper Thamae
- d) residential units at house no. 246, Moshoeshoe II and
- e) a refrigeration and appliance complex at the Industrial Area.

All the properties from (b) above are in Maseru

[4] The Trust was to benefit all the Nthongoa siblings ie the applicants and the respondent. The idea was to have the 5<sup>th</sup> respondent declared as the lawful

land lord pending the outcome of all litigation between the parties, including a matter pending in the High Court in CIV/APN/392/13 lodged by the current respondent.

[5] The Applicants showed that they had to form the Trust when they realized that the respondent was not sharing the rent from the immovable properties with them, as they were expecting. They lamented that the respondent has only been appointed to represent the family shares at Epic Printers (Pty) Ltd, after the death of their mother who was the last parent to pass on. Yet he has been holding himself as if he has already been appointed as the “mojalefa” to the Nthongoa estate. It is important to note that it is common cause that Mapheta Nthongoa the parties mother, died intestate leaving a large estate consisting mostly of immovable property. This is the same property at the centre of the current dispute.

[6] **Mr Letsika** on behalf of the respondent informed the Court that the respondent has sought relief in **CIV/APN/392/2013** to the effect that the applicants, who are the respondents in those proceedings, should be interdicted, prevented and restrained from collecting rentals from the immovable properties that belonged to their father, the late JM Nthongoa. In the main, the respondent sought an order that he should be declared as the “**Mojalefa**” of the estate of the late JM Nthongoa and in that regard, he is entitled to all the rights and privileges of a “**Mojalefa**”, in accordance with the **Laws of Lerotholi or Sesotho Customary Law**.

[7] It was the respondent’s evidence that he has always been in peaceful and undisturbed possession of the properties until the applicants attempted to

despoil him. The respondent averred that he has a clear right as a “**Mojalefa**” to the rentals, alternatively, he has a *prima facie* right in terms of sections 11 and 13 of the **Laws Lerotholi**, which entitle him to succeed his father.

[8] It was argued on behalf of the respondent that this Court does not have jurisdiction to entertain this matter since the dispute involves issues of Sesotho Customary Law (“**Bojalefa**”). Secondly, **Mr Letsika** submitted that there is pending litigation between the same parties, on the same issues in the High Court, in **CIV/APN/392/13**. The respondent as applicant in that matter seeks relief in the following terms;

- (a) *The respondents shall not be interdicted and prevented from obstructing and /or interfering with the applicant’s administration of the estate of his late father in accordance with Sesotho customary law.*
- (b) *The respondents shall not be ordered and directed to accept the applicant as the mojalefa of the late J.M. Nthongoa estate in accordance with the laws of Lerotholi and Sesotho customary law.*
- (c) *The respondent shall not be interdicted, prevented and restrained from collecting rentals from the immovable properties that belonged to the late J. M. Nthongoa in his lifetime and which now belong to the applicant in accordance with Sesotho Customary Law, namely residential Units at Moshoeshoe II, Upper Thamae and Teyateyaneng near Lioli garage in the district of Berea.*
- (d) *It is hereby declared that the applicant is a mojalefa to the estate of the late JM Nthongoa and in that regard is entitled to all the rights and privileges of a mojalefa thereto in accordance with the Laws of Lerotholi and/or Sesotho customary law.*

[9] The applicants vehemently oppose the issue that this Court has no jurisdiction to entertain this matter because, according to them the issue of succession is the one pending before another Court. **Ms Kao-Theoha** for the applicants argued that even though they acknowledge that there is a matter pending in the High Court, in **CIV/APN/392/13**, they were not before this Court on issues of “**Bojalefa**” under Sesotho Customary Law.

[10] I must mention at the outset that it is clear that even though the applicants deny it, the bottom line is that the matter at the High Court is very similar to the one before this Court. The applicants simply decided to single out the commercial aspect of it and tailor made it for the Commercial Court. It is not disputed that the respondent has also raised inter alia the issue of rentals in his application before the High Court. Indeed the defence is that the applicant want the rentals collected and kept in trust by the 5<sup>th</sup> applicant. However, the respondent was never a party to the registration of the 5<sup>th</sup> applicant. He does not even acknowledge it because his contention is that it was formed merely to frustrate his status as “**mojalefa**”. It is clear therefore, that he opposes even the registration of the 5<sup>th</sup> applicant since he regards himself as the heir. The issue of the “**mojalefa**”/successor cannot be divorced from the application before this Court. I find that it would be an academic exercise to go into any other issues at this juncture.

[11] It is my opinion that this application must fail. I fail to understand how the applicants can acknowledge that there is pending litigation in another Court yet dispute that the issues are the same, when they clearly are. At the centre of it all, is the issue of “**Bojalefa**” which would establish who would then be the heir and would eventually be entitled to collect the rentals. I am

convinced that the application before this Court is based on exactly the same issues pending in **CIV/APN/392/13**, depending on who has approached the Court. It would be remiss of me to ignore the fact that both parties have sought relief in two (2) different courts, on the same or related issues.

[12] I must also agree that this court has no jurisdiction to decide on issues of **“Bojalefa”** (and succession) under Sesotho Customary Law, which issues inevitably have to be disposed of first.

[13] In the premises, this application is dismissed. There is no order as to costs.

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**L. CHAKA-MAKHOOANE**  
**JUDGE**

For Applicants : Ms. Kao-Theoha  
For Respondent : Mr Letsika