

IN THE HIGH COURT OF LESOTHO

In the matter between:

**'MAHLALELE KHABO
HLALELE KHABO**

**1ST APPLICANT
2ND APPLICANT**

And

**'MATAU KHABO
MAIPATO KHABO**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Coram: His Honour Justice Keketso Moahloli

Ex tempore: 13 December 2018

Written reasons: 10 October 2019

Moahloli J

INTRODUCTION

[1] This is an opposed application for *mandament van spolie*, whereby the Applicants are seeking the following reliefs:

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(b) Respondents be directed to jointly and/or severally restore possession of the following numerated items of property and the keys pertaining thereto to the Applicant – Omnia ante;

(i) Double Storey residential house together with all its house hold property compartmentalized as follows:

Ground floor: 2 garages, kitchen, sitting room, dining room, bed room,

1st floor: 2 bed rooms, study room, two showers and toilet.

(ii) Three roomed house with all its household property.

(iii) Documentation ranging from bank cards, leases, academic certificates, driver's license bank cards, 1st Applicant's husband passport and mine clock card, blue card.

(v) White corolla Motor vehicle 2006 make.

(c) Respondents be restrained and interdicted from interfering with Applicants' possessory rights by continuing to occupy the premises referred to at para 1 (b) and/or by selling any of the properties mentioned thereat other than by due process of law.

(d) That Respondents be directed to pay costs of this application jointly and/or severally only in the event of contesting this same.

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Alternatively

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(e) 1st Applicant be declared the owner of the property mentioned at 1 (b) above.

(f) Respondents be ejected from the premises mentioned at 1 (b) above.

(g) 2nd Applicant be declared owner of the vehicle referred to at para 1 (iv) above.

(h) Respondents be ordered to jointly and/or severally restore the vehicle mentioned at 1 (iv) to 2nd Applicant.

(i) Respondents be ordered to pay nine hundred thousand (M900,000.00) for violation of Applicant's privacy and impairment of dignity.

(j) Respondents be ordered to pay costs of this Application.

(k) Applicant be granted further and/or alternative relief. ”

APPLICANTS' CASE

[2] In her founding affidavit 'Mahlalele avers that she was married to late Francis Joseph Khabo during 1991 in terms of Sesotho law and custom and in community of property. They were blessed with two male children, namely Hlalele Khabo (born 9 January 1992) and Motseki Khabo (born on 14 April 2000). They had since accumulated a lot of fixed and movable property, including a developed residential site situated at Matšaneng in the Mafeteng urban area in the district of Mafeteng, two other undeveloped sites situated at Matšaneng and Matholeng in the district of Mafeteng, plus a white Corolla motor vehicle of 2006 make.

[3] 'Mahlalele attests that her husband was shot by a stranger on the 21st April, 2017 and police investigations are still ongoing. During her whole mourning period before the burial of her husband she was endlessly subjected to some unremitting violent outbursts of temper, and insults by her in laws. She was accused of being a witch and of having killed her own husband. She was also threatened with death in particular by 1st Respondent ('Matau).

[4] 'Mahlalele avers that her husband was buried on the 10th June, 2017 while she was forcefully evicted like a dog from the residential house referred to at paragraph 1 b (i) and (ii) of the Notice of Motion on the 11th June, 2017 by 1st Respondent in

concert with other members of the extended family. She says she was kicked out of the house with only the clothes on her body.

[5] She claims that she has since heard rumours that 'Matau is the process of selling the vehicle mentioned above at a valueless price. On the 21st December, she saw a stranger and 'Matau in the premises mentioned at paragraph 1 (b) inspecting the said vehicle at length. This had augmented her fear that 'Matau may sell some of the movables to her prejudice.

[6] 'Mahlalele maintains that she has always been in peaceful and undisturbed possession of the properties referred to in her Notice of Motion since 1996 until the 11th June, 2017 when she was forcibly evicted from the premises. Following her eviction she tried all means to have the said properties restored to her but with no success. Amongst other things, she triggered some mediation processes and was a party to some settlement negotiations with Respondents before the Mafeteng Police Peace and Reconciliation Department, the Principal Chief of Mafeteng and before the Master of the High Court, to no avail.

[7] 'Mahlalele attests that she has since requested 'Matau to at least release her academic certificates and her husband's bank cards but 'Matau instead threatened to rather burn them to hell. 'Mahlalele says that she has never given up her possessory rights over the said property and had always communicated her assertion of rights to the Respondents.

RESPONDENTS' CASE

[8] 1st Respondent ('Matau) in her answering affidavit avers that she is the mother of the late Tau Francis Joseph Khabo (the deceased) who died on 21st April, 2017 after being shot died outside his house by a hired assassin. Her late husband, Dyke Khabo passed away many years ago. They were married according to Sesotho law and Custom on the 1st December, 1954; out of their said marriage four (4) children were born. The deceased was their only male child and an heir to their estate. The 2nd Respondent is one of her said children.

[9] 'Matau attests that 'Mahlalele started cohabiting with the deceased as a couple in 1992 until 2013 when 'Mahlalele left the deceased place at Matšaneng. When they started to cohabit 'Mahlalele was highly expectant. Shortly thereafter she gave birth to a male child called Hlalele Khabo (2nd Applicant). It has always been common cause that the latter was not authored by the deceased.

[10] 'Matau maintains that 'Mahlalele was never legally married to her late son. She says that to the best of her knowledge and recollection their relationship was one of concubinage.

[11] 'Matau attests that after the death of the deceased, 'Mahlalele suddenly emerged and passed herself off as the legal wife of the deceased when she is not. 'Matau and

the Khabo family buried her late son on the 10th June, 2017. 'Mahlalele was never made to wear mourning clothes because she was not a widow.

[12] 'Matau maintains that she is the heiress to the deceased estate by operation of law and she was nominated as such by the family council on the 11th June, 2017. She refers this Honourable Court to the family council's resolution annexed to her affidavit.

DISCUSSION

[13] This case is not about who is legally entitled to inherit the deceased's estate, but merely about whether 'Mahlalele was unlawfully dispossessed of the estate by 'Matau and Maipato through "self-help" (that is to say, by taking the law into their own hands and exercising "power" which they do not have, without following proper legal procedure).

[14] I therefore have to merely factually investigate whether at the time of the alleged dispossession:

- (i) 'Mahlalele was in actual fact in peaceful and undisturbed control of the estate; and
- (ii) the estate was unlawfully taken from her control by 'Matau without her consent or acquiescence.

[15] At the start of the hearing Applicant's counsel emphasized that in this hearing they are only going to pursue to prayers relating to spoliation, and not the reliefs and issues prayed in the alternative.

[16] 'Mahlalele avers that she was in peaceful and undisturbed possession of the residential properties from 1996 until 11 June, 2017 when she was forcibly evicted from them by 'Matau¹.

[17] 'Matau on the contrary, while admitting that 'Mahlalele cohabited with the deceased as a couple from 1992, alleges that 'Mahlalele left the residential properties at Matšaneng in 2013 when the couple separated, and the deceased delivered her remaining personal effects to her parents' home².

[18] I found there to be a real, material and very significant dispute of fact, having an important bearing on whether 'Mahlalele was despoiled of her property on 11 June, 2017 as she alleges or not. Hence I took the unusual but legally permissible step [in terms of Rule 8 (14)] of calling the two to give oral evidence on the specified issue with a view to resolving this dispute of fact. Unfortunately their evidence and cross-examination did not assist the court in this regard.

[19] As 'Mahlalele must have anticipated that 'Matau would resist her claim for spoliation, I do not understand why her counsel did not make efforts to fortify her

¹ Founding Affidavit, paras 4.5

² Answering Affidavit, paras 4.3, 6.1, 6.2.1

evidence with corroborative affidavits of say, her neighbours (to support her assertion that she was in possession until her husband's funeral in 2017) and the independent third parties she claims that she roped in to mediate the dispute [viz. the police, the Principal Chief and the Masters' office].

[20] As matters stand, it is her word against that of 'Matau. And according to the *Plascon-Evans* rule³ where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. *In casu* they do not, and the Respondents' version must prevail. I do not agree with applicants' counsel's contention that "Respondents' version consists of bald, hollow, fanciful and untenable denials safely rejectable on paper."

[21] Neither do I agree with applicants' counsel's invocation of the so-called presumption of continuance of possession. I endorse the view that such so-called presumptions of fact are not rules of law, but merely inferential reasoning. In my view this particular "presumption" is singularly unhelpful in the evaluation of the evidence. Each case must be considered on its own merits. The mere fact that 'Mahlalele resided at this property from 1996 does not give rise to an inference that

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). Endorsed by our apex court in, inter alia, *Makhutla & Another v Makhutla & Another*, LAC (2000-2004) 480 at para 12; *MNM Construction Co (Pty) Ltd v Southern Lesotho Construction Co (Pty) Ltd & Others*, LAC (2005-2006) 112

she continued to reside there beyond 2013. This so-called presumption cannot affect the incidence of the burden of proof⁴.

[22] In the result I, on 13 December 2018, delivered an *ex tempore* judgment dismissing the application for spoliation with no order as to costs, and undertook to furnish reasons for my judgment later.

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K L MOAHLOLI
JUDGE

Appearances:

Adv. F. Sehapi for the Applicants
Adv. Z. Mda KC for the Respondents

⁴ See Zeffertt & Paizes, The South African Law of Evidence, 3rd Ed 2017 Lexis Nexis at p 193 where it is said: "Because everything depends on the facts of the individual case, the presumption of continuance hardly deserves the dignity of being stated as a rule."