

IN THE HIGH COURT OF LESOTHO

In the Application of :

SAMUEL PULE

Applicant

V

ROSE PULE

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng  
on the 29th day of November, 1982.

On the 15th day of November 1982 Advocate Modisane appeared in chambers before the Honourable Chief Justice Cotran to move an urgent ex parte application. The Chief Justice, after perusing the papers, commented as follows on the file :

"Order: I see no urgency here. Applicant must use form J of the High Court Rules."

On the 19th November 1982 a document titled "Notice <sup>was filed</sup> TO OPPOSE." It is addressed to the Registrar and to Advocate J.L. Modisane (styled: Attorneys for Plaintiff). This confusion comes about simply because Advocate Modisane has plainly refused to obey the order of the Chief Justice. To date, he has not followed the form J of the High Court Rules as ordered. Instead, the format he uses is worded as follows :

"TAKE NOTICE FURTHER THAT the Applicant has appointed the offices of C/O Advocate J.L. Modisane of allied Building, P.O. Box 4547, MASERU, at which he will accept notice and service of all process in the proceedings."

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"TAKE NOTICE FURTHER THAT THE applicant has appointed .....(here set forth an address within 5 kilometers of the office of the Registrar) at which he will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER THAT IF you intend to oppose this application you are required (a) to notify applicant's attorney in writing on or before ..... (b) and within fourteen days of such notification to file your answering affidavits if any;

AND FURTHER TAKE NOTICE that you are required to appoint in such notification an address within 5 kilometers of the office of the Registrar at which you will accept notice and service of all documents in these proceedings." (My underlining).

If is quite clear from the perusal of the Notice of Motion that Advocate J.L. Modisane has been described as the person at whose offices service of all documents in these proceedings will be accepted on behalf of the applicant. But Advocate J.L. Modisane is admitted to practice before the Courts of Lesotho as an Advocate and not an Attorney. Advocate J.L. Modisane, moreover, did not claim a right under sec. 4 of the Legal Practitioner's Act 11 of 1967 nor that he was a Law Officer in terms of sec. 5 of the above Act. An advocate receives his instructions, in our system of Law, through an attorney. He never has anything to do with a client directly. Whatever information he needs from a client he will always communicate with the instructing attorney and never with the client directly. He has no client. For his fees he looks to the instructing attorney. It is therefore totally out of step and conflicts with the practice of an advocate under our Legal system to act as Advocate J.L. Modisane has done and indeed has stubbornly persisted a long time against wise counsel. This state of affairs cannot be allowed to continue any longer. The judgment of Rooney, J. in the case of Legal Practitioners Committee v. Advocate Rashid Ahmed Karim, 1979(1) L.L.R at 260 is

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very instructive on this point. The result of his stubbornness has led to his non-compliance with the head of the Judiciary's order. It is a grave insult to him; to this Court and to the profession as a whole. Advocate Karim was struck off the roll.

Mr. Moiloa took another point in limine. The founding affidavit was vague. It disclosed no cause of action. There were no annexures. There were supporting affidavits which could have been obtained with the greatest ease. Was it really difficult for the applicant to furnish the respondent with a copy of their alleged earlier marriage certificate or a certified copy thereof? In the case of Lebelo v Lebelo and Another, 1976 LLR. 206 at 209 (in the press) this Court said :

"In motion proceedings .... the affidavit(s) constitute not only the evidence but also the pleadings and therefore must contain all that would be necessary in a trial."

In a trial, therefore, a party would not be satisfied with making a bold allegation in an extraordinary application, of this nature, requesting the variation of the status of a person. Additional evidence in support of such allegation would be furnished to enable the Court to arrive at a just decision.

Then finally I notice that the service of the process of the documents was on an advocate. Is this a good service or not. This follows the decision of Rooney, J. in the case of Michael Mthembu v Chhogala Igbal, 1980(2) LLR. at 510 with which I entirely agree. The learned judge refers to the passage in the case of Legal Practitioners Committee v Advocate Rashid Ahmed Karim (supra):

"While it is true that in some areas there is not a precise definition of the function of attorneys

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and advocates the distinction between the two branches of the profession depends upon the general and accepted rule that in civil matter ..... the general public has access to all attorneys, but, an advocate has no mandate to act for any person in a cause or matter unless he has first been instructed by an attorney duly admitted to practise before the courts of this country." On appeal to the Court of Appeal (Court of Appeal CIV/3/79) unreported) Maisels P. in reference to the above said that he agreed with these observations and went on "they afford in my judgment valuable and correct guidelines for members of the profession in Lesotho."

Again in words of Rooney, J. :

"Advocate Ramodibeli's intervention in these proceedings was quite unwarranted. The plaintiff's attorneys were not entitled to treat with Mr. Ramodibeli as if he were the attorney for the defendant. They should not, in my view, have served the notice to file plea upon him instead of upon the defendant at the address for service given in the notice of appearance. I must in the circumstances hold that the notice to file plea was not properly served upon the defendant and it follows that the plaintiff was not entitled to bar him from pleading or make an application to this Court for judgment in default under Rule 23 of the High Court Rules (now repealed)."

The same principle is applicable with equal force in the present case. The respondent attorneys should not have served any process or document on Advocate J.L. Modisane at all in the light of judge Rooney's ruling which, to the best of my recollection, has not been over-ruled by a higher Court. It is not surprising that Advocate J.L. Modisane deliberately refrains from reading such decisions because he wishes <sup>to</sup> practice as an attorney when he knows full-well he should not.

In the circumstances of this case I am left with no alternative but to uphold the application made in limine, with Advocate J.L. Modisane being ordered to pay the costs.

The Registrar of this Court is asked to send a copy of this judgment to the Solicitor-General for his attention and action.

For the Applicant :  
For the Respondent : Mr. Moiloa



J U D G E.

29th November, 1982.