

IN THE HIGH COURT OF LESOTHO

In the Application of

BERNADETTE RAPEANEApplicant

and

SAMSON RAPEANE Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 27th day of April, 1984.

This is an application in which the Applicant moved the court for an order against the Respondent framed in the following terms.

- "1. Committing the respondent to gaol for contempt of the above Honourable Court's order dated the 28th November, 1983;
2. Directing the respondent to pay the costs of this application;
3. Granting the appellant such further or alternative relief as to this Honourable Court may seem just."

In support of her application, the applicant filed a founding affidavit in which she deposed that the respondent and herself were husband and wife married to each other by civil rites in community of property on 5th February, 1969 and the marriage still subsists. She was a housewife and resided at the matrimonial home at Stadium area in the Maseru urban area while the respondent who was a businessman carrying on his business at Mantsonyane Bottle Store near the bus stop in the Maseru urban area resided at Florida in the Maseru urban area.

On 10th November, 1983, she applied for and obtained a Rule Nisi against the respondent calling upon him to show cause on 21st November, 1983 why he should not be ordered, inter alia, to pay maintenance for the four (4) minor

children of the marriage at the rate of M100 per child and M550 per month for herself. The rule was on 28th November, 1983, confirmed in the presence of the respondent who was in court at the time. However, the respondent had since neglected/failed to comply with the maintenance order but instead on 12th December, 1983 through his attorney served a Notice of Motion on the applicant's attorney for a variation of the said maintenance order. The respondent's application for variation of the maintenance order was opposed but had since been postponed to a date to be arranged with the Registrar.

Applicant further averred that on 15th December, 1983, her attorneys issued a writ of execution against the respondent. On 16th January, 1984, the Deputy Sheriff of this court, one P.A. Masienyane, went to execute the writ upon the respondent at his place of business. The respondent resisted the Deputy Sheriff's levy of execution on his car and the stock in the bottle store and directed the Deputy Sheriff to execute upon the property in the matrimonial home where the applicant was staying with the minor children.

The applicant submitted, therefore, that the respondent was in contempt of the order of this court inasmuch as he was neglecting/failing to pay maintenance either for the children or for herself as directed by the Court. Respondent also acted in contempt of the Court because he had deserted the matrimonial home and execution upon the property therein which comprised household furniture would defeat the very purpose for which the court's order was granted.

The application was opposed and in his opposing affidavit, the respondent on the whole admitted the averments made by the applicant in her founding affidavit. He, however, denied the submissions that he was in contempt of the court order for maintenance of the minor children of the marriage and the applicant on the grounds that

- (a) the amounts that he had been ordered to pay were in excess of his means and for that reason he had applied for their variation.
- (b) The Deputy Sheriff, one Mr. Chitja, had levied execution and asked him to point out his property. He accordingly showed him what property he had. Mr. Chitja then prepared an inventory. The execution by the Deputy Sheriff, Mr. Masienyane, was therefore, a second one on his property.

The Respondent, however, denied that he resisted Mr. Masienyane in the performance of his duties. In that regard the respondent was supported by one Hopolang Mojela who filed a supporting affidavit in which he deposed that on the day Mr. Masienyane went to the respondent he had accompanied him as the Reserve Headman's representative. He confirmed the respondent's version that after some initial hesitations, the respondent allowed Mr. Masienyane to go on with his duties but the latter did not do so.

According to the papers before me, no replying affidavit was filed.

It is clear that the relief sought by the applicant was based on two grounds. Firstly, that the respondent had neglected/failed to comply with the order of this Court directing him to maintain the minor children of the marriage and the applicant herself. Secondly, that the respondent resisted the Deputy Sheriff, Mr. Masienyane in the execution of a writ issued against the respondent himself pursuant to a judgment of this Court.

I propose to deal first with the second ground, namely, the resistance of Mr. Masienyane in the performance of his duties. It is worth noting that the court has only the averment of the applicant that the respondent resisted Mr. Masienyane in the execution of the writ issued against him. On the papers before me, Mr. Masienyane himself did not file an affidavit in support of applicant's averment. Only his return of service alleging that the respondent had resisted the attempt to execute was

annexed on the applicant's founding affidavit. The averment of the applicant was, however, denied by the respondent in his opposing affidavit. In his denial, the respondent was supported by Hopolang Mojela, the reserve headman's representative who deposed that he had accompanied Mr. Masienyane when the latter went to execute the writ. Hopolang Mojela confirmed respondent's averment that after his initial query that Mr. Masienyane was executing on a writ that had already been executed by another Deputy Sheriff, Mr. Chitja, the respondent allowed Mr. Masienyane to carry on with his duties but the latter declined to do so.

Considering the evidence as a whole, it seems to me that the balance of probabilities favours the respondent's averment on this point. The applicant cannot, therefore, succeed in the relief that she seeks on the basis of the second ground alone.

As regards the first ground of contempt, the parties were ad idem that a rule nisi, directing the respondent to show cause on 21st November, 1983 why he should not be ordered, inter alia, to maintain the applicant and the minor children of the marriage in the aforementioned amounts, was issued. If the amounts with which he was required to maintain his wife and minor children were beyond his means, as he now expects this court to believe, respondent should have said so on the return day. He did not do so or if he did he was obviously not successful. The rule was then confirmed and made an order of this Court.

The respondent is admittedly not complying with the order on the basis that he has filed an application for its variation. In my view mere application for variation of the order does not ipso facto invalidate that order. In any event, the application for variation does not concern this Court now. As far as this Court is concerned, the order for maintenance still stands good against the respondent who is not complying with it. The


only question is whether or not the respondent is deliberately defying the order of this Court.

Respondent is admittedly a businessman carrying on the business of bottle store in Maseru. I was also told in argument that on 18th April, 1984, just a day before the hearing of this application, the respondent had made payment into court in the amount of M550 and that money was available to the applicant and the children. I fail to understand how money paid into court is available as maintenance to respondent's wife and minor children. There is not even a suggestion that they were advised that such money was available for them. If he really intended the M550 to be available to the applicant and the children, the respondent should have given it to them instead of making payment into Court. There is nothing to convince me that the respondent has not been intentionally defying the maintenance order made by this Court.

In the circumstances, I come to the conclusion that on the first ground of her application for contempt, the applicant ought to succeed and I accordingly order.

It is not without some hesitation or reluctance that I am prepared to allow the respondent an option of fine. He is sentence to pay a fine of M300 or 6 months imprisonment in default of payment of the fine.

The parties are married in community of property of which the respondent is the sole administrator. It is only fair, therefore, that he should pay the costs of this application and it is accordingly ordered.


B.K. MOLAI

JUDGE

For Applicant • Mr. Sello
For Respondent • Mr. Koliseng.

27th April, 1984.