

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

VS

SEKHOBE KHALANE

Review Case No.11/2002

Cri.1202/2001

Review Order No.3/2002

In Qacha's Nek District

JUDGMENT

Before the Honourable Mrs Acting Justice A.M. Hlajoane
On the 26th Day of February, 2002.

The matter came before me on automatic review.

The Accused was charged before the Magistrate Court Qacha's nek with the crime of housebreaking with intent to steal and theft. The charge having been read and explained to the Accused and the Accused pleaded not guilty.

The witnesses were called by the Crown. The first witness being the

Respondent/Plaintiff had a notice of withdrawal as Attorney and record filed by his counsel. The reason for this withdrawal being that client wished to instruct a lady practitioner who would be very accommodative and understanding in the issues involving children.

Counsel raised an objection saying that the withdrawal came at the eleventh hour yet the Respondent/Plaintiff was soon leaving for her studies. The Court all the same granted the postponement to the 8th February at 9:00 a.m. at the request of Respondent/Applicant.

The Court commenced at 9:20 a.m. on the 8th February as requested, but 20 minutes late, but there was no appearance for the Respondent/Plaintiff's counsel or the Respondent/Plaintiff herself.

The matter proceeded and the interim custody was awarded to the father, Applicant/Defendant. An order was also made of the appointment of the liquidator to be approved by the Registrar, who will take over the assets of the joint estate for liquidation and thereafter sharing the proceeds equally between the parties.

On the 13th February, 2002 on *ex-parte* application was moved for the

rescission of the order of the 8th February, 2002. The rule was granted and was made returnable on 20th February, 2002. The Respondent in that application had the Rule anticipated to 18th February, 2002, and also raised some few points of law in *limine*. The notice was in terms of Rule 8 (10) (c) of the High Court Rules.

Rule 8 (10)

“Any person opposing the grant of any order sought in the applicant’s notice of motion shall:

- (e) if he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question.”

The following points in *limine* were therefore raised;

- (i) There is no evidence to show that Applicant instituted these proceedings as she has not deposed to any affidavit.
- (ii) No good cause is shown why Applicant herself did not attend Court despite the fact that she knew about the date of hearing.
- (iii) No defence has been laid down for both orders namely:
 - (a) Interim custody during Applicant’s absence

- (b) Division of the joint estate by a liquidator approved by the Registrar of the High Court.

In the Application for stay the affidavits filed are those of a clerk from Counsel's office and is supported by that of Counsel herself. There is no affidavit filed by the Applicant herself. On the authority of **Selikane and Other vs Lesotho Telecommunications and Others 1999-2000 LLR & LB 127** the Court of Appeal showed that, one could not depose to an affidavit of facts which he has no personal knowledge. The clerk has no personal knowledge as regards the welfare of the child.

The Applicant herself was before Court when the matter was postponed to allow her to secure attendance of her female counsel. Her affidavit would have helped to explain why she failed to attend. As it is now, there is no explanation for her non-attendance as the Court was then not aware that she in fact managed to brief a female counsel.

As regards the interim custody of the minor child, the Court is left in the dark as Applicant in this case chose not to depose to any affidavit. It is not explained as to who would look after the child in her absence or whether she is taking the child to school with her. Respondent has only sought for interim custody.

On the question of division of the joint estate, the Court is not going to go into it as it has not been one of the issues for determination in this Application, as it is not being contested.

The Application is therefore not properly before this Court, it is dismissed with costs.


A.M. HLAJOANE
ACTING JUDGE

For Plaintiff: Ms N. Thabane

For Defendant: Mr Matooane