IN THE HIGH COURT OF LESOTHO

CIV/T/352/2010

In the matter between:

MR JUSTICE THAMSANQA NOMNGCONGO PLAINTIFF

And

REV. MALEKA ALPHONSE MATHIBELI 1ST DEFENDANT
MAZENOD PRINTING WORKS 2ND DEFENDANT

RULING

Delivered by the Honourable Acting Judge L.A. Molete On the 20th April 2011

This matter comes before me as an Application for Rescission of a judgment I granted by default in favour of the plaintiff on the 24th February 2011.

The defendants applied for rescission of the judgment, and both parties' counsel appeared before me on the 4th April for allocation of a date of hearing. On that day they also agreed to stay execution of the judgment and consolidate the two applications as for some reason the two defendants had applied separately.

A date of hearing was fixed for the argument being the 15th April 2011.

Mr. Phoofolo for the defendants indicated at that stage that he intended to apply for my recusal from the case on the basis that plaintiff in the matter is my colleague and senior. The application could not be entertained because the parties were faced with the application for rescission of a default judgment granted by myself.

The hearing was then postponed to the further date. It was agreed that the recusal application would also be dealt with on that day depending on the outcome of the rescission application. I suggested that if plaintiff consented to rescission the application for recusal could be heard straight away. Mr. Nathane had to take instructions on this and the matter was accordingly postponed.

On the 15th April both counsel approached me in chambers and informed me that they had agreed that the judgment be rescinded by consent; and further that the matter be placed before another judge as submitted by the defedants' counsel, even though they were still pursuing settlement negotiations and attempting to resolve the matter out of court.

I agreed to the arrangement; but informed counsel that I would recuse myself not on the grounds advanced and agreed by them, namely that plaintiff is my colleague and senior. My view was that such argument is incorrect and misleading and would not constitute valid grounds for my recusal. In any event, that aspect had been considered when the matter was allocated to me by the Chief Justice after Madam Justice Hlajoane had recused herself. This was because not only did it involve a colleague; but also that she was one of the judges referred to in the article. Since I was not acting judge at the time the Honourable Chief Justice allocated it to me in pursuit of the required independence and impartiality.

My understanding is that a judge for (or any other presiding officer for that matter) is expected to carry out his duties independently; fairly and without fear or favour as dictated by the judicial oath. The fact that another judge or a senior is a party to any proceedings is not sufficient grounds for recusal, unless the presiding officer individually or personally feels that in dealing with such a case there could be a likelihood or possibility of their independence or fair judgment being compromised.

The High Court judges are all subject to the same statutes and rules. They equally possess unlimited jurisdiction and are expected to adhere to the judges rules and act impartially.

They ought to comply with high standards of diligence, independence and integrity in dealing with matters before them.

The High Court bench is not stratified in any manner. It is therefore illogical and misleading to impose seniority ranking amongst judges with regard to carrying out their duties. Only the Chief Justice, as head of the judiciary, as his title also makes it clear, is obviously senior to all the judges. To distinguish and rate the individual judges in terms of seniority is unsupportable. It only applies to magistrates who are legally classified by statute.

I should not be misunderstood to mean that there are no senior judges; or that plaintiff is not one of them. It is clear that judges differ in terms of experience and length of time on the bench. It however has no bearing on their duties and roles as judges. It is a descriptive reference to their status. It is akin to saying a person is "elderly" as opposed to "older". The application for recusal carries the wrong connotation. I may mention also that the seniority of the plaintiff was in fact a relevant consideration in my judgment and award of the 24th February 2011.

In our jurisdiction only the Judges of Appeal could be correctly described as senior to judges of the High Court; but even then

they would still be subject to the jurisdiction of the High Court in appropriate cases. To argue that the High Court judge would be unable to deal with the matter; or appear to be biased in such a case would not be sustainable.

The test is whether the judge has an interest in the outcome of the case and whether there is a real likelihood of bias;

> *"that is to say: were there any circumstances affecting him that might reasonably create a suspicion that he was not impartial".*
>
> SEE BARNARD v JOCKEY CLUB OF SOUTH AFRICA 1983(2) SA 35
> AND
> ROSE v JOHANNESBURG LOCAL ROAD TRANSPOTATION BOARD 1947(4) SA 272

In my assessment the practical effect of the argument by defendants would be unacceptable and contrary to basic legal principles. Taken to its logical conclusion, it would mean that no judge would be able to preside over any matter involving another judge because they are colleagues. The first appointed or "senior" judge would not be subject to the jurisdiction of all the other judges; and the second in rank would only have his matters determined by one judge because

all the others would be junior to him. In the same way, judges would not be subject to the jurisdiction of magistrates for being senior in the judicial hierarchy. A senior resident magistrate would not have his case before any other than the chief magistrate; and even amongst the same level of magistracy a ranking could be imposed; and it would follow that the one considered to be junior would be precluded from presiding over a case of his or her senior. Similarly ministers of government, in particular the Minister of Justice would not be subject to the ordinary jurisdiction of our courts.

These grounds for recusal, therefore would lead to absurdity; inequality and selective access to justice for some officials. This would seriously violate the accepted principles enshrined in the constitution of democratic countries.

I therefore rejected the grounds advanced by counsel for my recusal.

I however considered the fact that I made a determination in the matter with regards to the defamatory nature of the words published. I came to the conclusion that they were defamatory, not only by granting a mere default judgment, as prayed, but by carefully considering the effect of the articles published.

The defence of the defendants set out in their affidavit in support of the rescission application is basically that the words are not defamatory. They do not advance a defence such as truth; fair comment in the public interest; or that the words were not meant to refer to plaintiff. It is those defences that could upon hearing further evidence at the trial, alter my initial conclusion.

The defence as presently set out in their papers, merely negates my judgment, and because my conclusion is based on the words published, I cannot possibly see any evidence adduced at the trial that could absolve the defendants from liability because the publication can never be altered. It would therefore prejudice them in their defence if I proceeded to deal with the matter on the merits after having made the finding that I did against them. On that basis I am prepared to recuse myself.

In NEWELL v CRONJE AND ANOTHER 1985(4) SA 692 it was held that even where the observations of the judicial officer conflict with those of a litigant; recusal is not necessarily permissible. In that event; his observations must be conveyed to the parties:

> *"Who then have the opportunity of agreeing with or challenging such observations. Such a challenge does not*

in any way impugn the presiding officer's integrity or render his position intolerable".

I am however satisfied in this case that no prejudice will result to either party as the matter has not yet gone to trial. Consequently no failure of justice would result. It is furthermore acceptable because both counsel agree.

Accordingly the judgment granted in favour of the plaintiff on the 24th February 2011 is rescinded by consent, with no order as to costs.

The matter is postponed sine die to allow the parties to file further pleadings.

I recuse myself and refer the matter back to the Chief Justice for reallocation as he sees fit. I hope that both counsel will be of assistance to suggest how the matter is to be concluded in view of their consent order.

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L. A. MOLETE
ACTING JUDGE

For Plaintiff : Mr. Nathane
For Defendant : Mr. Phoofolo