IN THE HIGH COURT OF LESOTHO

CIV/APN/363/2011

In the matter between:-

NKOPA EMMANUEL LETUKA	**1ST APPLICANT**
ESTATE LATE JOHANNES LETUKA	**2ND APPLICANT**

And

ESTATE LATE ASLAM ABUBAKER	**1ST RESPONDENT**
YACOOB ABUBAKER	**2ND RESPONDENT**
MASTER OF THE HIGH COURT	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**

AND

YACOOB ABUBAKER	**APPELLANT**

And

MESSENGER OF COURT-LERIBE	
MAGISTRATE'S COURT-T. KHAMPEPE	**1ST RESPONDENT**

NKOPA EMMANUEL LETUKA	**2ND RESPONDENT**
ESTATE LATE JOHANNES LETUKA	**3RD RESPONDENT**
SENIOR RESIDENT MAGISTRATE	**4TH RESPONDENT**
MASTER OF THE HIGH COURT	**5TH RESPONDENT**

JUDGMENT

Coram : Hon. Majara J.

Date of hearing : 14th November 2011

Date of judgment : 12th December 2011

Summary

Application to declare appeal irregular and null and void and counter application for review of proceedings in the Magistrate's Court - whether 1st respondent has the capacity to note appeal without first having applied for substitution post his father's death – whether the conduct of the Magistrate in the court a quo irregular – whether the two remedies reconcilable - remedies not mutually exclusive as long as a party does not seek review once a decision has been made on appeal.

ANNOTATIONS

CITED CASES

1. Clarkson NO v Gele & Others 1981 (1) SA 288
2. Estate Smith v Estate Follett 1942 AD 364

3. Katz v Peri-Urban Areas Health board & Others 1950 (1) SA 306
4. Rowe v Assistant magistrate, Pretoria 7 Another 1925 TPD 361

STATUTES

Subordinate Court Rules of 1996

[1] This matter involves two applications which were consolidated and heard together as they involve the same parties and the same cause of action. In the main application, the applicant seeks this Court to declare the appeal noted by the 1st respondent in the Leribe Magistrate Court case in CC: 27/09 null and void. That alternatively, the applicant should be substituted as the respondent in the said appeal in the place of the late Johannes Letuka.

[2] In the counter-application, the applicant therein seeks a review of the Senior Magistrate of Leribe's judgment on the grounds that the learned magistrate acted irregularly in that matter contrary to the provisions of Rule 49 (3) of the Subordinate Courts and that of a likelihood of bias.

[3] At the hearing of the applications, it was agreed that the two be dealt with holistically so that Counsel would make their submissions both on the points of law that were raised as well as on the merits respectively.

[4] Facts that are common cause are that the late Johannes Letuka instituted ejectment proceedings against the late Aslam Abubaker in the Leribe Magistrate's Court in CC: 27/09 in which he applied for summary judgment against the latter. It is also common cause that the 4th Respondent in the counter-application, namely the Senior Resident Magistrate delivered judgment in favour of the plaintiff, the late Johannes Letuka in terms of which he ordered that the defendant, namely, the

late Aslam Abubaker be ejected from the site, the subject matter of the proceedings. It is also common cause that when the said judgment was delivered, both parties had since passed away.

[5] It is against that judgment that the applicant in the counter application, Yacoob Abubaker noted an appeal as the executor of the estate of the late Aslam Abubaker, the defendant in CC: 27/09.

[6] At the hearing thereof, **Mr. Nteso** who appeared on behalf of the applicant in the main and respondents in the counter application told the Court that both the applicant and the 1st respondent became aware of the summary judgment on the 23rd May 2011 and that a warrant of ejectment was issued against the 1st respondent on the same day. Further that both parties and the Clerk of Court had laboured under the impression that the judgment had been formally delivered to the parties' legal representatives.

[7] He added that it however turned out in **CIV/APN/284/11** which is an application that was instituted before this Court that this was not the case whereby an order was made by consent of the parties' legal representatives that the warrant of ejectment be set aside and the Magistrate was ordered to deliver the summary judgment within seven days of the granting of the order. That pursuant to that order the Magistrate delivered the handwritten judgment on the 13th July 2011. Further that on the same date the appellant in the counter-application noted the appeal.

[8] It was **Mr. Nteso**'s submission that the said appeal is not properly before the Court because the appellant did not apply for substitution first, either as the heir or as the executer of the estate of the late Aslam after his father's passing away. He

added that should this Court find that the appeal is valid that Nkopa, the applicant in the main be substituted in the appeal.

[9] On behalf of the respondents in the main, **Mr. Teele KC** made the submission that on the date when the summary judgment was delivered both parties had already passed away and both Counsel were aware of this fact and for that reason, the court a quo should have applied the provisions of Rule 49 (3). He added that Counsel for the defendant in those proceedings objected to the delivery of the judgment having made the Court aware that the parties had both passed away.

[10] It was his contention that even if it could be accepted that the two lawyers had agreed to the delivery of the judgment in spite of that fact, they had no right to do so as they had not been instructed by anyone since both their respective clients had already passed on. Further that the consequences of the delivery of a judgment is that the time and rights of the parties start running inclusive of the time within which to note an appeal. It was his further submission that if judgment could be delivered despite the absence of the parties there is no reason why the executor could not appeal as he steps into the shoes of the deceased as he is entitled to do so pursuant to the letter of appointment as the executor.

[11] Further that this being a procedural matter the applicant in the main cannot take advantage of such an irregularity as this would amount to an injustice. That this Court's order that the judgment should be formally delivered was made at the time the parties were still alive so that the applicant cannot rely on that order as the rules still had to be observed.

[12] With respect to the issue that they raised against the applicant namely, lack of *locus standi*, **Mr. Teele** stated that the applicant admits that he has not been

substituted by seeking an order that he be substituted. It was his submission that the applicant is not a proper party in the appeal as he has no *locus standi*.

The Counter Application

[13] With respect to the counter-application **Mr. Teele** submitted that the manner in which the summary judgment in CC: 27/09 was delivered, was improper for the reason that the envelope that contained the undelivered judgment was handed over to the attorneys of the respondent in the absence of the other party and/or his Counsel. He added that parties should know the judgment at the same time in open Court. It was his contention that the manner of the delivery of same smacks of foul play.

[14] Further that there was a likelihood of bias in the whole conduct of the court a quo in that, the second delivery of the judgment was done post the execution thereof and that this was neither an accident nor a mistake so that it disqualified the magistrate from proceeding with the matter. He added that the fact that the applicants were given the file in their absence suggests that they have access to the court which they as the other side do not similarly have. Further that no explanation was given why the one side was given the file pursuant to which the writ was issued.

[15] He added that the applicant in the counter-application is only challenging the procedure and does not wish to get into the merits of the matter. It was **Mr. Teele**'s further submission that the provisions of Rule 49 (3) are stated in imperative terms and the lawyers could not agree to overlook the rule because at that time they had no parties to represent. That for all these reasons these proceedings cannot be allowed to stand.

[16] In his reply in the main application, **Mr. Nteso** made the contention that both parties read the file before the judgment was formerly delivered. He added that before noting the appeal, the respondent still had to make an application for substitution in terms of the Rule 49 (4). Further that no explanation was given why an application for substitution was not made between the 5th and 13th July 2011. He added that the letters of appointment of Yacoob as the executor have nothing to do with the property the subject matter herein but are in relation to the property of the late Abubaker's estate. It was his further submission that Yacoob's deceased father had no rights and as such the respondent also have none.

[17] In relation to the issue of there being a likelihood of bias on the part of the magistrate, Counsel for the applicant made the submission that no grounds had been alleged to substantiate same. He added that the handing over to them of a closed envelope containing the judgment is not an irregularity. He added that the applicant did not apply for substitution in an appeal which was not properly filed.

[18] In turn, **Mr. Teele** contended that the grounds for review in the counter-application are contained in the undisputed facts in the founding affidavit especially at paragraphs 10 and 11. He added that **Mr. Nteso** is the attorney that personally handled the matter, knew what was happening and is the one that issued the writ on the basis of an undelivered judgment. He added that this suggests that he opened the envelope and read the judgment that had not been delivered and that this alone is sufficient to vitiate the proceedings.

[19] It was his further submission that Rule 49 (4) is not couched in imperative terms as is Rule 49 (3). Further that in terms of the common law, the executor assumes the right to represent the estate *ex lege* upon his appointment as such and he does not have to be substituted. He added that the provision has to be read

together with the common law and that the definition of the term estate includes rights and liabilities as well as litigation which is transmitted into the estate. That the issue herein is the litigation with respect to the plot which was instituted during the lifetime of the deceased. Further that what is in issue here is not the rights per se but the involvement in litigation. It was his further contention that this court has not even been told that the late Aslam had developed the site in question.

[20] With respect to the issue of bias, it was Counsel's submission that the respondents in the counter-application clearly had access to the Magistrate which the applicants did not have and that the impropriety of his conduct and the respondents' lawyers is not disputed.

[21] I now proceed to deal with the first issue in the main application, namely, whether or not the appeal that was noted by the 1st respondent in CC: 27/09 is improper and as such null and void.

[22] I have already shown that the basis for this particular prayer is that the 1st respondent who is the executor of the estate of the late Aslam Abubaker has no *locus standi* for the reason that he did not apply for substitution before he noted the appeal.

[23] It is not disputed that the respondent, Yacoob Abubaker is the executor of the estate. What is disputed is whether or not he ought to have first applied to be substituted. On the one hand the respondent seeks to rely on the provisions of Rule 49 (3) in support of his submission that he need not have made such an application. On the other hand the applicant submits that the rule has to be read together with the subsequent one namely Rule 49 (4). It was **Mr. Nteso**'s submission that in terms of this latter rule, the executor has to apply to be substituted before he can take any action. Rule 49 (3) reads as follows:-

> *"If a party dies or becomes incompetent to continue an action, the action shall thereby be stayed until such time as an executor, trustee, guardian or other competent person has been appointed in his place or until such incompetence shall cease to exist."*

[24] There can be no argument that in this case in so far as this sub-rule goes, we are only interested in the first part of the provisions because both parties herein have since passed away and there can be no ceasing of the incompetence envisaged therein. In my opinion the wording of the sub-rule suggests that an action shall be stayed and can only be continued once an executor, trustee or guardian has been appointed. The provision says nothing about an application for substitution having to be made before this can take place.

[25] Sub-rule 49 (4) which the applicant seeks to invoke in turn provides thus:-

> *"Where an executor, trustee, guardian or other competent person has been so appointed, the court may, on application, order that he be substituted in the place of the party who has so died or become incompetent."*

[26] By its wording, this sub-rule is permissive rather than peremptory, i.e. it makes provision that the Court may order such substitution. For the reason that it is not stated in mandatory terms, it in my view means that where an application for substitution has not been made the appointed person can continue with the matter by virtue of his appointment as provided for in sub-rule (3).

[27] Another submission that was made on behalf of the respondent is that the provision is to be read with the common law. I am attracted to this argument especially when account is taken on the fact that it is not couched in mandatory

terms. In this regard the remarks of Preiss J in **Clarkson NO v Gele and Others**[1] on which **Mr. Teele** sought to rely in support of his submission are illustrative. In this regard the learned Judge stated *inter alia* that:-

> *"A deceased estate is an aggregate of assets and liabilities. It has no legal personality and, when referring to it as an entity, one must be careful not to imply or understand there that one is dealing with anything like a persona. The executor is vested with its administration and he alone has the power to deal with this totality of rights and obligations."*

[28] The judge went on to add that the executor is the only person who can sue on behalf of the estate to recover damages for harm caused to the estate assets or their vindication.

[29] Bearing the above sentiments in mind, and cognizant that it is common cause that when the summary judgment was delivered, Aslam had since passed away, it is my opinion that the 2nd respondent in the main was legally entitled to appeal that judgment as the executor of his late father's estate. In addition, I am not persuaded by the submission that Yacoob's deceased father had no rights in the site, the subject matter of these proceedings and as such the respondent also has none because it is my view that it is those rights that have to be determined in this case. Therefore, it is my finding that the prayer that I should declare the conduct of the 1st respondent as improper and thus, null and void, cannot stand.

[30] Further, the submission that the rights that the 1st respondent's father may have had in the plot the subject –matter herein were extinguished by the operation

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[1] **1981 (1) SA 288**

of the law [2] goes into the merits of the case which in my opinion will be properly dealt with in the appeal and/or review.

[31] With respect to the alternative prayer that the applicant be substituted as respondent and replace the late Johannes Tuoane Letuka in the appeal the respondent raised the point that he has no *locus standi* because *ex facie* the papers there is no evidence supporting same.

[32] In this regard the applicant avers at paragraph 14 of his founding affidavit that he has inherited the rights of his late father in the plot the subject matter in the proceedings. The 2nd respondents disputes this in his opposing affidavit and goes on to state that there is no shred of evidence placed before this Court that he is the first son of his late father.

[33] In reply, the applicant asserts that he is the eldest son and sole heir to his father's estate and has attached annexure "NEL 5" as proof namely, a letter in terms of which the family appointed him as the sole heir to his late father's estate.

[34] Although same is disputed, it is my view that the applicant has in this respect successfully established his status as the heir and that the dispute is not bona fide in that the respondents' denial in this regard is a bare one as opposed to the applicant's averments that he is the sole heir to the deceased estate as supported by the annexure referred to above.

[35] However, the matter does not end there since another submission was made on behalf of the respondents that under the received law the legal position is that it is only the executor who can institute proceedings in connection with the estate of the deceased. This in turn poses the question whether an heir has the legal right to

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[2] **Section 24 of the Deeds Registry Act of 1967**

institute and/or continue with proceedings in connection with the estate of the deceased. To this end, **Mr. Teele** cited the **Clarkson case (supra)** as well as that of **Estate Smith v Estate Follett**[3].

[36] The Court in the latter case discusses at length the question of the heir's entitlement to sue on behalf of the deceased estate. In his judgment Watermeyer J.A states that the notion of an inheritance as the whole estate of a deceased person, a universitas of rights and liabilities, which vests on adiation in the heir no longer exists in our law. He continues as follows[4]**: -**

> *"Under our system of administration of the estates of deceased persons an heir is in fact a residuary legatee… and when we speak of his "inheritance" we mean either the property which he is entitled to claim from the executors of the estate of the deceased, or his legal right to claim such property derived from the will."*

[37] In the light of the above remarks, it would seem that it is only the executors who have the right over the deceased estate and that the heir can only claim from them the residue after they have dealt with the estate assets and liabilities unless he bases his claim on the contents on the will. Coming back to the present case, the applicant does not aver that he has been appointed as the executor of his late father's estate, nor has he tendered any proof in that regard, namely a letter of appointment.

[38] This is especially important because in his founding papers the 2nd applicant is cited as **Estate Late Johannes Letuka** which as **Mr. Teele** submitted is in itself suggestive and this was not contradicted, that the estate is administered under the received law. For these reasons, it is my finding that while he may indeed be the

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[3] **1942 AD 364**

[4] **Estate Smith (Supra) at p 383**

heir to his late father, the 1st applicant does not have the *locus standi* to be substituted on the strengths of the cited authorities.

[39] I now turn to deal with the two main issues that arise herein namely, that the magistrate should not have continued with the proceedings and the delivery of judgment after he was made aware that the parties thereto had both since passed away and the contention that there is a likelihood of bias in his conduct.

[40] I find it apposite to mention at this stage that my initial attitude was that due to the fact that the applicant in the counter-application has already noted an appeal against the Magistrate's decision which step I have just found to have been properly taken, it might not be tenable for this Court to also grant an order that the matter should be heard *de novo* before another Magistrate. However before I could consider the issue, I found it prudent to call the parties' respective Counsel to come and address me on this issue namely, whether these two processes are reconcilable.

[41] In addressing me on this point, both **Mr. Teele** and **Mr. Nteso** were agreed that there is authority that both remedies are not mutually exclusive as long as the party that has noted an appeal does not turn around after losing same and continue with the review application. In this regard, they referred me to the case of **Katz v Peri-Urban Areas Health Board & Others[5],** wherein it was held, in terms of Clayden J's judgment, that what is not tenable is for the court to disturb the finality of its own judgment on appeal in subsequent review proceedings. The learned Judge went on to state that '*the applicant is I consider entitled to the relief for which he firstly asks*', thus suggesting that a party can resort to both whichever will happen first as long as he will not seek review once a decision has been made on appeal.

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[5] **1950 (1) SA 306 at 310**

[42] It is on the strength of the above authority that I proceed to consider the first ground for review namely that the court a quo irregularly delivered its judgment after having been made aware that the parties had since passed away contrary to Subordinate Court Rule 39 (3).

[43] I have already stated that this Rule is couched in mandatory terms, as such, whether or not Counsel had agreed (which fact is disputed at any rate), is immaterial because indeed at that time they had no mandate from anyone as their respective clients had already passed away and which in turn compelled the Court to act in terms of the Rule. His failure to do so thus, amounted to an irregularity.

[44] I now turn to deal with the second ground, i.e. that there is a likelihood of bias in that the Magistrate gave the other party's Attorneys of record the envelope containing the file and the judgment in the absence of the other party on the basis of which they took action by issuing a writ. While **Mr. Nteso** made the contention that they did not open the envelope, it is my considered view that the facts speak for themselves in that they went ahead and issued a writ which they would not have done unless they were privy to the judgment. Since it is common cause that same had not been delivered by the magistrate then it is safe for me to conclude that they read it and acted on it.

[45] This is turn begs the question whether that in itself constituted bias. While there is room for argument that the judgment was already written at that stage, it must be remembered that bias can either be real or perceived from the conduct of a presiding officer. This being the case, I pause here to consider whether where one party is given access by the presiding officer to an envelope containing an undelivered judgment of the Court, gets to see the contents thereof in the absence of the other side and proceeds to issue a writ on that basis, that constitutes bias.

[46] It cannot be disputed that, unless in very special circumstances, all proceedings from start to finish, have to take place, in open court and in the presence of all parties. Even in those circumstances where proceedings are held in chambers, this has to be done openly safe where the one side absconds which is not what happened herein.

[47] In his affidavit, the explanation of the Magistrate is that he gave the envelope to the other party's attorney **Mr. Mukhawana** through his colleague Mrs. Kabi to take it to the Leribe Magistrate's Court and to ask the clerk of court to call him for directions. It is common cause that this did not happen. Instead the applicant herein got to know about the judgment when he or his late father's estate was served with the writ of execution of that judgment. While I am unable to visit the blame squarely on the door of the magistrate given his explanation, I consider that this was indeed another irregularity in the proceedings.

[48] It should be noted that the irregularity does not necessarily have to be imputed to the magistrate. Suffice for it to be a gross irregularity in the proceedings. In terms of certain decided authorities [6] the test is whether the irregularity is of such a nature that it is calculated to prejudice the party who complains.

[49] In my opinion, the conduct of the other party's attorneys of record was indeed calculated to prejudice the applicant in the counter-application who not only did not know that judgment had been taken against him, but who also did not have the opportunity to take appropriate steps at the material time and within the limits stipulated by the rules of Court only to be served with a writ of execution pursuant to a judgment taken against him under those dubious circumstances.

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[6] **Rowe v Assistant Magistrate, Pretoria and Another 1925 TPD 361**

[50] For all these reasons, it is my considered opinion that these grounds were well taken by the applicant herein. I accordingly grant him prayers 2(a), (c) and (d) as they are stated in the notice of motion.

N. MAJARA
JUDGE

For applicant (respondent in the counter application) : Mr. P.T. Nteso

For respondent (applicant in the counter application) : Mr. M.E. Teele KC