IN THE HIGH COURT OF LESOTHO

CIV/APN/41/2013

In the matter between:

RAMASHAMOLE SEBINANE **APPLICANT**

And

THE CLERK OF COURT THABA-TSEKA MAGISTRATE'S COURT **1ST RESPONDENT**
THE RESIDENT MAGISTRATE (MR. M.P. KOLISANG **2ND RESPONDENT**
ATTORNEY GENERAL **3RD RESPONDENT**

JUDGMENT

Coram :Honourable Acting Justice E.F.M. Makara
Dates of Hearing :24 April, 2013
Date of Judgment :30 May, 2013

Summary

Trial magistrate granting a default judgment in a civil case for damages-Same magistrate subsequently unilaterally cancelling the default judgment after the same counsel had acted contemptuously before him during bail application proceedings-Reason being that the magistrate thought that he had no reason to believe that the contemptuous counsel, had told him the truth in the civil matter-The High Court making an order for the reinstatement of the default judgment despite strong reservations about the merits and the procedure followed in the granting of the default judgment-irreparable breakdown in professional relations between the

magistrate and the counsel-A challenge for lawyers who practice in the district of Thaba-Tseka.

CITED CASES

Ramashamole Sebinane v Commissioner of Police & Attorney-General cc 15/12

STATUTES AND SUBSIDIARY LEGISLATION

Subordinate Court Rules 1966.

BOOKS

GWKL Kasozi, Introduction to the Law of Lesotho, A Basic Text on Law and Judicial Conduct and Practice, Vol 1, Morija 1999.

[1] This is a review application which was moved before the High Court on the 2nd April 2013 by Mr. Fosa representing the applicant in the matter. The application sought for an order that:

1. The 1st respondent be directed to dispatch to the Registrar of this court the record of the proceedings in **Ramashamole Sebinane v Commissioner of Police & Attorney-General cc 15/12.**
2. The 2nd respondent's decision to cancel the default judgment obtained in the afore cited case, be reviewed corrected and set aside.
3. The applicant be awarded the costs on the attorney-client scale.

[2] Mr. Fosa had on the very first day of his appearance before the court in this matter, appraised it that the respondents have been

respectively served with the application and that they have not filed any notice to oppose the application or any opposing papers. He protested, however, that the 1st respondent has not dispatched the records of the said proceedings to the registrar.

[3] The Court directed that it could not proceed with the application in the absence of the record of the proceedings before the Magistrate. It *ex- facie* the founding affidavit noted that there was no averment made on the question of the stage at which the Magistrate had made the cancellation and, perhaps, the reason which he might have advanced for that subsequent decision. The concern was being expressed well mindful that the Magistrate could have done so before the record had left his chambers upon a discovery of some error in law. The rationale being that a mistake should be corrected before the record could reach the office of the clerk of court and, therefore, become a public record.

[4] Mr. Fosa responded that he would make a supplementary affidavit and serve the respondents with it. He undertook to specifically address therein the stage at which the cancellation was made and to state whichever reason for that action.

[5] The Court, consequently, ordered that the 1st respondent should, transmit the record to the registrar. Since Mr. Fosa had indicated that the second respondent could be throwing his weight

against the intended transmission, the second respondent was requested to oversee the compliance with the order.

[6] The Court had further granted the 2nd respondent the indulgence to file his affidavit if the 3rd respondent would continue with his non participation in the matter. This was in desperation to obtain a rather balanced perception for the dispensation of justice.

[7] The hearing was re-scheduled to the 24th April 2013 to enable the respondents to file their counter papers (if any). On this day, the applicants attorney informed the Court that the respondents have been served with a supplementary affidavit and that they have nevertheless, not responded. He also drew it to the attention of the Court that the 2nd respondent has filed his affidavit of the record and assisted the court with its copy. It later emerged that the Magistrate Court's copy of the record of the proceedings was inside the registrar's file.

[8] It is common cause that the 2nd respondent had on the 2nd November 2012, unilaterally cancelled the said judgment which he had entered in favour of the applicant on the 1st November 2012. The applicant is, on this basis, asking the High Court to review, correct and set aside the cancellation of the default judgment.

[9] The background scenario in **S.Ramashamole v Commissioner of Police & Another (supra)**, is that the action proceedings related to it,

were instituted by the applicant against the defendants on the grounds that the police had assaulted him and thereby caused him to suffer general damages amounting to M18 000.

[10] The applicant had in his particulars of claim, pleaded that the Mantšonyane based police had arrested him on the allegation that he had threatened Tokane Tempele with a gun. It is not in dispute that the police had arrested the man and then released him on the same day of his arrest. The police, however, detailed him to return home to fetch the gun in question and submit it to them.

[11] When the applicant arrived home, he shot Ntokane Tempele when he met him. He, thereafter, proceeded to the Mants'onyane police to hand over the gun to them. In doing so, he simultaneously informed the police that he has shot Ntokane Tempele with it. It was that report which triggered the police assault against him.

[12] The applicant complained in his papers that immediately after he had disclosed it to the police officer Monyako that he has shot Tempele, the officer left him without uttering a single word and after a while, came back armed with a stick. He explained that the officer again without a word started belabuoring him with that stick and shortly thereafter, some six policemen joined their colleague in the assault. I have, in particular, noted that the applicant had not in his particulars of claim stated any injuries, the degree of disability or even the intensity of the *contumelia* which he claimed to have

suffered as a result of the police assault. This has been worsened by the consequent lack of testimony in support of the claimed damages. This being contrary to the procedure prescribed under **Rule 12 (4) of the Subordinate Court Rules 1996.**

[13] All that the applicant has said in the particulars of claim is that after the assault on him, he had sought for medical treatment from a medical facility and that he incurred costs to which he holds the defendants liable. Here, it is not categorically ascertained if these are the expenses connected with medical treatment. His verbatim explanation is simply that "As a result of the said assault, he was attended to at a medical facility and incurred costs to which he holds both the defendants liable." The applicant had, interestingly, not mentioned the name of the medical facility which had attended him and precisely what the which ever facility did to him. There was correspondingly also no medical report given to the Magistrate to at least place him in some perception regarding what the facility may have done to the applicant at the material time. He in conclusion held the defendants liable to general damages of M18 000; one paying the other absolved.

[14] The applicant had, with reference to the M18 000 general damages, specifically itemized the acts and the expenses on the basis of which he asked the court *a quo* to award him the damages against the respondent. Thus, he has in his prayer particularized them as damages for:

1. (a) Unlawful assault M10 000
   (b) Pain and suffering M 3 000
   (c) *contumelia* M 5 000
2. Interest at 18% per annum from the date of the judgment.
3. Cost of suit.
4. Any further or alternative relief.

[15] The court observes in passing that the applicant had not in his particulars of claim, stated in any manner, whatsoever, that he had sustained any physical injuries or psychological trauma as a result of those assaults. The claimed *contumelia* had not also been substantiated or qualified in the particulars of claim.

[16] The most disturbing deficiency in the record of the proceedings is that there no indication that the counsel had ever led the applicant to present any *viva voce* evidence before the Magistrate to prove the claimed damages. The irony is that even the affidavit which the applicant had filed of the record of the proceedings as an alternative way of proving the damages does not refer to the physical and or psychological injuries which the applicant has suffered as a result of the police assault. The same applies to the stated *contumelia*. The affidavit was described as having been executed pursuant to **Rule 12 (4) of the Subordinate Court Rules.** The

rule is part of a list of rules under the general heading of judgment by default. The rules there under relate to the procedures for securing default judgments including the manner of moving the claims connected with this mode of judgment. **Rule 12(4)** provides that:

> The clerk of court shall refer to the court any request for judgment for an unliquidated amount and **the plaintiff shall furnish to** the court evidence, either oral or by affidavit, of the nature and extend of claim. The court shall thereupon the amount recoverable by the plaintiff and shall give judgment.

In casu, there was no oral evidence tendered before the Magistrate to move anyone of the claims. The affidavit as it has already been explained does not have the requisite averments on the nature, the degree of the disability, the extent of the *contumelia* etc. the indication is simply that the default judgment was granted on the basis of the simply tabulated claims and *quantum* assigned to each of them without the requisite supporting evidence under the rule.

[17] A resultant question would be whether or not the applicant's counsel had properly guided the court regarding the legal pre-requisites for the default judgment to have been entered in favour of the applicant. The answer is clear from the record of the proceedings before the Thaba-Tseka Magistrate Court read in conjunction with the said **Rule 12 (4).**

[18] The other question without an answer, would be why the subordinates of the 3rd respondent decided not to participate the in the proceedings. Their intervention would have balanced the *pendulum* of justice to save the magistrate from being in a vulnerable situation and, thereby, expose the police to a seemingly unproceduraly secured default judgment.

[19] The Resident Magistrate appears to have, in good faith, entered the default judgment following the information conveyed to him by the applicant's counsel that the 3rd respondent would welcome **any** judgment in the matter. He, therefore, might not have found it necessary to address his mind to the essential procedural requirements and even on the justification of the M18 000 *quantum* for damages plus the 18% interest thereon. It would appear that he thought that once an application is not opposed, it logically follows that a default judgment should, automatically be granted.

[20] At this juncture, it has to be made clear that notwithstanding the identified procedural defects in the proceedings which culminated in the granting of the default judgment, the assignment before this court is not to make its judgment upon them. They have been addressed simply because they are part of the facts which are inseparably interrelated with the present review application with which this court is seized.

[21] The court is in precise terms, being called to review the cancellation of the default judgment and to decide on whether in considering the factors surrounding the act, the decision can not be reviewed, set aside and have the default judgment reinstated.

[22] Mr. Fosa in motivating the application for review and for the reinstatement of the default judgment argued that the 2nd respondent had on the 2nd November 2012, suddenly and unilaterally cancelled the default judgment which he had granted the applicant, on the previous day. According to him, he had reversed his earlier decision due to the emergence of a sudden and spontaneous anger which resulted in total abuse of judicial authority and the court process.

[23] The court responded to the representation by referring to the Magistrate Court's minutes recorded on the 1st November 2012 and 2nd November 2012 respectively. It then transpired that indeed the default judgment was entered in favour of the applicant at around 2.30 PM on the 1st November 2012. The minutes of the 2nd November 2012, deserve to be referred to as recorded since they precisely contributed to the basis of the application. They appear thus:

> At 3pm Mr. Tšeliso Fosa utters obscene words to the court, it shows blatant disrespect and contempt to the court by saying the court allows nonsense. In other words he says the judgment of the court is nonsense.

> The default judgment granted above (on 1st November 2012) is cancelled and plaintiff's action dismissed with costs on attorney and client scale. A warrant of arrest be issued be issued against Mr. Fosa for contempt of court.

It should be mentioned that the magistrate wrote the above quoted words in capital letters to project the emphasis.

[24] The picture becomes broader and clearly elucidated when the minutes of the 1st and 2nd November are read in conjunction with the answering affidavit by the Resident Magistrate. The developments had suddenly taken an extremely adverse turn at the moment the court upheld the application made by Public Prosecutor Molaoli that the bail application be postponed for him to secure the police instructions in the matter. It was then that according to the Magistrate, Mr. Fosa confronted the court that it was countenancing nonsense and maintained a belligerent position that the court should, despite its ruling, proceed with the hearing of the application.

[25] The salient features in the answering affidavit which has been deposed to by the Resident Magistrate is firstly that, he has therein raised points *in limine*. At the end of those points he asks the court to dismiss the application.

[26] The initial point raised *in limine* is that Mr. Fosa has made a foundationless affidavit which is just his means of ventilating a personal grudge against him, that it is merely an after thought and

lacks compliance with the High Court rules. In the alternative, the Magistrate has described the affidavit filed by Mr. Fosa as being devoid of legal principles and just an expression of emotional sentiments.

[27] In addressing the merits of the affidavit filed by Mr. Fosa, the Magistrate conceded that he had cancelled the default judgment. He has, however, denied that this was done on the 2nd November 2012 and explains that he had done so on the 1st November 2012. The latter being the date on which the judgment was given.

[28] The magistrate has deposed that Mr. Fosa had, through his contemptuous acts and utterances compelled him to cancel the judgment. He maintained that this was because the behavior demonstrated by the counsel before his court forced him to develop skepticism about the truthfulness of the averments made in support of the application for the default judgment. He has at paragraph 10.2 of his answering affidavit expressed this in these terms:

> Accordingly, I genuinely believe that probably he (Mr. Fosa) misled me into granting him that judgment vexatiously (i.e by relying on fake pleadings knowing them to be so) simply because he thought that I am stupid.

[29] It should be explained that the relationship between the Magistrate and the attorney were professionally healthy at all material times when the application for the default judgment was moved and granted. Be that as it may, the two encountered

unhealthy and antagonistic relationships at the time Mr. Fosa was moving the bail application in CR/417/2012 Pokeli Mosese v Rex. The court gathers the impression that their relationship became irreparably harmed when the counsel could not submit to the court ruling that the bail application be postponed.

[30] The court pronounces itself in unequivocal terms that the cancellation of the default judgment was an injudicious and unlawful decision regardless of the circumstances in which it was made. The end result is that irrespective of the reservations which it has expressed regarding the evidential deficiencies in proving the damages in **R. Sebinane v Commissioner of Police & Attorney-General (supra),** the judgment should be reinstated and it so orders. The judgment could only be rescinded through proper procedures and not otherwise as the Magistrate has purportedly done.

[31] This court has, despite its pronouncement, found it imperative to address the above stated relational developments. It realizes that in this respect, it should refrain from adopting an armed chair approach but instead, follow a practical oriented reasoning.

[32] The reality is that much as the bench-bar relationship must be characterized by a prevalence of a professional mutual respect, discipline and order; a lawyer appearing before the court must accord it the *decorum* it deserves. This should be demonstrated in the words employed in addressing the court and in the acts. The

idea behind would be to maintain the dignity of the court, show confidence in its authority to dispense justice and to make it command the confidence of the public.

[33] It is trite knowledge that though in principle lawyers, be they those in private practice, in public service, in the magistracy or the judgeship, must be people of high moral integrity and ethical standards; they nevertheless, remain human beings. Magistrates and judges in particular, have their personal strengths and weaknesses, endowments, temperaments etc. It is on account of this reality that one of the key techniques in advocacy is the lawyer's understanding of the personality and professional competency of a particular magistrate or a judge before whom he is appearing. This is strategic for a context sensitive approach. He must be able to enhance the strengths and mitigate the weaknesses of a presiding officer concerned. This is because, the reality is that there is no judge who is immune to human criticism simply because he is a human being and there is no perfect human kind. This has perfectly been illustrated in the following extract:

> A group of lawyers worked for hours for a total of 18 months, striving to consolidate the criteria suggested by Law Association of the United States of America, on how a judge should be appointed. The list of virtues included legal ability, above average experience, good health, industry, and diligence and integrity, judicial temperament which includes courtesy, dignity, patience, tact, humour and a personality free from arrogance, pomposity, impatience, loquacity, bias and prejudice and ability to listen as well as to keep an open mind. It happened that a

journalist who heard this definition remarked, "Why, that man was crucified 2000 years ago."[1]

[34] What remains indispensible is that the authority of a judge must be respected. In the event of dissatisfaction about the judgment, there are proper procedures prescribed for a relief. Nevertheless, a lawyer or any law abiding citizen who is conscientious of the authority of the presiding officer and the constitutional standing of the institution he represents, would, regardless of the reservations he might have with it, welcome the decision with the words "as it pleases the court." In the Sesotho Khotla language, this is expressed in the words, " *le lumme*" meaning it has thundered.

[35] This court once again in the clearest terms, finds that the uncompromising belligerence which the applicant's attorney maintained before the court after its ruling and the statement that it was allowing nonsense ; to have constituted the author of the storm which suddenly beclouded the wisdom of the court. The episode indicates the circumstances which suddenly overwhelmed the magistrate such that he irresistibly and impulsively cancelled the judgment. In all fairness, the poor magistrate should not have been let into the temptation but assisted to have a well balanced perception of justice.

[1] See Ferreira- Strafproses in die Lar Howe 2nd edition 23 quoted in GWKLKasozi, Introduction to the Law of Lesotho, A Basic Text on Law and Judicial Conduct and Practice, Vol 1, Morija 1999.

[36] The psychological impact of the crisis into which he was forced, rendered him not to draw a distinction between the bail application with which he was seized and the civil application in which he was *functus officio.* His logical reasoning was simply that the counsel's demonstration of his disrespect, constituted basis for skepticism that he had told the truth in the civil matter hence its cancellation.

[37] Resident Magistrate is renowned for his high moral integrity and for being a disciplinarian. He has demonstrated that by invoking the contempt of Court powers in relation to a case of a Court Clerk who had the financial books of accounts entrusted upon her untraceable and had not reported herself to work despite his standing directive. The Magistrate had with equal vehemence zealously used the powers against a Clerk of Court who was frustrating the smooth functioning of his court by consistently arriving late to work. He leaves no stone unturned when investigating a case for a contemplated disciplinary action. He has even stood his ground against the decision of his colleagues where he had a conviction that their action was wrongful. He is also an independent minded judicial officer who leads by example through his punctuality and dedication to work.

[38] It would also appear from the number of appeals against his refusal to admit accused on bail and from the review applications that the lawyers who practice in the district, lack the technique of

persuading him accordingly. He seemingly, like every person, has his conception about crime and its related dimensions. In the mist of this picture, there is evidence that Advocate Tšenoli and Advocate Shale have respectively, throughout a tactful combination of humility, professional diplomacy and the articulation of the relevant principles of law; succeeded to obtain bail for their client.

[39] Advocate Tšenoli had incidentally through the same technique and by acknowledging the over pouring mercy of the court, succeeded to persuade the Resident Magistrate to uplift the warrant of arrest which he had issued against the applicant's counsel. He was consequently, peacefully released from custody. The lesson which should be learned here is that each presiding officer must be approached according to his or her merits and demerits with a view to enhance one's strengths and minimize the weaknesses.

[40] The paradox is that the Officer Commanding the police in the district, has publicly expressed his confidence and that of his subordinates about the performance of the Magistrate. They view him as a 'messiah' who has through his approach towards justice and his sentencing system, significantly reduced the crime rate. The prison population in the district has, in the meanwhile, skyrocketed beyond the prison holding capacity.

[41] The scenario posses a challenge for a genuine introspective examination towards a mutual understanding between the lawyers

and the Magistrate concerned. It may be premature and unjustifiable to blame the latter. Perhaps, the prosecutor who was seized with the said bail application should equally revisit the manner in which he approaches bail applications. The court record appears to indicate that he did not attach any urgency to this application and took advantage of the willingness of the magistrate to postpone the application. This seems to have triggered the frustration of the counsel and became catalystic to the disruption of the professional relations between the magistrate and the counsel.

[42] In the premises, it is reiterated that the decision of the Resident Magistrate to unilaterally cancel the default judgment which he had entered in favour of the applicant in **Ramashamole Sebinane v Commissioner of Police and Attorney General (supra)** is set aside and the default judgment is accordingly reinstated. The prayer for costs on the attorney-client scale is refused since no justification has been advanced for that scale.

E.F.M MAKARA
ACTING JUDGE

For Applicant : Mr Fosa
For Respondent: No appearance