

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the Matter Between:

PHELELANE FANE

Applicant
(Defendant)

And

PHANDA MOFOLO

1st Respondent
(Plaintiff)

QACHA'S NEK MAGISTRATE COURT (Mrs. Pitso)

2nd Respondent

JUDICIAL COMMISSIONER'S COURT (JC)

3rd Respondent

CLERK OF COURT (JC)

4th Respondent

MATEBENG LOCAL COURT

5th Respondent

CLERK OF COURT – MATEBENG LOCAL COURT

6th Respondent

MESSENGER OF COURT

7th Respondent

ATTORNEY GENERAL

8th Respondent

JUDGEMENT

Coram : Hon. Acting Chief Justice T. E. Monapathi
Date of Hearing : 16th December, 2013
Date of Judgement : 5th November, 2014

SUMMARY

Where the local court had granted a judgement by default in favour of the Respondent and where the Magistrate Court intervened and ordered for the matter to be tried denovo but that local court instead ordered for application for condonation and the application for condonation was dismissed. While later the

Central Court asked for the case to be tried denovo. When later the Judicial Commission on appeal failed to address the merits, the only justifiable order of this court was that the original judgement of the Local Court remained valid and stood to be confirmed. Inasmuch as no court dealt with the merits this was the fairest conclusion in what otherwise was a comedy of errors on the part of all the lower courts..

CITED CASES

STATUTES

BOOKS

[1] This matter of two (2) applications before the High Court concerns in the beginning a matter that was in the Matebeng Local Court under CC: 28/00. The claim was where Applicant (Mofolo) got a default judgement against First Respondent (Fane) and a team of local men. Only Fane as shown hereunder resisted. From there it became a comedy of errors and decisions which were hard to explain.

[2] The present applications are about, firstly “the main application”, which Mofolo claims for the following orders: to show cause why:

- a) Rules pertaining to notices and service be dispensed with on account of urgency of this matter;
- b) An order shall not be made setting aside, varying, correcting and reviewing the proceedings in JC; 1995/2005 as being irregular;

- c) The Second, Fourth and Sixth Respondents or anybody responsible shall not be ordered to dispatch the record of proceedings in CC: 36/06, JC: 95/2005 and informal record of Second Respondent to this court with 7 days following receipt of this application;
- d) That the proceedings in CC: 36/06 at Matebeng Local Court be reviewed and set aside;
- e) The execution of the judgement in CC: 36/06 be stayed pending finalization of this matter
- f) An order declaring as irregular the judgement of Resident Magistrate Mrs. Pitso dated 15th March 2012.
- g) Such further or alternative relief;
- h) That prayers 1 (a) and 4 be made an order of court in the interim.

[3] This application speaks about matters emanating from the contents of paragraph above. And secondly, matter where the Applicant (Fane) seeks for *rule nisi* and calls for Respondents to show cause why:

- a) That the Applicant's fifty five (55) sheep which are currently in the possession of the First Respondent (Applicant in the main application) should be kept under the custody of the Applicant (1st Respondent in the main application) pending finalization of this matter of application;
- b) That the Applicant's fifty five (55) sheep which are currently in the possession of the First Respondent (Applicant in the main application) should be kept under the custody of the Applicant (1st Respondent in

the main application) pending finalization of the main review application;

- c) That the court orders cost at attorney and client scale if the Attorney General and/or Respondents persist in opposing this application;
- d) That prayers 1 and 2 (a), should operate with immediate effect as interim relief.

[4] It is worthy to note that while the case from Matebeng Local Court had a long journey past the Magistrate Court it ended up as an appeal before the Judicial Commissioner's Court in JC 93/05 which was withdrawn later. It is against the decision of the court that appeal was noted or leave to appeal to the High Court was granted. After the filing of the main application referred to in paragraph 2 above the appeal was as aforesaid withdrawn. The question that will have to be answered will be whether in the circumstances, the main application will still have any value.

[5] The history of the whole matter can be summarized as follows:

5.1 Fane was sued by the Mofolo in 2000 in which he was claiming fifty (50) sheep or five thousand maloti. Fane received the summons which stated a date of hearing. On the same day Fane was detained by the police at the police station in Sehlabathebe for a whole day but was not put in custody. He did not appear before court as he had been arrested.

5.2 Fane said he was later informed by his co-defendants that the case has been withdrawn from court to be discussed with a view to reach settlement.

5.3 On the month following the one in which they were at the local court Fane and his co-defendants, one Tholofane in the absence of Third Defendant went to the home of the Fane to discuss the matter that put them before court. Negotiations were started, they did not for far because Mofolo was claiming that Defendants should pay him his sheep. Parties disagreed because Mofolo failed even to state which sheep he alleges they took.

5.4 On the following year in 2001 Fane was informed, while he was at Mokhotlong, by his shepherd that his fifty five (55) sheep had been taken by court messengers in execution of judgement.

5.5 Upon Fane's arrival at home he went to the magistrate court and informed the magistrate about this matter of his attached sheep.

5.6 The magistrate (Mr. Mothebe) made a letter that the record be forwarded to Magistrate Court Qacha's Nek. The Court officials at Matebeng Local Court refused to release the record.

5.7 The Magistrate (Mr. Mothebe) went on two (2) occasions but failed to get the record. On the third occasion, the Magistrate (this time a Mr. Ramabele) ordered that the case should start *de novo* because there was no record. Later (miraculously) the record was discovered.

5.8 The president of Matebeng Local Court then said Fane should apply for condonation and reasons why he was not before court so that it can determine whether the application for rescission could succeed. The

presiding officer dismissed his application for rescission. Fane appealed to Central Court at Qacha's Nek.

5.9 At Central Court Fane was ordered to apply for condonation again. His case was dismissed again.

5.9.1 He then consulted lawyers.

5.9.2 He was represented by Adv. Seleke. He said he was not familiar with the procedures to be followed but the case ended up before Central Court again at Qacha's Nek.

5.9.3 The decision of the Central Court was that my fifty five (55) sheep should be taken back to him and the Applicant should start the case *de novo*.

5.9.4 Mofolo then appealed to the Judicial Commissioner's Court.

5.9.5 The Judicial Commissioner's Court, in 2005, confirmed the judgement of the Central Court and stated that the case should start *de novo* but his fifty five (55) sheep should remain in the possession of Mofolo.

5.9.6 The case was started *de novo* before Matebeng Local Court in 2006 but was strangely completed after five (5) years in 2011. The case was dismissed.

5.9.7 The Matebeng Local Court did not pronounce itself about Fane's sheep.

5.9.8 Fane went to the Judicial Commissioner's Court in Maseru for clarification.

5.9.9 The Judicial Commissioner's Court wrote a letter that the judgment should address the issue of the sheep which had remained undecided. The letter was dated 5th January, 2012.

5.10.1 The Court President said in Fane's presence that he would not be able to comply with the letter from the Judicial Commissioner's Court and he did not in fact do anything at all.

5.10.2 He told Fane that he would consult the Magistrate in Qacha's Nek. He failed to do so.

5.10.3 Fane went back to Judicial Commissioner's Court in Maseru. Fane was referred back to Magistrate Court Qacha's Nek.

5.10.4 Fane went to the Magistrate Court in Qacha's Nek. The Magistrate then called the parties together, that is Fane and the Applicant, and she explained to the Applicant that Fane's sheep had to come back to Applicant because the case against him had been dismissed.

5.10.5 The magistrate then made a decision that the fifty five (55) sheep be returned to Fane.

5.10.6 The sheep were not returned to Fane.

5.10.7 Fane caused to be issued a writ of execution at Matebeng Local Court. The messengers of Matebeng Local Court refused to assist to have the fifty five (55) sheep restored back into Fane's possession.

5.10.8 Fane went to the Sehlabathebe Local Court and caused to be issued the same writ for it to be executed by different messengers.

5.10.9 It then followed therefore that while he was waiting for the execution of judgement and return of fifty five (55) sheep to Fane, he received the High Court papers referred to in the main application (paragraph 2.1 herein).

[6] The completed summary to above can be rounded up as follows:

6.1 Up to the stage when Fane went to the Magistrate after hearing of the execution on his sheep the judgement had remained valid and unchallenged.

6.2 The reference by Fane of the matter to Magistrate Mothebe was of no effect as he failed to take any forceful initial step.

6.3 Magistrate p4... had only ordered for matter to be started *de novo*. And the only reason was that the record was not traceable. On the record re-surfaced Fane was instead advised to apply for condonation. The necessary conclusion was that that judgement of the local court in favour of Mofolo remained valid, and not effectively challenged. Advisedly, the situation is that it was not disturbed. The learned magistrate order could not have had any consequence it was empty and invalid.

6.4 The application for condonation failed. It is inevitably to be concluded that the judgement remained undisturbed.

6.5 While Fane is appealed to Qacha's Neck Central Court it had not been clear as to whether he appealed against the original judgement itself or the dismissal of the application for condonation. The only conclusion is that if this or

the other failed that judgement of the local court remained valid and undisturbed at that stage.

6.6 This strange re-appearance (of CC 30/2003) at the behest of Adv. Seleke at Qacha's Neck Central Court which was virtually having a second go could only have been irregular. It is noteworthy that the court ordered for trial *de novo* and that the fifty five sheep be taken back to the execution debtor (the original Defendant). Hence appeal by judgement creditor (Fane) for the Judicial Commissioner. Mofolo complained that the Central Court President had no right to decide the merits.

6.7 While as commented before the challenge before the Central Court was irregular the above appeal was not challenged and the Respondent (Fane) seemed to have accepted the jurisdiction of the court. Why so? Incidentally no pronouncement was made over the Fifty Five (55) sheep. So the natural thing would be that they should remain with Mofolo (Defendant).

6.8 See judgement, the Judicial commissioner (in JC 1995/2002) confirmed the judgement of the Central Court by ordering for re-starting the case *de novo*. The case was dismissed. My conclusion is that the case after re-starting (*de novo*) can only mean that the failure resulted in Fane for the first time losing or dropping the ball. While the court made no pronouncement over the sheep the sheep therefore remained with Mofolo who then became the judgement creditor.

6.9 The events elicited in paragraphs 5.9.9 to 5.10.4 in my finding have one meaning one legal conclusion which is that Mofolo had finally won and secured a valid judgement before Matebeng Local Court (see paragraph 5.9.6).

6.10 In the same vein the events starting from where the Judicial Commissioner wrote a letter and all those events from paragraph 5.9.9 to

paragraph 5.10.6 do not change the conclusion I have reached in the last paragraph inasmuch as nothing changed the final decision of Matebeng Local Court in paragraph 5.9.6. Indeed no judicial decision was ever made until the next case.

[7] The next case was the filing of appeal by the Applicant in the main application to the High Court from the decision of the Judicial Commissioner in JC 93/2005 of the 27th October 2005. The Learned Judicial Commissioner decided that:

“It is therefore ordered that the trial (Matebeng Local) resume the case at the points where Respondent will answer the case of the appellant/plaintiff and cross-examine the witnesses. Then he defend the case against him and put his evidence. The subject sheep remain not appellant until final determination. There is no order as to costs.”

[8] It is against the above decision of the Judicial Commissioner that Mofolo has taken the step in the main application (paragraph 2 above) and he has already taken up an appeal to the High Court.

[9] Since the review envisaged in paragraph (b) would fail, the withdrawal of the application does not have any effect. In that the original judgement of Local Court still has validity. The application ought to fail.

[10] Costs are awarded to First Respondent (Plaintiff).

T. E. MONAPATHI
JUDGE

For Applicant (Defendant) : Adv. C. J. Lephuthing
For Respondent (Plaintiff) : Adv. L. A. Molati