

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOTLATSI PETROSE KOLISANG

Applicant

Vs

RESIDENT MAGISTRATE L. NTELANE

1st Respondent

CLERK OF COURT

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

‘MATOKELO ROSA NTHATI KOLISANG

4th Respondent

JUDGMENT

Coram: Hon. M. Hlajoane

Date of Hearing: 5th February, 2015.

Date of judgment: 16th March, 2015.

Summary

Application for review – Magistrate having ordered paternity test and tests confirming paternity - Applicant not being satisfied that the magistrate would not be biased in favour of his wife – No harm in

asking for review in the middle of proceedings – But procedure followed in accordance with real and substantial justice – Application dismissed.

Annotations

Statutes

Books

Cases

- 1. Rascher v Minister of Justice 1930 TPD 810 at 820**
- 2. Ginsberg v Additional Magistrate of Cape Town**

[1] The Applicant approached Court *ex parte* asking for an order of staying proceedings before the 1st Respondent pending finalization of these proceedings. He has also asked on review for the setting aside of the proceedings before the 1st Respondent and allowing the matter to start de novo before a different magistrate.

[2] A brief synopsis of the facts of the case before the 1st Respondent being that; she was dealing with a maintenance case between the Applicant and the 4th Respondent who are husband and wife.

- [3] The Applicant and the 4th Respondent were blessed in their marriage with one daughter who is still a minor. The parties must have quarrelled as are presently staying in separation.
- [4] The 4th Respondent then approached the Magistrate's Court for maintenance. The Applicant disputed paternity and the magistrate ordered that paternity test be made. The results confirmed that the Applicant is the father of the child.
- [5] Since it was the Applicant who disputed paternity he was ordered to pay the costs for the test. After all these the Magistrate then had to determine the quantum of maintenance to be paid.
- [6] The Applicant in his founding affidavit has shown that the 1st Respondent did acts which he labelled as showing favouritism to the 4th Respondent. In other words saying the 1st Respondent helped 4th Respondent to build up her case. The matter even had to be taken before the Chief Magistrate to intervene but was settled amicably.
- [7] But the Applicant has shown in his affidavit that the Chief Magistrate even asked the 1st Respondent to recuse herself from

the case which advice was considered and the 1st Respondent recused herself. But Applicant saw the 1st Respondent continuing with the case.

[8] Applicant has complained that the 1st Respondent is a close friend of the 4th Respondent. Applicant had made an Application for the 1st Respondent to recuse herself but he was overruled.

[9] Dealing with the Application for recusal, it must be understood that there have to be reasons why a litigant applies for a recusal of the Presiding Officer. What Applicant has said in his papers might be considered as valid reasons for recusal but what this Court observed in dealing with this matter made me think otherwise

[10] It appeared as though the Applicant would not approve of anyone whose decision favours the 4th Respondent. The Applicant started complaining when the 1st Respondent was to deal with the issue of Paternity test. When that issue had been dealt with he complained that Magistrate had to recuse herself when it came to the question of quantum of maintenance. He

also complained that he had not been awarded custody of the minor child.

[11] When this matter was before me the Applicant started to lodge yet another fresh complaint that Mr Malefane was having an affair with his wife as he observed the way they were looking at each other. He was thus asking the Court to ask counsel to end his brief of representing his wife. The Court could not entertain that request.

[12] As I said earlier on, the Applicant seems not to trust anybody who would find against him. But with this Court I have yet not made any decision in the matter. He had earlier on on the 29th September, 2014 agreed with counsel for 4th Respondents that they were going to file their heads and that the Court based on those heads make a decision in the matter.

[13] Yesterday when I was about to deliver that judgement, had it not been because of some corrections on the judgment, he came up with the suggestion that the matter be postponed for some further three weeks for them to come and argue. He was made aware that the judgment was ready as had been agreed to by both sides.

[14] Based on what I have said above I came to realize that the Applicant is not eager to see this case reach finality and the Court is not going to allow or entertain endless litigation.

[15] I quite agree with the Applicant's submission that "No man can be an advocate for or against a party in one proceedings, and at the same time sit as a Judge of that party in another proceedings". This in short says one cannot be a Judge in his own case.

[16] In review proceedings the Court considers the manner at which the proceedings were conducted. It is confined to the issue of procedure followed, not whether or not the decision is correct. The Applicant in his papers says the 1st Respondent refused to recuse himself. But the Court has a judicial discretion to exercise even in Applications for recusal.

[17] What the Applicant fears is the fact that she has to determine the amount of maintenance to be paid by him. That has got nothing to deal with how she conducted her trial.

[18] Applicant in his heads has shown that the 1st Respondent adduced evidence in support of the 4th Respondent in the

proceedings she was sitting as a Presiding Officer. How does that happen, giving evidence to yourself? He says he is not in good terms with 1st Respondent whom he works with.

[19] Applicant let things go up to a stage when maintenance had to be fixed. He happens to be against everybody whom he considers to favour what is said by the 4th Respondent. His wife would be having an affair with every counsel who would represent her.

[20] The matter has yet not reached finality. I would not agree with the 4th Respondent in saying cannot consider review before a case is finalized. He herself has referred to authorities that demonstrated that the Court has inherent power of review, **Rascher v Minister of Justice**¹ when it was said;

“... a wrong decision of a magistrate in circumstances which would seriously prejudice the right of a litigant would justify the Court at any time during the course of the proceedings in interfering by way of review.”

¹ 1930 TPD 810 at 820

[21] Even in the case of **Ginsberg v Additional Magistrate of Cape Town**² the Court did not want to commit itself in saying reviews can only be taken at the end of the trial. The Court said;

“Now as a rule, the Court’s power of review is exercised, only after termination of the criminal case, but I am not prepared to say that the Court would not exercise that power before the termination of a case, if there were gross irregularities in the proceedings.”

[22] The Applicant was quite entitled to have applied for a review before the end of the proceedings if he felt there were some gross irregularities. But the Court has not identified such irregularities as the magistrate followed the procedure of ordering paternity test when Applicant doubted that he was the father. The only issue was who had to pay for such costs. The ruling was he had to pay as he is the one who called for that.

[23] The Magistrate then after satisfying herself that the Applicant was the father, had to determine the amount of maintenance. I don’t see how he could have given evidence for the 4th Respondent yet she was presiding, the thing which has vehemently been denied.

² 1933 CPD 357 at 360

[24] The Court therefore on review finds that to that far the proceedings were still in accordance with real and substantial justice. The Application is dismissed with no order as to costs as parties are a family. The magistrate to proceed with the case to finality in determining the amount of maintenance to be paid.

A. M. HLAJOANE
JUDGE

For Applicant: Adv. Kolisang

For Respondents: Mr Malefane