IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU **CCA/0068/17**

In the matter between –

TLOHELANG MOILOA **APPLICANT**

And

THE LEARNED MAGISTRATE
MRS. MOKUENA **1ST RESPONDET**
SENIOR CLERK OF COURT – BEREA
MAGISTRATE **2ND RESPONDENDT**
JONE MOTIKI **3RD RESPONDENT**
MESSENGER OF COURT **4TH RESPONDENT**
THE ATTORNEY GENERAL **5TH RESPONDENT**

Neutral Citation: Tlohelang Moiloa v. The Learned Magistrate Mrs. Mokuena and 4 others [2022] LSHC 273 Comm. (21st October 2022)

CORAM: **M. S. KOPO, J**
HEARD: **31ST August, 2022**
DELIVERED: **21st October, 2022**

SUMMARY

Procedure – matter not finally disposed of not res judicata – following the rule that proceedings have to be interpreted if conducted in a language other than English would be too strictly following the rules of procedure in the Small Claims Court.

ANNOTATIONS

Books

Cases

Lesotho

Florio v Minister of Interior and Chieftainship Affairs and Another LAC (1990-94) 446

Lenka v R LAC 2000-2004

Lephoso Kobile V. Prosecutions and Another CRI/APN/472/2006

Makafane v. DPP (CRI/APN/158/12) [2012] LSHC 96 (02 May 2012)

Makula and Another v Magistrate CRI/APN/720/2003

R v. Maphethekatsi and others CRI/T/213/2002) (CRI/T/213/2002) [2004] LSHC 147 (22 November 2004

Ranthithi and Another v RexLAC 2007 -2008 245

Rathulo v Magistrate Court – Mohale and Another CRI/APN/628/09

Richard Moeletsi v Letsitsi Ndondozela and Others LC/APN/156/2014

Tšehle v Magistrate and Another CRI/APN/68/2009

Vincent Notsi v 1st Class magistrate Her Worship Mrs. Mofilikoane – Leribe Magistrate Court and 3 others CRI/APN/206/2013

South Africa

Rex v. Padsha1923 AD 281 at 290

Statutes

High Court Act No. 5 of 1978

High Court Rules1980Legal Notice N0.9 of 1980

High Court (amendment) Rules 2006 Legal Notice No. 75 of 2006
The subordinate Court Rules of 1996Legal Notice No. 132 OF 1996
The Subordinate Court (amendment) Rules of 2006Legal Notice No. 76 of 2006
The Subordinate Courts (Small Claims Procedure) Implementing Rules 2011Legal Notice No. 30 of 2011

JUDGMENT

[A] Introduction

[1] The journey of this litigation has been long. It emanates from the district of Berea and landed in Maseru on the lap of Justice Molete before it found its way before me. For a matter that was initially instituted as an urgent matter, circumstances have caused it to only be completed now. Be that as it may, this judgment hopefully will mark the end of the journey. This is not, however, meant to deny those in this journey an opportunity to proceed on their journey to justice if they feel that this is not yet Canaan.

[2] The journey of this litigation began in 2012 when one Jone Motiki instituted action proceedings in the Berea Magistrate Court against one Tlohelang Moiloa claiming payment of money owed. The matter was registered as CC: 105/2015 but in the middle of the proceedings, the said Motiki withdrew the matter.

[3] In 2016, Motiki instituted yet another matter before the Small Claims Court of Berea and the matter was registered as SC/BRA/40/2016. Apparently, the claim was still the same as the one under CC: 105/2012 and the court ruled in favour of Motiki.

[4] On the 21st day of July, 2017, Moiloa launched an urgent application against the Learned Magistrate, Mr. Thamae, the Senior Clerk of court for the Berea Magistrate Court, Jone Motiki, the Messenger of Court and the Attorney General as the representative of government in all civil suits as the 1st, 2nd, 3rd, 4th and 5th Respondents respectively. It is however to be noted that the Learned Magistrate Thamae was wrongly cited since the matter was presided over by the Learned Magistrate Mokuena. In this application, Motiki prayed for an order in the following terms:

1. *Dispensing with the ordinary modes and periods of service provided for in the Rules of this Honourable Court on account of urgency hereof.*
2. *Directing the second Respondent to dispatch the record of proceedings in SC/BRA/40/16.*
3. *Stay of execution of an order in SC/BRA/40/16; and/or any attachment already done by the Fourth Respondent pending finalisation hereof.*
4. *A Rule Nisi be issued returnable on the date and time to be determined by this Honourable Court calling upon the Respondent to show cause (if any) why;*

    (a)The proceedings in SC/BRA/40/16 shall not be reviewed, corrected and set aside as irregularly conducted.

(b)The matter shall not be ordered to start de novo before a different Magistrate

5. *Cost of suit in the event of unsuccessful opposition hereof*
6. *Prayer 1, 2 and 3 operate with immediate effect as Interim Orders.*

[5] Motiki opposed the Application. The matter dragged from July 2017 for what, I must say, displayed difficulties, lack of will and zeal from both parties to have the matter disposed of. The application was eventually dismissed for non-compliance with the rules by Justice Molete on the 05th day of June, 2018

[6] On the 08th day of June, 2018 the matter was re-instituted in this court on more or less, the same prayers as quoted in paragraph 4 above, by Moiloa who will hereinafter be referred as the Applicant save that there was a new prayer for condonation for late filing of the application. Motiki opposed the Application as the 3rd Respondent and will hereinafter be referred to as such.

[7] On the 14th day of June 2018 Advocate Potsane and Advocate Nyabela appeared for the Applicant and 3rd Respondent respectively before the Justice Molete. By consent, an order for dispensation, stay of execution and dispatch of the record of proceedings was granted. Both counsels were also put to terms to file all the necessary pleadings and heads of argument to the effect that on the 14th day of July, 2018, the matter would be ready to be set down.

[8] The 16th day of October 2018 was the date designated for arguments. Justice Molete then adjourned the matter to allow parties to resolve the

matter out of court. I totally understand his predicament and the reason for such an order given the history of the matter. Unfortunately, Justice Molete could not see the matter through as he would eventually pass on. May His beautiful soul rest in eternal peace.

[9] On the 21st day of June, 2022, the matter was allocated to me and was set down for arguments on the 31st day of August 2022. On that day Advocate Potsane, who was counsel of record for the Applicant leading to that date, appeared only to withdraw. He had not filed the Notice of Withdrawal as he said he could not trace the record. His reason for withdrawing was that since the matter was last before court in 2018, Applicant was nowhere to be found. Advocate Nyabela appeared for the 3rd Respondent. He agreed that indeed Applicant could not be found as they also tried to find him but in vain. There is, in fact, a Return of service showing that Applicant could not be traced. Advocate Nyabela then moved that the matter should proceed.

[10] Having seen the history of this matter as illustrated above, I had to make a ruling that the matter proceed. I turn now to discuss the reasons for my ruling. I have been rather elaborate in setting out the history of this matter and I hope that the reason for such elaborate story telling will become clear in the reasons for my ruling. I must mention that at the time, on the 31st day of August, 2022, all the papers were filed and the pleadings were closed. Both counsels, who were appearing for both parties then, had filed their heads and the matter was ripe for arguments. Having seen the long and winding road of the journey of this litigation, it was only proper that I rule that the matter proceed. There has to be finality to litigation. It could not drag forever. I therefore allowed counsel for 3rd Respondent to argue the

matter orally and tried as best I could to point him to address the written arguments by Applicant's counsel.

[11] First of all, the matter was initially instituted in the ordinary jurisdiction of the Berea Magistrate Court. It was then withdrawn in the middle of the cross examination only to be re-instituted in the Small Claims Court. There have been no reasons tendered as to why this matter was indeed withdrawn. In the absence of such reasons, there is a fear and possibility of abuse of court process. See **Richard Moeletsi v Letsitsi Ndondozela and Others**[1]. Be that as it may, the legitimacy or otherwise of the withdrawal of the matter was not investigated in the Small Claims Court as parties appear in person and as a result legal issue may not be thrashed out adequately. We are therefore now seized with the proceedings of the Small Claims Court which we may never know if indeed they were properly before that jurisdiction of the Subordinate Court. However, the action has had a bearing in my making a decision that the matter should proceed. It has had an effect in the delay to reaching finality to this litigation. If we were to compute the time from the date when the litigation ensued in the Subordinate Court in its original and normal jurisdiction, this year marks the 10th anniversary since the dispute between the parties was placed before the courts of law.

[12] As has been shown, the pleadings were closed and the heads of arguments were filed for both parties. For that reason, therefore, my decision to rule that the matter proceed without representation of the Applicant could not prejudice anyone. And finally, Applicant was nowhere to be found and with no indication that there was any hope that he would be found. Even if I were to rule that the matter be postponed to allow

[1]LC/APN/156/2014

appearance for the Applicant, there was no hope that that could be done in the near future without adding to the delay in the administration of justice. I could not deny justice to the defendant that way.

[B] APPLICANT'S CASE AND SUBMISSIONS

[13] It is the Applicant's case that during the proceedings in **SC/BRA/40/16**, the evidence was given in Sesotho language but was recorded in English language by the learned magistrate without the use of a sworn interpreter. The Applicant further contends that the Ruling of the Learned Magistrate, the 1st Respondent herein, was based on what is not the true reflection of the proceedings or testimony of the witnesses since she (the 1st Respondent) inaccurately recorded the proceedings.

[14] Advocate Potsane for the Applicant argued that the act of the Learned Magistrate turning herself into an interpreter was wrong. He relied on the court of Appeal case of **Lenka v R**[2]**.**

[C] THE 3RD RESPONDENT'S CASE AND SUBMISSIONS

[15] The 3rd Respondent first raised the points of law *in limine*. His case is that the matter was fully dealt with by Justice Molete and finalised on the 05th day of June, 2018. For that reason, therefore, the matter is *res judicata* and therefore stands to be dismissed.

[16] On merits, 3rd Respondent pleaded that there was nothing wrong with the 1st Respondent conducting the proceedings in Sesotho and then recording same in English. He argued that the 1st Respondent was competent to

[2]LAC 2000-2004

conduct the proceedings in Sesotho as both the Applicant and the 3rd Respondent together with other witnesses could understand Sesotho. Moreover, 3rd Respondent denied that the ruling of the 1st Respondent was based on record of proceedings that was not truthful.

[17] And finally, the 3rd Respondent had pleaded that the delay by the Applicant in instituting this matter was deliberate and that it was not correct that the record of proceedings in *SC/BRA/40/16* could not be traced. It is apposite to mention that during oral arguments, Advocate Nyabela did not seem to concentrate on this point nor on the point *in limine*. He only addressed the argument on merits.

[D] ANALYSIS OF THE FACTS AND LAW

[I]*RES JURICATA*

[18] As has been mentioned, advocate Nyabela did not necessarily pursue this point during oral arguments. I think he was correct not to exert too much effort on this point. Be that as it may, it is best to address it as it was raised as an issue in this matter.

[19] The law is settled on the requirements for this special plea to succeed. I believe the court of appeal in **Florio v Minister of Interior and Chieftainship Affairs and Another**[3], by quoting with approval **Jones and Buckle**, succinctly provided a guide, on the plea of Res judicata, especially wherein the merits had not been decided on. The relevant quotation stands thus:

> "*Where a party pleads that a point in issue is*

[3]LAC (1990-94) 446

already res judicata because of an earlier judgement in personam, he must show-

(a) that there has already been a prior judgement;

(b) by a competent Court;

(c) in which the parties were the same, and

(d) the same point was in issue."

Under the heading "A prior judgement" the learned authors go on to say:

"There must have been prior litigation or legal proceedings culminating in a ***final judgement*** *on a decision which has a final effect between the parties based on the merits of the point in issue."(my emphasis)*[4]

[20] In *casu*, the order of the 5th June, 2018 by justice Molete dismissed the application on a point of law in *limine* that the Applicant had not complied with the rules of court. This is common cause. This cannot be said to be a final judgment. Such a ruling is not dispositive of the matter. A party who has been dismissed for not complying with the rules has an opportunity to apply for condonation for non-compliance. Indeed, Applicant re-instituted the matter and among the prayers, he applied for condonation. For this reason, therefore, the *exceptio rei judicatae* (an exception that a matter has been judged and decided) cannot be upheld.

[II] IRREGULARITY OR NON-THEREOF OF PROCEEDING BEING CONDUCTED IN SESOTHO BUT RECORDED IN ENGLISH WITHOUT AN INTERPRETER.

[21] As has been shown, Advocate Potsane cited the case of **Lenka**[5] to support his argument that it is irregular for a magistrate to conduct the proceedings

[4]Ibid at 462 - 463

[5]Supra

in Sesotho but record them in English without the assistance of a sworn interpreter. Advocate Nyabela countered by citing two (2) cases of **Ranthithi and Another v Rex**[6] and **Rathulo v Magistrate Court – Mohale and Another**[7]

[22] The **Lenka** case is the one that established the rule or clarified the rule that a judicial officer cannot record evidence delivered in Sesotho or any other language that is not the official language of the court in the official language of the court without the use of a competent sworn interpreter. Subsequent to the decision in **Lenka**, High Court (amendment) Rules 2006[8] were passed. This rule (Rule 2 of the 2006 amendment Rules) was amending Rule 58 (4) of the High Court Rules1980[9].

[23] The above-mentioned Rules were discussed in the *obita dictum* by the learned Ramodibedi JA in **Ranthithi**[10]. The net effect of the Rule 58 (4) was that where proceedings are conducted in any language other than the official language of the court, the proceedings shall be interpreted into the official language of the court by a competent interpreter. The amendment (Rule 2 of the 2006 amendment) say;

> *"Where the evidence in any proceedings is given in any language other than in English such evidence shall be interpreted by a competent interpreter. However, it shall be competent in civil or criminal proceedings for a presiding judge to record evidence in English without the assistance of a court interpreter where all parties know and understand Sesotho and the services of the interpreter cannot be secured without undue delay, expense or inconvenience."*

[6]LAC 2007 -2008 245
[7]CRI/APN/628/09
[8]Legal Notice No. 75 of 2006
[9]Legal Notice N0.9 of 1980
[10]supra

[24] The subordinate Court Rules of 1996[11] were also amended by The Subordinate Court (amendment) Rule of 2006[12] around the same time with the High Court Rules in a rule in *pari materia* to the one quoted above. The amendment provided that;

> *"It shall be competent in civil or criminal proceedings for a presiding officer to record evidence in English without the assistance of a court interpreter where all parties understand Sesotho and the services of the interpreter cannot be secured with undue delay, expenses or inconvenience."*

[25] It was the considered view of Ramodibedi JA that the amendment in effect has not changed anything but has only made "…it competent for judicial officers to "record", as opposed to "interpret", evidence in English…"[13]. I must admit that it took me a while to get the difference made by the Honourable Judge of Appeal. Be that as it may, even after understanding the difference herein made, one still finds it difficult to accept that that is what becomes the effect of the Rule. Since the Rule allowed (I am using past tense because, as it will be seen later, the Rules were declared ultra vires empowering legislation in 2006) that the proceedings go on if "the services of the interpreter cannot be secured with undue delay, expenses or inconvenience", one could argue that the word "record" therein used meant "interpret". In any case, the reliance of Advocate Nyabela on this judgment is misplaced. He relies also on the judgment by Monaphthi J. in **Makafane v. DPP**[14]. It was also the view in this judgment that **Ranthithi** had overruled Lenka. This is not the only

[11]Legal Notice No. 132 OF 1996
[12]Legal Notice No. 76 of 2006
[13]
[14](CRI/APN/158/12) [2012] LSHC 96 (02 May 2012)

case that is of this view as The **Rathulo**[15] case also seems to suggest as such. That is not the case in my reading of **Ranthithi**. Be that as it may, the **Makafane case**[16] was decided on the basis of absence of the element of prejudice. However, all the cases that relied on the element of prejudice (that in the absence of prejudice suffered by the accused, the argument on the irregularity of the proceedings should not stand) were reviews of criminal proceedings in which Section 8 (2) of the **High Court Act**[17] was relied on. That section provides that:

> *"when considering a criminal appeal and notwithstanding that a point might decide in favour of the Accused, no conviction or sentence shall set aside or altered by reason of any irregularity or defect in record of proceedings, unless it appears to the High Court that failure of justice has in fact resulted there from."*

The question is, can this case and others similar to it (**Tšehle v Magistrate and Another**[18], **Makula and Another v Magistrate**[19]), be followed to play the prejudice card?

[26] Prior to the ruling in **Ranthithi**, on the 18th day of December, 2006, Maqutu J, had already declared the Rule 2 of the Subordinate Court (amendment) Rules of 2006" null and void – being ultra vires to the Chief Justice" in **Lephoso Kobile V. Director of Public Prosecutions and Another**[20]. Maqutu J went on to quote with approval the words of De Villiers JA in **Rex v Padsha**[21] that; *"As a general proposition it may be*

[15]supra
[16]Supra
[17]Act No. 5 of 1978
[18]CRI/APN/68/2009
[19]CRI/APN/720/2003
[20]CRI/APN/472/2006
[21]1923 AD 281 at 290

laid down that when a person travels outside his powers, the Court will set him right". The net effect of this judgment therefore is that, the Rules in question are non-existent.

[27] Prior to **Kobile**[22] above, Maqutu J penned down a very passionate judgment in **R v. Maphethekatsi and others**[23] in which he was strongly against the judgment of **Lenka**[24]. In reading **Kobile**[25], one would not guess that the language in **Maphethekatsi**[26] was from the same Judge. I guess issues did not appear to him then in **Maphethekatsi**[27] as they appeared to him in **Kobile**[28]. Probably the worst evil to him was the Rules made by the Chief Justice that went against the ruling of the court of Appeal. For what it is worth, it is my considered opinion that **Kobile** has a very sound reasoning. However, it is still stopped dead in its tracks by **Lenka**.

[28] This judgment (**Kobile**) takes us back to the judgment of **Lenka**[29]. While technically speaking this judgment is the law, the Rules were closer to the practice and in tune with what is happening on the ground. It is apposite to also mention that no miscarriage of justice can be envisaged in situations where in all the parties understand Sesotho and the presiding officer records the proceedings in the official language of the court. This country is unique in the sense that it is almost monolingual and all the officers of the court speak the official language of the court. This, the court can take judicial notice of. Moreover, mostly, the judicial officers are mostly more conversant in English language than most of the available interpreters. Makara J. shared the same frustration as me in **Vincent Notsi v 1st Class**

[22]Supra
[23](CRI/T/213/2002) (CRI/T/213/2002) [2004] LSHC 147 (22 November 2004)
[24]Supra
[25]Supra
[26]Supra
[27] supra
[28]Supra
[29]Supra

magistrate Her Worship Mrs. Mofilikoane – Leribe Magistrate Court and 3 others[30]. I believe the honourable judge put the problem succinctly in that case and I agree.

[29] The trajectory of this subject in our courts ricocheted and zig-zagged to the effect that it is safe to conclude that it is not settled. However, in the case wherein the Amendment Rules (both of the High Court and the Subordinate court) being non-existent on account of having been declared null and void, it is my considered view that **Lenka**[31] remains intact. Be that as it may, I believe that each case has to be treated on its own merits.

[30] Advocate Nyabela argued that the procedure of the Small Claims Court is designed to be flexible and accommodative of people unrepresented by counsel. It is therefore not supposed to follow strict rules of procedure. **Rule 26 (1) of the Subordinate Courts (Small Claims Procedure) Implementing Rules 2011**[32]provides that; "subject to other limitations set out in these rules, strict rules of civil procedure and of evidence shall not apply to cases decided under the small claims procedure". Taking into consideration the known fact that all the parties in these proceedings spoke Sesotho as their mother tongue, that it is not disputed that the judicial officer speaks Sesotho as her mother tongue and that the rule that the recording of proceedings in the subordinate court should be in English is a rule of procedure, I take it that it would be too strict a following of procedure were we to rule for its adherence. It is my considered believe that the Court of Appeal in **Lenka** did not intent for such a strict application of the rules to apply to Small Claim Courts. By their very nature, these courts are meant to be flexible and accommodating to those who are not learned in matters of the law.

[30]CRI/APN/206/2013
[31]Supra
[32]Legal Notice No. 30 of 2011

[31] The Applicant raised an argument that the presiding officer recorded what was not said by the witnesses. It is true that the record of the proceedings from the court a quo was not dispatched as it was not found. Be that as it may, there was no dispute that the proceedings were conducted in Sesotho and recorded in English. Moreover, to prove that indeed the presiding officer recorded what was not said, Applicant would need to provide viva voce evidence. It could not be proved from the record of proceedings alone. In the absence of Applicant or any evidence to prove that, it cannot even be entertained. For that reason, therefore, the fact that the proceedings were conducted in Sesotho and recorded in English did not result in irregularity as envisaged in **Lenka. Lenka** is distinguishable as not applying to small claims court.

[E] ORDER

[32] Having ruled that;

1. The matter is not res judicata,
2. That High Court (amendment rules) 2006 and Subordinate Court (amendment) rules 2006 were declared null and void
3. That Lenka has not been overruled but it was not meant for the Small Claims Court,
4. The Application is dismissed with costs.

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Kopo J.
Judge of the High Court

For Applicant: **Adv. Potsane**

For Respondent: Adv. Nyabela