CIV/REV/1/81

IN THE HIGH COURT OF LESOTHO

In the Application of :

SANTAM BANK LIMITED Applicant

V

KHABO SEBATANA MOABI Respondent

J U D G M E N T.

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 20th day of August, 1982.

This is an application for review of certain proceedings before the learned magistrate Mokaloba and the learned Resident magistrate Mphafi.

The application was brought by way of a notice of motion supported by two affidavits. It is only addressed to the Resident magistrate. The grounds for review are set out in the affidavit of Mr. Pistorious as follows :

2.

That the learned magistrate for the district of Berea held at Teyateyaneng in Civ. app. 47/81 on the 21st day of August 1981 found that the subject matter of the application, a certain Datsun 180 J SSS, 1980 model, did not belong to Santam Bank.

3.

That the learned magistrate compared the relevant numbers from the Hire Purchase Agreement filed on record and did not take heed of the strong possibility that there has been tampered with the engine numbers because the number on the block of the engine differs from the engine number on the plate on the fireqall of the vehicle between the engine and passenger compartment.

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4.

That the learned magistrate wrongfully did not take into consideration that the numbers on the small plate also on the firewall of the vehicle being 0330037573 and the number on the Hire Purchase Agreement 0330037573 were exactly the same and wrongly decided that all the numbers differ in all respect.

5.

That the learned magistrate wrongly decided that the fact that Mr. Pieter Le Roux personally brought a set of duplicate keys from Vereeniging which fitted on the vehicle, could not be accepted as genuine keys.

6.

That the magistrate himself, at the inspection in loco, took down the engine number as 44H 38648D while it was in fact L14 H38648D stamped on the engine block and did not take into account that the engine numbers on the Hire Purchase Agreement could be a printing error.

Mr. Snyman, in elaborating the above grounds, states that he had been instructed to launch an application for the recovery of a certain motor vehicle which was the subject-matter of certain criminal proceedings. He was informed (so he avers) that unless a certain party was joined as respondent the said application would not be entertained. He obeyed. An ex parte order was granted returnable on a certain date but before that date arrived the order was cancelled by the learned magistrate Mokaloba. This cancellation was done in the absence of the parties. However, on being asked about the matter the learned magistrate orally told Mr. Snyman that he was not thereby barred from pursuing his application.

Mr. Snyman complains that throughout the trial he noted that the presiding magistrate (Resident Magistrate Mphafi) "refused to apply his mind to the then plaintiff's case....." He alleges that there were discussions which took place between himself and the Resident magistrate where it was revealed to him that the learned Resident magistrate had

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received a lot of correspondence from the respondent.

Mr. Snyman finally complains that he was led astray by the two learned magistrates at the expense of his client.

Now the facts in perspective are as follows:

The respondent and another were arrested and tried for a crime of theft it being alleged that they had stolen a motor vehicle. They were both found not guilty but the learned trial magistrate made no order as to whom the motor vehicle (an exhibit in that case) should be returned. He was not satisfied that it belonged to the present respondent. He then made the following order:

> "The vehicle - no order as to whom released - Application in the normal way should be followed."

That order led to the launching of the ex parte application already referred to. Whether Mr. Snyman feels terribly aggrieved about the action of the learned magistrates in requiring him to join some other party, they were really compounding an already faulty situation. When a servant of the government in the execution of his official duty is being sued the Solicitor-General is usually joined. However, this is not obligatory. (See Solicitor-General v Dhlamini and Another, CIV/APN/157/81). In any event I do not detect from Mr. Snyman's affidavit that the learned magistrate forced or coerced him into accepting their suggestion. He could have insisted that his application proceeded as he had wished and if he met with further resistence he surely should have known what course to take.

If it is true that the learned magistrate cancelled an order he had already made, (as alleged and the onus on the applicant) that would be a very serious matter indeed.

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He cannot do such an act in the absence of the parties and without their specific consent. Such an act is a serious irregularity if proved to be true because it opens the door to abuse.

The serious complaints about the irregularities committed by the learned magistrate Mokaloba were never brought to his attention for comment. The notice of motion was only served on the learned the Resident magistrate Mphafi requiring him to furnish the applicant with the record and reasons of the case and to show cause, why the proceedings should not be corrected or set aside.

In the absence of such a notice to the said learned magistrate there are no proceedings before me as recorded by the said learned magistrate. The only record I have is of the proceedings before the learned Resident magistrate Mphafi. The proceedings to be reviewed must be placed before the reviewing tribunal. It is so elementary. (Solicitor-General v Dhlamini and Another, CIV/APN/157/81).

Mr. Snyman does not say so in so many words that the learned Resident magistrate was biased in favour of the Respondent. If that is so the least be could have done was to have made an application at that stage for the learned Resident magistrate to recuse himself. However, there is no evidence of this serious allegation on the record of the proceedings before me. I believe that in future, extravagant allegations of unjudicious approach to a judicial officer's duty should not be lightly made unless well supported by evidence.

The thrust of the remaining grounds of bringing the proceedings of the learned Resident magistrate court's for review in this Court, is that given a set of facts the learned Resident magistrate came to a wrong conclusion. This is

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particularly clear in grounds five and six. However, a wrong decision does not necessarily constitute an irregularity entitling an aggrieved party to bring the learned Resident magistrate's decision under review. It may perhaps be a ground of appeal. (See Vawda v Rasool, 1947(1) S.A. 724 (N). Mr. Wilkens giving evidence for the applicant stated that the engine number was L 18 H878870. Mr. Snyman applied for an inspection in loco and the learned Resident magistrate records the engine number, on the block, as L 14 H 38648D and the attorneys for both parties agreed with such findings. Now in ground six it is averred that the learned Resident magistrate took down the engine as 44H 38648D. However, it now alleged that the correct number is L 14 H 3864D. The learned Resident magistrate is faulted for not having taken into consideration a printing error in the Hire Purchase Agreement. There was no basis for such an inference since the numbers could equally have been tempered with. However, the engine number recorded by the learned Resident magistrate was approved by applicant's own legal representative who no doubt, also saw the digits for himself. Mr. Wilkens was reading the engine number as given on the Hire Purchase Agreement. Where the third number comes its not revealed except to allege that it is the correct one.

It is quite correct that the proceedings of an inferior Court may be reviewed because of a gross irregularity in the proceedings. Trollip, J. in Ceidel v Bosman, N.O. and Another, 1963(4) S.A. 253(T) at 255 said:

> "..... a "gross irregularity" in civil proceedings in a magistrate's court meant an irregular act or omission by the magistrate (or probably some other officer or official of the court) in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant, on proof of which the court would set aside such proceedings unless it was satisfied that the litigant had in fact not suffered any prejudice."

I have applied this test in the present matter. The

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applicant has failed to discharge the onus on it. Not only did the applicant proceed with the application but had the benefit of a full trial. The applicant in my view was afforded every opportunity of proving his case. If he failed it was not because any irregularities committed were of such a gross a nature as to prejudice him. It was for other reasons which need not concern us here.

Consequently in my view, the application for review ought to be dismissed with costs and it so ordered.

JUDGE.

For the Applicant : Mr. Snyman

For the Respondent : Mr. Masoabi