CIV/T/295/79

see CIV/APN/116/80

IN THE HIGH COURT OF LESOTHO

In the matter of:

CHHOGALA IGBAL — Plaintiff

v

MICHAEL MTHEMBU — Defendant

REASONS FOR JUDGMENT

Filed by the Hon. Chief Justice, Mr.Justice T.S. Cotran on the 13th day of January 1983

On 8th December 1982 I entered Judgment for the plaintiff in the sum of M5050 with interest at 9% from the date the summons was filed on 21st November 1979 up to and including the 8th December 1982, at 12% interest from 9th December 1982 until settlement, costs of the 1st and 3rd day hearing on party and party scale, costs of 2nd day hearing on attorney and clients scale, the costs on party and party scale of rescinding (by Rooney J on 21st November 1980) of the default Judgment granted against the defendant (by Mofokeng J on 31st March 1980), with no order as to costs in the subsequent chamber proceedings (before Rooney J) wherein the learned Judge recalled his order (that the Registrar be authorised to reinstate the default Judgment in the event of the defendant failing to file a plea within seven days - see last paragraph but one of the Judgment at p.5) and allowing the defendant extension of time to file a plea. This the defendant did. I see no minute of the last mentioned event on file but attorneys for both parties agreed this took place.

Pleadings having been closed the trial took place before me on 6th December and the two subsequent days. I gave judgment as intimated and said reasons will be filed later. These now follow. If an appeal is contemplated time will start to run from the date of this Judgment.

It is common cause that the plaintiff and defendant entered into two contracts (both drafted by attorneys apparently acting

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on behalf of the defendant) on 23rd November 1978, one contract providing for the lease of premises known as "Mthembu's cafe" at site 45 Pitso Ground Maseru Reserve owned by defendant to the plaintiff (Annexure B) and one contract providing for the sale by the defendant to the plaintiff of that cafe as a "going concern" (Annexure A).

It is also common cause that prior to the 23rd November 1978 "Mthembu's cafe" was leased to a gentleman called Kaleem. Kaleem wanted to give up the business and introduced the plaintiff to the defendant as the prospective lessee and purchaser. The negotiations between plaintiff and defendant culminated in the two agreements above referred to. Kaleem had some stock in the cafe and had employed a sales girl called Mamothetsi(PW3). Kaleem sold his stock to the plaintiff and arranged for Mrs. Mamothetsi to continue in plaintiff's service, which she did, up to the time of the events that gave rise to these proceedings. The value of stock purchased by plaintiff from Kaleem had nothing to do with defendant. Its value has not been disclosed.

The plaintiff ran the cafe with the assistance of his wife with nothing untowards until early September 1979. Clause 2 of the lease provided that the rent (M200 per month) be paid on or before the 7th of each month at the offices of Messrs Du Preez, Liebetrau & Co. who had clients to whom the defendant owed debts. The rent due for September 1979 was not however paid by the plaintiff.

The plaintiff testifies that after running the cafe for some months he wanted to exchange the cafe premises with another premises, a clothing shop, next door to the cafe, also owned by the defendant, which was larger and commanded a higher rent. The plaintiff's wife was expecting a child and had gone to Durban for her confinement and he, the plaintiff, was about to follow her there to be in attendance. It has not been clarified if the plaintiff wanted to dispose of the cafe business altogether to take up the clothing business or whether he wanted to enlarge the cafe, but according to him the defendant said that the clothing shop was, or would be, available upon his return, that he need not pay the rent on the cafe due for September and that they would finalise the swopping arrangements upon the plaintiff's return. The plaintiff says that in addition to the equipment that the cafe had under the terms of the lease and sale he brought from his house for use at the cafe, and purchased for the business, a number of items, which included a deep freeze, a stove, a "sandwich machine", an electric frying pan, pots and pans, a

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settee and chairs, etc... to the value of M1050. He also had stock to the value of M2000. He locked up the cafe and took the keys with him. He proceeded to Durban on or about 10th September 1979. He returned on the 27th September 1979 only to find that the cafe had been let to a "coloured couple" who were in the process of cleaning, painting, and otherwise renovating the cafe. The plaintiff says he asked the defendant what was happening and the defendant kept procastinating for 3 weeks and finally told him "You can go to Court". The plaintiff sought legal advice and lodged his action in November 1979. In his declaration he stated that the defendant had broken into his cafe. He claimed M5050 in damages consisting of -

(a) M2000 paid for the goodwill under the sale agreement.

(b) M2000 value of stock at the cafe.

(c) M1050 value of the equipment additional to the existing equipment which was in the cafe.

The plaintiff also claimed loss of profits but this portion of the claim had been abandoned.

The defendant gives a different story. He testifies that in early September 1979 the plaintiff told him that his wife had gone to Durban for confinement, that he himself wanted to give up the cafe business altogether, that he was proceeding to Pakistan for good since the South African authorities would not give him a residence permit, and that the defendant could have his cafe in the state that the plaintiff was leaving it, with no liabilities incurred by either side on the lease contract or the sale contract. The defendant denied that there were any negotiations about swopping the cafe for the clothing shop next door and maintains he could not have given such an undertaking to the plaintiff because the clothing shop was already let to a third party. He admits "leasing" and "selling" the cafe to the "coloured couple" after the plaintiff's departure,but denies there was anything underhand about this and more especially denies breaking the doors and locks of the cafe to give the new tenants possession. The defendant swears that prior to the plaintiff's departure from Maseru the plaintiff handed him the keys to the cafe. But as I said the plaintiff produced these as an exhibit. The defendant explains this by saying that when he leased and sold the cafe to the plaintiff, he handed him <u>two</u> sets of keys -.that is duplicate bunches, in accordance with his (the defendant's) custom. When the plaintiff was about to depart for good plaintiff handed him only <u>one</u> bunch and when asked

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about the second he replied that the other bunch was probably with his wife in Durban or was lost or mislaid. This, it was implied, was the bunch produced by plaintiff to the Court. When the "coloured couple" expressed interest and finally took over the cafe before the return of the plaintiff defendant adds that he handed to them the bunch given him by the plaintiff but told them that a set of duplicates were "floating around" and warned them about the risk of unauthorised entry by whoever could procure the duplicate keys. In other words the defendant intimated to the "coloured couple" that it will be in their interests to change the locks. The defendant added from the witness box that he himself did not know (three years after the event) whether the "coloured couple" or subsequent tenants(the "coloured couple" could not get a trading licence and had to vacate the premises after 3/4 months) fixed new locks nor did he bother to check. In the course of the trial, and after an adjournment, it was established that the locks were in fact changed. The keys plaintiff produced would not open the new locks. It is my considered view that defendant knew all along that the locks were changed and the probabilities are, as will appear later, that he did or authorised changing the locks because he had no keys to the premises save the ones he gave the plaintiff and those he did not have.

In the course of his evidence the plaintiff testified that after his return from Durban the defendant would not allow him to go into the shop to remove his stock and other equipment which he had brought (additional to those the cafe had as part of the lease) and all his books of accounts were gone. The value of the stock could only be an estimate. Some of the equipment he brought for the cafe were either in use originally for domestic purposes at home or he bought new. He gave a rough value of these in Exhibit B. He also installed a Shell paraffin tank at the rear to dispense paraffin on a retail basis. The defendant admits there was some stock, but "no more than Mr. Kaleem had left", and denies categorically that a tank was in existence. Since the plaintiff had bought Kaleem's stock on defendant's own admission, I do not see how the defendant's case can in any way improve or his liability for damages decrease. The defendant alleged that all equipment in the shop was his and the plaintiff brought nothing, but this, as we shall see, is a blatant lie.

A large part of the second day's hearing was devoted to investigating the paraffin tank which the plaintiff alleged he installed at the back of the cafe to dispense this commodity to

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retail customers. The defendant denied that this tank existed. The plaintiff called Ernest Ramokoena (PW4) a salesman in Shell BP Lesotho who confirmed that he authorised the installation of the tank at plaintiff's request. Two documents were produced, Exhibits A and C which were invoices for installation of the tank and supply of paraffin. These prima facie show that a tank was indeed installed. I asked the deft whether his case was that no tank existed, or whether, if there was a tank, he did not know about it or was installed contrary to his wishes or terms of the lease. The defendant, who had hitherto been speaking in perfect English, found the question difficult to answer except in Zulu his mother tongue! No Zulu interpreter could be had and that question was abandoned. He insisted, however, that an official from Caltex be called as a witness. That witness was not available in Court and Mr. Kolisang on his behalf requested an adjournment.

The Court was reluctant to grant an adjournment and asked Mr. Kolisang what the witness was expected to say. Mr. Kolisang replied that that witness will describe to the Court the "procedure" for installing tanks. Mr. Sello objected to an adjournment for this purpose since the evidence the witness is expected to give is irrelevant to the issues, but said that if the defendant knows the Caltex procedure he can go into the box to describe it and he (Mr. Sello) would not even cross-examine him. In the event the defendant went into the box and testified that he was familiar with the Caltex procedure for installing tanks. The defendant's evidence according to my notes was as follows :

> "A customer applies to the Company to have a tank installed. The company would tell him if a tank was available or not because there is a shortage of manpower and transport. If the customer is in a hurry, he gets his own transport and Caltex will reimburse the cost to the customer. The customer need not pay one cent since he buys the company's products".

Now Exhibit C produced by the plaintiff shows prima facie that he paid R16.50 for this service. I asked the defendant what conclusion or inference he wants the Court to draw since the issue in dispute (not a very relevant one in my view but Mr. Sello says it may well go into the defendant's credibility as a witness of truth) was whether a tank did or did not exist on the premises. The defendant replied that the evidence he adduced shows that the plaintiff was swindled by Shell BP because they charged him for the installation when they need not!

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The defendant's case, as I have endeavoured to demonstrate, is that the lease and sale agreements were cancelled by mutual consent to the convenience of both parties. The plaintiff's case was that there was no cancellation. Mr. Sello then cross examined the defendant about the contents of his founding affidavit in CIV/APN/116/80 wherein he sought to rescind the default judgment granted by Mofokeng J. The following exchange took place:

"Q : In para 13 page 2 of your founding affidavit you stated that you had reasonable prospects of success

'in as much as respondent is himself in breach of the agreement of lease between the parties signed on the 23rd November, 1980 in that respondent failed to pay rent either before or after the seventh September, 1979 thus contravening clause 2 of the said agreement of lease. Your petitioner hereby attaches a photostatic copy of the said lease. Annexture "B". Your petitioner refers to clause 2 thereof. Your petitioner was thus entitled to cancel the said agreement and retake possession of the said cafe business as he did in terms of clause 9 of the said lease"

That was your oath on 18th July 1980. Do you remember that?

A : Yes.

Q : Read it again ....(pause)

A : Yes I have an answer for that. I was stating in my evidence what took place prior to 7. 9. 1979 but when I saw him (plaintiff) sommersaulting then I instructed my attorney to say those things.

Q : You decided to tell an untruth not only in your affidavit but also in your plea.

A : The plaintiff sommersaulted so I said in the alternative that he breached the agreement.

Q : But he did not breach the agreement?

A : I had to say he did.

Q : But also look at the second leg of the clause at page 3 of the founding affidavit. How can he pay rent after 7th?

A : He sommersaulted and I did the same.

Q : Why did you lie in your affidavit?

A : Because the plaintiff sommersaulted."

The plaintiff called two further witnesses apart from Mr. Ramokoena from Shell BP. Candido Feleciano de Freitas(PW1) is the son-in-law of the "coloured couple" who took over the lease and purchased "Mthembu's cafe" soon after the plaintiff departed from Lesotho. The "coloured couple" had gone to the Transkei and they did not testify, but Candido says he heard a cafe was available in defendant's complex block at Pitso Ground and his parents-in-law wanted it. He saw defendant

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with his father-in-law and expressed interest in the cafe. The cafe was locked. The witnesses did not know if the defendant had the keys but he, his father-in-law and defendant looked at it from the outside. Candido says there was some stock and other equipment. His father-in-law started negotiations with the defendant and eventually his father and mother-in-law took over the cafe and he (Candido) assisted in painting and renovating the shop but himself took no part in the running of the business. The defendant says he has not met this witness. I believe Candido and in my view the defendant is untruthful.

Another witness was Mamothetsi(PW3) the plaintiff's saleslady. She testifies that in September 1979 the plaintiff told her he was going to Durban to fetch stock for the shop. She was present when he did so. She had previously been working in the shop when owned by Kaleem. She says that during plaintiff's tenure she saw new items of equipment and furniture brought by the plaintiff. When the plaintiff left the shop had stock but it was "not full". She certainly was still on the plaintiff's payroll when she saw new people painting and renovating the shop. She met the defendant and asked him what was going on to which he replied that he let the shop to new people because plaintiff had not paid the rent. If it is true that plaintiff and defendant agreed to cancel the lease there was not need for the lie.

The plaintiff and his witnesses gave their evidence in a candid a straightforward manner. The defendant the exact opposite. In my view he is a devious character to whom the truth means nothing.

I am of opinion that no oral agreement was reached between the parties in September 1979 to cancel the sale and the lease. I have no doubt that the defendant; by causing the plaintiff's premises to be let to third parties, has commited both a breach of contract and the delict of wrongful trespass on plaintiff's property and goods.

The non payment of the rent for September does not justify in law the defendant's entry into the leased premises. Clauses in some contracts whereby the landlord is given the right of entry for non payment of rent mean no more than that the landlord <u>may invoke the law</u> to get his remedy. No one is allowed to take the law into his own hands. The defendant's alternative defence is therefore just nonsense.

I shall now deal with the quantum of damages. The

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plaintiff paid M2000 for the cafe "as a going concern". He had three years lease with an "option" to renew for a further three years. This so called "option" has no effect in law since no amount was specified in advance. The question that crossed my mind is whether, the M2000 claimed under this head should be reduced proportionately under the formula 10 months use divided by 36 multiplied by M2000 i.e. M555.55. I have decided against reduction because the plaintiff had paid for the overall ahree years goodwill not for a portion.

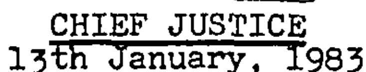
The plaintiff next claimed M2000 for the value of the stock. Since the defendant was responsible for the breach, for the disappearance of the books and the goods the onus was on him to prove it was less than the M2000 claimed. This he failed to discharge.

The plaintiff next claimed M1050 for equipment he brought from his house and bought for the cafe. The plaintiff was dispoiled by the defendant who admits he did not even bother to take an inventory. I have no reason to suspect the plaintiff's valuation and the fact that additional equipment was brought is confirmed by the saleslady Mamothetsi whose evidence I believe.

Judgment was accordingly entered as prayed.

This was a case where the defendant had prostituted the rules of court to his advantage, and on the merits had no leg to stand on (except possibly on quantum) and had succeeded, for over three years, in frustrating the plaintiff from obtaining the fruits of his judgment.

Interest and costs have therefore been assessed to take into account the defendant's shameful and disgraceful abuse of process.



CHIEF JUSTICE
13th January, 1983

For Plaintiff : Mr. Sello
For Defendant: Mr. Kolisang } with copies of the judgment