

IN THE HIGH COURT OF LESOTHO

In the matter of :

MOGGIE & DU TOIT (PTY) LTD

Plaintiff

V

P.P. MAKHOZA

Defendant

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice M.P. Mofokeng  
on the 18th day of May, 1983.

In this matter judgment has already been granted in favour of the plaintiff and what follow now are my reasons thereof.

The plaintiff claimed payment of an amount of M10480.00 for goods sold and delivered to the defendant. pleadings in the various forms were filed culminating in the trial which was schedule to take place for two days. Defendant in his plea denies entirely the allegations by the plaintiff. He concerns himself with a transaction which was entered into between the parties prior to 2nd January 1980.

The trial was set down for hearing for two days consecutively. It must hear be mentioned that the parties were extremely lucky to have had this opportunity. However, on the first day, counsel for the defendant moved the court for a postponement to a date to be arranged with the Registrar.

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The reason he advanced was that the defendant was not in Court. It was not quite clear to this Court whether in all seriousness he knew the whereabouts of his client. The application was, understandably strenuously opposed. It was submitted, as a main reason for the application for a postponement, that the defendant was absent. His whereabouts could not with all honesty be properly explained to this Court.

For an application of this nature to succeed it must be clearly shown in what manner the applicant will be prejudiced. This has clearly not been done in this matter. The mere absence of a party from the hearing of the matter does not entitle him, as of right, to claim a postponement. This was, in my humble view, what may be referred to as wanton procrastination of the proceedings, a procedure certainly not encouraged by the Courts. Great expense was caused by the plaintiff. His instructing attorney and counsel had travelled a long distance. Needless to say, the Court, refused the application.

There are various ways in which default judgment may be granted. Defendant may consent to judgment; he may simply do nothing upon receipt or service of the summons; he can enter an appearance either to delay the matter or in order to obtain further particulars so as to decide whether to settle and indeed do so sometimes; he may finally omit to plead. In this particular matter default judgment was granted because the defendant failed, when called upon, to give evidence if so advised. He had deliberately not attended Court in order to force either the Court or the plaintiff to be inclined to

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consider the possibility of a postponement. Unfortunately for him such a trick would not work precisely because a postponement would have been highly prejudicial to the plaintiff who had, as said earlier, together with counsel and instructing attorneys, travelled a considerable distance to seek justice before the courts and not mockery. It was embarrassing and almost bordering on contempt to ask the Court to exercise its discretion in these circumstances.

The plaintiff was personally present and gave evidence on his own behalf. He was duly assisted by his advocate and instructing attorney. The defendant was personally not present. He was represented by an advocate but his instructing attorney was also absent. At the close of his evidence, the plaintiff had placed prima facie evidence before the Court which called for an answer from the defendant. It is true that a default judgment cannot be given in the presence of a party. According to the definition section to the Rules of this Court the word "party" includes an attorney but not an advocate. This is only to be expected because an advocate never has a client of his own. He derives his authority from his instructing attorney. In essence, therefore, the defendant was in default and, the plaintiff having led evidence in satisfaction of his claim, he was, in my view, entitled to default judgment. Incidentally in the subordinate court the word "party" is defined as "any person who is a party to the proceedings." An attorney would not, therefore, be excluded and an advocate is not only excluded by this definition but also by operation of the provisions of section 1(1)(c) of Order No. IV, High Commissioner's Notice 111 of 1943.

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(See Vol. 1: Laws of Basutoland p. 604).

For the above reasons judgment was granted when it was applied for by the plaintiff after the latter had led prima facie evidence proving his case.

  
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J U D G E.

18th May, 1983.

For the plaintiff : Adv. Rubbenheimer  
For the defendant : Adv. Gwentshe.