CIV/T/56/83
(See also CIV/APN/73/83
and CIV/APN/76/83)

# IN THE HIGH COURT OF LESOTHO

In the Matter of :

RABBY RAMDARIES t/a RABBY RAMDARIES — Plaintiff

v

KHADEBE MAFAESA — Defendant

## REASONS FOR JUDGMENT

Filed by the Hon. Chief Justice, Mr. Justice T.S.Cotran
on the 25th day of May, 1983

This is an application to rescind a Judgment entered (in favour of plaintiff) in default of appearance (of defendant) by my brother Molai J on the 14th March 1983.

I dismissed the application on the 26th April 1983 and said I will file my reasons later and these will follow in a moment but it should be stated that execution on the defendant's (now applicant) and judgment debtor movable property was issued out of the office of the Registrar shortly after the default Judgment had been granted. Five buses pointed out to the deputy sheriff by the judgment creditor or his attorney as belonging to the judgment debtor (who ran a transport business) were attached to satisfy the Judgment. The risk of, and liability for, anything going wrong lies on the judgment creditor (and or his attorney - see CIV/APN/44/83 of 16th May 1983 - unreported) and deputy sheriff depending on the circumstances. A sale was advertised to take place on the 30th April 1983. Mr. Attorney Masoabi in addressing me in opposition to the granting of the application explained his alacrity in applying for the writ by alleging that the judgment debtor was hiding his buses, was

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cannibilising some of them, or was replacing some of the engines. The judgment creditor was afraid that the applicant will dispose of everything unless he had acted quickly.

I think a history of what happened in this case ought to be given.

On the 8th of April 1983 the applicant (and judgment debtor) made two applications to the High Court. One application was styled "In the matter of ex-parte application" in which a rule nisi was sought for the immediate release to the applicant of the buses attached by the sheriff in execution of the default judgment and allocated No. CIV/APN/73 of 1983 and another application styled "In the matter of an application for recission and stay of execution" which was appended to the papers in the main action which had been allocated No. CIV/T/56/83.

The first application came before my brother Molai J who had granted the default Judgment. When he was apprised of the latter application which was filed in the papers of the main action he refused to grant the application.

On the 19th April 1983 another urgent application styled "In the matter of ex-parte application for stay of execution and release of vehicles" was made to me in chambers and was allocated No. CIV/APN/76/83. The Registrar then apprised me of the proceedings before Molai J on the 8th April. When I enquired from attorney if it was professionally ethical to seek from a different Judge an order already refused by a colleague on the same bench, attorney replied :

(a) that this was not intentional. An urgent applicat[illegible] would be heard before any Judge who was free.

(b) the nature of the application was different from the one before Molai J for here the applicant wanted the sale stopped.

I accepted these assurances but nevertheless directed attorney to appear before Molai J. Attorney did not do so however and preferred to rely on the main arguments in the recession application and this was due to be heard on 26th Apr[illegible] before the sale. This matter came before me and will now be

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dealt with.

The papers in this application, i.e. the founding affidavit, the opposing affidavit, the reply and documents attached are voluminous. Some of the averments in the affidavits are argumentative and unnecessary, but the applicant's complaints in brief were :

(a) that he was not served with the summons and had no idea that a default Judgment was obtained except when he was served with the execution writ and attachment,

(b) that his default of appearance was not deliberate, and

(c) that he has a good defence to the action, to wit, the relationship between him and the plaintiff (now judgment creditor) was not that of seller and buyer of vehicles but one of partnership (in some vehicles) in a transport enterprise wherein the plaintiff (a builder of bus and truck bodies in Durban) would share in the profits of the business.

The applicant's attorney argued that the plaintiff was entitled to an account on this one aspect but to no more. The applicant denied he owed the plaintiff any money. It was submitted that one of the buses attached belonged to a third party a Mr. Ras.

The summons was actually served by the deputy sheriff on the applicant's civil law wife at the parties matrimonial home at Roma, not on the applicant himself who now avers he never received it. He gave me a lengthy story that he was estranged from his civil law wife at the time and that she had deliberately refrained from handing over the summons in order to cause him as much financial loss as possible, the implication being that she omitted to pass the papers because of pique, or in a fit of jealousy over an affair that the applicant was having with another woman whom he had taken as a "wife" by customary law.

These assertions, even on paper, sounded to me fragile in the extreme since the applicant and his civil law wife were not only married in community of property but they also operated businesses jointly, so any fraudulent claim on her applicant husband materially effected her own financial position in the event

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of proceedings that may end in a division of their joint property if any were contemplated. In addition to that I have in the opposing papers an affidavit from the deputy sheriff that on the following day he went again to the matrimonial home of the parties to enquire if she had passed the summons to her husband and she answered in the affirmative. The opposing affidavits contained abundance of supporting documents evidencing a relationship of seller and buyer, such as claims for repayment of and acknowledgements of debt. The replying affidavit (on this occasion supported by the civil law wife of the applicant now mysteriously reconciled) the same denials are made but these do not tilt the balance in applicant's favour. Mr. Ras, the alleged owner of one of the buses attached, purported to have sent two telegrams one to Mr. Masoabi (in an answer to a letter) saying he has no interest in the bus and one telegram to Mr. Khauoe saying he had.

The question of rescission of a Judgment granted by default is governed by Rule 27(6) of the High Court Rules. One of the pre-requisites of entertaining the application is the furnishing of security to the satisfaction of the Registrar. It has been held by two of my colleagues, Mofokeng J in Musiyambiri v Molar CIV/T/207/81 - dated 20th August 1982 - and Molai J in Nkhetse v Santam Bank and 2 others CIV/APN/89/82 dated 19th April 1983 - both unreported that failure to provide security is fatal to the application. I have no reason to disagree, but even if this failure can be condoned by requiring the applicant to furnish the security and move the Court again, the onus is on the applicant, in terms of Rule 27(6)(c) to show good cause.

What is or is not good cause has been discussed in numerous cases in the Republic and in Lesotho. Two Lesotho cases come to mind Khiba v LEC 1980(2) LLR 392 and Ntisa & others v F... 1980(2) LLR p 533. The Court does have a wide discretion, but the requirements are :

(1) the applicant must explain to the court's satisfaction the reasons for the default,

(2) the applicant must persuade the Court that the application is not made simply to delay the plaintiff's claim,

/(3).....

(3) the applicant must show a bona fide defence.

On balance of the papers before me on the affidavits and the documents annexed the applicant has failed to discharge the onus placed on him and the application was dismissed with costs.

At about midday on the 29th April 1983 another ex-parte application was placed before me for stay of the sale in execution due to take place the following day, Saturday 30th April 1983. This time the documents in support of the application included a purported copy of an agreement made by the judgment creditor and the judgment debtor (applicant) in Durban on the previous day, 28th April 1983. This document has been uplifted from my file but to the best of my recollection it was to the effect that the judgment creditor and judgment debtor were partners in the transport enterprise something completely at variance with the judgment creditor's oath at p.9 (page 6) of the opposing affidavit sworn as recently as 16th April 1983. There was, however, no affidavit from him regarding the new agreement.

I refused to entertain the application ex-parte and directed attorneys for applicant (Mr. Khauoe) to serve the papers on attorney for respondent and judgment creditor(Mr.Masoabi). This was done and both attorneys appeared in my chambers within an hour. Mr. attorney Masoabi said he had no instructions from his client at all and suggested that the agreement was forged.

It was impossible to deal with the accusations and counter accusations but it would not have been proper to stop the sale unless the judgment creditor himself or his duly authorised attorney so requests. His duly authorised attorney of record is Mr. Masoabi. There was no evidence or affidavit that his powers had been revoked.

This last application is dismissed with costs on attorney and client scale, but I confirm the order I had given on the 26th April that the proceeds of sale will be paid by the sheriff into Court and would not be uplifted until the time for appeal

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has elapsed, or if an appeal is lodged, until the appeal against my Judgment is determined. Time will begin to run from the date of Reasons for this Judgment. There has been some acrimony in this case, not only between the parties themselves but between their respective attorneys, and I am not sure if there has not been a transaction in fraudum legis. If such was the case there may be a remedy outside these proceedings.

CHIEF JUSTICE
25th May, 1983

For Applicant/Defendant : Mr. Khauoe } with copy of Judgment
For Plaintiff/Respondent: Mr. Masoabi }

copy : Registrar(to note last paragraph)

CRI/A/101/82

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

KOKOLIA MAJARA Appellant

v

REX Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 24th day of May 1983

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This is an appeal against the Judgement of the Chief Magistrate Maseru (B.K. Molai esq as he then was) who convicted the appellant of the crime of culpable homicide and had sentenced him to pay a fine of M90 or 9 months imprisonment in default of payment.

The appeal is against conviction and (if the conviction was in order) against the length of sentence in default of payment of the fine.

Mr. Buys for the appellant raised a point in limine which he submitted ought to succeed without going into the merits, alternatively that on the merits, the appellant was at the very least entitled to the benefit of the doubt in that his negligence in running over a pedestrian (causing his death) had not been proved and the version given by the appellant was more likely to have been true rather than the evidence of Tlhobohano Mohloai(PW2) the star witness from the Crown, a lady who was sitting by the road side selling vegetables near the scene of accident that gave rise to the proceedings.

The point in limine on which Mr. Buys laid great stress was that it was incumbent on the magistrate at the court a quo

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to keep a proper record of the proceedings. As the magistrate had failed to do so the High Court in its appellate jurisdiction did not have before it what actually transpired at the trial, that that was not a case where a full record can be assembled ex-posto facto (S. v Van Sitters 1962(4) SA 296) and the appellant was therefore entitled to an acquittal on this ground alone. (S. v. Marais 1966(2) SA 514 and S. v Van Collier 1976(2) SA 378).

Mr. Buys (who appeared for the appellant in the Court below) complained that -

(a) The record does not state the questions put to the witnesses and only constitutes a summary of the evidence of each witness.

(b) The record does not render the cross examination by the defence but also render only a summary of the witnesses evidence in cross examination.

(c) The record does not render the questions and proper answers of any witnesses in reply by the Prosecutor.

(d) The record does not render the whole and exact address by either the Prosecutor or the Counsel for Defence to the Court on:

(i) The Application for discharge of the Appellant after the Crown's case and

(ii) After the case for the Defence."

We have no recording machines in the Subordinate Courts of Lesotho. The procedure for taking evidence in criminal cases there is not very clear. Order XXXIV Rule 2(1) of the Subordinate Court Rules empowers the presiding judicial officer to employ a shorthand writer and direct him either to take the evidence verbatim or in narrative form. I have never heard of a shorthand writer having been so employed. The practice in the Subordinate Courts and indeed in the High Court if the recording machine breaks down and the Judge sees fit(with the consent of the legal representatives of the parties) to continue with the trial, is that the evidence is taken down in longhand in narrative form in examination in chief, cross examination, and re-examination unless either of the parties legal representative requests otherwise. As a magistrate for many

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years I recorded both questions and answers only if I felt it is important for my own assessment of the evidence. At the end of the witness' evidence, however, I read it back to him, and asked him (and the accused's legal representative if any) whether he seeks a change, a correction or addition. I advise magistrates to do the same. It is possible, but not necessarily conducive to speedy justice, to write down everything said during the proceedings as a matter of routine if the question (or the answer thereto) was irrelevant or did not advance either the case for the Crown or the case of the defence. It did happen sometimes of course that what I, or cousel before me, thought was unimportant turned out to be important and would try to make a note of what was said in the margin opposite the evidence taken in narrative form, or myself, when it came my turn to ask questions at the end of re-examination, to establish or clarify from the witness what I thought he said but did not initially record, and thus make that evidence available to me when writing the judgment and to the appellate tribunal if an appeal was lodged. Now I am not saying that Mr. Buys cannot challenge the accuracy or completeness of the record of a lower court in an appeal but in my view it cannot be done, with respect, from the Bar, without a supporting affidavit or affidavits detailing precisely the portions of the evidence allegedly omitted or allegedly favourable to the appellant and unfavourable to the State, if only to give an opportunity to the presiding magistrate to reply thereto.

In the absence of anything on oath, it will be quite wrong to conclude that the learned magistrate had omitted from the record, anything favourable to the appellant and I must consequently decide this appeal on the record as it stands.

The principle I have attempted to enunciate above is not against any ratio decidendi of the three cases cited to me by Mr. Buys. In Van Sitters supra, for example the evidence was recorded on dicta belt part of which had been lost, including the Judgment. The magistrate who was asked if he could supply the missing links had replied that he was unable to remember either the missing evidence or his reasons for convicting the accused. Nevertheless the order of the Court was to the effect

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that before it will proceed further with the review, an attempt should be made at reconstruction. In Collier, supra, another case where the evidence was mechanically recorded, the concensus of opinion, if the lost evidence could not be reconstructed, was for the appeal Court to deal with the case "on the best available record". It is only when admittedly material evidence is not on record and the defect cannot be cured that the appeal should succeed. Marais, supra, was also a case where the evidence was recorded by mechanical means, but in that case attempts to get a complete record were not only abortive but compounded by loss of vital books of accounts, produced as exhibits, from which it was impossible for the appellate court to determine the appeal.

No such pre-requisites obtain in this appeal and this ground in limine must accordingly fail.

The appeal against conviction must also fail on the merits. An appeal Court is loathe to interfere with questions relating to credibility of the witnesses. On the record the vegetables lady's evidence reads better than the appellant's. Their testimonies were at variance. The magistrate believed the former. She was independent and in a position to see. I am quite unable to say the magistrate was wrong in his assessment.

I thought the sentence of fine of M90 was on the lenient side but on reflection I propose to allow it to stand. Apart from the factors in mitigation mentioned by the Chief Magistrate, it should be stated that the appellant stopped his vehicle and himself conveyed the injured person to hospital (without waiting for anyone) thus showing humanity towards a fellow humanbeing, and immediately went to report to the police and returned with them to the scene of the accident thus showing respect for the law. As a matter of interest the police sketch plan was compiled from pointings made by the appellant not by the lady witness.

I confirm the sentence of a fine of M90. The default

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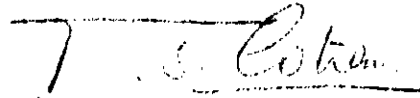
term of 9 months imprisonment however is disproportionate to the fine and this is reduced to read "one month imprisonment in default of payment". The appellant is given seven days to pay the fine.



CHIEF JUSTICE
24th May, 1983

For Appellant : Mr. Buys
For Respondent: Miss Moruthane