

IN THE HIGH COURT OF LESOTHO

In the Application of :

DOTI STORE

Applicant

v

HERSCHEL FOODS (PTY) LTD. Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng  
on the 12th day of July, 1983.

This is an application for an order :

- "1. that judgment in CIV/T/313/81, granted on the 22nd February, 1982 be rescinded;
2. that execution in CIV/T/313/81 be stayed;
3. that the respondent pay the costs of this application in the event that it opposes this application."

In support of this application, the applicant in an affidavit, states briefly as follows :

He only became aware of this case when he was served with a warrant of execution.

He makes some strange allegations that the original summons was sent to the Magistrate at Quthing and upon inquiry by the Registrar he says : "On the 9th December, 1981 there appears what purports to be a return of service by the messenger of court at Quthing alleging that "summons was on 8th November on Messenger at Mphaki".

/"Perhaps it

Perhaps it was meant that it was sent there.

He says that he has no manager. He is with his wife. In his absence service could have been effected on his wife (Para. 4(4)). But the writ of execution, which he concedes was properly served on him, was actually served on the "manager" according to the deputy sheriff.

He says he never had any credit business dealings with the respondent. The latter has never sent him a "statement showing that I am indebtedness to him". He received no letter of demand either. For those reasons he has a bona fide defence.

Applicant is supported by his wife who says that in his absence she is in charge. She denied that she was ever "served with a copy of the summons" in this case

In reply the respondent replies with a fully documented affidavit as follows :

The summons was served on the applicant's wife. There is the deputy sheriff's report or his lawfully appointed representative who made it on his behalf. The summons was, therefore properly served.

Applicant had had business dealings with the respondent since 1980 to 1981. During that period certain purchases were made and certain payments were made. Statements of accounts, in respect of the amounts from time to time owing by the applicant, were sent to him on a monthly basis. Reminders in respect of indebtedness were sent to the applicant (such a reminder is attached marked annexure 'B'). A letter of demand was written, registered

/and forwarded

and forwarded to the applicant through respondent's attorneys at Aliwal North (Annexure 'C'). Respondent says that applicant has no bona fide defence.

In the matter of Rabby Ramdaries t/a RABBY RAMDARIES v. Khadebe Mafaesa, CIV/T/56/83, Cotran, C.J. said 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) the applicant must show a bona fide defence."

I am satisfied that there was proper service of the summons in terms of the law - (Rule 4). The applicant's wife confirms that in his absence at the place of business she is in charge. Moreover, the return of a sheriff or authorised person to perform his function is prima facie evidence stated therein. The clearest evidence must be adduced if it is disputed. (Deputy Sheriff Witwatersrand v. Goldberg, 1905 T.S. 680). See also BAKER, ERASMUS, FARLAM The Civil Practice of the Magistrates' Courts in South Africa, 7th Ed. p. 25. The respondent has shown by supported documents, that there had been business connection between the parties since 1980. The summons, itself, is a demand, incidentally. Despite all these lengthy efforts to get payment from the applicant for his debts owing to them he now belatedly comes to court and does not tell the truth and the courts have said repeatedly that this type of behaviour makes it extremely difficult for the them to exercise their discretion. It emerges from the

/respondent's

respondent's affidavit that applicant evaded his responsibilities. But above all, he failed to defend the action when summons had properly been served. Instead, he resorted to untruths.

The Court is in no doubt that on balance of the papers before me on the affidavits and the annexures the applicant has failed to discharge the onus placed on him and terribly out of time and the entire application is dismissed with costs.

J U D G E .

For the Applicant : Mr. Kolisang  
For the Respondent : Mr. Koornhof.