

CIV/A/5/83

IN THE HIGH COURT OF LESOTHO

In the Appeal of

PHAMOTSE MAKHETHA

Appellant

and

LEEPILE MOLELEKOA

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai  
on the 7th day of March, 1986.

Respondent and Appellant were respectively Plaintiff and Defendant before the Local Court of Mafeteng where Plaintiff sued the Defendant for one head of cattle or M120-00 as his payment for herding Defendant's animals for a period of 3 years.

The trial court decided the case against the Defendant who was unhappy with the decision against which he lodged an appeal to the Central Court of Ramokoatsi. The Central Court dismissed the appeal and the Defendant further appealed to the Judicial Commissioner's Court which also dismissed the appeal. The Defendant has now appealed to the High Court on a certificate granted by the Judicial Commissioner.

The questions of law reserved by the learned Judicial Commissioner are whether the Defendant was not given sufficient notice of the date of hearing by Mafeteng Local Court in terms of Rule 33(b) of Government Notice No. 21 of 1961 and whether even though he had failed to comply with Rules 39 and 40 of Government Notice No. 21 of 1961 Defendant could be held to have acted legally.

The facts were briefly that after Plaintiff had instituted a civil action against the Defendant on 3rd December, 1979, the court clerk of Mafeteng Local Court issued summons in which he advised the parties in accordance with the pro-

visions of Rule 33(a) of Government Notice No. 21 of 1961, that their case had been set down for hearing on 13th December, 1979. The summons was, however personally served on the Defendant in Maseru only on 11th December, 1979. The Defendant then posted a letter dated 12th December, 1979 to the Court President advising him that he was taking a journey to Botswana and would not be able to attend court on 13th December, 1979. The case should, therefore, be postponed to a later date. That letter reached the Court President only on 19th December, 1979- On 13th December, 1979, the case was, however, outcrowded and the hearing postponed in open court to 20th December, 1979. The Defendant was not in attendance on that day and the hearing proceeded in his absence.

The only evidence heard by the court on 20th December, 1979 was that of the Plaintiff who told the court that he and the Defendant had agreed that he would look after Defendant's cattle for 3 years in return for one head of cattle or R120.00. Plaintiff did look after Defendant's cattle for 3 years at the end of which period Defendant took away his cattle in the absence of the Plaintiff and without paying anything. Consequently Plaintiff demanded payment but Defendant refused/neglected to do so Hence this action.

Plaintiff's evidence that Defendant was to pay him one head of cattle and he did not do so was confirmed by Plw.1 Mojela Raleting. As has been pointed out earlier, the trial court proceeded with the case in the absence of Defendant and entered judgment against him It was in fact a judgment by default granted in terms of the provisions of Government Notice No 21 of 1961 of which Rule 44(1) provides

"subject to the provisions of Sub-rules (2) and (3), any Plaintiff or Defendant who after proper notice of the time and date set down for the hearing of case fails without reasonable excuse to attend the court to prosecute or defend his case may, at the discretion of the court have a default judgment with costs entered against him."

Now, the question that immediately arises is whether or not there was a proper notice of the time and date set

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down for hearing. It was not disputed that the Defendant was served with summons which is a process by which parties in the Local and Central Courts are advised, inter alia, of the time and date set down for the hearing of their case. Whether that was a proper notification of the time and a date set down for hearing falls, in my view, to be governed by the provisions of Rule 33 of Government Notice No 21 of 1961. The Rule reads as follows, in part

"33. On receiving payment of all prescribed fees of court, or on being satisfied that such fees have been waived by the court in accordance with Rule 117, a clerk of court shall

- (a) set down a date for the hearing of the case.
- (b) in setting down the date for the case to be heard, allow sufficient time to enable all parties to attend the court .....

In the present case the process (summons) by which the clerk of court notified Defendant that his case was set down for hearing on 13th December, 1979 was issued on 3rd December, 1979 i.e. an allowance of 10 days for the Defendant and his witnesses to attend court. If it were borne in mind that Defendant's home is within the District of Mafeteng, it cannot seriously be argued that in setting down the date for the hearing of the case the clerk of court did not, in accordance with the provisions of Rule 33 above, allow sufficient time to enable Defendant to attend court. That, in my view, disposes of the first question of law reserved by the learned Judicial Commissioner.

It is, however, to be observed that although the summons was issued on 3rd December, 1979, the Defendant could not be found at his home in Mafeteng and he was served only on 11th December, 1979 in Maseru. He had, therefore, the allowance of only two days to enable him to attend court. I think the court was entitled to take judicial notice that the journey from Maseru to Mafeteng was just a few hours by public transport so that if he were served with the summons on 11th December, 1979, the Defendant could have easily been in

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Mafeteng on 13th December, 1979. It may well be that Defendant needed more days to contact his witnesses (if any). That was, however not a sound reason why the Defendant should not have personally attended court on 13th December, 1979 and obtained a postponement in accordance with the provisions of Rules 39 and 40 of Government Notice 21 of 1961. Indeed, reading from his grounds of appeal against the decision of the trial court, it is obvious that Defendant failed to attend the hearing of his case at Mafeteng Local Court not because there was insufficient time to enable him to attend the court on 13th December, 1979, but because he was preparing to take a journey to Botswana.

It is trite law that when a person is summoned to appear before a court of law he must put aside all other businesses and attend the court. Defendant's failure to attend court on 13th December, 1979 on the pretext that he was preparing to take a journey to Botswana was a deliberate contempt of court in consequence of which he failed to hear on 13th December, 1979 that his case was outcrowded and the hearing postponed to 20th December, 1979. That being so, he was in default and the court had a discretion to proceed, as it did, under the provisions of Rule 44(1) of Government Notice No. 21 of 1961.

It follows from the foregoing that the view that I take is that the second question reserved by the Judicial Commissioner viz. whether even though he had failed to comply with Rules 39 and 40 of Government Notice No. 21 of 1961, Defendant could be held to have acted legally must be answered in the negative.

Consequently, I come to the conclusion that there are no good reasons to disturb the decisions of both the Central and the Judicial Commissioner's courts. I would, therefore, dismiss this appeal with costs.

B.K. MOLAI

JUDGE

7th March, 1986.

For Appellant Mr. Matsau,  
For Respondent In person.