C. of A. (CIV) No.22 of 1987

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

LUCAS DLAMINI Applicant

v

NTHOESELE NOTS'I Respondent

HELD AT MASERU

Coram:

SCHUTZ, P.
TRENGOVE, J.A.
ACKERMAN, J.A.

J U D G M E N T

Trengove, J.A.

This is an appeal about an unsuccessful application for a spoliation order. On 15th September, 1987 the applicant brought an ex parte application in the High Court, as a matter of urgency, for a rule to issue calling upon the respondent to show cause, inter alia, why he should not be ordered to return a certain Fiat tractor to the appellant (at that stage the applicant). In his founding affidavit, the appellant alleged, in effect, that on about 26th March, 1987 the respondent wrongfully, and by means of physical force, deprived him of his peaceful and undisturbed possession of the tractor in question. The respondent opposed the application.

He admitted, in his answering affidavit, that he had obtained the tractor from the appellant but denied that

2/ he had .....

he had spoliated him. He alleged that on the day in question the appellant voluntarily handed over the tractor to him as security for the payment of certain sums of money to which I shall presently refer more fully.

When the matter came before the learned Judge a quo, on the extended return day, he was of the view that aforesaid dispute of fact between the parties could not be resolved on the affidavits and that the matter should therefore go to trial. However,counsel for the appellant, Mr. Sooknanan, was opposed to this suggestion because he was of the view that the matter could be disposed of on a point of law. He submitted that the applicant was entitled to a spoliation order on the basis of the respondent's own admissions. The learned Judge then proceeded to deal with the application on this basis. Mr. Sooknanan submitted that the respondent had, on his own admission, obtained possession of the tractor without the appellant's permission and against his will. However, the learned Judge rejected this argument and discharged the rule. The main issue in this appeal is whether the learned Judge erred in so doing.

The respondent's account of the circumstances in which he obtained possession of the tractor can be summed up as follows. In,March, 1987 the respondent told the appellant that he was interested in acquiring a second-hand Micro-bus and asked him to find a seller. The appellant subsequently introduced the respondent to one LESALA TSIRA (also known as Joe) who had such a vehicle for sale for M6,000. He required a deposit of M2,000 but

3/ was pursuaded .....

was persuaded by the respondent to accept M1,500. Thereafter, the respondent, his son Vusi, and the appellant met with Mr.TSIRA in MASERU to conclude the deal. The respondent gave the appellant the deposit of M1,500 which he, in turn, paid over to Mr. Tsira. The respondent's son Vusi then left with Mr. Tsira to get the registration papers of the vehicle which were at his home. They failed to return on that day. Vusi however turned up at the respondent's home at Morija on th following day. He reported to the respondent that on their way back from Mr. Tsira's home on the previous day, Mr. Tsira picked up five young men. They then went to Teyateyaneng where Mr. Tsira and the young men assaulted him, forciby ejected him from the vehicle, and then left him stranded.

Some days after this incident, the respondent went to see the appellant, at his home, about the vehicle that he bought from Mr. Tsira and the deposit of M1,500 that he had paid on the purchase price. Five people accompanied him as witnesses. I should also mention here that, according to the respondent, the appellant at that time owed him an amount of M5,000 in respect of three previous business dealings.

However, it was on the occasion of this visit that the alleged spoliation occurred. The respondent's account of how he obtained possession of the tractor is set out in the following paragraph of his answering affidavit:

"7.3. Applicant (i.e. the appellant) voluntarily handed to me the tractor as security for the M5,000 he owed me personally and the M1,500 which his friend Joe had taken. Applicant promised to pay me M1,500 if Joe was not found. He promised to fetch the tractor once the M6,500 was available.

7.4. I wanted to take the Applicant to the police as I could no more trust him, but Applicant chose to hand over the tractor as he did not want the police to be involved."

Against this background, I now turn to the arguments advanced on behalf of the appellant in this Court. Appellant's counsel, Mr. Edeling, submitted first that the learned Judge a quo should have found in favour of the applicant on the point of law taken on his behalf. He said that it was quite clear from paragraph 7(4) of the respondent's affidavit, that the appellant had not handed over the tractor to the respondent voluntarily, but had done so only because of the respondent's threat to take him to the Police. Counsel contended that as a result of this threat the appellant was in effect unlawfully deprived of his possession of the tractor. He referred, in this regard, to the judgment of Corbett J. in Arend and Another v. Astra Furnishers (Pty) Ltd 1974 S.A. 298.

In my view, this judgment does not really assist the appellant. The point at issue in that case was whether a contract induced by a threat of criminal prosecution was unenforceable on the ground of duress. At p.306 the learned Judge pointed out that where a person seeks to set aside a contract on the ground of duress based on fear, the following elements must be established:

(i) The fear must be a reasonable one;

(ii) it must be caused aby the threat of some considerable evil to the person concerned or his family.

(iii) it must be the threat of an imminent or inevitable evil;

(iv) the threat or intimidation must be unlawful or contra bonos mores,

(v) the moral pressure must have caused damage.

Then, after a comprehensive review of the authorities on the point at issue, he came to the following conclusion at page 311 G - H:

> ". . . . . generally speaking a contract induced by a threat of criminal prosecution is unenforceable on the ground of duress and, in certain instances, also on the ground that it involves the compounding of a crime and the stifling of a prosecution. It is not necessary to express a positive view on whether this rule obtains where the party making the threat and the agreement involves merely the payment of this amount since, for the reasons already stated, that is not the position in this case."

(See also MACHNICK STEEL FENCING (PTY) LTD v. WERSHODAN 1979(1) S.A. 265 (W) at 271B - 273E, and ILLANGA WHOLESALERS v. EBRAHIM AND OTHERS 1974(4) S.A. 242 (D & CLD) 297D-298A, where slightly different views were expressed).

I turn again to paragraphs 7.3 and 7.4 of the respondent's affidavit. The statement that "I wanted to take the applicant to the police " is so vague as to be virtually meaningless. It is not at all clear from the statement why the respondent wanted to take the appellant to the Police, or for what purpose. In my view, it does not constitute a threat to prosecute the appellant

6/ for any .....

for any particular crime, and most certainly not for a crime, involving imprisonment (see Arend's case, supra. p.306 F-H). Furthermore, even if the statement were to be regarded as a threat to lay a criminal charge, there is no evidence that it was made with the object of exacting a pledge (in the form of the tractor) from the appellant. And, finally, there is no evidence that the respondent's statement induced fear in the appellant causing him to hand over the tractor to the respondent as security for payment of the debt in question. To sum up on this issue, in my view, the learned Judge a quo correctly refused to grant a spoliation order solely on the basis of the facts admitted by the respondent.

Mr. Edeling further submitted that the learned Judge, having found against the appellant on the point of law, should have referred the matter to trial instead of discharging the rule. I do not agree with this submission. There is no indication in the record that Mr. Sooknanan ever asked the Judge a quo to refer the matter to trial should his decision on the point of law go against the appellant. On the contrary, the impression that I get from the relevant passages in the Judgment,, and from Mr. Sooknanan's Heads of Arguments, which form part of the record, is that the appellant elected to take his stand on the admissions in the respondent's affidavit, and on nothing else. That being so, the learned Judge was fully justified in exercising his discretion in favour of discharging the rule. (see Kalil v Decotex (Pty) Ltd and Another 1988 (1) S.A. 943A at 981 A -H).

7/ And, finally ....

And, finally, Mr. Edeling submitted that the application should be regarded as one for vindicatory relief, based on the appellant's ownership of the tractor which, he said, was not in dispute on the papers. I cannot accept this submission. The application is quite clearly one for a Spoliation Order, it was regarded as such by the parties concerned, and the argument in the Court a quo proceeded on that basis. The point now taken by Mr. Edeling was not raised in the Court a quo and it was not considered by the learned Judge. Having regard to all these circumstances, I am of the opinion that the point cannot properly be raised at this stage of the proceedings.

In the result, the appeal is dismissed with costs.

Sgd J.J. TRENGOVE
J.J. TRENGOVE
JUDGE OF APPEAL

I agree Sgd by W.P. SCHUTZ
W.P. SCHUTZ
PRESIDENT

I agree Sgd by L.W.H. ACKERMANN
L.W.H. ACKERMANN
JUDGE OF APPEAL

Delivered at Maseru this 28th day of July, 1988.

For Appellant : Mr. Edeling
For Respondent : Mr. Maqutu.