

IN THE HIGH COURT OF LESOTHO

In the matter of :

MOLOMO SOLOMON MALEBANYE

Plaintiff

V

SEBATANA W. RUSSEL

Defendant

R U L I N G

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 25th day of October, 1988.

At the close of plaintiff's case an application was made on behalf of defendant for absolution of the defendant from the instance.

It was argued that if the Court were to hold the view that plaintiff had established his case nothing would follow from that holding because he has not proved specific damages.

In support of this submission reference was made to CIV/T/37/84 Kalaoane vs Tuke And 4 Others (unreported) at 4 where Molai J. said

"In my view the onus is on the plaintiff to prove on a balance of probabilities, that he has incurred damages He has not satisfactorily discharged the onus that clearly rests with him. Consequently I am unable to award him any damages for loss of earnings and medical expenses."

The exposition of the law in the above quotation calls to mind the matter decided last Friday in CIV/T/874/86 Morake vs Victoria Hotel And 4 Others

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where this court upheld an objection against production of a medical report by a doctor other than the one who had treated the plaintiff and consequently rejected a claim for medical expenses lying under one of the items spelt out in the summons.

Further reliance was reposed on the statement of the law appearing in CIV/A/17/82 Kaibane vs Magolo (unreported) at 5 where despite coming to the conclusion that evidence was overwhelming in support of plaintiff's case and that defendant was correctly held legally liable for damages the learned Judge stated

"However, on the question of quantum of damages it must be observed that the amount claimed by plaintiff comprised R1000 and R80.75 arising from the dog bite and the resultant expenses, respectively. The amount of R80.75 for expenses, was ... a claim for specific damages requiring substantial and precise proof."

Demurring at the fact that plaintiff merely relied on his oral statement instead of further producing receipts to substantiate his claim the learned Judge reversed the order made by the Court below under the relevant heading. While agreeing with the above quotation I wish to point out that it is enough that applicant proves his claim on a balance of probabilities without necessarily producing substantial proof.

It was submitted on behalf of applicant for the absolution that no problem would arise if quotations H1 and H2 were handed in for some other purposes than reliance on them to prove the truth of their contents. Further that the problem would have better been gone round by production of receipts or calling people to testify and thus through their experience in dealing with matters entailed in these quotations substantiate their reasonability as specific damages.

In answer Mr. Moiloa submitted that the application was not proper, therefore was misconceived. He drew attention to the fact that the two quotations objected to on any ground when handed in. Further that the had been discovered in the pleadings of the parties.

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Reference was made to the relevant pleadings namely paragraph 4 of particulars to defendant's request for further particulars dated 4-3-85.

Attention was drawn to the cheque produced in evidence as proof of payment by defendant to Coetzen Motors dated 3-9-84. It was submitted that this cheque was tendered as proof of part payment of the bill from Coetzen Motors for repairs effected on the vehicle.

It was further contended for the respondent that plaintiff adduced evidence to the effect that he made payment in settlement of a debt owing to Coetzen Motors when his vehicle was being sold in execution of a judgment. There may well have been such payment but my record does not bear out the reason alleged to have been tendered by plaintiff for effecting it.

It was contended further that the quotation from Coetzen Motors represented payment effected by the plaintiff plus extra charges for late payment.

It is regrettable that instead of relying on the well known maxim that obvious truths need not be proved respondent sought to explain away failure to call requisite witnesses by saying that it is difficult to call witnesses outside Lesotho to come and give evidence. It is regrettable because no attempt was made to show that in fact failure to secure their presence occurred despite having been served with subpoenae from this Court.

In reply Mr. Nthethe referred to paragraph 4 of the document referred to above and stressed that it is trite that pleadings do not constitute evidence. He explained that no objection ensued on the production of H1 and H2 because the purpose for the production was not known. Indeed it is not obvious from my reading of the text in which the production was made what the purpose was for the production. Regard being had to the effect

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that objections of the nature envisaged in this connection is often likely to be i.e. making the court lose trend and the usual waste of time attendant thereon plus irritation, I think criticism against Mr. Nthethe's abstention from objecting does not meet with the light of my countenance.

Furthermore reference to 4(d) clearly shows that respondent stated that the action was not based on the cheque itself whereupon the particulars requested in connection therewith were refused by the respondent as being of no relevance. If so, how then can respondent benefit from his own ill-advised move? He has unfortunately cooked his own goose.

Absolution from the instance is granted with costs.

J U D G E

25th October, 1988.

For plaintiff : Mr. Moilola
For defendant : Mr. Nthethe.