

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAHOLELA LEKATSA

Applicant

AND

MOHLALEFI BERENG

1st Respondent

THE POUND MASTER (PHOMOTSA RAKEPA)

2nd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 21st day of November, 1988

On the 2nd November, 1988 the applicant obtained an order in an ex parte application in the following terms:

1. That a Rule Nisi issue, returnable on the 11th November, 1988 calling upon the Respondents to show cause (if any) why:-
 - (a) The 1st Respondent shall not be interdicted from selling or in any manner disposing of Applicant's fifteen herd of cattle presently held at a pound at Rothe, pending the finalisation of an action to be instituted by Applicant within thirty days from date hereof;
 - (b) The Respondents shall not be directed to release to Applicant for safe keeping, Applicant's fifteen herd of cattle held at a pound at Rothe, pending the finalisation of an action to be instituted by Applicant within thirty days from date hereof;

- (c) The Respondents shall not be restrained from releasing Applicant's fifteen herd of cattle to anyone other than Applicant himself;
- (d) The 1st Respondent, and the 2nd Respondent in the event of opposition hereto, shall not be directed to pay the costs hereof;
- (e) This Honourable Court shall not dispense with the forms of service provided for by the Rules of Court;
- (f) The Applicant shall not be granted such further and or alternative relief as this Honourable Court deems fit.

2. That prayer 1 (a), (b) and (c) operate with immediate effect as an Interim Order."

The opposing affidavits, as well as the replying affidavit, were duly filed and the matter was argued before me on the extended return day which was the 16th November, 1988.

The facts of the case are that on the 2nd October, 1988 fifteen (15) head of cattle belonging to the applicant were found grazing wheat crop on the 1st respondent's field. The herdboy was fast asleep. The cattle were seized and impounded at Rothe under the care of the 2nd respondent. On the same day the applicant deposes that he met the 1st respondent who demanded M7,000 for the damage caused to his wheat crop. The 1st respondent denies this and deposes that the amount of M7,000 was actually demanded by one Moholi Hlalele with whom he entered into a contract whereby he (1st respondent) contributed his arable land and Moholi Hlalele would plough the land, sow the wheat and then they would share the harvest. In other words the 1st respondent contributed nothing except his arable land.

It seems to me that the 1st respondent has locus standi in judicio because he is entitled to half of the wheat crop as it stands now and the land is his. He cannot be heard to say that he has no interest in the matter inasmuch as even the damages that have to be paid by the applicant shall be shared between the 1st respondent and Moholi Hlalele.

The applicant deposes that he pleaded with the 1st respondent that the amount he claimed for the damage caused to the wheat crop was too high and he did not have that large amount of money. He made an offer of M1,000 and eight (8) goats, but the 1st respondent rejected the offer and insisted that the applicant must pay M7,000. He then sought the assistance of the District Secretary hoping that the matter could be solved administratively. However when the 1st respondent persisted in his threats to sell the animals he sought recourse to this Court. The animals were to be sold by public auction on the 29th October, 1988, however the sale never took place because it has not been properly published.

The 1st respondent avers that the demand of M7,000 was made by Moholi Hlalele, he denies that the applicant brought M1,000 and eight goats to him. He is being sued wrongly because he has nothing to do with the damages. As I said above he has something to do with the damages because he is entitled to half of them. On the 8th November, 1988 he sent messengers to the field to go and assess the damage. They have now assessed the damages at M4,600.

I think the Laws of Lerotholi are very clear on this point.

Section 13 (4) (a) (b) (c) read as follows:

- "(a) Any person claiming damages by reason of trespass committed by any animal sent to the pound shall inform the Chief or Headman of the amount of damages claimed.
- (b) If the owner of the animal, or any person acting on his behalf, disputes the amount claimed as damages, the Chief or Headman shall depute two independent persons to assess the damages: Provided that if either party is dissatisfied with the amount assessed such dissatisfied party may take the matter to court.
- (c) The Chief or Headman in charge of a pound shall, before releasing any impounded stock, demand from the owner the amount of any assessed damages and the pound fees. If the owner shall refuse to comply with the demand or shall deny his liability, the owner shall forthwith state his objection to the Chief or Headman in charge of the pound, who shall give notice to all parties concerned, and thereafter, unless sufficient security is given, he shall detain the stock until the dispute shall have been settled between the parties: Provided that if the dispute is not settled within 14th days or satisfactory evidence given within that time that court proceedings have been instituted, the Chief or Headman may sell such of the stock as shall be sufficient to pay for the pound fees and damages in accordance with sub-rule (5) of this rule."

It is clear from subsection (b) above that as soon as the applicant disputed the amount claimed as damages it was the duty of the 1st respondent to depute two independent persons to assess the damages. The difficulty here is that the 1st respondent and his witnesses deny that the applicant disputed the amount claimed, according to them he merely pleaded that the damages should be reduced. The applicant avers that he did dispute the amount claimed as damages. It seems to me that he was not under any obligation to ask the chief to depute two independent persons to assess the damages. It was the duty of the chief (1st respondent) to do so as soon as an indication was made that the amount was excessive.

The damages have now been assessed at M4,600. This assessment was done after the institution of the present proceedings so that it is not clear whether the applicant will accept the new damages. Be that as it may the keeping of these animals in the pound while the litigation is going on is a very expensive exercise which must be stopped as soon as possible. If the animals are kept in the pound for too long the pound fees will exceed their value. The amount claimed as damages is a very large sum which cannot be raised by a villager who is a subsistence farmer or a mineworker. All his animals are impounded and he is not in a position to sell some of them to raise the amount claimed. In the meantime the pound fees are increasing at the rate of M15 per day.

It seems to me that the only equitable solution to this problem is that the animals should be released to the applicant on payment of a sufficient security in terms of subsection 4 (c) above. In assessing what is a sufficient security the Court or the chief must take into account that the applicant is an ordinary villager who owns less than twenty head of cattle. Such a villager can hardly have an amount of M7,000 in his house or in a bank account. He must be given the chance to take the matter to the courts of law and at the same time have his animals in his possession so that he can sell some of them in the open market where he is likely to get better prices than in a public auction.

The 1st respondent or Moholi Hlalele will not suffer any prejudice by the release of the animals to their owner because they will eventually get their damages. I am of the opinion that sufficient security does not mean the total amount claimed as

damages; in the present case the amount of M7,000 or even M4,600 seems to me to be excessive when one takes into account that the applicant is an ordinary peasant in the village.

The 1st respondent failed to follow the procedure prescribed by the proviso to subsection 4 (c) of section 13 of the Laws of Lerotholi.

If my computation of time is correct the animals in the present case ought to have been sold on 18th October, 1988 because at that time the dispute between the parties had not been settled and there was no satisfactory evidence given within that time that court proceedings had been instituted. If the 1st respondent had strictly followed the law the animals would have been long sold unless the applicant paid security for their release.

There were many points raised by Mr. Maqutu, attorney for the respondents, but unfortunately he did not raise them in limine. The first point was that this matter fell within the jurisdiction of the magistrate court. He referred to section 6 of the High Court Act 1978 which provides that for such a matter to be brought to the High Court, leave of the judge must be obtained. The problem in this case is that we do not know the value of the animals involved. The market prices of cattle vary according to condition of the animal concerned and its breed. If the animals involved are of the right age and condition and thorough-bred their total value can be far beyond the jurisdiction of a subordinate court. I am not in a position to say this matter is within the jurisdiction

of a subordinate court because there is no evidence to support that allegation.

It was submitted on behalf of the respondents that there was no urgency in the matter entitling the applicant to move the application on ex parte basis without notice to the respondents. The applicant avers that the matter is urgent on the ground that the animals in question ^{are} likely to die of hunger because in the pound they are not properly fed and cared for. Furthermore the respondents were threatening to sell the animals to recover their damages and pound fees. I am of the opinion that the matter was very urgent and that an attempt to give the respondents notice would have caused a delay.

It was further argued that the applicant was guilty of non-disclosure of material facts in this case. He failed to disclose that the animals were being deliberately grazed on the reserved pastures when they strayed on the 1st respondent's land. He failed to disclose that during the seizure of the animals his herdboy fought with the people who intended to impound them. It is correct that the above two matters were not disclosed in the founding affidavit, however I doubt that if they were disclosed the Court would have refused to grant the interim order because they are not material to the issues before court. In any case these two matters are disputed. According to Teboho Lekatsa who was herding the animals that night he fell asleep while depasturing them on reserved pastures (leboella) and they strayed on 1st respondent's land. In other words he denies that he deliberately grazed them there.

As far as the fight is concerned Teboho Lekatsa deposes that

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the men who impounded the cattle attacked him when they arrived at 1st respondent's field and hit him with sticks till he lost consciousness.

I confirm the order in the following terms:

- (a) The 1st and 2nd respondents are interdicted from selling or in any manner disposing of applicant's fifteen head of cattle presently held at the pound at Rothe, pending the finalisation of an action to be instituted by applicant within thirty days from the date of this order.
- (b) The respondents are directed to release to applicant for safe keeping applicant's fifteen head of cattle held at the pound at Rothe on payment of security by the applicant in the sum of M1,500, pending the finalisation of an action to be instituted by applicant within thirty days from the date of this order;
- (c) The applicant shall pay respondents' costs of the present application because his duty under the law was to pay security for the damages claimed and then have the release of his animals without dragging the respondents to court;
- (d) If the applicant fails to institute an action within thirty days of this order, the possession of the fifteen head of cattle shall be restored to the respondents who will sell them after fourteen days and after proper publication in terms of the law.
- (e) Repossession shall be by a proper writ issued by the Registrar.

J.L. KHEOLA

JUDGE

For Applicant - Mr Mohau
For Respondents - Mr. Maqutu.

21st November, 1988.