

IN THE HIGH COURT OF LESOTHO

In the matter between:-

SHELTER DEVELOPMENT AND CONSTRUCTION

Plaintiff

and

BOCHABELA NU BUILD

Defendant

J U D G M E N T

Delivered by the Honourable Mr. Justice: J.L. Kheola
on the 25th day of September, 1989

This is an application for an order varying the default judgment granted on the 21st October, 1988 by the substitution of the amount M15,290-45 for the amount of M1,672-07 and directing that the costs of this application be paid by the defendant only in the event of opposition.

In the founding affidavit Mr. Koornhof, plaintiff's attorney avers that according to the summons the plaintiff has a claim against the defendant for payment of the sum of M20,290-45. Summons was duly served on the defendant who entered no notice of appearance to defend. The matter was set down for default judgment on the 7th October, 1988. A few days before the

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matter was heard he (Mr. Koornhof) was informed by an employee of the plaintiff that the defendant had paid the sum of M13,618-38 direct to the plaintiff. He assumed that the payment had been made towards the reduction of the above claim and accordingly when he applied for default judgment he deducted this amount from the initial claim and also deducted a further sum of M5,000-00 which had been paid to him by the defendant on the 20th October, 1988.

Mr. Koornhof avers that he has now been informed by the plaintiff that his aforesaid assumption was incorrect. The said sum of M13,618-38 was in fact paid to the plaintiff not in respect of the claim in the above matter but in respect of payment of a further order which the defendant had made to the plaintiff for the supply of further goods and which do not form part of the claim in this action.

Mr. Molapo Seetsa is the managing director of defendant. He has deposed that at the time the summons was filed with the Registrar the defendant was indebted to the plaintiff in the amount reflected in the summons. He contends that the sum of M13,618-38 was paid towards the reduction of the sum reflected in the summons. The sum which was paid in respect of a further order is M10,225-21 which was paid on the 27th October, 1988.

In the replying affidavit which was made by one Jozua Hermanus Joubert, the managing director of the plaintiff, he denies that the sum of M13,618-38 was paid towards reduction of the

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amount reflected in the summons. He annexed copies of the relevant delivery notes from which he alleges it will clearly be noted that the said sum was paid in respect of a house which the defendant is building for a certain Sopeng. The said job has nothing to do with the claim set out in the summons. (He annexed delivery notes 908 and 909 which are Annexure "JHJ1" and "JHJ2").

The sum of M10,225-21 was paid in respect of a further order relating to a house which the defendant is building for a certain Lehloenya as it appears from copies of delivery notes. (The delivery notes are Annexures "JHJ3" and "JHJ4").

It is important to note the procedure followed by the applicant when issuing receipts and delivery notes in its dealings with the defendant. The procedure was that when the defendant bought building materials the plaintiff indicated on the receipt and on the delivery note the name of the person whose house was going to be built with the materials supplied. Delivery notes numbers 908 and 909 (Annexures "JHJ1" and "JHJ2") clearly show that the materials supplied to the defendant on the 21st October, 1988 were in respect of a house of one Sopeng of Maseru.

The receipt which is Annexure "BB1" to defendant's opposing affidavit clearly shows that the money was paid in respect of the building materials for the house of one Lehloenya.

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The delivery notes (Annexures "JHJ3" and "JHJ4") show that the materials supplied were in respect of the house of Lehloenya. The amount appearing in Annexures "JHJ1" and "JHJ2" tallies exactly with the amount of M13,618-38 which was paid to the plaintiff allegedly in reduction of the sum claimed in the summons. I do not think that the defendant is being honest with this Court. There is no how the amount he was paying in reduction of the amount claimed in the summons could correspond to the last cent with the amount for the order it made in respect of Sopeng's house. If the defendant is honest with the Court, then it was mistaken when it thought that the payment was in reduction of the sum claimed in the summons.

It is also significant that the defendant annexed the receipt in respect of payment for Lehloenya's house and not the receipt in respect of M13,618-38 which is the subject matter of the present dispute. There is an irresistible inference one must draw from the defendant's failure to attach a relevant receipt and that inference is that the receipt will show that payment was in respect of Sopeng's house and not in reduction of the amount claimed in the summons. I am almost sure that if the defendant had nothing to hide it would have attached the relevant receipt and that would show the Court that payment was in respect of the claim in the summons.

On the 17th November, 1988 the defendant filed a Notice to Furnish Security in the sum of M1,500-00 as security for defendant's costs. On the 9th March, 1989 the plaintiff filed a

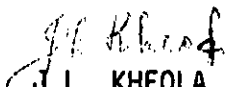
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Notice in terms of Rule 48 (3) of the High Court Rules 1980 in which it stated that it contested its liability to furnish security on the ground that the plaintiff already had a judgment in its favour and as such the judgment itself serves as sufficient security for any costs that the defendant may incur.

The plaintiff has a judgment against the defendant in the amount of M1,672-07 plus costs and interest at the rate of 11% per annum. The amount of security for costs demanded by the defendant is far less than the amount in the judgment the plaintiff already has against the defendant. The dispute about the security for costs is in respect of the same judgment that the plaintiff already has against the defendant. It wants the judgment to be varied to a larger amount. If the plaintiff's application is dismissed the original judgment will still stand and can easily cover the costs of the defendant.

I have not been referred to any authority that a judgment which the peregrinus has against the incola can serve as a security for costs, however, I am of the opinion that there is no reason why it should not serve as such because it can be used as a set-off when costs are claimed.

For the reasons stated above the application for variation of the judgment granted on the 21st October, 1988 is granted as prayed with costs. The defendant's application that plaintiff furnish security for costs is dismissed.


J.L. KHEOLA
JUDGE

25th September, 1989.

For Plaintiff - Mr. Koornhof
For Defendant - Mr. Pheko.