CIV/APN/76/89

IN THE HIGH COURT OF LESOTHO

In the Application of :

DORBLY FINANCE (Pty) Ltd Applicant

and

ABEL SELLO MULATI Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice B.K. Molai
on the 11th day of July, 1989.

On 6th June, 1989 I confirmed a rule nisi which the applicant had previously obtained against the Respondent and indicated that reasons would be filed at a later stage. These now follow:

On 4th April, 1989 the applicant herein moved the court, on an urgent basis, for a rule nisi calling upon the respondent to show cause why an order in the following terms should not be issued:

"2.1 That the Deputy Sheriff for the District of Maseru alternatively any Deputy Sheriff of the above Honourable Court in whose area of jurisdiction the hereinafter described goods may be found, be directed, authorised and empowered to search for, seize and attach and retain in his possession the goods hereinafter described pending the outcome of an action to

2/ be instituted .....

be instituted by the Applicant against the Respondent within a period of 30 days from the date of this order alternatively within a period of 30 days from the date upon which the goods hereinafter described are attached by the Deputy Sheriff, whichever date is the later, to wit:

2.1.1 One 1987 Mercedes Benz 1113 Bus
Engine Number MB 010385A0348611N
Chassis Number 35808226003772

2.2 That the Respondent be ordered to pay the costs hereof on the attorney and own client scale.

2.3 Alternative relief.

3. That the order referred to in 2.1, supra, operate with immediate effect pending the outcome of this application."

The application was moved before my brother Lehohla, J. who on the same day, 4th April, 1989, granted the rule. It was subsequently served upon the Respondent who intimated intention to oppose confirmation thereof. Affidavits were duly filed by the parties.

It was common cause from the facts disclosed by affidavits that on 20th March, 1987 and at Johannesburg, alternatively Bethlehem, in the Republic of South Africa, the applicant, of 14th Floor Barnib House, 11 Diagnal Street in Johannesburg and the Respondent, of Makopo in the District of Butha-Buthe, Lesotho, entered into a written agreement (annexure "B")

3/ styled .....

styled an "Instalment Sale Master Agreement" whereby the former sold and delivered to the latter the bus described under paragraph 2.1 of the above cited order for the amount of M98,620 plus Government Sales Tax and Finance Charges of M11,834 and M20,643-24, respectively. Upon signature of the deed of sale by the parties, the Respondent paid a deposit of M40,000 leaving a balance of M91,097-64 which was to be cleared in 36 monthly instalments at the rate of M2,530.49 per month with effect from 5th May, 1987 and monthly thereafter on the 5th of each month.

The conditions of sale included, inter alia, that ownership in the bus would not pass to the buyer until receipt by the seller of all amounts payable by the buyer, in terms of the agreement; in the event of the buyer defaulting in the punctual payment of any amount falling due, the seller would have the right to claim specific performance in terms of the agreement i.e. payment of all amounts due by the buyer to the seller, alternatively, an order cancelling the agreement, return of the bus forming the subject matter of the agreement, damages and payment of all legal costs including costs as between attorney and his own client, charges and disbursements incurred by the seller in enforcing any of the provisions of the agreement.

In his averments Paul Johan Slot, who deposed to the affidavits on behalf of the applicant, alleged, inter alia, that as of 10th March, 1989 the Respondent had fallen in arrears, with his payment of the instalments, to the tune of M12,061-60 plus interest thereon in the amount of M3,016-47. He had, therefore, committed a breach of the terms of the agreement.

4/ Consequently the .....

Consequently the applicant intended instituting, against the Respondent, an action in which to claim specific performance in terms of the agreement, alternatively an order cancelling the agreement, return of the bus damages and costs.

To enable the applicant to elect which course to pursue in the intended action the applicant needed to obtain a valuation of the bus which was, however, under the control of and being used by, the Respondent in the Kingdom of Lesotho. Wherefor the applicant moved the court for an order as aforementioned.

In his answering affidavit the Respondent initially alleged that he was up to date with his payment of the instalments. As proof thereof he attached annexures "NM1" to "NM19", copies of his bank statements, and annexures "NM20 to "NM36" copies of counterfoils of the cheques he had sent to the applicant. However, he later averred that the applicant had not been regularly keeping him up to date with information of the true position of his account. In that regard he had addressed annexure "NM36", a letter of 18th July, 1988, in which he pointed out that he had requested a certain Mrs. Smith of the applicant's office to furnish him with clear statements of his account but all to no avail. Even if he were in arrears with his payment of the instalments the Respondent alleged that it would not be in the amount claimed by the applicant. Consequently he prayed that applicant's application be dismissed with costs.

For obvious reasons, in the Replying Affidavit, the applicant contended that the Respondent's copies of counter-

5/ foil cheques .....

foil cheques, annexures "NM20" to "NM36" could not be regarded as conclusive proof of payment. Furthermore, he attached annexure "A", a reconciliation of Respondent's statement of account reflecting all debits and credits, and pointed out that it was clear from that annexure and, indeed, annexures "NM1" to "NM36" to the answering affidavit that some of the payments allegedly made by the Respondent were subsequently dishonoured by his bank. The purported payments were, therefore, no payments at all, and the applicant reiterated that the Respondent was in arrears with his payment of the instalments, contrary to the conditions of the terms of the agreement.

On the papers before me there could be no doubt in my mind that on 20th March, 1987 the applicant and the Respondent did enter into a sale agreement whereby the former sold and delivered to the latter the bus, the subject matter of this case, for a total price of M131,097-64 including Government Sales Tax and Finance Charges. The Respondent paid a deposit of M40,000-00 leaving a balance of M91,097-64 which he was to clear in 36 instalments at the rate of M2,530-49 per month.

According to the applicant, the Respondent defaulted in his payment of the instalments and as of 10th March, 1989 was, therefore, in arrears in the amount of M12,061-60 together with interest thereon. However, the Respondent denied that he owed any arrears to the applicant and claimed that he was always punctual in his payment of the instalments.

I was referred to the decision in Pillay v. Krishna and Another 1946 A.D. 946 where the following principle in regard to the burden of proof was stated in the head note:

> "When a defendant in his plea sets up a plea of payment of money, the onus is upon him,

6/ and if he .....

> and if he fails to satisfy the court that there is a sufficiently strong balance of probabilities in his favour, judgment must be given for the plaintiff."

In the present case, I agreed with the contention of the applicant that, for obvious reasons, the respondent's counterfoil cheques, annexures "NM20" to "NM36" could not be regarded as conclusive proof of payment. As the reconcilliation of his statement of account, annexure "A" to the Replying Affidavit, showed that some of the payments he had made were, indeed, dishonoured by his bank, the Respondent could not be heard to say he was up to date with his payment of the instalments.

In my judgment the Respondent had failed to satisfy, on a balance of probabilities, the onus of proof that rested upon him in accordance with the principle laid down in Pillay v. Kreshna and Another, supra. That being so, it must be accepted that he had on the face of it, defaulted in the payment of his instalments and was, therefore, in arrears in the amount claimed. In terms of the agreement concluded by the parties, the applicant was, therefore, entitled to the relief sought for in the application.

In the result, I came to the conclusion that the rule ought to be confirmed, subject to the condition that the applicant instituted the contemplated action within 30 days after the vehicle, the subject matter of this case, had been seized and taken possession of by the Deputy Sheriff to enable valuation thereof. I accordingly ordered.

B.K. MOLAI
JUDGE

For Applicant : Mr. Steyn,
For Respondent : Mr. Mphalane.

11th July, 1989.

CIV/APN/120/86

IN THE HIGH COURT OF LESOTHO

In the Application of :

REV. P.L. PITSO Applicant

V

EXECUTIVE COMMITTEE OF L.E.C. Respondent

REASONS FOR RULING

Filed by the Hon. Mr. Justice M.L. Lehohla
on the 11th day of July, 1989.

With regard to a point raised in limine by the respondent this Court ruled that the respondent was successful.

Reasons for that ruling follow.

The applicant sought an order of this court against the respondent in terms of which

(1) a resolution taken by the respondent on 21-6-1985 should be declared null and void and of no effect,

(2) the respondent was to be restrained from transferring the applicant to Leribe L.E.C.

(3) the respondent was to pay the applicant's salary in the amount of M220 from October 1985 and monthly thereafter.

(4) the respondent was to be restrained from ejecting the applicant from the residence he is presently occupying within the Teya-Teyaneng L.E.C. premises.

(5) the respondent was to be restrained from interfering with the applicant in the execution of the latter's pastoral duties at Teyateyaneng L.E.C.

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(6) the respondent was to be directed to pay the costs of the application.

It is common cause that the applicant is an ordained priest performing his duties under the auspices of the Lesotho Evangelical Church.

From the papers it appears as summarised in the notice of motion the applicant had some differences with the Executive Committee of the Lesotho Evangelical Church (L.E.C.).

It seems to me that the point in limine relates to the fact that the applicant did not exhuast the domestic remedies available to him in the hierarchy of the L.E.C. He himself alludes to the fact that he was going to appeal against the decision of the Executive Committee to the Seboka. See para 13 at page 6. On this ground alone it is legitimate to conclude that the application is not properly before this Court. See L.E.C. vs Nyabela 1980(2) LL.R. 466 at 470

> "The constitution of L.E.C. does not provide an "appeal" properly so called to the full Seboka on the question of transfers. An appeal lies as of right only if the Executive Committee relieves a priest of his duties whether permanently or temporarily, but pending appeal, the Executive Committee's decision stands" (S. 210 of the constitution).

With regard to the breach of natural justice Judicial Review of Administrative Tribunals in South Africa 1963 Edition by Rose Innes at page 82 makes relevant and interesting reading. It says

> "Until a final decision has been given to an application before the domestic or statutory body and its appellate organs, it cannot be said that an irregularity which may have occurred will not be set right nor justice done. This justification loses its force where the appellate body has prejudged the matter and was itself the body which in the first instance committed the irregularity."

In the absence of any demonstrable act attributed

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to the Seboka showing that it has prejudged the issue it follows that whatever irregularities may have been condoned by the Executive Committee of the L.E.C. would be put right by the Seboka in due course.

Unlike in Nyabela where the Seboka had already dealt with the matter when resort was later sought to this Court, in the instant matter there is no indication that it has already done so.

It was argued on behalf of the applicant that he has been taken by surprise by the other party and pointed out that relying on Rule 8(10)(c) the point raised should have been contained in an answering affidavit. The rule reads

> "Any person opposing the grant of any order sought in the applicant's notice of motion shall :
>
> (a) .....
> (b) .....
> (c) if he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question."

The applicant relied on Theory of Pleadings 5th by Isaacs at p. 110. Clearly the authorities disapprove of another party being taken by surprise.

But at p. 81 The Civil Practice of the Superior Courts in South Africa by Herbstein and Van Winsen it is said

> "If legal points are set forth in the application, the applicant is not confined thereto but may advance any further legal basis for the application that may arise from the stated facts. A party is entitled to make any legal contention which is open to him on the facts as they appear on the affidavits, and the court may decide an application on a point of law which arises out of the alleged facts even if the applicant has not relied thereon in his application."

It is significant that Rule 8(10)(c) specifically enables an opposing party to raise a question of law

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without any answering affidavit. Further that Hebstein and Van Winsen state that such a party is entitled to make any legal contention which is open to him on the facts as they appear on the affidavits.

Moreover Rule 8(17) provides that

> "The periods prescribed with regard to applications shall apply mutatis mutandis to counter application."

Read Rule 8(8) 8(21) with Munnik J.'s dictum in Yorkshire Insurance Co. Ltd vs Ruben 1967(2) at p. 265 with regard to forms of notices in interlocutory matters, that:-

> "There is to my mind a substantial difference between an application being brought on notice and an application brought on notice of motion. It could never have been intended, when parties are already engaged in litigation and have complied with such formalities as appointing attorneys and giving addresses for the service of documents in the proceedings, that the parties would be required to go through all the same formalities again with all the concomitant and unnecessary expense.
>
> I am satisfied that the use of the word "notice" in sub-rule (11) (read 5 and or 21 to Rule 8 of Lesotho Rules) as opposed to the "notice of motion" in the other sub-rules to Rule 6 (read Rule 8) indicates clearly that interlocutory and other applications incidental to pending proceedings were not intended to be brought by way of formal notice of motion, in the same way as applications initiating proceedings."

It was further argued for the applicant that respondent failed to place his appeal before the appellate body which had sat in 1985 i.e. an occasion which took place well within the period when his appeal could have been heard and disposed of by Seboka.

This argument was countered by the submission that the applicant could have sought an order compelling the respondent to pass the appeal records to Seboka. It is a fundamental law of procedure that the court cannot assume bias.

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It was further submitted that even if the applicant was given notice it would not get rid of the fact which he admits that he did not go to Seboka on appeal. Hence as no point of fact is in dispute Rule 8(10)(c) does not apply in so far as it requires that notice be given.

I upheld the points raised in limine with costs on the above grounds.

J U D G E.

11th July, 1989.

For Applicant : Mr. Mphalane
For Respondent : Mr. Matsau.