

CIV/APN/ /89

CIV/T/ 500/88

IN THE HIGH COURT OF LESOTHO

In the matter between:-

SIMON LETOAO

Applicant

and

TEBOHO SEHAPI

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 24th day of September, 1990

This is an application for rescission of judgment and for leave to defend the action in CIV/T/600/88 which was granted by this Court on the 9th June, 1989.

In his founding affidavit the applicant avers that some time in August, 1988 his wife gave him a copy of a summons in CIV/T/600/88 and informed him that the deputy-sheriff who served the summons told her that if the applicant wanted to say anything regarding the summons he must report himself at the offices of Mr. Kambule, respondent's attorney. He immediately went to Mr. Kambule's offices but was informed that Mr. Kambule had gone to

Butha-Buthe. He was asked to come back some other time. The applicant avers that for about a month he kept on reporting himself at Mr. Kambule's offices but got no assistance because Mr. Kambule was not there. He was however given the impression that as soon as Mr. Kambule was available, he could be contacted to report himself at the aforesaid offices.

Thereafter the applicant left for Semonkong where he had some construction work to do. He remained at Semonkong for about four months and when he returned to his home there was still no message from the offices of Mr. Kambule. He was surprised when on the 19th June, 1989 his wife gave him a copy of a writ of execution in CIV/T/600/88. She also informed him that certain property of the family had been attached and was to be removed at a later stage. The applicant avers that he was misled by the deputy-sheriff, Rethabile Sehloho, who happens to be Mr. Kambule's employee.

The applicant avers that he has a bona fide defence to respondent's claim inasmuch as it is the respondent who is in breach of the terms of their contract. He has failed to pay M4,000-00 agreed upon and only paid M2,000-00. He stopped payment of a cheque for M500-00 although in the summons he claims that he paid an amount of M2,500-00.

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It is also not correct that when the respondent took the vehicle which is the subject matter of CIV/T/600/88 it was not in a roadworthy condition. It is also not correct that the applicant and the respondent agreed that the latter would effect repairs to the vehicle and then deduct the cost of the said repairs from the purchase price of M4,000-00.

The applicant avers that the correct position is that the respondent paid to the applicant the sum of M2,000-00 in April, 1988 when he took delivery of the vehicle. He promised to pay the balance when he got paid from the construction work he was doing in Mohale's Hoek. He however failed to live up to this promise until the vehicle in question got involved in an accident at Thabong. The alleged repairs thus arose out of the said collision and normal wear and tear. The respondent cannot therefore properly set off the costs of effecting such repairs from the purchase price of the vehicle.

The applicant denies that he ever demanded the return of the said vehicle on the 5th January, 1988. The respondent returned the vehicle on his own saying that he could no longer afford to pay the applicant any more. He has annexed a letter allegedly written by the respondent when he returned the vehicle (See Annexure "DD").

In his opposing affidavit the respondent denies that the applicant went to Semonkong and remained there for four months. He avers that he met the applicant before the end of 1988 and they discussed this matter. The applicant promised that he would settle this matter. The respondent deposes that he referred him to his counsel's offices as the matter was already before this Court. He admits that the purchase price was M4,000-00 and that he paid M2,000-00. He also admits that he stopped payment of the cheque for M500-00 because the applicant refused to renew the licence for the vehicle for the year 1988 and told the respondent that he wanted the vehicle for his own use. After stopping payment of the cheque he made a demand for payment of damages he had suffered as a result of repairs to the vehicle and the deposit he had paid. (See Annexure "Y").

The respondent avers that the damage caused by the accident referred to above was minor as only the front mudguard on the right side was dented. When the vehicle was delivered to him it was not in a roadworthy condition and repairs were effected on various occasions. He did not fail to pay the balance because the applicant took possession of the vehicle before the balance could be determined taking into account the expenses incurred by the respondent in putting the vehicle in a roadworthy condition. He denies that he voluntarily returned the vehicle to the applicant and denies that he wrote Annexure "DD".

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In an application of this nature the applicant must satisfy the Court that his default not to enter an appearance to defend was not willful and that he has a bona fide defence (Nqoko v. Morreira 1976 L.L.R. 137). In the instant case the applicant has shown that after receiving the summons he went to the offices of the respondent's counsel because he was going to show that he was not liable and to explain what had happened. In other words he had all the intended to defend this action. Rethabile Sehloho is Mr. Kambule's clerk and messenger. He admits that the applicant came to the offices of his employer. His intention was to settle the matter. He (Rethabile) informed the applicant that Mr. Kambule was the person with whom he could discuss a settlement. On that day Mr. Kambule was not available and the applicant promised to come back but he never did so.

I shall accept applicant's story that he did try to meet Mr. Kambule to discuss the matter whether it was with the intention of settling the matter or not is not something that can be resolved without viva voce evidence being heard.

It is the applicant's contention that he has a bona fide defence in that the respondent was in breach of the terms of the contract in that he failed to pay the balance of M2,000-00 and voluntarily returned the vehicle saying that he could no longer afford to pay the applicant.

Most of the issues raised by the applicant in this application are disputed by the respondent. It seems to me that if at the trial the applicant can prove the allegations he has made in this application the trial court may find that he has a bona fide defence. I think this is a proper case to go to trial to enable the parties to lead viva voce evidence in order to enable the Court to resolve the highly disputed matters.

In the result the application is granted as prayed. Costs shall be costs in the cause. The applicant shall file his plea within twenty-one days from the date of this judgment.

J.L. Kheola
J.L. KHEOLA
JUDGE

24th September, 1990.

For the Applicant - Mr. Mohau
For the Respondent - Mr. Kambule.