

CIV/APN/103/89

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOKHALI SHALE

Applicant

and

MAHLOMOLA SHALE AND 14 OTHERS

Respondents

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 4th day of December, 1990

On the 1st May, 1990 the applicant obtained an interim order restraining the 14th respondent from disposing of applicant's sixteen head of cattle and ordering him to release them to the applicant upon payment of security, for safe keeping pending the finalization of an action instituted by the applicant against respondents in the Mafeteng Magistrate Court.

The order has been fully complied with by the 14th respondent and must be confirmed. The only question remaining to be decided is that of costs.

Mr. Mda, counsel for the applicant, submitted that the 1st respondent had no reason to oppose this application. In his own affidavit he has stated that he together with the other respondents have always been willing that applicant's cattle be released from the pound upon payment of security in terms of the Laws of Lerotholi. It is surprising therefore why the 1st respondent is opposing an order directing what is consistent with his wishes.

According to the evidence placed before this Court by the 1st respondent, the applicant paid security on the 20th May, 1989 and his sixteen head of cattle were released to him on the same day. The security was paid to the 14th respondent in whose pound the cattle were kept. Two days later, on the 22nd May, 1989, the 1st respondent was served with the interim order, without any accompanying affidavit. It is not clear why the applicant decided to go ahead and serve the 1st respondent with an interim order requiring him to release or cause to be released sixteen head of cattle to the applicant when the latter knew very well that the said head of cattle had been released to the applicant by the 14th respondent. I am of the opinion that the 1st respondent was entitled to oppose the application on the ground that the said cattle had been released two days before he was served with the interim order. He was no longer in a position to comply with the order and he was entitled to place the facts before the Court.

I do not agree with the suggestion that the intention of the 1st respondent is just to waste the Court's time and to cause the applicant to incur unnecessary costs. There was no reason why the applicant served the 1st respondent with the interim order when he knew that two days before such service the 14th respondent had released the cattle. It seems to me that he was actually inviting the 1st respondent to state what his attitude was towards the application and he cannot now say the 1st respondent ought not to have opposed the application. He had to inform the Court that it was impossible for him to comply with the court order.

Mr. Mda submitted that the 14th respondent must pay costs because he acted contrary to the provisions of section 13 (4) (c) of the Laws of Lerotholi in that he insisted on a condition not provided by the law, when he demanded payment for damages despite the fact that the applicant had already taken the matter to Court as a dissatisfied party and the 14th respondent was aware of this. He insisted that he was going to sell the cattle despite the fact that he was aware that the applicant had already taken the matter to Court.

Section 13 (4) (c) of the Laws of Lerotholi reads as follows:-

"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 14 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."

The stages described in section 13 (4) (c) above are very clear. The first stage is that the chief or headman in charge of the pound must demand payment of the assessed damages and the pound fees. The second stage is that if the owner of the animals denies liability he must pay sufficient security before his animals can be released to him. The third stage is that if the dispute is not settled within fourteen days or satisfactory evidence given within fourteen days that court proceedings have been instituted, the chief or headman may sell the stock to pay for damages and pound fees.

It seems to me that in the instant case the chief demanded payment of damages and pound fees. The owner of the stock refused to comply with the demand and also denied liability. After that the chief and the owner of the stock did not discuss the question of payment of sufficient security and the chief continued his detention of the stock. I think up to this stage

the chief was entitled to refuse or to release the stock. Then the owner of the stock instituted court proceedings in the Mafeteng Subordinate Court. The applicant's Counsel wrote a letter to the chief demanding the release of the stock upon payment of sufficient security for damages.

In his founding affidavit the applicant deposes as follows:-

- "5:1 Having failed to negotiate a reasonable settlement with the Respondents, on the 13th April, 1989 I instructed my attorney MR. A.P.S. Mda to sue out summons against the Respondents herein for the release of my aforesaid livestock, which he did in CC 29/89 in the Mafeteng Subordinate Court.
- 5:2 On the 18th April, 1989 my counsel adv. Z. Mda wrote a letter to the thirteenth Respondent requesting him to release the said cattle to me for safe keeping pending the finalisation of the aforesaid action. This Honourable Court is referred to annexure marked "A".
- 5:3 On the 20th April, 1989 I attended the offices of the thirteenth respondent and met him in person; he advised me that he received the letter from my counsel and had taken note of the contents therein but that he was not prepared to release the cattle as advised save if he were to be so ordered by the above Honourable Court. The Principal Chief further warned me that if I was not in possession of such Court Order by the 1st May 1989 he would sell my sixteen head of cattle by public auction."

In answer to the above allegations the 14th respondent deposes as follows:-

"AD PARA 5:

- 5.1 Save to deny the question of negotiations at my offices and to say that I have not been cited as a defendant in said CC 29/09. I have no knowledge of contents herein.
- 5.2 Contents herein are admitted.
- 5.3 Save to say that I said that I would only release the cattle if he paid for the damages to the crops and the pound, contents herein are admitted. I further told applicant that if fourteen (14) days expires the cattle will be sold by public auction."

I agree with the submission that the 14th respondent acted contrary to the second proviso to section 13 (4) (c) of the Laws of Leretholi by insisting that unless the applicant paid the assessed damages and pound fees, he would sell the cattle after the expiry of fourteen days. The second proviso makes it quite clear that if the owner of the stock produces satisfactory evidence within fourteen days that court proceedings have been instituted the chief or headman in charge of the pound is no longer entitled to sell the stock. His duty is to demand sufficient security from the owner of the stock and once payment of security is made he must release the stock.

The applicant was entitled to come to Court urgently to stop the unlawful sale of his stock and I am of the view that he is entitled to costs because if the 14th respondent had strictly complied with the provisions of the law the applicant would not have been forced to incur unnecessary costs of instituting this application.

In the result the 14th respondents and the 15th respondent are ordered to pay applicant's costs, jointly and severally, and

paying the other to be absolved.

J.L. KHEOLA
JUDGE

4th December, 1990.

For Applicant - Mr. Z. Nda
For Respondents - Mr. Moorosi