CIV/T/558/87

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAKHENKHE SEKEI	Plaintiff
AND	
PETROSE MAJORO	1st Defendant
MOEKETSI MAJORO	2nd Defendant
NONE MAJORO	3rd Defendant
PANDA MOFOLO	4th Defendant
MOZELELA LAMANE	5th Defendant
TLHOPHEHO MOLATO	6th Defendant
BABY MPHEPHE	7th Defendant

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 2nd day of February, 1990.

On the 14th September, 1987 the plaintiff issued summons against the defendants in which he claimed M23,090-00 as damages for the loss of his sheep and goats which were negligently killed by the defendants. He also claims interest at the rate of 22% per annum a tempore morae and costs of suit.

All the defendants were served with the summons on the 17th April, 1988. Only the first, the fifth and the 6th defendants have

filed their pleas. On the 19th October, 1989 the plaintiff's counsel, Mr. Rakuoane, indicated that he was proceeding against the second, third, fourth and 7th defendants who have not filed any Notice of Appearance to Defend. He then called the plaintiff and one Mookameli Ngenaphe to give evidence.

In his declaration the plaintiff avers that at all material times hereto, he was a farmer who was lawfully permitted by the Chief of Matebeng to graze his animals at a place called Pekamollo near Mount Tsolo. He annexed a copy of a permit No.617563 dated 20th January, 1986 which confirms that he had permission to graze his animals there. According to the permit one hundred and eighty-seven goats and eighty-four sheep were covered by it.

In February, 1986 the defendants wrongfully and unlawfully seized his sheep and goats at Pekamollo and impounded them. The Chief of Matebeng intervened and released animals to plaintiff.

On the 8th March, 1986 the defendants again wrongfully, unlawfully and maliciously seized plaintiff's animals and impounded them. The plaintiff alleges that his animals were kept in the custody of the defendants for five days and that during that period one hundred and forty-one goats and seventy-three sheep died. The death of the animals was caused solely by malicious, reckless and/or negligent methods of keeping the animals by the defendants in that :

a) The 1st Defendant's kraal where they were kept was small to accommodate the number of animals which were about Seven Hundred (700) in all and therefore the small and weak ones were trampled upon by the others;

b) The animals were not let out to graze and drink water.

c) The animals were not passed to the Ward Chief who would appoint a person to look after them as it is provided in Laws of the Country.

ALTERNATIVELY

The Defendants themselves and/or through their agents failed to exercise reasonable care to safekeep the animals and therefore they negligently caused the death of the animals. The defendants failed to discharge the duty of care once they had taken the animals in their custody.

The plaintiff testified that after he received a report that his animals had been impounded by the defendants he sent one Napo to go and pay pound fees for them so that they could be released. Napo went and came back and told him that the defendants wanted M37-00. From his home the plaintiff could see the kraal in which his animals were kept and he noticed that for the five days that they were kept there they were not allowed to graze. He gave the amount of M37-00 to Napo to go and pay for his animals. The following animals were missing when Napo returned:

85 She - goats
37 he - goats
19 kid
23 hammels
38 ewes
12 lambs
214

The plaintiff claims M100 for each of he-goats, she - goats and hammels; M80 for each ewe and M50 for each kid lamb; M2000 for the loss of wool and mohair earnings and M3000 for trespass.

Mookameli Ngenaphe testified that the defendants (except the first defendant) arrived at the cattle-post where he was herding plaintiff's animals. They told him that they were instructed by the first defendant to seize the animals and to impound them for grazing at that place which was reserved pasture. He assisted them to count all the animals under his care including some that did not belong to the plaintiff. All the animals were driven to the home of the first defendant and put in a small kraal which had an area of about 120 square metres. The kraal was so small that some animals remained outside; but the defendants caught them and threw them into the kraal on top of others. The kraal was muddy. The animals suffocated and died. When the first defendant [illegible] that the animals were suffocating he ordered the defendants to take out some of them. They complied and took out only nineteen of them. However, it was too late because some had already died while others were dying.

Mookameli said that during the afternoon of that same day he managed to escape because he was also under detention. He reported the impounding of the animals to the plaintiff.

I have come to the conclusion that the plaintiff has established a prima facie case of negligence on the part of the defendants against whom he has decided to proceed. The prima facie case must now become conclusive proof because the defendants decided not to give any defence.

I have assessed the damages claimed by the plaintiff and have come to the conclusion that they are not unreasonable. However I was not satisfied that the plaintiff was entitled to damages for trespass. If the first defendant is the chief of Tsolo as alleged by the plaintiffin paragraph 12 of his declaration I do not see how trespass can arise. A chief has a right to declare any area under his jurisdiction a reserved pasture. Now if he impounds animals he finds grazing in that area he cannot be accused of trespassing.

Judgement is granted for plaintiff against the second, third, fourth and seventh defendants who are severally and jointly liable the one paying the others being absolved, in the following amounts:-

(a) M18,090-00 being for the loss of the animals that died;

(b) M2,000-00 being for the loss of wool and mohair;

(c) Interest at the rate of 11% with effect from the date of this judgment and

(d) Costs of suit.

J.L. KHEOLA
JUDGE

2nd February, 1990.

For the Plaintiff - Mr. Rakuoane
For the Defendants -

CIV/T/503/88

IN THE HIGH COURT OF LESOTHO

In the matter between:

LEBOHANG MONAPHATHI Plaintiff

and

FRED SEHLOHO Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 2nd day of February, 1990

The plaintiff in this case issued summons against the defendant claiming M3,000-00 plus interest at the rate of 11% being payment for work done by the plaintiff to the defendant's house at Lithoteng.

In his declaration as supplemented by further particulars the plaintiff alleges that in November, 1987 he and defendant entered into an oral contract whereby he undertook to do the following work to defendant's house:

(a) to complete the walls
(b) to plaster the walls
(c) to make topping
(d) to put glazestone
(e) to do the roofing
(f) to do glazing
(g) to fit door locks.

He further alleges that he has completed the work and that he has never received any payment. The work was carried out in accordance with the terms of the agreement and the payment of M3,000-00 was to be done upon completion of the building. Despite demand the defendant is refusing or neglecting to pay the said sum of M3,000-00.

In his plea the defendant alleges that it is correct that a contract was entered into by the parties as indicated by the plaintiff, however he avers that plaintiff did not complete the work as agreed. He has also stolen from the site some of the materials which were to be used in the building of the house. He further avers that the plaintiff took an amount of M900-00 from the defendant for the purpose of buying some building materials but the money has never been brought back.

The defendant avers that the agreement was that plaintiff would assess the work on completion and give his price which would then be negotiated. The plaintiff has left the work unfinished and has disappeared with the money which was to buy additional building materials.

3/.....

On the 1st September, 1989 the plaintiff gave oral evidence before this Court. He testified that before he started work he inspected the house and found that the walls had been built to the window level; there were no window-frames on the front wall; the concrete on the floor was not good and had to be removed and done again; the walls were not plastered; he had to do the roofing; he agreed to complete the walls, to roof the house, to plaster the walls and to partition the house. That meant that he had to finish the whole house.

The plaintiff deposed that he finished all the work covered by their agreement but did not do the facia boards, ceiling, plumbing and wiring. The amount of M3,000-00 was agreed upon after he had finished the plastering and the roofing of the house. He built a toilet and also repaired a crack in the wall by making an underpeel. He also bought bricks, glazestone, cement, glass, crushed stones ( ) and s...d. The amount of M3,000-00 covers the building materials he bought with his own money as well as his labour.

The plaintiff deposed that the defendant agreed to pay him for the work he had done and that thereafter he must finish what had not been done. It is now over one year since he finished but the defendant has not paid him anything. He met him (defendant) about five times but the latter was in financial difficulties and said he was waiting for certain Government cheques which were due to him apparently for work he had done for Government. After about three months after he had completed the work the wife of the

defendant came to him and asked him to give her the keys for the house because she wanted to employ a person who would do the wiring. She has never returned the keys to him and the defendant and his family are now in occupation of the house.

The defendant did report the loss of building material from the site in question but he (plaintiff) asked him why he was claiming loss of materials after he had finished the work he was supposed to do to the house. He did not tell him when he discovered the theft nor the value of the stolen material. Regarding the amount of M900-00 allegedly given to him to buy additional building materials, the plaintiff says that the amount was in fact M700-00 and not M900-00 as alleged by the plaintiff. He used the amount for the purchase of additional building materials. The plaintiff did the assessment after he had completed the work. He denies that it was agreed that someone from outside would do the assessment.

The plaintiff admits that initially they did not agree on the price but the parties agreed on the sum of M3,000-00 after he had completed the work. It was for the work he had done and they still have to agree on the price of the outstanding work.

The defendant did not give any evidence in this Court and closed his case without calling any witness.

Mr. Monaphathi, attorney for the plaintiff, submitted that the prima facie case established by the plaintiff has not been controverted and it must now become conclusive. He further submitted that the agreement between the parties has not been denied by the defendant. The defendant admits that he has not paid the plaintiff any amount for the work he has done nor has he made any offer for such work.

On the other hand Mr. Hlaoli, attorney for the defendant, submitted that the agreement was that assessment was to be done after the completion of the whole work. He submitted that the plaintiff is in breach of contract because he has not completed the work according to the agreement. He further submitted that the evidence given by the plaintiff contradicts paragraph 4 of the declaration.

I agree with Mr. Hlaoli that there seems to be a conflict between the evidence of the plaintiff and paragraph 4 of his declaration. One cannot be allowed to give evidence which is in conflict with one's declaration unless one has been granted leave to amend the declaration to bring it in line with one's evidence. In the declaration the plaintiff avers that 'the parties agreed that the works were to be completed at the cost of M3,000-00 and that Defendant would pay Plaintiff on completion of the said building works.' In his evidence in Court plaintiff admits that initially there was no agreement on the price; there was to be an

assessment of the work done and then an agreement on how much defendant was to pay. He testified that after completing the work agreed upon the assessment was made. The parties agreed on payment of M3,000-00 for the work done.

In my view the conflict referred to above is a minor one and does not in any way change the cause of action. The amount claimed has not changed, the only change I can see is as to the time when the agreement was reached. In paragraph 3 of his pleas the defendant admits that the terms of contract were as described in paragraph 3 of the plaintiff's declaration. Paragraph 3 of the declaration must be read with the further particulars in which the plaintiff set out in detail the work that he had to do in terms of the contract. He avers in the same paragraph that all the works have been done. He also testified in Court that such works have been done.

In paragraph 3 of his plea he merely avers that the plaintiff did not complete the works as agreed. He does not state exactly what the plaintiff has not done. It was necessary for him to have clearly mentioned the things he has not done because the plaintiff has given a full list of the things which he was supposed to do in terms of the contract. It seems to me that in terms of the contract the plaintiff was not to do certain things such as ceiling, plumbing and electrical wiring. These things do not appear in paragraph 3 of the declaration as supplemented by further particulars. As I have indicated above the defendant has admitted in paragraph 3 of his plea that those were the terms of the contract.

The defendant's wild allegation that the plaintiff has not finished the works, unsupported by any evidence, cannot be accepted. He elected not to give evidence despite the fact that he admits that there was a contract between him and the plaintiff. He has not given evidence to prove that the plaintiff did not complete the works agreed upon in terms of the contract.

In Ex parte Minister of Justice: re R. v. Jacobson and Levy 1931 A.D. 466 at p. 478 Stratford, J.A. said:

> "Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus".

At page 36 of his book: South African Law of Evidence, 1st edition, Hoffmann has this to say:

> "If the evidence adduced by one party can reasonably support an inference in his favour, and it lies exclusively within the power of the other party to show what the true facts were, his failure to do so may entitle the court to infer that the truth would not have supported his case. On the other hand, if there is no reason to expect a party to be able to throw light upon the facts, his silence can add nothing to the evidence by his opponent. In such a case there is no difference between prima facie and sufficient evidence".

I am of the view that if the defendant had given evidence he would have been able to throw light on the things which the plaintiff

left unfinished because according to him that is the first reason why he refuses to pay the plaintiff.

The second reason is that building materials were stolen. I do not see any connection between the theft of the materials and the payment of the plaintiff. The defendant does not say what materials have been stolen by the plaintiff and why he has not reported him to the police for criminal prosecution. In any case if theft by the plaintiff had been proved the defendant could claim a set-off provided he proved the value of the stolen material. He cannot arbitrarily refuse to pay the plaintiff what is due to him by relying on mere suspicion that he stole his property.

With regard to the alleged M900 which was given to him to buy additional building material the plaintiff has testified that it was in fact M700 and that he bought the relevant material with it. His evidence has not been controverted and I have no reason to disbelieve him.

For the reasons I have stated above I have come to the conclusion that the prima facie proof established by the plaintiff now becomes conclusive proof and that he has discharged his onus.

Judgment is granted for the plaintiff as prayed in the summons with costs.

J.L. KHEOLA
JUDGE

2nd February, 1990.

For Plaintiff - Mr. Monaphathi
For Defendant - Mr. Hlaoli.