CIV/T/377/89

IN THE HIGH COURT OF LESOTHO

In the matter between:

LAMBONS FORD	PLAINTIFF
V	
SOLOMON S. CHABALALA	1ST DEFENDANT
OFFICER COMMANDING C.I.D.	2ND DEFENDANT
ATTORNEY-GENERAL	3RD DEFENDANT

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 12th day of November, 1991.

For the Plaintiff : Mr. Molyneaux
For the Defendants : Mr. Malebanye

ORDER

Cases referred to:

(1) Moloi v DPP & Anor.; CIV/T/647/89;
(2) Botha v. Dreyer 1 E.D.C. 74;
(3) Burgers v. Fraser (1907) TS 318;
(4) Meikle v South African Trade Protection Society (1904) TS 94.

This is an application for committal for contempt of the Court's order to deliver possession of a tractor to the Deputy Sheriff.

I am conscious of the fact that the applicant has adduced evidence by way of affidavit, whereas the respondent and his wife have given *viva voce* evidence which has been tested by cross-examination. The evidence on affidavit is but ***prima facie*** - it

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has not been tested by way of cross-examination. It is safer therefore to proceed on the basis of agreed facts.

When it comes to the issue of credibility I find that the respondents' evidence contained contradictions. So also did the evidence of his wife.

He at first testified that he did not know the Deputy Sheriff, i.e. on 8th November, 1991; thereafter he admitted that the latter had approached him a week earlier, when he knew of his identity and was aware of the purpose of the latter's visit. He testified that the police officer was not in uniform, specifying in detail the clothes that he wore; then he admitted that he was in uniform. He stated that the Deputy Sheriff had no proof of his capacity, yet he admitted that he understood the nature of the order he produced. He testified that the Police Officer "did not show that he was a policeman", yet he subsequently admitted that the latter was in uniform and was armed. He testified that his Attorney did not say anything to him, yet his wife testified that initially the latter explained the effect of the order to the respondent. It was his evidence that he parked the tractor to get diesel. Then he added that the valve of the tube in a tyre had broken. Then he added that the tube was also punctured.

As for his wife, who had been present in Court throughout her husband's entire evidence, she testified that the tyre of the

tractor was torn on 8th November, 1991. Then she said the tyre was not 'torn' but merely deflated. Then she elaborated that it was but a 'bit deflated' - in which case of course the vehicle could be moved. She testified that the respondent spoke to his Attorney before the Deputy Sheriff served the Court order. Then she subsequently testified that such conversation took place after such service, "long afterwards", she said. Then she said that after such service the police officer prevented the respondent from approaching his Attorney.

Then there are the inherent improbabilities to which the learned Attorney for the applicant, Mr. Molyneaux refers. It is inherently improbable that the respondent was willing to hand over the vehicle. His wife, as indicated, at first suggested that the vehicle was immobile, which prevented its removal. She subsequently resiled from that position. In any event the vehicle was recovered the following day, with a completely deflated tyre. The only reasonable inference therefore is that the respondent resisted seizure of the vehicle.

I cannot accept that an armed police officer, who allegedly prevented the respondent from communicating with his lawyer, nonetheless failed to arrest the respondent, unless it is the case that the latter resisted arrest. I cannot imagine that a police officer, who had not effected an arrest would attempt to prevent the respondent from communicating with his Attorney, five

paces away. In particular, I cannot accept, on the wife's evidence, that the Attorney made no protest in the matter.

Then there is the aspect of not one but two punctures in a short space of time, and in particular the latter puncture at a crucial stage. Again, there is the improbability of both a puncture and a broken tube valve at the same time.

Suffice it to say that I find that the evidence of the respondent and his wife, which is riddled with inconsistencies, could not reasonably possibly be true, and that the only reasonable inference is that he resisted delivery of the vehicle and indeed resisted arrest.

There is the requirement of wilfulness. The respondent states that he wished to have the Court's order read to him in Sesotho. It was his wife's evidence however that the Attorney explained the effect of the order to him. Indeed, the respondent admitted to having been in Court when the Court made its order in the matter and that his Attorney explained that the Deputy Sheriff would approach him and that he must hand over the vehicle to the latter. He admitted that when the Deputy Sheriff first approached him on 1st November, 1991, he knew that the latter had come to collect the tractor.

In the case of Moloi v DPP & Anor. (1) I relied upon the

following passge at page 1125 of South African Criminal Law And Procedure Vol.II by Gardiner & Lansdown (1957):

> "In an application to commit for contempt for failure to obey an order of court, it is necessary to prove that the respondent had personal knowledge of the order, but it is not necessary that it should have been actually served on him - Botha v. Dreyer, (2); Burgers v. Fraser, (3)."

In the case of Moloi (1) indeed I held that a third party who had not been served with, but was aware of the existence of a Court order, and who acted contrary thereto, was in contempt thereof.

In the case of Burgers v Fraser (3) the learned Innes C.J. referred at p.320 to a dictum by himself in the case of Meikle v South African Trade Protection Society (4) thus:

> " "When an order of court issues, operative as against the whole world, then any person, however ***bona fide***, intending to take action contrary to that order, who is warned of its existence by some responsible person, like a solicitor or officer of the court, goes on at his peril". The Court was there dealing with a notice given by a responsible person (a solicitor), and the words used covered the case then before the Court. But they were not intended to cover - nor do they in my opinion cover - every case which may arise. The general rule may be stated more broadly. I think that where a man has information, which he has no reasonable grounds for disbelieving, to the effect that an order of court has been granted against him, he is bound to act as if that order had

> been duly served. In every case it is a question of fact. The point is whether the man when he received the information had any reasonable ground for disbelieving it. It is not contended here that the appellant did not believe that the information supplied to him was correct. He stood upon a technicality, and demanded that the order itself should be produced to him. I do not think he was justified in taking up that position. We must have regard to the facts.
> .....
> He had no reasonable ground for doubting the correctness of (the) information, which was in fact true, and he ought not to have acted as if it were not true. He was not justified in disregarding that information and acting in defiance of the order of court on the technical ground that the written order had not been produced."

The respondent has admitted that as early as 23rd October, 1991, he was present in Court and the effect of the Court's order was explained to him by his Attorney. He has admitted that he was aware of the Deputy Sheriff's visit on 1st November. His wife has testified that on 8th November his Attorney again spoke to him and explained the effect of the Court's order. The learned Attorney for the respondent, Mr. Malebanye, who wished to withdraw from these proceedings, and whom the Court persuaded to represent his client at least as to the application for committal, submits that his client did not act wilfully. With respect, I cannot agree. In all the circumstances and in the light of the above authorities, I cannot see how the respondent's behaviour could be described as anything but wilful.

I am satisfied indeed, as the only reasonable inference,

that the respondent was fully aware of the Court Order, and that he was determined to resist it. I find therefore that the respondent acted in contempt of Court.

As to his punishment therefor I wish to hear submissions thereon.

Delivered at Maseru This 12th Day of November, 1991.

B.P. CULLINAN
CHIEF JUSTICE