

IN THE HIGH COURT OF LESOTHO

In the matter between:

LOTI BRICK (PTY) LTD

Applicant

AND

THABISO MPHOFU  
THABISO MLUNGWANE  
(EDITOR OF THE MIRROR)  
EPIC PRINTERS

1st Respondent

2nd Respondent

3rd Respondent

J U D G M E N T

Delivered by the Honourable the Chief Justice Mr. Justice  
J.L. Kheola on the 17th day of October, 1995

This is an application for an order in the following terms:

1. That a Rule Nisi returnable on a date and time to be determined by the above Honourable Court be issued, calling upon Plaintiff to show cause (if any) why an order should not be granted in the following terms:
  - (a) That judgment and warrant of execution in CIV/T/503/93 shall not be stayed pending the outcome of the Rescission Order prayed for herein,
  - (b) That the judgment delivered by the Honourable Mr Justice J.L. Kheola (as he then was) on the 14th March 1994, be rescinded and set aside;
  - (c) That the Respondents herein be ordered to pay costs in the event of opposition.
  - (d) That the Applicant shall not be granted such further and/or alternative relief as the court

may deem fit.

In his founding affidavit Moruti Mphatsoe, the Managing Director of the applicant, deposes that failure to defend this matter was neither wilful nor an admission of liability in any way. When a letter of demand was received a reply was written to the respondent's attorneys to attempt a settlement of the matter out of Court. It was stated that the damages were excessive and a tabulation of how the amounts were made up would be required. (A copy of that letter is annexed to the founding affidavit).

There was no response to that letter until December, 1993 when the summons was served upon the respondent. At that time the attorneys of the respondent had just opened an extension office at Metropolitan Insurance building and the person who delivered the summons delivered it to that office, instead of to the office intended which is at Lesotho Bank Centre.

He avers that in January, 1994 it came to his knowledge that the case against the respondent was somehow proceeding and had not been properly defended. He reported the matter to his attorneys of record who again investigated the matter, but unfortunately they could not find the file in the registry of the High Court. It was said to be missing. It subsequently turned out that at that time the matter was awaiting judgment. On the 14th March, 1994 the attorney obtained a copy of judgment.

At the time of the events leading to this publication there

was a lot of public criticism of; and even Parliament consistently made pronouncements condemning the unfair business practices of certain companies, in particular companies formed by chinese nationals who take unfair advantage of the labour situation, and are also in some respects unfair businessmen.

The Managing Director avers that during that same period it transpired, and the applicant had reasonable grounds to believe that one of such companies called Unibrick had attempted in an underhand manner to obtain some manufacturing materials from the applicant which is its competitor and by use of that obtain the trade secrets as well as some insight into the operation of the applicant in order to gain an unfair advantage.

He avers that the allegations were not defamatory of the respondent, and the words said were not only in the public interest but were also substantially true of the practice that Unibrick as well as the respondent had engaged in.

The second affidavit on behalf of the applicant is made by one Mike 'Mabathoana who is the Assistant Technical Manager of the applicant. On the day alleged the respondent arrived in the morning at the premises of the applicant and asked for some top soil to make a flower-bed at his home. He indicated that he wanted the top soil from a heap of clay used in the manufacturing of bricks.

The deponent avers that he knew that at that time Unibrick

had just been established and there was a shortage of clay for making bricks. He was further surprised by the fact that the respondent required the whole truck load which is more than enough for a domestic flower-bed, and would be enough to make 3,000 or more bricks which is the standard used to test the suitability of the clay and its quality. However, despite all possible explanations the respondent insisted. He was promised that he would have the soil in the afternoon of the same day. The deponent avers that he was suspicious of his (respondent's) intentions and planned to trap him and trace his movements because he knew that respondent was involved with Unibrick.

In his founding affidavit Barbanas Gugushe avers that he was ordered by Mr. 'Mabathoana to follow the respondent's truck when it left the applicant's premises loaded with top soil. The truck proceeded directly to Unibrick with its load and passed Borokhoaneng area where respondent lives. It entered the premises of Unibrick. The deponent avers that he then approached and made it known to the respondent and to the Chinese who were welcoming him that he had come to see the respondent. He (respondent) refused to see him and ordered the Chinese not to allow him into their premises, which was done. The action by the respondent confirmed to him that he (respondent) was in fact going to off-load the soil at Unibrick.

**Mr. Lebohang Aaron Molete** is an attorney of this Court and an attorney of record for the applicant. He confirmed what happened about the delivery of summons. He alleges that it was

only in December, 1993 when it was discovered that the summons had not reached him. Thereafter attempts were made to find the file but it could not be found. It was only in February, 1994 that it transpired that the file was with the judge as only judgment was pending.

In his answering affidavit the respondent admits that he was given the top soil in question by the applicant. He transported it by his truck. He passed his home with the load of the soil and drove straight to the premises of Unibrick for the purpose of collecting his cheque. He did so because it was late in the afternoon and decided to collect his cheque before closing time.

In an application for rescission of judgment the applicant must show three things, namely -

- (a) The applicant must give a reasonable explanation of his default;
- (b) The application must be **bona fide** and not made with the intention of merely delaying the plaintiff's claim;
- (c) the applicant must show that he has a **bona fide** defence to the plaintiff's claim, it being sufficient if he sets out averments which, if established at the trial, would entitle him to the relief asked for, he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour. (See **Grant v. Plumbers (Pty) Ltd.** 1949 (2) S.A. 470).

In the present case the applicant has shown that it never

filed a notice of intention to defend the action because the summons was duly served upon the the applicant. Thereafter it was delivered to its attorneys. Unfortunately it never reached the attorney of record because it was taken to the wrong office.

It seems to me that that explanation is reasonable and there was no intention on the part of the applicant to play delaying tactics simply to delay the respondent's claim.

Regarding a **bona fide** defence the applicant has shown that the words complained of were not only true but were in the public interest. In its founding affidavit the applicant shows that the respondent, by false pretences, stole the soil for making bricks and took it to Unibrick which produces bricks. After loading the soil he drove his truck straight to the premises of Unibrick and passed near his home without off-loading the soil for the alleged flower-bed.

If at the trial the applicant can establish the above averments then it will have a good defence. At the moment it need not deal with the merits and produce evidence that the probabilities are actually in its favour.

The respondent's story that he hurried to Unibrick's premises with the load of soil because he wanted to collect his cheque before closing time is something that can be tested in a trial, through proper cross-examination.

In the result the application is granted as prayed in terms of prayers (a) and (b). The applicant must pay the wasted cost incurred by the respondent in obtaining the judgment and the respondent's costs in opposing the present application.

J.L. KHEOLA  
CHIEF JUSTICE

17TH OCTOBER, 1995.

For Applicant - Mr. Molete  
For Respondent - Mr. Khauoe