CIV/T/511/89

IN THE HIGH COURT OF LESOTHO

In the matter of :

JOSEPH NYAMANE ..... Plaintiff

and

LESOTHO STEEL PRODUCTS ..... Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 12th day of December, 1995.

Plaintiff herein instituted, against the defendant, an action in which he claims:

"(a) payment of an amount of M54,000;

(b) interest thereon at the rate of 11% per annum calculated from 14 days after the date of judgment to date of payment;

(c) costs of suit;

(d) further and/or alternative relief."

Defendant intimated intention to defend the action. No minutes of pre-trial conference were, however, handed in pursuant to the provisions of

subrule (5) of rule 36 of the High Court Rules, 1980.

In his declaration to the summons, as amplified by further particulars, Plaintiff alleged that on 6th November, 1985 he had bought a hammermill at the cost of M12,000. As proof thereof, Plaintiff attached annexure "MM2" being a High purchase agreement. The hammermill was used to grind grain for members of the public and plaintiff earned on the average, M70 a day.

In December, 1987, Plaintiff went to defendant's place of business and requested that repairs be effected on his hammermill. On 8th December, 1987 Eddie Pelser and a certain Michael accordingly came to Plaintiff's home, at Peka, and informed him that they had been sent by the defendant to repair and/or collect the hammermill for repairs at the defendant's place of business. Acting as defendant's agents, Eddie Pelser and Michael removed the hammermill to defendant's place of business for repairs. They at the same time, collected from Plaintiff an amount of M400 as deposit. Plaintiff attached a form headed "Service Contract" and bearing the letter heads of defendant (annexure "MM1") as proof that Eddie Pelser and Michael had been sent to him by the defendant and he had paid the amount of M400 deposit.

On 22nd February, 1988 Plaintiff's Attorneys of record addressed, to defendant, a letter by which a demand was made for the return of the hammermill, duly repaired, failing which reimbursement of the M400 deposit, payment of M12,000 being the cost of the hammermill and collection commission. Notwithstanding demand, the defendant refused and/or neglected to either return the hammermill or pay the M12,000. Nor did he reimburse Plaintiff with the amount of M400 deposit.

In his declaration to the summons, Plaintiff further alleged that sometime after the 22nd February, 1988, he went to defendant's place of business and demanded an amount of 41,650 being his loss of earnings due to the deprivation of the use of the hammermill for 596 days at the rate of M70 per day. Despite demand, defendant refused and/or neglected to pay the M41,650.

Consequently, plaintiff suffered damages, for which he held defendant liable, in the amount of M54,050 calculated as follows:

| | |
|---|---|
| 1. value of the hammermill | M12,000.00 |
| 2. Deposit advanced..... | 400.00 |
| 3. Loss of income ..... | 41,650.00 |

Wherefor, Plaintiff prayed for judgment against the defendant.

In its plea, defendant alleged that it was selling hammermills. It was, however, not responsible for the repairs of any of the hammermills sold by it. It had, instead, entered into an agreement, with a certain Eddie Pelser, whereby the latter attended to the servicing and repairs of the hammermills. Eddie Pelser wass, therefore, acting in his own capacity and not as its (defendant's) agent or employee.

On 6th November, 1985 defendant sold a hammermill to the Agricultural Bank for a total purchase price of M9,306. It did not dispute that Plaintiff subsequently bought the hammermill from the Agricultural Bank and used it to grind grain for members of the public. It denied, however, Plaintiff's allegation that he had bought the hammermill at the cost of M12,000 and used it to earn, on the average, an amount of M70 a day. Furthermore, defendant did not dispute that the hammermill was subsequently removed from Plaintiff's house by Michael and Eddie Pelser who also collected the amount of M400 deposit from him (Plaintiff).

According to defendant's plea, at the time he wanted to fetch the hammermill for repairs, Eddie

Pelser did not know the location of Plaintiff's home. He, therefore, asked for the assistance of Michael, an employee of the defendant. Michael was consequently given leave by the defendant so that he could be free to assist Eddie Pelser. Defendant denied, therefore, Plaintiff's allegation that when they removed the hammermill for repairs and collected the amount of M400 deposit Eddie Pelser and Michael were acting as its agents and/or employees.

Defendant acknowledged receipt of the letter of demand from Plaintiff's attorneys of record. It, however, pleaded that it was entitled to refuse to effect the repairs to Plaintiff's hammermill or, alternatively, pay the amount of M12,000, being the cost of the hammermill, together with the M400 deposit, to the Plaintiff.

Defendant denied that Plaintiff had suffered damages in the amount of M41,650, or at all, as alleged in the declarations to the summons. It, therefore, pleaded that it was entitled to refuse to pay the amount of M41,650, or any other amount, to Plaintiff in respect of the alleged loss of earnings or deprivation of the use of the hammermill. wherefor, defendant prayed that Plaintiff's claim be dismissed with costs.

No witnesses were called to testify on behalf of the Plaintiff. However, Plaintiff himself gave evidence, on oath, in support of his case. At the close of the case for the Plaintiff, defendant did not adduce any evidence. He, instead, applied for absolution from the instance which application was, however, resisted by Plaintiff who contended that he had, on a preponderance of probabilities, established a case for damages.

Where, at the close of the case for the Plaintiff, defendant applies for absolution from the instance, the test to be applied is, in my view, whether there is, at the close of his case, evidence upon which a reasonable man might, and not should, find for the Plaintiff. I am fortified in this view by the dicision in Ruto Flour Mills (Pty) Ltd v. Adelson (2) 1958(4) S.A. 307 where at page 309 Boshoff, J. had this to say on the issue:

> "At the close of the case for the Plaintiff, therefore, the question which arises for consideration of the court is : Is there evidence upon which a reasonable man might find for the Plaintiff?"

Inasmuch as it is relevant, the evidence, adduced by the Plaintiff, is that he bought, from the defendant, a hammermill for the total purchase price of M12,981-87. As proof thereof, Plaintiff handed in annexure "MM2" as exh "A" and part of his evidence.

This, however, contradicts the declarations to the summons where Plaintiff alleged that on 6th November, 1985, he had bought the hammermill for the amount of M12,000.

It is also significant to observe that, according to exh "A", Plaintiff had, in fact, bought the hammermill, from the Agricultural Bank, and not, therefore, from the defendant, at the total purchase price of M13,912-47. Indeed, Plaintiff handed in payment receipts as exh "C" and part of his evidence. According to Exh "C", Plaintiff had been paying instalments for the hammermill to the Agricultural Bank, and not to the defendant.

In his evidence, Plaintiff further told the court that later on the hammermill gave him problems. He then went to defendant's place of business and reported the problems to a certain white person whose names he could not even remember. The hammermill was, on 8th December, 1987, removed from his home for repairs by Michael and Eddie Pelser who also took from Plaintiff an amount of M400 as deposit. They informed him that they were doing so on the instructions of the defendant. According to him, Plaintiff believed and allowed them to remove his hammermill merely because he had, on an earlier occasion, seen Michael working at the defendant's place of business and Eddie Pelser

produced a blank form headed " SERVICE CONTRACT" and bearing the letter heads of the defendant. The form was handed in as exh "B" and part of Plaintiff's evidence.

Plaintiff told the court that when, on 8th December, 1987, Pelser and Michael removed it from his home, the hammermill was to be returned after 4 days. It was, however, never returned. On 22nd February, 1988 Plaintiff caused a letter of demand (annexure MM"3") to be addressed to defendant. The letter reads, in part:

"Dear Sirs,

re Joseph Nyamane vs Lesotho Steel Products:

We refer to the abovementioned matter and wish to inform you that we are herein acting on behalf of our abovenamed client, Mr. Joseph Nyamane.

Our client informs us that on or about the 8th December, 1987 your Messrs. Michael and Eddie took his grinder for repairs, but till now he hasn't got back his grinder. He is always informed by you that some spares for the grinder are with Mr. Eddie in Ladybrand.

That being the case, our client's instructions are to demand from you, as we hereby do, an immediate return of our client's grinder which must be thoroughly repaired and in good working conditions, failing which you must repay our client his M400-00 paid to you as a deposit for the said repairs, together with an amount of M12,000-00 which is the amount at which the

grinder was bought.

> The above amounts, together with our 10% collection commission to be calculated from the total of the above amounts as well as M10-00 being for this letter of demand should be paid at our offices within seven (7) days from the date hereof failing which summons will be issued against you without any further notice.
>
> Yours faithfully,
>
> M. TAU (Miss)
> N. MPHALANE & COMPANY"

According to Plaintiff's evidence, before it was removed from his home, he had been using the hammermill for profit and earned an income of M70 a day. Although no record of any kind was produced to substantiate this evidence, Plaintiff testified that, at the time of instituting the preesent proceedings, he had been deprived of the use of the hammermill for 595 days. He, consequently, suffered damages, for which he held defendant liable to him, in the amount of M41,650 calculated at the rate of M70 a day for 595 days. This is, however, in conflict with the declarations to the summons, as amplified by further particulars, where Plaintiff alleged that he had been deprived of the use of the hammermill for 596 days and consequently lost earnings in the amount of M41,560 calculated at the rate of M70 per day for 596 days.

Notwithstanding demand, defendant refused and/or neglected to pay the amount of M41,650, return the hammermill or, alternatively, pay the amount of M12,000, being the cost of the hammermill, together with the M400 deposit. Wherefor, Plaintiff asked for relief against the defendant, as prayed in the summons.

Plaintiff's evidence is, in my finding, too vague and contradictory to serve as proof of the question in issue, viz. the claim for damages. I entirely agree with the decision of Boshoff J. in Ruto Flour Mills (Pty) Ltd Adelson (2) 1958(4) S.A. 307 where at page 309 the learned judge said:

> "if it be a fact that it is too vague and contradictory to serve as proof of the question in issue - (Shenker Bros. v. Bester, 1952(3) S.A.664 (A.D.) at p.670 - then it would be evidence on which a reasonable man would not find, and the court would be perfectly justified in granting absolution from the instance at the close of the case for the Plaintiff".

Assuming the correctness of my finding that Plaintiff's evidence is too vague and contradictory to serve as proof of the question in issue, it must be accepted that, on the authority of the above cited passage from the decision in Ruto Flour Mills (pty) Ltd v. Adelson(2), supra, the court is perfectly justified to grant absolution from the instance.

In the premises, I would grant absolution from the instance, with costs to the defendant.

B.K. MOLAI

JUDGE

12th December, 1995.

For Plaintiff : Mr. Mphalane

For Defendant : Mr. Buys.