IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) No. 6/2007

CIV/APN/56/2004
In the matter between:

MOONLITE TAXIS **APPELLANT**

and

PHOMOLO SEBOKA **RESPONDENT**

Heard : 16 October 2007
Delivered : 24 October 2007

CORAM:
GROSSKOPF, JA
MELUNSKY, JA
NOMNGCONGO, JA

Summary

Review of proceedings in the Magistrate's court. Court a quo allowed application for review on the ground that the Magistrate misdirected herself in granting default judgment for the amount claimed (M16 800,00) while the appellant had allegedly proved a debt of M22500,00. Held on appeal that there was no misdirection on the part of the Magistrate and that the court a quo erred in setting aside the judgment of the Magistrate. The court a quo further erred in finding that there was a difference between the amount claimed and the amount proved by the appellant as the amounts were in fact identical.

JUDGMENT

GROSSKOPF, JA

[1] On 15 June 2001 the appellant issued summons in the Magistrate's court for the district of Maseru against the respondent as defendant. The appellant claimed M16800,00 in respect of arrear rentals due and payable by the respondent to the appellant, as well as interest and costs. The respondent failed to enter appearance to defend the action and the appellant obtained judgment by default on 26 June 2001. For reasons which do not appear from the record the respondent only applied in October 2002 to have the judgment set aside. He alleged in his founding affidavit in that application that he never received the summons, yet in the papers before us there is a return of service which shows that the summons was served on the respondent personally

on 18 June 2001. Be that as it may, the Magistrate eventually rescinded the judgment in May 2003 and granted the respondent leave to defend the action.

[2] The respondent alleges in his founding affidavit in the present application that his former counsel of record (who appears to have been Mr. Sethathi) informed him at the time that the matter was "settled finally" and that he "would never hear about it again". In spite of that alleged assurance the matter nevertheless proceeded. On 5 June 2003 a notice to file a plea was served by the appellant's attorney on Mr. Sethathi's chambers, whereupon the respondent filed a plea on 18 June 2003. The respondent denied in the plea that he was indebted to the appellant or that he had entered into any rental agreement with the appellant. No mention of

any alleged settlement was however made in the plea, nor did the appellant, in his affidavit, set out any of the terms thereof.

[3] The appellant's attorney thereafter, and on 20 June 2007, served a notice of set down on Mr. Sethathi's chambers informing the respondent that the matter has been set down for hearing on 11 November 2003 at 09:30. The appellant and his counsel waited until 10:30 on 11 November 2003 for the respondent and his counsel to arrive but there was no appearance for the respondent and the case proceeded in the absence of the respondent and his counsel. The appellant led evidence and handed in documents which proved its case. The Magistrate entered judgment as claimed on the same day in favour of the appellant. This was followed by a writ

of execution issued on 13 November 2003 and served on the respondent on 29 January 2004 by the Messenger of the court who attached two motor vehicles of the respondent.

[4] The respondent alleges that he was never informed that the appellant's case was set down for hearing on 11 November 2003, or that the case was proceeding at all. The first he knew of the judgment was when the Messenger served the writ of execution upon him on 29 January 2004. This in turn led to the respondent's present application on 4 February 2004. The respondent did not however follow the normal procedure and seek an order rescinding the Magistrate's judgment by default but decided rather to bring an urgent ex parte review application in the court a quo. The respondent cited

the appellant as first respondent, the Magistrate, Mrs. Mokuena, as second respondent, the deputy sheriff, Mr. Khati, as third respondent, and the Attorney-General as fourth respondent. The respondent sought the following order in his notice of motion:

> 1. That a rule nisi do hereby [issue] calling upon the Respondents herein to show cause if any on a date to be determined by this Honourable Court why:-
>
> (a) the ordinary periods of notice shall not be dispensed with due to the urgency of the matter.
>
> (b) Further execution of the warrant of execution issued on the 2nd day of January 2004 in CC562/01 shall not be stayed pending the finalisation hereof.
>
> (c) The Second Respondent herein shall not be directed to return forthwith to the Applicant; the Applicant's motor vehicles mentioned in paragraph 10 of the founding affidavit for safekeeping pending the finalisation hereof.
>
> (d) the decision of the Second Respondent herein of the 11th November 2003 shall not be reviewed, corrected and/or set

aside.

(e) the Applicant herein shall not be granted leave to defend the main action in CC562/2001.

(f) the First Respondent herein shall not be directed to pay the costs hereof on the attorney and client scale, and the other Respondent only in the event of opposition.

(g) that prayers 1 (a) (b) and (c) operate with immediate effect as temporary interdicts."

[5] It seems to me that the respondent primarily sought to review and set aside the decision of the Magistrate. Judgment in that respect would in the ordinary course have led to the granting of the further relief sought, i.e. the stay of the further execution of the writ of execution and a return to the respondent of his attached motor vehicles. The court a quo actually dealt with the matter on the basis of review proceedings and concluded that the application for review succeeds, that the Magistrate's decision be set aside and that the respondent be

granted leave to defend.

[6] I am of the view that the court a quo erred in granting the review application and in setting aside the Magistrate's decision. We are dealing here with a review of the Magistrate's decision and not with an appeal. There is a clear distinction between an appeal and a review, as is explained by Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed., 932:

> "The reason for bringing proceedings under review or appeal is usually the same, sc to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked."

See also Nkuebe Khoeli v Hertig Mapeshoane 1963-

1966 HCTLR 127 at 128 C-D; and Judicial Service Commission and Others v Chobokoane 2000-2004 LAC 859, where Steyn P remarked as follows at 864 A-B:

> "It should be borne in mind that, when exercising review functions, the court is 'concerned with the legality of the decision, not its merits' (Baxter, Administrative Law, 306)."

[7] The only ground for review on which the respondent in this case relied relates to the merits and not to the legality of the Magistrate's decision. On this ground alone the proceedings in the court a quo appear to have been irregular. The respondent pointed out in his founding affidavit that the appellant's evidence in the Magistrate's court disclosed a debt of M22 500,00 which is much higher than the sum of M16 800,00 claimed in the summons. The respondent alleged that there is "no

plausible reason on record as to why judgment was granted as prayed in the summons". According to the respondent this amounted to a "gross misdirection" on the part of the Magistrate. The learned judge in the court a quo erred in concluding that this was a proper ground for setting aside the Magistrate's judgment on review. It certainly is not a proper ground. The judgment of the court a quo on this crucial aspect of the case reads as follows:

> "First Respondent [appellant] alleged in his summons before the Magistrate's Court, that he was owed a three months rental for 5 vehicles by the applicant at a reduced charge of M1,500.00 per vehicle. He has however claimed an amount of M16,800 in the summons, for those five vehicles not M22,500 which would be M1,500 times 5 vehicles by three months. There has been no explanation in the papers filed or in his evidence concerning that huge difference. This alone calls for intervention by this Court on review. …….. In casu the Magistrate granted default judgment on the amount not proved by the facts from what first Respondent [appellant] said in evidence."

[8] There is no reason why a litigant cannot claim less than what he is able to prove and a judgment for such lesser amount would not be open to review or appeal. The finding of the court a quo that "there has been no explanation in the papers filed or in his [the appellant's] evidence concerning that huge difference" is in any event not correct. It is also incorrect to hold that the default judgment was for an amount not proved by the appellant. Mr. Thuso Green, who testified on behalf of the appellant, explained that if a vehicle could not operate for a full month payment was charged for the number of days on which it actually operated. Mr. Green handed in the invoices for the months of August, September and October 2000 and these invoices formed part of the Magistrate's court record before us. These invoices clearly show that the amount due for August

2000 was M7 500,00, while the invoice for September 2000 was for M7 300 after 4 days were deducted. The invoice for October 2000 showed a debit of only M2 000,00 for 10 days less 7 days in respect of certain vehicles. The total debt in respect of these three months therefore amounted to M16 800,00, being the amount claimed in the summons and granted by the Magistrate. The amount of M22 500,00 was therefore wrongly calculated by the court a quo.

[9] It was submitted by the respondent that one of the grounds upon which proceedings can be set aside on review according to Becks Theory and Principles of Pleading in Civil Actions, 5th ed., at 326 is –

"The admission of evidence which should not have been

admitted."

It has not been the respondent's case however that the Magistrate admitted any evidence which should not have been admitted.

[10] The respondent advanced no grounds to establish that the attachment was invalid and we therefore need say nothing further in this respect.

[11] It follows in view of the aforegoing that the appeal should be upheld. The following order is accordingly made:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and the following order is substituted therefore:

"The application is dismissed with costs."

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F.H. GROSSKOPF
JUDGE OF APPEAL

I agree:

_____

L.S. MELUNSKY
JUDGE OF APPEAL

I agree:

_____

T. NOMNGCONGO
JUDGE OF APPEAL

For the Appellant : Adv M Mphaololi
For the Respondent : Adv H Nathane