

IN THE HIGH COURT OF LESOTHO

In the matter between:

SELLO BUTI

Plaintiff

and

MALUTI EARTH MOVING EQUIPMENT SERVICES
(PTY) LIMITED

Defendant

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice
J.L. Kheola on the 22nd day of April, 1996.

In this action the plaintiff claims:-

- (a) Judgment in the sum of R63,000-00
- (b) Interest thereon at the rate of 18% a
tempore morae;
- (c) Costs of suit;
- (d) Further and/or alternative relief.

In his declaration the plaintiff alleges that on or about the 14th September, 1989 the parties hereto entered into a verbal agreement whereby defendant was to repair three rollers namely W5083, W5084 and W5086 the property of plaintiff which he had bought from the Labour Construction Unit of the Lesotho Government. The said rollers were delivered to the defendant on the same day.

The rollers have since been repaired and the defendant has without the knowledge and consent of the plaintiff sold the said rollers some time in or about January, 1990.

At all material times the plaintiff was willing to pay for the costs of the said repairs and has tendered payment of the sum of R12,000-00 as the costs of such repairs. At the time the said rollers were sold their fair market value was R25,000-00 for each. The defendant is indebted to the plaintiff in the sum of R63,000-00 being the fair market value of the said rollers less the costs of repairs calculated as follows:

Market value of repairs	=	M75,000-00
less costs of repairs	=	<u>12,000-00</u>
Total		M63,000-00

In its plea the defendant alleges that the contract between the parties was that the defendant would purchase three Bomag rollers, repair them and thereafter sell them and share profit/loss made equally between them. Defendant paid M3,400-00 for the three Bomag rollers aforesaid. Thereafter repaired them and sold them in terms of the aforesaid verbal agreement. The profit made was M6,110-53. Accordingly plaintiff's share of the profit was M3,055-26. The rollers were sold with a six months' guarantee and the net profit will only become known at the end of the guarantee period.

The plaintiff testified that in 1989 he worked for the defendant as a storeman. Defendant had a number of machinery which it hired out to its customers. It also repaired the

machinery for its customers. In 1989 he tendered for certain rollers which were sold by the Labour Construction Unit. His tender was successful (See exhibit "A"). It is a letter from the Manager of Labour Construction Unit (L.C.U.) informing the plaintiff that his tender had been successful and asking for payment of the three rollers. He says that he paid an amount of M3,400-00 for the three rollers. (See Exhibit "C"). It purports to be a receipt issued by L..C.U. on the 14th September, 1989.

The plaintiff says that he took possession of the rollers and took them to the premises of the defendant so that they could be repaired. By December, 1989 the repairs had been completed. After the christmas holidays he returned to work and noticed that the rollers were not there. He asked Mr. Booysen, the Managing Director of the defendant, the whereabouts of the rollers and asked for a quotation. Mr. Booysen expressed his surprise and asked the plaintiff which rollers he was talking about and told him that he had no rollers there. He threatened him with death and warned him never to go there.

The plaintiff estimates that the costs of repair was M5,000-00 for each roller. He estimates that he would have sold them for M25,000-00 each. He eventually discovered that the rollers were sold by the defendant to a company known as Dumez. He is now tendering the costs of repairs.

Under cross-examination the plaintiff denied that on the 14th September, 1989 the defendant gave him a cheque for M3,400-00

as payment for the rollers at L.C.U. He denied that when he received Exhibit "A" he came to Booysen and asked that the defendant should pay for the rollers so that they could become co-owners with him; that the defendant should repair them, sell them and share the profit with him. He said that one of the rollers did not have an engine. The price of a new engine was M3,000-00. He admitted that a quotation is usually issued before the repairs are started. However in the present case the quotation was demanded after the repairs were completed because when he asked for it before the repairs were started, the defendant said the rollers had not been opened, apparently to assess the costs of repairs. He admits that he did not claim the rollers immediately after they were repaired; the reason being that there were too many bosses at the time and his bosses were too busy at the time. He denied that it was a false excuse.

D.W.1 Hendrick Booysen testified that he is the Director of the defendant. He has known the plaintiff for about five to six years. He (plaintiff) was employed as a salesman. In September, 1989 he told the defendant that he had won a tender at L.C.U. for the rollers. At that time he did not have the money to pay for them. He asked that the defendant should pay for the rollers and become co-owner then repair them and sell them. They would then share the profits after deducting the repair costs. The defendant had the facilities and manpower to repair the rollers because it specialised in the repair and sale of heavy machinery. It accepted the offer made by the plaintiff. A cheque for the amount of M3,400-00 was made out and given to the plaintiff to

go and pay for the rollers.

Thereafter the rollers were collected from the premises of L.C.U. with the defendant's truck. They were in different conditions - one had no engine, another had no drum and a lot of parts were missing from the three of them. The parts were obtained from Johannesburg, Bloemfontein and locally. It took about two and a half months to repair the rollers. They were sold to Dumez International for M69,000-00 and were delivered to Dumez at Katse with the defendant's truck. Dumez had been introduced by a certain K. who was to get commission fee. The plaintiff did not ask for quotation because as a result of the verbal agreement mentioned above the rollers were jointly owned by the plaintiff and the defendant.

The misunderstanding between the parties started after the christmas holidays in January, 1990. All the staff punctually reported for duty except the plaintiff. He said that he had his own business to attend to before coming to the defendant's work. Booysen says that he took exception to that and told him that if he behaves like that, then the company shall have to employ another person in his place. The encounter was not a friendly one and did not last a long time. Later that morning the plaintiff came to him (Booyesen) and demand his rollers. He asked him 'what rollers'.

Booyesen handed in a bunch of invoices showing the prices of various parts which were used in the repair of the rollers.

(Exhibit "D" collectively). The total amount is M26,528-65 according to my calculation. However the defendant's figure is M24,020-61.

D.W. 2 S. Bosch testified that he was employed by the defendant as an accountant. He confirmed the evidence of D.W.1. He identified exhibit "D" and issued a cheque and gave it to the plaintiff for payment of the price of the three rollers. That cheque was apparently never paid because the defendant's account was never debited with that amount of M3,400-00.

The first issue that I wish to dispose of is Exhibit "C" which purports to be a receipt issued by the Ministry of Works L.C.U. to the plaintiff for the amount of M3,400-00 as purchase price of the rollers in question. It is unsigned. It does not show whether payment was by cash or by cheque. It is receipt No.138442 dated the 14th September, 1989. A receipt can be regarded as an authentic document if it is signed by a person who is its author. The date stamp on Exhibit "C" has no evidential weight because a person who stamped it has not given evidence.

I find it very strange that the plaintiff has decided not to call any person from the Ministry of Works L.C.U. to come and identify the receipt in question. Even if its author could not be identified by the present staff at L.C.U. the accountant or the Treasury could identify it as coming from a receipt book issued to L.C.U. At the Treasury there is a register known as the nature of form register in which all Government receipt books

are recorded. It also shows to which Ministry or Department a particular book has been issued.

Another major defect of the receipt in question is that it does not show whether payment was by cash or by cheque. We do not know how such payment was made, if it was ever made at all. I come to the conclusion that this unsigned document which purports to be a receipt issued by L.C.U is not a receipt at all. I shall decide this case on the basis that both plaintiff and defendant paid nothing for the rollers in question. If I may be allowed to speculate; it may be the plaintiff used the defendant's cheque to pay for the rollers. But because of the robbery alleged to have taken place at the relevant time at L.C.U. the cheque was taken together with the money which was stolen. It was never presented for payment by the robbers.

The plaintiff has failed to prove that Exhibit "C" is a genuine and an authentic document issued by L.C.U. in payment for the rollers in question.

The second issue is whether the plaintiff is telling the truth that he bought the rollers with his own money and asked the defendant to repair them for him. This is most unlikely. He has admitted that the usual and normal procedure is that when machinery such as the rollers in question, is to be repaired by the defendant, a quotation is issued before the work of repairing is started. The plaintiff cannot allow defendant to start repairs before the quotation is provided. The price may be so high that he cannot afford it. In which case he would take his

property to another firm.

The defendant would also not start the repairs before it had been authorised to go ahead by the owner. Without such authorisation there would be no contract. There would be no lien over such property. It is improbable that the defendant would take such a chance.

The defendant used its own truck to collect the rollers from the premises of L.C.U. The plaintiff does not say that he hired the truck from the defendant and at what price. The probability is that the defendant collected the rollers from the premises of L.C.U. with its own truck because it was a joint owner and did not expect any payment from the plaintiff.

Mr. Pheko, attorney for the plaintiff, submitted that it is improbable that the defendant could buy the rollers and repair them while the plaintiff did nothing except to share in the profits.

On the other hand **Mr. Moiloa**, attorney for the defendant, submitted that the plaintiff played a major role in the tender. That role was rewarded by a fifty per cent share in the profits.

I tend to agree with **Mr. Moiloa**. The fact that the plaintiff's tender was accepted meant a very profitable business for the defendant:

In its further particulars to defendant's plea the defendant has tabulated the costs it incurred in the repair of the rollers and other expenses.

The first item is the purchase price of M3,400-00. I have already dismissed this item on the ground that its cheque was never cashed. The plaintiff has also failed to prove that he paid anything for the rollers. The parties got the rollers free of charge.

The second item is transport of the rollers by crane truck from the premises of L.C.U. which is M400-00. That item is allowed.

The third item is parts bought for cash - M4,500-00. This item is not allowed because it has not been proved.

The fourth item is parts used in repairs - M24,020-61. This item is allowed because invoices have been produced in evidence.

The fifth item is labour - M10,800-00. No job cards were produced to prove this item. There is no doubt that the repairs were done. I award M7,000-00 being for 100 hours at the rate of M70-00 per hour.

The sixth item is transport of rollers to Katse - M1,150-00. That item is allowed as being reasonable.

The seventh item is Railage costs for delivery of parts ex their creditors - M590-00. This item is allowed because it is included in Exhibit "D".

The eighth item is consumable materials, duco lubricant etc M680-00. This item is allowed as being reasonable.

The ninth item is commission paid to salesman - M6,000-00. This item is allowed as being a reasonable percentage of the sale price of M69,000-00.

The tenth item is interest on capital invested for purchasing and repairing the rollers - M3,105-00. This item is allowed as being reasonable because the amount involved was large.

The eleventh item is for telephone, fax and administration - M650-00.

The last item is for costs incurred to repair defects on rollers during warranty period - M7,593-86. The invoices I have used show an amount of M5,697-55. I used all the invoices dated after the delivery of the rollers.

I have found that all costs incurred by the defendant amount to M49,193-16. A number of items shown by the defendant in its further particulars to the plea were either totally rejected or greatly reduced. The defendant is or was a fairly big company

but was apparently not keeping its records in a satisfactory manner. It was unable to produce job cards which would have assisted the Court to determine the number of hours spent in the repairs of the rollers. I arbitrarily fixed the hours at hundred hours at the rate of M70-00 per hour.

Defendant was also unable to prove cash payment for some parts. As far as I am aware every cent paid out to buy anything for the company must be recorded somewhere.

In the result I have come to the conclusion that the plaintiff has proved his case to the extent that because his tender was accepted he became joint owner of the rollers in question. In terms of the verbal agreement entered into by the parties he is entitled to 50% of the net profit which is purchase price minus the costs incurred by the defendant i.e. M69,000-00 minus M49,193-16 = M19,806-84, 50% of which is M9,903-42.

In the result judgment is entered for plaintiff in the amount of M9,903-42, with interest and costs as prayed.


J.L. KHEOLA
 CHIEF JUSTICE

22nd April, 1996

For Plaintiff - Mr. Pheko
 For Defendant - Mr. Moiloa