

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Division)**

In the matter between:

**CONMILLA TRADING (PTY) LTD**

**PLAINTIFF**

AND

**MATHATO MONYAKE**

**1<sup>ST</sup> DEFENDANT**

**KALI MONYANE**

**2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Coram : L. Chaka-Makhooane J**

**Date of Hearing : 6<sup>th</sup> August, 2013**

**Date of Judgment : 2<sup>nd</sup> April, 2019**

**SUMMARY**

*Plaintiff having entered into a hire agreement with defendants through misrepresentation – Defendants denying any misrepresentation – Defendants having failed to prove that they are not liable – The court finding that defendants liable for payment of the claim against them on a balance of probabilities.*

## ANNOTATIONS

### CITED CASES

1. Lebakeng v Co-op Lesotho Limited (CIV/T/172/80).
2. Ruto Flour Mills (Pty) Ltd v Moriates & Another 1957 (3) S.A 113 (T).
3. The liquidator of Lesotho Bank v Tamaku Michael Molefe Nkalai CCT.65/07 (unreported).

### BOOKS

1. Schulze H, Kelbrick, T Manamela, Stoop, E Manamela, E. Hunter, B Masuku, C Stoop, 2015 Edition General Principles of Commercial Law, 8<sup>th</sup> Edition, Juta.
2. Van der Merwe et al (3<sup>rd</sup> Edition), 2007, Contract: General Principles.

[1] This is a claim by the plaintiff against the defendants for an amount of two hundred and ten thousand six hundred and sixty one Maloti (M210, 661.00), being the cost of catering equipment hired out to the defendants by the plaintiff, for a period of one hundred and forty one (141) days.

[2] The plaintiff is a company whose main business is hiring out catering equipment. It is the plaintiff's case that, on the 14<sup>th</sup> May, 2011 the defendants hired catering equipment comprising of one hundred fifty (150) cups, one hundred and fifty (150) saucers, four (4) trifle dishes, one hundred and fifty (150) table knives, one hundred and fifty (150) table forks, one hundred and twenty (120) teaspoons and four (4) serving spoons from the plaintiff.

- [3] As part of the oral agreement the catering equipment was to be hired out to the defendants from the 14<sup>th</sup> May, 2011 to the 16<sup>th</sup> May, 2011.
- [4] It is **Sister (“Sr”) Mokhoros** (PW1) testimony that, on the 14<sup>th</sup> May, 2011 she was representing the plaintiff when the catering equipment was hired out to the defendants. The 2<sup>nd</sup> defendant and PW3 are alleged to be the ones who came to hire the equipment from PW2. According to the witness, DW2 was the one who paid for the equipment, while PW3 **Mrs Hesisi**, presented herself as **Lineo Peete**. According to PW1, the equipment was never returned to the plaintiff company.
- [5] The defendants having failed to return the equipment on the date agreed upon, they kept it in their possession for a total of one hundred and forty one (141) days. The matter was reported to the police. The catering equipment was later discovered and identified by PW1 at a wedding function held at the Emmanuel Hostel premises, the same venue where the plaintiff also operates its business from. The police were called and the defendants were arrested and charged with theft. They were eventually found guilty and were sentenced. The property was returned to the plaintiff by an order of the magistrate’s court.
- [6] ‘**Maphatela Heisi** (PW3) testified that, she was requested by the 1<sup>st</sup> defendant in the presence of the 2<sup>nd</sup> defendant to hold herself out as **Lineo Peete**, when she accompanied the 2<sup>nd</sup> defendant to the offices of the plaintiff. Her assignment was to hire catering equipment from the plaintiff. She testified that she was willing to commit the alleged misrepresentation, because she wanted to assist the 1<sup>st</sup> defendant because, on a previous

occasion the 1<sup>st</sup> defendant had failed to bring back the stuff she had hired from the plaintiff and she was afraid that she would not be able to obtain another hire – agreement from the plaintiff.

- [7] It is the defendant's case that they are in the business of food catering and on many occasions they have entered into an agreement with the plaintiff to hire catering equipment. The defendants claim that they have always returned such equipment.
- [8] The defendants further testified that they amassed catering equipment by buying from different places such as Table Charm, from shops and from different individuals, including one called **Lineo Peete**, who is a hawker who had a stall next to a place called Manonyane, at the Bus Stop area. At one point they had purchased used equipment from the said **Lineo Peete**.
- [9] DW1 **Mathato Monyake's** testimony was that sometime in October, 2011 while they were catering at a wedding held at the Emmanuel Hostel, a place from where the plaintiff operates its business, they were approached by PW1 one directors of the plaintiff. PW1 identified some of the utensils they were using as those similar to the ones that had been hired by one **Lineo Peete**, who had not brought them back.
- [10] According to the defendants, PW3 was known to them and she had assisted them in cooking, however, they denied ever having sent her to hire any equipment at the plaintiff company under the names of **Lineo Peete**. DW2 denied going to the plaintiff's offices with PW3 and ever having to pay for

catering equipment that had been hired by her, while she held herself as **Lineo Peete**.

[11] **Mr Sakoane** Counsel for the plaintiff submitted that the general principle is that an act upon instruction is considered to be the act of the person who gives the instruction. The principal who instructs a misrepresenter to make misrepresentations will be liable for damages in full.<sup>1</sup>

[12] **Mr Sakoane** further argued that the plaintiff's evidence that the defendant's contracted with the plaintiff to hire out catering equipment, is more probable than the defendants' bare denial. **Heisi PW3**, misrepresented herself at the request of the 1<sup>st</sup> defendant that she was **Lineo Peete** so that the 1<sup>st</sup> defendant could gain access to the plaintiff's catering equipment. The defendants' defence that they had bought the catering equipment from **Lineo Peete** was rebutted by the evidence of **PW3**, who interestingly was an accomplice witness in the criminal case. The defendants were found in possession of the same catering equipment that **Lineo Peete** had hired. Lastly, they had pleaded guilty to the charge of theft in the magistrate's court and were found guilty as charged. According to **Mr Sakoane** the two (2) defendants' demeanor was unimpressive and they were unreliable witnesses.

[13] **Mr Sakoane** further submitted that the defendants are liable for the payment of the sum of two hundred and ten thousand and six hundred and sixty one Maloti (M210 661.00) for one hundred and forty one (141) days that the equipment was their possession.

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<sup>1</sup> Contract: General Principles, Van der Merwe et al 3<sup>rd</sup> Edition, 2007, at page 258.

[14] In her submission **Ms Molapo** Counsel for the defendants argued that there could not have been a contract between the plaintiff and the defendants because there was no relationship between **Heisi** and the defendants, for her to have concluded a valid contract on their behalf. The purported agreement between plaintiff and **Heisi** was not of an agent, neither was she an employer of the defendants. Whatever agreement **Heisi** got into with the plaintiff, she was on her own frolic.

[15] According to **Ms Molapo**, since the defendants never requested **Heisi** to contract on their behalf, neither did they (DW1 in particular), request PW3 to hold herself out as **Lineo Peete**, thereby misrepresenting herself. Counsel argued that it is most improbable that the defendants would knowingly misrepresent themselves and then go to the business premises of the plaintiff using the same stolen items that it was alleged were stolen by them, under false pretences.

[16] It is common cause that the defendants were arrested at a wedding function while they were catering. It is also common cause that the plaintiff (through PW1) identified the catering equipment that the defendants were using at that function, as similar to the one the plaintiff had lost through the defendants and one **Lineo Peete**. It is further common cause that criminal charges of theft were preferred against the defendants and they had pleaded guilty and were indeed found guilty.

[17] While the plaintiff insists that the defendants had taken its catering equipment under false presences by using PW3 to misrepresent herself as

**Lineo Peete**, the defendants claim to have bought the catering equipment they were arrested while using, from a hawker called **Lineo Peete**.

[18] It is important to recall the evidence of two (2) witnesses for the plaintiff and this is the evidence of the PW2, **Sr Mokhorro** and PW3, **Heisi**. PW2's evidence was that **Heisi** entered into the hire agreement with the plaintiff and was the one on duty that day. PW2 gave out the forms and physically gave out the equipment to **Heisi**, who at the time called herself **Lineo Peete**. Clearly PW2 could not fabricate all that evidence for no apparent reason. Her evidence was not only believable but it was also probable. She was a credible witness.

[19] Next was the evidence of PW3 **Heisi**. She was an accomplice witness in the criminal case in the magistrate's court. She also gave evidence on behalf of the plaintiff *in casu*. She testified that she was asked by DW1 to hold herself out as **Lineo Peete** when she hired the catering equipment from the plaintiff and she confirmed that she did so. She further testified that DW2 was present and he is the one who paid for the equipment.

[20] Even though the defendants deny any liability to the plaintiff's claim, they were unable to shake the evidence, of all three (3) plaintiff's witnesses. PW2 was the one who concluded the hire agreement with PW3 and DW2 who was with PW3 at the plaintiff's offices when the catering equipment was hired. The 1<sup>st</sup> defendant cannot absolve herself from liability either, because of the evidence of PW3, that she was the one who procured PW3 to make representations to the plaintiff and that the representation was for PW3 to hire catering equipment from the plaintiff as **Lineo Peete**. Clearly DW1

intended the plaintiff to act upon that representation, as such the plaintiff was induced into contracting with PW3. The defendant knew that if the plaintiff had known that it was actually contracting with her, it would not have hired out the said equipment. The plaintiff was as a result induced into contract with the representor.<sup>2</sup>

[21] The defendants' bare denial unfortunately has not persuaded the court that they are not liable to pay the plaintiff's claim. The court has also considered the fact that the defendants pleaded guilty to the charge of theft on their own volition and they were found guilty.<sup>3</sup>

[22] In the circumstances I find that on a balance of probabilities, the defendants are liable for payment of the sum of two hundred and ten thousand six hundred and sixty one Maloti (M210, 661.00) to the plaintiff, as damages for the hiring costs of the catering equipment, for a period of one hundred and forty one (141) days, together with the two hundred and forty eight Maloti (M248.00) for replacement costs.

[23] The following order is therefore made:

- a) The 1<sup>st</sup> and 2<sup>nd</sup> defendants are liable jointly and severally, the one paying the other to be absolved for the payment of the amount of two hundred and ten thousand six hundred and sixty one Maloti (M210, 661.00).

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<sup>2</sup> See Ruto Flour Mills (Pty) Ltd v Moriates & Another 1957 (3) SA 113 T.

<sup>3</sup> Lebakeng v Co-op Lesotho Ltd CIV/T/172/80.

- b) Interest on the amount at the rate of 18.5% per annum from the 16<sup>th</sup> May, 2011 to the date of payment.
- c) Costs of suit.
- d) This order is granted in the main and not in the alternative.

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**L. CHAKA-MAKHOOANE**  
**JUDGE**

For the Applicant : **Mr K D Sakoane**  
For the Defendants : **Ms N S Molapo**