

IN THE HIGH COURT OF LESOTHO

In the matter of :

JOAQUIM SILVA FREITAS

Plaintiff

V

JARDAN DE JARDIN  
JOAD VELHO REGO

1st Defendant  
2nd Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng  
on the 29th day of October, 1982.

The plaintiff sues the two defendants for an amount of twenty thousand maluti and interest at a stated rate on the plaintiff's Declaration. This was a loan which both defendants undertook to repay to the plaintiff. The two defendants, simply deny the existence of such a loan between them and the plaintiff.

In his evidence in brief, the plaintiff deposed that he and the defendants were the best of friends. He often visited at their business premises. Then the defendants requested a loan of an amount of twenty thousand maluti (20,000.00) and promised to repay it within a matter of days. The reason for such a big loan was that the defendants wished to purchase, from an unknown African gentlemen, a number of Kruger pounds. The plaintiff, like a good friend he says he was of the defendants, agreed but then stated that he did not have such a large amount of cash money on his person nor did he have it at home. He promised to draw money from the bank the following day and would then be in a position to

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grant the loan as requested. He charged no interest on this huge loan.

The plaintiff also testified that he had a cheque cashed at a Bank the following day. He was with Mr. Sebatana who is his part-time mechanic. It was in bundles of ten maluti notes of about a hundred maluti each. Thereafter it was placed in an ordinary off-whitish Bank bag which are provided free to customers. Plaintiff got off and took the "money" with him and went round the defendant's premises. There he delivered the required cash which was counted and placed in a small safe. Plaintiff then left to join Sebatana in his car outside. They drove off. Plaintiff is amply corroborated by this independent witnesses in his evidence as briefly outlined above.

The promised days passed and nothing happened. He then inquired when payment would be made. There began a saga of intrigue which culminated with court actions, first in the subordinate court and secondly in this Court. Trucks were either loaned or held in security for payment of a loan; false arrests were, in the process, made, to mention but a few of the vile things that occurred after the demand of payment.

The plaintiff says that later the defendant agreed to liquidate the payment of the loan by instalments of M2,000.00 per month. A postdated cheque was issued payable on 30/9/80 but on presentation it was returned with the following inscription on the face of it: "Refer to drawer" which is a Banking language of saying that there are no sufficient funds to meet the payment of that cheque. I am referring to "Exh. 'B'". The defendants say this cheque was a security of a loan of an equivalent amount the first defendant had loaned from the plaintiff when he proceeded to Portugal on

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holiday. It had nothing to do with a loan of M20,000.00 which they know nothing about. It will be seen shortly when we deal with the demeanor of witnesses that the defendants had previously made sworn statements in which they had denied having borrowed any sum of money at all from the plaintiff.

The defendants say that the plaintiff wished to buy Kruger pounds and lost a huge sum of M40,000.00. As usual, he was swindled during broad daylight and all the parties were present. However, the defendants could remember none of these characters. Indeed, the chief negotiator was simply referred to as the strange gentleman.

The second defendant called Mr. Simon Lipitsi as his witness. This man is a salesman in his business. He was engaged as such on that particular day when the plaintiff arrived at the shop to bring the money. He says he went out to see who was accompanying the plaintiff but found he was alone. But it is common cause that Sebatana was in the car. He gave the colour of the plaintiff's car as green whereas it was white. The plaintiff presently owns a green coloured car! He saw the plaintiff enter the door carrying a leather <sup>bag</sup> but everybody agrees that the plaintiff carried the usual off-white Bank bag in which money was contained. He was generally not an impressive witness who lied deliberately and unshamedly. This was a witness who had been brought patently to bolster up the story of the defendants which in the words of the plaintiff's counsel, was becoming "weaker and weaker".

The two defendants attested to Affidavits in Proceedings in the subordinate court in which they catagorically denied ever having borrowed money whatsoever from the plaintiff at any time. The second defendant ultimately found himself

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having to say that he just signed the Affidavit without knowing what was in it. Both defendants were greatly shocked by the production of "Exh.B" because I think when the affidavits were made it was thought that it had somehow disappeared. When it appeared dramatically in Court, it had to be explained and that is where, in my view, a web of lies began such as that "Exh.B" was meant to be a security. Who ever heard of a cheque being an instrument for security? A cheque is intended to be paid into the Bank when it falls due.

The second defendant did not deny that there was discussion regarding a building project. Why would the plaintiff be interested in discussing such a venture with him for. The proposal had been made, in my view, as that the second defendant should undertake such a project and with the proceeds repay the loan.

When the first defendant returned from a trip overseas he found a handsome profit of M6,000.00 awaiting him. This was a profit over a matter of about six weeks. The Books of the Bussiness were requested and produced. I saw them. They were not Books of Account from which any intelligible information could be gathered. They were utterly useless. If that Balance Sheet (Exh.F) was a Balance Sheet which was submitted to the Receiver of Revenue, somebody is telling a lie somewhere on the defendants' side or was not given all the necessary information.

First defendant now alleges that he subsequently paid the plaintiff a sum of M2,000.00, not directly but through his mechanic, one Moreira da Silvass. However, he never insisted upon a receipt or some document to the effect that a cash amount of M2,000.00 had been received by Moreira da Silvass. This gentleman has denied the existence of such a transaction. I believe him. I saw him. He appeared a truthful witness to me.

/The defendant

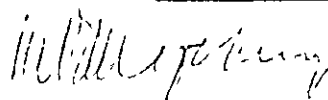
The defendants were both poor witnesses and were obviously fabricating and each was forced to concede that they told untruths either here in this Court or in the court below. Each one of them is caught under a web of lies connected with this loan which is advanced as a reason for making this payment. (i.e. Exh.B). This case has demonstrated clearly to me that the second defendant is a man who will say anything on Oath or otherwise to advance what he thinks is in the best interest of his case, regardless of what it is and regardless of the truth. And the same can be said of the first Defendant because he did know what was in the Affidavit. He knew what was in the Affidavit and he disclaimed any previous loan transaction or any loan with the plaintiff at all. The final question to be answered is: why did the defendants make a payment of M2,000.00? A person does not make payments for nothing. Having rejected the web of lies surrounding the explanation of this cheque (Exh.B), there remains one reasonable inference namely that the defendants were liquidating a debt as the plaintiff alleged.

The probabilities in favour of the plaintiff are enumerable: there is the Sebatana incident; there is a cheque (Exh. 'B') and, of course, the incredible evidence of both the defendants. The story of the M40,000.00 has proved to be a complete fabrication.

In my view of the matter, the whole evidence of the defendants and their witness is an incredibility and I do not accept it. The probabilities are overwhelmingly in favour of the plaintiff. He has discharged whatever onus was on him.

The judgment of the Court is as follows :-

- (a) Payment of the sum of M20,000.00
- (b) Interest thereon at 10% per annum a temporate morae
- (c) Costs of the suit.



For Plaintiff : Mr. Sapire

J U D G E.

For Defendants : Adv. Lombard. 29th October, 1982.