

IN THE HIGH COURT OF LESOTHO

In the Matter of.

LEAH TSOAKAE MOBE

Plaintiff

v

THOMAS SELEBELI LEFALATSA

Defendant

J U D G M E N T

Filed by the Hon. Chief Justice Mr. Justice T.S.
Cotran on the 5th day of January 1984

On the 2nd December 1982 I entered judgment in favour of plaintiff, Mrs. Leah T. Mobe, in the sum of M52,190 with costs and interest at a rate which will appear at the end of this judgment. I said reasons will be filed later and these now follow.

The plaintiff (P.W. 2) testifies that she and the defendant, Thomas S. Lefalatsa, had dealings with each other which commenced in January 1982. During their association it came to her knowledge that a certain Mr. Mohapi from Lets'eng-la-Terai had a large diamond for sale and that he wanted M100,000 for it:- M10,000 payable on delivery and M90,000 after its sale. The defendant is a well known diamond dealer but he was declared insolvent in December 1981 and (although he offered to compromise with his

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creditors a couple of months ago) is still unrehabilitated. The plaintiff and the defendant procured the M10,000 and paid it to Mohapi. The defendant went with the diamond overseas in order to sell it. He was successful. Some time around the 15th September 1982 two foreign bankers cheques for a total sum of US \$176,000 arrived at Leribe. This sum was in connection with the sale of the diamond and the cheques were deposited in the plaintiff's current account at Lesotho Bank Leribe. The manager of the bank at Leribe where the deposit was made was Mr. N. Monyane (P.W. 1). He testifies that the plaintiff and the defendant were customers of the bank and known to him. He accepted the bankers cheques but did not immediately credit the plaintiff's current account with the proceeds because in those days he did not have the facilities necessary to convert dollars into maloti but he had no doubt about the genuineness of the cheques and allowed the plaintiff to withdraw large amounts pending clearance from Lesotho Bank Head Office at Maseru. The bank ledger Exhibit E shows that on the 15th September 1982, M10,000 was withdrawn. On the 23rd September 1982 the ledger shows that the sum of M100,000 was withdrawn. On the same day the sum of M50,000 was transferred from the plaintiff's current account to a fixed deposit account in her name as evidenced in writing by Exhibit I. According to the plaintiff the sum of M100,000 was drawn by her and the defendant in cash in order to repay M10,000 to the person who lent the money to pay Mohapi's deposit, and the balance, M90,000, to the owner of the diamond, Mohapi. Her share of the diamond deal was to be M70,000. She adds that it was the defendant himself who suggested to her opening a fixed deposit account. On the 24th September 1982 (the following day) the defendant requested the plaintiff to give him a loan of M32,000. She says that she first made out a cheque

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for this amount from her own cheque book. She was then, no doubt, still "in the clouds" with the bonanza. On that date, it should be noticed, the equivalent value of the US \$176,000 in maloti has not yet been exhausted, but the bank refused to pay out because clearance from Maseru had not yet been received for the foreign cheques. The bank manager Mr. Monyane explains the reasons. He testifies that he did not know the exchange rate exactly and wanted to make certain that the proceeds of the (foreign) cheques, which were yet to be cleared by Lesotho Bank Head Office in Maseru, will not render the plaintiff's current account overdrawn and his confidence in the defendant himself left much to be desired. As a consequence of this refusal to honour the plaintiff's cheque she and the defendant came to his office at the branch in Leribe and he agreed to cash a cheque for M32,000 but only on the security of the plaintiff's fixed deposit account of M50,000 of the previous day. He called for a "counter cheque" which he himself completed with the amount of loan, procured the plaintiff's signature thereon, and handed it to the defendant in his office. This cheque is Exhibit A. The plaintiff then testifies that on the 6th December 1982 the defendant requested a further loan the amount of which he did not specify which he told her he wanted to pay for the purchase of a hotel. It should be noticed that by that date the plaintiff's current account was overdrawn to the extent of M32,553.54. She says she and the defendant went to the bank manager, Mr. Monyane, who allowed the withdrawal of a maximum of M17,000 also on the security of the plaintiff's fixed deposit account. Her deposit of M50,000 was thus almost exhausted after this transaction. She says that on this last occasion the defendant produced one of his own bank cheques. The defendant has apparently purchased Leribe Hotel and maintained an account in the Hotel's name bearing No. 030178. This cheque is Exhibit B. The bank manager testifies that he completed it in his own

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handwriting having crossed out the defendant's Hotel number in two places and substituted the plaintiff's account number at the top and the plaintiff signed it. It was handed to the defendant. The plaintiff expressed to the bank manager, in the presence of the defendant, that she had advanced quite a lot of money to him (almost the whole of her fixed deposit as I have said), that she was apprehensive about repayment, and that she wanted to know how he, the defendant, intended to settle it. The bank manager, Mr. Monyane, advised that it could be settled by instalments. The defendant agreed to make a stop order in favour of the plaintiff in the sum of M2,000 per week commencing from the 17th December 1982 until the whole debt was liquidated. The stop order was executed by the defendant then and there (Exhibit C) in the manager's presence. He made two payments of M2,000 on 17th December 1982 and 24th December 1982 (reflected in the ledger Exhibit E) to plaintiff's current account (Exhibits D1 and D2) and stopped all payments thereafter. The plaintiff and the bank manager testify (and this is reflected on the stop order) that the original agreement was for the defendant to pay M2,000 to commence on 13th December 1982 and thereafter fortnightly but this was changed to M2,000 on 17th December 1982 and thereafter weekly. On the 28th October 1982 (that is to say between these two dates when the plaintiff and the defendant were in good terms) the defendant requested the plaintiff to pay on his behalf to Anglo American Insurance Company the sum of M7,190 being the insurance premium on a policy he has taken out with the company. The plaintiff herself had taken out a policy with the same company. She says that she made out a cheque to Anglo American for the total sum due from them both which came to M8,690 (Exhibit F) on the understanding that the defendant would repay her M7,190.

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The Datsun Skyline purchased on 24th September 1982 was paid for in cash by her. It should be recollected that both plaintiff and defendant withdrew M100,000 on that day of which M90,000 (according to plaintiff) were to go to Mohapi. The defendant, she explains, had all the money in a brief case. She says she actually paid cash in notes to the company still part of her share in the profits but it was her money and her car.

The defendant admits that the equivalent of US \$176,000 was credited to the plaintiff's account in respect of the diamond deal. He gives, however, a different version of the deal with Mohapi. The details of the deal itself are irrelevant to this action except as providing the background to the plaintiff and defendant's association. The defendant denies that he and plaintiff borrowed M10,000 to pay Mohapi a deposit. He says Mohapi demanded M200,000 for the diamond. The defendant adds that he paid him M110,000 in cash, and when the dollar cheques arrived he and the plaintiff drew M100,000 from the proceeds and he paid Mohapi the balance of M90,000. He says that the plaintiff's share of the profit was M50,000 not M70,000 and this was paid to her.

He denied that he ever requested a loan of M32,000 on the 24th September 1982 from the plaintiff or at anytime and denied that he ever requested a further loan of M17,000 on the 6th December 1982 or at anytime. He never went with her to the bank on either of these two dates. He says in explanation that the cheque Exhibit B he gave it to the plaintiff at her own request when she said she had mislaid her cheque book in his or her house (it does not matter which) but not in the bank manager's office. It is true that he signed a stop order on the 6th December 1982 (Exhibit C) on the same date to credit plaintiff's account with M2,000 weekly commencing on the 17th December 1982 but says he was alone with the Bank Manager, Mr. Monyane, and it had

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nothing to do with the settlement of the loans the plaintiff alleged she made to him. It was made in connection with another deal with the plaintiff in respect of a Datsun vehicle, not an attempt to liquidate the debt by instalments of M2,000 weekly. I will discuss what the defendant says about this deal in due course.

With regard to the cheque for M8,690 made out to Anglo American on 28th October 1982 by the plaintiff the defendant says she is telling the truth when she says that of this sum, M7,190 was on account of his own premium on the insurance policy but explains that he had discharged this debt when he bought for the plaintiff a new Datsun Skyline referred to earlier for something like M10,000 as per copy of the invoice from Datsun Exhibit J, even though the vehicle was registered in the plaintiff's name, and even though the third party cover was taken out by her Exhibits G and H. On the purchase of the Datsun the plaintiff says she was so thrilled with it that the exact details of payment may have escaped her. The defendant also says that he once lent the plaintiff a Datsun Combi and she had overturned it and he held her responsible to make good the loss he had suffered.

The stop order to pay the plaintiff M2,000 weekly from his Leribe Hotel account, the defendant says, was in connection with a sum of M5,000 he owed the Datsun Motors. He says he arranged with the plaintiff that she should pay Datsun Motors the amount he owed them and he would in turn credit her account with M2,000 weekly by stop order but he discovered that she did not pay Datsun M2,000 weekly and he accordingly revoked his stop order. On 6th December 1982, the Datsun Skyline purchased for the plaintiff was paid for

in cash on 24th September 1982 so the stop order could not have been in respect of that Datsun. The Datsun Combi which he had lent to plaintiff only overturned on 17th December 1982, and the stop order could not therefore have been in respect of damages for overturning it. I cannot in any event fathom why he should employ a circuitous route to repay a debt he owed to Datsun, nor can I understand why he should make his stop order weekly, for an indefinite period, when that debt could have been almost discharged in two weeks. It cannot be because he was an undischarged bankrupt for that did not deter him from producing, according to him, M110,000 cash he kept with relatives to pay Mohapi nor did it preclude him from maintaining the Leribe Hotel account with himself as signatory, nor did it deter him from trading in diamonds, or deter him, or indeed his credulous bankers, from granting him overdraft facilities.

The position at the date of the commencement of the action, if the defendant is speaking the truth, would be not that he owed plaintiff the amount claimed, but she owed him:-

1. M4,000 : paid into her account as per the stop order when she allegedly renegad on her promise to pay Datsun
2. M2,284 · the difference between what he allegedly paid for the Datsun Skyline (M9,474.00) and what she paid on his insurance premium (M7,190)
3. an unspecified amount for damages to the Combi which did not figure at all in the pleadings.

The cheque for M32,000 (Exhibit A) was made out to cash and the second cheque (Exhibit B) was also made to cash but there is nothing either on the face of the cheques or at the back of the cheques to show that it was the defendant himself who had cashed them. Exhibit A is endorsed at the back "Mercedes Sport loan" and the second

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cheque Exhibit B is endorsed at the back "Loan for Hotel". The plaintiff says these endorsements were not in her handwriting and the defendant says that they were not in his handwriting either. He admits, however, that the endorsement on the back of the cheque Exhibit F was in his handwriting. The plaintiff's evidence on the Combi that overturned was to the effect that the defendant made no claim on her. Whilst she was in hospital recovering from injuries she had received he came and just towed the Combi away. It transpired on the defendant's cross examination that he did in fact purchase a Mercedes Benz for M51,000, that he had given his personal cheque for M32,000 to the Motor Company and that that cheque bounced. He gives the date of purchase, however, to a time subsequent to 24th September 1982. The defendant finds no incredible coincidence in the plaintiff's allegation of his borrowing M32,000 on the 24th September 1982 on the strength of a cheque endorsed at the back "Mercedes Benz Sport loan". The defendant, as I said, did admit that he purchased Leribe Hotel, but he also finds no coincidence in the plaintiff's allegation that he told her on 6th December 1982 that he needed a further loan to pay for the hotel on the strength of a cheque endorsed at the back "Loan for Hotel". I do not know who in the world, except the defendant, would have had any interest to write these notes. The handwriting on all three cheques looks very similar to me though no expert evidence was called on this aspect. The two cash cheques Exhibit A and Exhibit B were bank rubber stamped "Teller No. 1". Teller No.1 was Nora Khetsing (P.W. 3) who testified that she remembered paying the M32,000 and the M17,000 to the defendant personally on the respective dates.

Now the evidence of the plaintiff, supported as it is by the Bank Manager and the teller, coupled with the

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stop order is overwhelming unless the Court is able to find something in what they say to show that all three witnesses were deliberately falsifying the facts or biased or their version so inherently improbable, as to amount to fraud. The defendant says, however, that any of these possibilities could have happened. He dismisses the possibility that he was a liar because he says his version of events are more probable.

The case depends entirely on my view of the creditability of the witnesses - not with respect to the details of the diamond deal with Mohapi - but with respect to the allegations about the loans.

Before I go into that question, however, it ought to be explained that though the ledger Exhibit E shows credit on all the entries (the original was perused by me and returned) but the entries are in red, i.e. not credit but OD (i.e. overdrawn) except for a credit balance of M579.81 on the 28th September when the proceeds of the two foreign cheques were credited to the plaintiff's account having been cleared by Maseru Lesotho Bank Head Office.

The pleadings and particulars and discovery documents produced prior to the trial were:

1. the three cheques Exhibits A, B and F already referred to
2. copy of cheque by defendant dated 28.2.1983 made out to Maseru Datsun in the sum of M3,000 which was referred to drawer (Exhibit K) and evidence about another cheque by defendant dated 28.3.1983 made out to Maseru Datsun for the sum of M2,975 which cheques was also referred to drawer as evidenced by a slip Exhibit L and copy of an invoice purporting to be a

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copy of a former original invoice dated 24.9.82 for a Datsun Skyline where the defendant's name appears as the buyer Exhibit J.

The relevance of Exhibits K and L to the action did not feature at the trial at all and their introduction into the affair is beyond my comprehension, but the invoice Exhibit C was in support of the defendant's plea in answer to the M7,190 premium paid by plaintiff on his behalf to Anglo American that it was discharged (rather more than discharged) by his purchasing for her the Datsun Skyline. No viva voce evidence was adduced by Datsun Motors and no explanation about the original of the invoice (Exhibit J) much less its loss, was forthcoming.

The stop order (Exhibit C), the M50,000 transfer slip to a fixed deposit account Exhibit I, the Registration Book for the Datsun Skyline Exhibit G, the third party cover for the same Exhibit H, the bank ledger of plaintiff's current account Exhibit E and the credits and debits of the M2,000 on 17th and 24th December 1982 (Exhibits D1 and D2) were produced at the trial.

The Bank Manager, in chief, testified that both Exhibits A and B were "counter cheques". It was pointed out to him in cross examination that Exhibit B could not have been because it has come from the defendant's Leribe Hotel cheque book and his account number was embossed thereon. The manager replied that he made a mistake in chief and that the defendant gave a leaf from his own cheque book which he had with him at the time of the discussions in his office on 6th December 1982. This is in fact what the plaintiff says in her evidence and the cheque itself bears this out.

/Teller

Teller No.1, Nora, was asked in cross examination to look at the ledger Exhibit E and she was asked about the amounts of M100,000 and M50,000 drawn on the 23rd September 1982. She replied that these she paid in cash to the defendant. The defendant admits being paid M100,000 on that day. The documentary evidence Exhibit I shows that the sum of M50,000 was not drawn in cash but transferred to a deposit account by means of debit from the plaintiff's current account. She is clearly wrong on the M50,000 but not necessarily wrong on the M32,000 drawn on 24th September 1982 and the M17,000 drawn on the 6th December 1982 by the defendant.

Mr. Kolisang's submission is that the defendant is entitled to "absolution from the instance" because

1. the defendant denied receiving the two cheques and since nothing on the face of the cheques (Exhibits A and B) show the defendant was the person who actually cashed the amount the plaintiff and the bank manager's evidence should be ignored,
2. the bank manager told a lie when he testified in chief that both cheques were "counter cheques", whilst in fact one of them was the defendant's own cheque,
3. teller No. 1 also told a lie when she said M50,000 was paid to the defendant because it has been disproved by the debit transfer Exhibit I,
4. that the defendant's explanations with regard to the stop order to pay M2,000 weekly for M5,000 debt owed by the defendant to Datsun Motors which he wanted to discharge via the plaintiff's account was not an unusual transaction,
5. that on the 24th September 1982 when the M32,000 were drawn the plaintiff's current account was covered by the expected credit of the proceeds of the foreign cheques, which when cleared, came to M199,384.56 and what

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the plaintiff and the bank manager say cannot be true.

My impression of the plaintiff is that she was a simple truthful and straight forward witness with little education but with some connexions in the diamond trade. I find Monyane truthful and honest branch bank manager who was mistaken about the origin of the cheque leaf in Exhibit B. When he refused to cash the M32,000 Exhibit A he was simply cautious as he should be and for good reasons. He was not sure of the Maloti equivalent of the foreign cheques. He knew the defendant well, he had sought and was granted overdraft facilities within the manager's authority, but he had refused to grant him any thing further. The defendant brought to his aid the Leribe District Coordinator (a high ranking civil servant) to intercede on his behalf but this too proved of no avail. In short he knew the defendant as a bad customer. Mr. Monyane was then ordered by his Head Office to whom the defendant had appealed to extend the overdraft facilities the branch manager had already refused to grant. I find the teller, Nora, an honest witness when she says that the defendant was a bank customer who drew large cash amounts from the bank but was mistaken on the M50,000 and could have been mistaken about the M32,000 and M17,000, but that de hors her evidence, there was other cogent and compelling evidence, oral and documentary, to substantiate the plaintiff's claim.

The defendant on the other hand struck me as a man with no respect for the truth and utterly unscrupulous: in his evidence and demeanour in Court, his treatment of his associates in the trade, and indeed his whole attitude to law and to society. The evidence points out to the fact that by subtle means he gained the plaintiff's confidence on

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the diamond deal only to deprive her of the major fruits of her share shortly afterwards.

The plaintiff has discharged the onus placed on her not only on balance of probabilities but almost beyond reasonable doubt.

As I intimated earlier judgment has been entered for the plaintiff with costs in the sum claimed, i.e. M52,190 which consisted of the two loans of M32,000 and M17,000 respectively and M7,190 defendant's premium to Anglo American paid on his behalf less M4,000 paid by defendant to plaintiff on his stop orders totalling M4,000. Interest to be paid by defendant will be calculated as follows:-

1. for period 28.9.1982 until the date of the issue of the summons on 8.7.1983 at the rate the Lesotho Bank charged the plaintiff on her overdraft on her current account,
2. for the period from the date of issue of the summons to the date of final settlement at 11%.

If an appeal is contemplated against the judgment time will begin to run 2 days from to-day.

CHIEF JUSTICE

5th January 1984

For Plaintiff : Mr. Sello)
For Defendant : Mr. Kolisang } with copy of the judgment