CIV/T/ 63/82

IN THE HIGH COURT OF LESOTHO

In the Matter of

LESOTHO BUILDING FINANCE CORPORATION Plaintiff

v

M M MTHEMBU Defendant

REASONS FOR JUDGMENT

Filed by the Hon the Chief Justice Mr Justice T S Cotran on the 19th day of April, 1984

On the 2nd March 1984 I entered judgment as prayed in the summons (as amended) in favour of the plaintiff, the Lesotho Building Finance Corporation, against the defendant, Mr. M M Mthembu, with costs I said reasons will be given later and these now follow

The plaintiff is a statutory corporation established by Act No 7 of 1976 and is subject to the provisions of the Building Finance Institutions Act No 17 of 1976 (Vol XXI Laws of Lesotho p 24 et seq. and 124 et seq) The plaintiff's objects and powers are enumerated in ss.4 and 5 of Act 7 of 1976. The plaintiff has no power to lend money, except on the security of immovable property, or a matching deposit, or for a purpose consistent with the Act

It is common cause that the plaintiff advanced the defendant the total sum of M20,000 which was paid to him on the 6th March 1980 (M7,000) on the 28th May 1980 (M10,000) and on the 30th September 1980 (M3,000) The security was to be on property described as "every right on interest in and to the buildings and the improvements erected with the consent of government express or

/implied

implied on certain site No 5/9 Europa situate on the Maseru Reserve in the district of Maseru" by way of a reducable mortgage bond No 15864 (Exhibit A) payable by monthly instalments with interest from specified dates The certificate of title was handed to plaintiff and the bond duly registered on 29th May 1980 The defendant's plea is that he had repaid in full the said sum during June/July 1981 at the plaintiff's main branch in Kingsway Maseru to the Managing Director in cash but that no receipt was issued

It was agreed by attorneys of both parties that the onus of proof lay on the defendant and that he had to begin. He went into the box and swore vaguely that the bond was cancelled upon his paying the then Managing Director the amount outstanding on the loan He produced photocopies of two documents Exhibit A and Exhibit B Exhibit B is a form of consent by the plaintiff to the cancellation of the bond signed by the then Managing Director on 2nd July 1981, endorsed by the plaintiff's attorney and conveyancer on 8th July 1981, and Exhibit A which shows that the Registrar of Deeds effected the cancellation on the 24th September 1981 The defendant says that upon cancellation he got back the certificate of title and sent it to the Commissioner of Lands to convert the title into a lease (in terms of the new Land Act No 17 of 1979 (Vol XXIV Laws of Lesotho p 96 et seq)) but this cannot be true because there is evidence in Exhibit G, a letter from the plaintiff to defendant dated 31st May 1981 in which the former referred to an advertisement in the press in January 1980 in which the defendant had made an application for conversion to a lease The defendant denied ever receiving Exhibit G. Apart from giving the dates of his application for the loan, the offer and his acceptance, he did not (in examination in chief) give any dates. His answers to difficult question in cross examination

/were

were almost invariably that he was unable to remember He was confronted with his account with the plaintiff (Exhibit C) which shows that he paid on the 28th October 1981 the sum of M532 80 and could not therefore have paid the Managing Director "in full" in June/July 1981 He replied that that sum should have been credited to his "savings account" with the plaintiff He produced no evidence that he had such an account He was shown a letter (Exhibit E) from Mr Steyn, an attorney of the firm Lovius, Block, Meltz, Steyn and Yazbek dated the 28th April 1982, written on behalf of the defendant (para 1) in which the defendant acknowledges (para 4) that a balance was still outstanding on the loan granted to him on the security of the property The defendant answered the question by saying that he never briefed the attorney to say so and it is a "mystery" to him how Mr Steyn got this information

The defendant denied he had a transaction over the property with one Phofoolo at first but in the next breath he agrees that an action over the property is pending against him to compel him to transfer it to Phofoolo I will refrain, except where necessary, to refer to that matter since the action is still pending but straightforward questions were answered by a protest that he, the defendant, is "prejudiced" by the plaintiff's attorney bringing matters up in this way

The plaintiff's mortgage manager, Mr Khoboko, gave evidence that he was personally aware of the loan to the defendant, that defendant had started to build a house on the site and applied for a loan in March 1980 because he had difficulty in completing it, that there was an agreement over the amount of the loan (M20,000) and the security but that the loan was to be staggered to coincide with progress of the construction, that on a visit to the site in

/September

September 1980, the house was not completed and the last M3,000 was advanced to the defendant to enable him to do so, that the defendant fell into arrears in his monthly payments and demands were made on him (Exhibit D) which payments were made over the counter in the banking hall of the plaintiff He produced (Exhibit H) a bunch of banking slips showing repayments by defendant From his personal negotiations with the defendant the witness explained how the cancellation came about The defendant needed cash because his property was about to be sold in execution over judgment debts The defendant agreed to sell the property to Phofoolo, and the plaintiff agreed to advance a loan to Phofoolo in the sum of about M55,000 on the security of the same property. The arrangements were for the plaintiff to deduct the defendant's outstanding loan from this amount, and pay, he could not say on the first day of the trial to whom, Phofoolo or the defendant, the balance, to provide the defendant with cash to enable him to stop the High Court sale Through an error the plaintiff made out a cheque for some M55,000 without deducting the amount due on the defendant's loan The mortgage manager was given time overnight to produce the cheque or the counterfoil He was unable to do so (and indeed the time was far too short to dig for a cheque or a stub almost four years old) but he checked his books and made enquiries and found out that a cheque for M55,257 31 was made in favour of Phofoolo on the 28th June 1980, and endorsed by Phofoolo in favour of the defendant which cheque was handed over to the Sheriff of the High Court before the sale The defendant does not deny receiving this sum but as usual does "not remember" exactly how much, when, and from whom, and in what manner, but he did not deny that the proceeds were used to

/stop

stop the sale in execution of judgment debts

The defendant produced no receipt, the story that he privately paid the then Managing Director, now dead, in cash at his office must be a fabrication because, through his attorneys, he was inter alia admitting the outstanding loan up to April 1982 and came up with a different story when he was sued and knew that the dead cannot speak The result is that the defendant who struck me as a man with little respect for the truth has not discharged the onus placed on him, and I find, as a fact, that the amount claimed has not been paid

On the 3rd August 1982 I declined to enter summary judgment in favour of the plaintiff for reasons then given and granted the defendant leave to defend No point of law was taken either in the pleadings or in limine or in the course of the evidence although defendant's attorney took up the question of vires in his final address

It is now absolutely clear that the loan was granted on the security of defendant's property by way of a reducable mortgage bond dated 21st April 1980 which the plaintiff agreed to cancel on or about 28th June 1980 in the circumstances described by Mr Khoboko. The plaintiff continued, however, to receive from defendant some payments on and off until October 1981 Mr Khoboko did concede that the last sum of M3,000 in September 1980 was advanced after the plaintiff knew of the mistake it made in not deducting the defendant's loan from the cheque given to Phofoolo but it only knew that the defendant will claim he settled the loan when an action was lodged to recover it The plaintiff's mortgage manager struck me as a man of honesty and integrity I could not discern in his evidence any attempt to

/lie

lie or whitewash

The position therefore on or about 28th June 1980 was that the plaintiff agreed to cancel the defendant's bond on the secured property, recouping any amount he owed, and after discovering its mistake a week later, loaned him M3,000 in September 1980 knowing that defendant had agreed to sell to Phofoolo The plaintiff was obviously in a dilemma It had lent out over R75,000 on the security of one property (probably worth less) to two persons, defendant and Phofoolo The defendant had at the same time an unexpected bonanza to satisfy his creditors, which upon the death of the Managing Director, defendant converted to a false claim that he settled the loan of M20,000 in full.

Plaintiff acted intra vires its powers certainly over the M7,000 and M10,000 respectively in March and May 1980 for the advance was made on the security of the defendant's property The last M3,000 was not so much ultra vires the plaintiff's powers as ultra vires the plaintiff Managing Director's power because though plaintiff retained the security, it was a security in respect of property upon which a loan was already granted and paid out to Phofoolo There was on the part of the plaintiff an indulgence to defendant and business incompetence perhaps, but I have no doubt that in the circumstances this part of the loan is recoverable as well There are several reasons for this Firstly the defendant had not only renounced all benefits from specific exceptions and all other exceptions which might or could be pleaded in bar to the validity of the debt or part thereof by Clause 7 of the bond (Exhibit A), but did not in fact except or plead confining his case

/to a

to a decision on the facts. Secondly because whilst plaintiff should have exercised better judgment by refusing to pay defendant any amount after it mistakenly parted with Phofoolo's cheque the transaction was not contra bonds mores. Thirdly because the matter of ultra vires (now confined to M3,000) must be resolved in plaintiff's favour in any event. The former anxiety in the proceedings for summary judgment occurred from reading in haste a passage in Gower's Principles of Company Law, 4th Edition at p 171 and 172, viz -

> "But, to revert to the ultra vires rule proper, as we have seen, it was designed to protect the company against itself (or rather against its organs) so as to safeguard its members and creditors Hence one might have supposed that it could not be invoked by the other party so as to enable him to escape from a transaction from which he found it more profitable to resile This would be consistent with other examples of lack of capacity, such as non-age or insanity, where, normally, the lack of capacity can be relied on by the infant or lunatic, or by those acting on his behalf, but not by the party with whom he has dealt On the other hand, the orthodox view is that an ultra vires transaction is "void" and if that expression is taken literally it must mean that the transaction is totally ineffective in respect of both parties
>
> Until very recently there was virtually no authority on this question and when it arose the courts had a rare opportunity of deciding on policy grounds - which, it is submitted, would inevitably have led them to decide that the third party cannot plead that a transaction is ultra vires Instead, they first assumed and then held, that as the transaction was void he could do so - thereby adding one more absurdity to the list "

Some of the authorities quoted by the learned author are available in my Library albeit the English cases in the All E.R series There seems to be some divergence of opinion when the issue arose between, on the one hand, the Supreme Court of Nigeria

/in

In Continental Chemists Ltd. v Ifakundu 1966 1 African Law Reports (Commercial) 54 where the Court held that a contract entered into with a former employee by the terms of which the employee had to serve his employer for a number of years after education at the employer's expense was ultra vires the employer's power under its memorandum of association and it could not therefore recover damages for breach of contract from the employee (and Metalimpex v Leventis & Co (Nig) Ltd 1976 1 African Law Reports (Commercial) 20, obiter at p 32 lines 35-40) and, on the other hand, the Supreme Court of Canada in Breckenridge Speedway Ltd. v The Queen (1969) 9 Dominion Law Reports (3rd) p 142 the judgment of which was made available to me through the courtesy of Dr Alan Milner, Editor-in-Chief, African Law Reports, Trinity College, Oxford, where the Court held that money loaned by the Province of Alberta to a local businessman through the operation of the Treasury Branches Act 1955, is recoverable with interest according to the loan contract, whether that statute is ultra vires the province as a venture into the federal field of money and banking or not.

I have not been able to trace any authority in Lesotho on the subject and we are therefore at large I shall grasp what Prof Gower calls this new opportunity and hold, if the Court can raise the issue mero moto, that unless there is anything intrinsically illegal, or immoral, or contrary to public policy, in a loan transaction between a borrower and his building society, the latter can recover the loan even though the granting of it, or part of it, turns out to be ultra vires the society's power and objects

The costs in the proceedings for summary judgment were reserved until the result of the trial These costs are also to be borne by the defendant

CHIEF JUSTICE
19th April 1984

For Plaintiff Mr Koornhof
For Defendant Mr Matsau