

IN THE HIGH COURT OF LESOTHO

In the Matter of :

LESOTHO BUILDING FINANCE Plaintiff
CORPORATION

and

THOLOANA NKUEBE Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on
the 27th day of November, 1989.

On 14th October, 1985, the Plaintiff corporation filed with the Registrar of the High Court summons commencing an action in which it claimed against the defendant payment of the sum of M17,506-44 (as amended), interest thereon at the rate of 16% and costs of suit.

On 5th November, 1985 the defendant intimated her intention to defend the action. The Plaintiff corporation then filed an application for summary judgment duly accompanied by a founding affidavit in which it averred, inter alia, that the defendant was indebted to the Plaintiff corporation as claimed in the summons. She had in fact signed an acknowledgment of debt form in that regard. She had, therefore, no bona fide defence in the action and her intimation to oppose the application for summary judgment was merely for the purpose of delay.

2/ The defendant

The defendant opposed the application for summary judgement and in the answering affidavit denied the averments that she was indebted to the Plaintiff corporation as claimed in the summons (as amended) and that her notice of intention to oppose the application for summary judgment was merely a delaying tactic. She conceded, however, to have signed the acknowledgment of debt form although she did so under duress.

On 25th November, 1985 the application was placed before my brother Kheola, J. who apparently ordered that it be converted into a trial and the defendant's answering affidavit be treated as her plea. The matter was eventually placed before me on 8th February, 1989 when the hearing commenced.

It is common cause that during 1984/5 the defendant was already employed as a computer operator by the Plaintiff corporation with which she operated a savings account. In her testimony P.W.2, Nyakallo Mohapeloa, told the court that she was the Legal Advisor of the Plaintiff corporation. Sometime in August, 1985 she received a certain information as a result of which she caused investigations to be carried out on the defendant's savings account by the Accounts section of the Plaintiff corporation. A report was subsequently made.

This is confirmed by P.W.1, Pauline Mokhohlane, who told the court that in August, 1985 she too was already employed as Assistant Accountant by the Plaintiff corporation. She was the one who carried out the investigations on the defendant's savings account. To do so she got hold of the master file which the defendant had with the Plaintiff corporation and examined it. She compared all the withdrawal slips (exh "A") and the deposit slips (exh "B") drawn and signed
3/ by the defendant

by the defendant herself in relation to her savings account. From the information obtained in exhibits "A" and "B" P.W.1 prepared a computer print out (Exh "C").

The period covered by the examination extended from 9th April, 1984 up to 31st July, 1985. The examination revealed that from the period 30th July, 1984 up to 31st July, 1985 the defendant's savings account was overdrawn by the amount reflected in the summons (as amended).

When she was asked to surrender her savings account book for inspection the defendant told P.W.1 that she did not have it with her and never handed it over to P.W.1. The defendant's savings account book was, for that reason, not examined by P.W.1. This is disputed by the defendant according to whom her savings account book was taken by P.W.1 herself. As it will become evident in the course of this judgment defendant did not impress me as a truthful witness. I am convinced that in her denial that she refused to hand over her savings account book to P.W.1 she is not being honest with this court.

It is not disputed that following the investigations carried out by P.W.1 and the revelation that the defendant's savings account was overdrawn by the amount reflected in the summons (as amended) a meeting was, on 19th August, 1985 convened in the office used by Plaintiff corporation's Managing Director (Mr. Woldeyesus) and his counterpart (Mr. Monyane). According to P.W.2 the meeting was attended by the Defendant, the Managing Director and his counterpart, a certain Mr. Mothepu and herself (P.W.2.) At the meeting the defendant's

4/ attention was

attention was drawn to the fact that her savings account with the Plaintiff corporation was overdrawn. When she disputed it, defendant was allowed to go through and compare exhibits "A" and "B". Thereafter she conceded that the account was, indeed, overdrawn and agreed to sign an acknowledgment of debt form. P.W.2 then drafted exh "D" (acknowledgment of debt form) which the defendant duly completed and signed on 20th August, 1985.

A few days later and as a result of further investigations by the account section of the Plaintiff corporation P.W.2 received another report showing that defendant's savings account was, in fact, over-drawn by a figure much higher than the one reflected in exhibit "D". Consequently on 28th August, 1985, P.W.2 called the defendant into her office and drew her attention to that fact. Defendant conceded that her account was overdrawn in the amount which was higher than the one reflected in exh "D" and agreed to sign another acknowledgment of debt form rectifying the error in the previous form. Accordingly P.W.2 drafted the second acknowledgment of debt form (Exh "E") which was again completed and signed by the defendant. P.W.2 was positive that no duress of any kind was exerted to the defendant who freely and voluntarily completed and signed Exh "D" and "E".

The evidence of P.W.2, was, in all material respects, corroborated by that of P.W.3, Nkopane Manyane, who told the court that following the departure of Mr. Wolderyesus in 1986 he was the Managing Director of the Plaintiff corporation.

In her defence the defendant gave evidence on oath and told the court that she was first called to the office of P.W.2 who

5/ simply

simply read out to her an acknowledgment of debt form after which she asked her to sign it. She refused.

The evidence of defendant clearly differs from that of P.W.2 according to whom the former was called into her office to complete and sign the acknowledgment of debt form only after she had conceded, in the meeting of 19th August, 1985 that her savings account was overdrawn and she was, therefore, indebted to the Plaintiff corporation.

Bearing in mind that P.W.2 is the legal advisor in the Plaintiff corporation and, therefore, a legally trained person, I consider it highly improbable that she could have prepared the acknowledgment of debt form for completion and signature by the defendant without knowing whether or not the latter was admitting indebtedness to the Plaintiff corporation. I am inclined to reject as false the defendant's story and accept as the truth P.W.2's version on this point.

Be that as it may, defendant went on to tell the court that after she had refused to sign the acknowledgment of debt form in the office of P.W.2, she was called to the Managing Director's office where she found the Managing Director himself, his counterpart (P.W.3), Mrs. Mohapeloa (P.W.2) Mr. Mothepu, Mr. Khoboko, Mr. Lichaba and Mr. Malikelle. The defendant's evidence that Messrs. Khoboko, Lichaba and Malikelle were among the people who attended the meeting of 19th August, 1985 is, of course, denied by P.W.2 and P.W.3.

It is worth mentioning that in her reply to the request for further particulars defendant stated that the people who had participated in the meeting were herself, the Managing Director,

6/ his counterpart

his counterpart (P.W.3), Mrs. Mohapeloa (P.W.2) and Mr. Mothepu. Inasmuch as they did not state that Messrs. Khoboko, Lichaba and Malikelle were present at the meeting defendant's pleadings corroborated the evidence of P.W.2 and P.W.3. I am convinced that P.W.2 and P.W.3 were testifying to the truth when they said Messrs. Khoboko, Lichaba and Malikelle did not attend the meeting of 19th August, 1985 and the defendant's evidence that they did is but an after-thought in an attempt to deceive this court.

Defendant did concede that in the meeting of 19th August, 1985 her attention was drawn to the fact that her savings account was overdrawn. She was allowed to examine and compare exhibits "A" and "B" and she realised that according to the exhibits her savings account appeared to be overdrawn. She however, contended that as she was operating her account in the normal manner her withdrawal slips could not have been passed by the teller unless the account showed the existence of sufficient funds. The fact that her account appeared to be overdrawn could, therefore, only be attributed to the computer which she and a certain Mrs. Mathabo Tsatsi operated and sometimes made mistakes. According to her, defendant only signed the acknowledgment of debt form (Exh "D") because the people before whom she appeared at the meeting of 19th August, 1985 were threatening to call the police who would assault her.

On 28th August, 1985 she was again called to a meeting which was attended by the same people i.e. the Managing Director, P.W.3, P.W.2, Mr. Mothepu, Mr. Khoboko, Mr. Lichaba and Mr. Malikelle. She again signed another acknowledgment of debt form (Exh "E") under

7/ threats that

threats that the police would be called to assault her and she would not be permitted to leave the office unless she complied. In her evidence defendant told the court that she had reported to her lawyer that she had completed and signed the acknowledgment of debt forms under duress. She also reported it to the people who acted as witnesses in Exh "D" and "E". She told the court that she would call the two people to confirm her story in this regard. She never did. Nor, indeed, did she call the lawyer to support her in this regard.

As it has been pointed out earlier in this judgment, P.W.2 testified that she and defendant were alone in her office when, on 28th August, 1985, the latter agreed to sign the second acknowledgment of debt form. Her evidence is in a way corroborated by P.W.3 who testified that he was not present when defendant signed Exh "E". Both P.W.2 and P.W.3 denied defendant's evidence that she was subjected to any threats with a view to compelling her to sign the acknowledgment of debt forms which she signed freely and voluntarily.

I find no good reason why P.W.2 and P.W.3 who were the legal advisor and the Managing Director's counterpart, respectively, would falsely implicate the defendant on this point. There is not the slightest doubt in my mind that the defendant's story that she signed the acknowledgment of debt forms under duress is false and the truth is in the evidence of P.W.2 and P.W.3 that defendant did so, freely and voluntarily.

As regards Defendant's contention that her savings account appears to be overdrawn because of mistakes that may have been made by the computer, it must be borne in mind that P.W.1

8/ told the court

told the court that in her investigations of defendant's savings account she got hold of the latter's master file, examined and compared all the withdrawal and deposit slips therein contained which slips were admittedly drawn and signed by the defendant herself. The conclusion that defendant's savings account was overdrawn was, therefore, arrived at, not by examining the computer print out but by examining and comparing the actual withdrawal and deposit slips exh "A" and "B".

Assuming the correctness of the defendant's contention that the computer which she and Mrs. Tsatsi operated sometimes made mistakes, it seems to me such contention does not advance her case any further precisely because the conclusion, that her savings account was overdrawn, was arrived at not by examining the computer print out but the actual withdrawal and deposit slips which the defendant does not deny to have drawn and signed.

By and large, I am satisfied that the Plaintiff Corporation has, on a balance of probabilities, proved that defendant's savings account (which she operated with it) was overdrawn. She was, therefore, indebted to the Plaintiff corporation to the extent that her account was overdrawn (i.e. as claimed in the summons). Although the defendant contended that she had completed and signed the acknowledgment of debt forms under duress, her contention could not be supported by evidence and for that reason I find it unconvincing.

9/ I would

I would, in the circumstances, enter judgment for the Plaintiff Corporation as prayed in the summons.

B.K. MOLAI
JUDGE

27th November, 1989.

For Plaintiff : Mr. Koorhof.
For Defendant : Mr. Mohau.