CIV/T/205/86

IN THE HIGH COURT OF LESOTHO

In the matter between:-

BARCLAYS BANK P L C. Plaintiff

and

LEHLOHONOLO KHOBOKO Defendant

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 17th day of April, 1989

The plaintiff is claiming payment of M19,591-02, together with interest at the rate of 22% per annum from the 22nd January, 1986 to date of repayment and costs of suit.

In its declaration the plaintiff states that in terms of an oral agreement entered into between the defendant and itself, and at the special instance and request of the defendant, the plaintiff lent and advanced money to the defendant, from time to time, payment of which amount was secured by way of a deed of hypothecation registered in favour of the plaintiff in the offices of the Deeds Registry, Maseru, under the Deeds Registry Act 1967, on the 18th February, 1985.

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Clause 1 of the Mortgate Bond as read with Clause 5 (1) specifically stipulates that, should the defendant fail to make payment of any amount on demand, the plaintiff shall be entitled to proceed forthwith for the recovery of the full amount due and payable without notice and to have the mortgaged property declared executable for the full amount of the Bond.

The plaintiff alleges that on the 17th March, 1986 a demand was made but notwithstanding such demand, the defendant has since neglected to pay the full amount or any part thereof.

The amount of M19,591-02 is arrived at by calculating the amounts lent and advanced to the defendant, together with interest thereon as on the 22nd January, 1986.

Clause 11 of the Deeds of Hypothecation (page 15 to 20 of the record) provides that a certificate signed by the Manager or the Accountant of the plaintiff shall be sufficient proof of the defendant's indebtedness to the plaintiff. Mr. Peter Bolton, in his capacity as branch manager of the plaintiff signed such certificate on the 18th March, 1986 and it shows that the defendant is indebted to the plaintiff in the sum of M19,591-02 (see page 2).

The plaintiff alleges that in terms of the agreement between the parties, the defendant is obliged to pay interest to the plaintiff on the outstanding amount from time to time at the rate of 22% per annum.

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In his plea the defendant states that plaintiff's claim is res judicata in that such a claim was the subject matter of an action between the parties in this Court, in which action a final judgment was given in favour of the defendant with costs.

In its replication the plaintiff has denied that its claim against the defendant is res judicata and avers that no issues on the merits were concluded in a previous action between the parties arising from the same cause of action.

In the defendant's supplementary plea it is denied that any demand was made. He also denies that the plaintiff is entitled to interest on the amount claimed at the rate of 22% and/or at any rate at all and therefore places the plaintiff to the proof thereof.

The plaintiff called Mr. C.T. Kimane who is the Retail Manager of the plaintiff. He testified that according to the records of the plaintiff, to which he has access, the defendant is now indebted to the plaintiff in the amount of M34,831-26 i.e. on the 18th February, 1989. He told the Court that interest is still being charged on the loan at the rate of prime rate plus five per cent. It was clear from the evidence of this witness that he did not know how the charge of interest at 22% was arrived at. He made it clear that he was not involved in the original granting of the loan facilities to the defendant. His evidence was challenged on the ground that he had no personal knowledge and that his evidence was hearsay.

I made a ruling that Mr. Kimane's evidence was not hearsay. He had personal knowledge by looking at the accounts and statements of accounts of the defendant kept by the plaintiff. Mr. Mphalane, defendant's attorney, referred the Court to a South African case - Trust Bank of Africa v. Senekal, 1977 (2) S.A. 587. If that case is authority for the proposition that the evidence of a bank manager whose evidence is based on the books of a bank which show to what extent a customer of a bank is indebted to it, is hearsay, then I decide to follow Maharaj v. Barclays National Bank, 1976 (1) S.A. 418 at page 424 where Corbett, J.A. said:

> "In regard to certain of these facts, It would be difficult, if not impossible, for any one person to have first-hand knowledge of every fact that goes to make up the plaintiff's cause of action. In this connection I am in full agreement with the following remarks of MILLER, J., in Barclays National Bank Ltd. v. Love, supra at pp 516-7, made with reference to an affidavit made by the manager of a branch of the plaintiff bank (oddly enough also the Stanger branch):
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> "We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment. It goes without saying that a manager of a bank who claims to have personal knowledge of the extent to which a client has overdrawn his account must needs rely upon the bank records which show the amounts paid into his account and the amounts withdrawn by the client." "

In the present case Mr. Kimane testified that as a Retail Manager his duties included overdraft and loan arrangements between the plaintiff and its customers. He has access to bank records for loans, overdraft and other accounts relating to the customers of the plaintiff. I ruled that his evidence was admissible. His evidence was that in January, 1985 the defendant's current account was overdrawn to the amount of M3,744-56; his loan account was standing at M11,179-72. The two accounts were consolidated on the 18th January, 1985 (see Further particulars page 26). Then the total amount stood at M14,924-28.

The defendant testified that in 1984 he had three accounts with the plaintiff. They were a current account, a loan account and Lucky Shoe account. The three accounts were eventually consolidated. His evidence is that he does not dispute the amount claimed but disputes that the plaintiff is entitled to any interest at all. He avers that he tried to settle this account out of court but the plaintiff refused to accept the offer he made. Because the plaintiff refused the offer, it is not entitled to any interest from the date the offer was made. He agrees that lending charges i.e. interest are usually made by banks to their customers. He also asks the Court to finalize this matter on the basis of the offer he made.

It was submitted on behalf of the defendant that this action is res judicata. Reference was made to CIV/T/29/85, CIV/T/270/85 and CIV/T/586/85. The requisites of a plea of res judicata are that the two actions must have been between the same parties or their successors in title, concerning the same subject - matter and founded upon the same complaint (Pretorius v. Barkly EAst Divisional Council, 1914 A.D. 407 at page 409.).

In CIV/T/270/85 the subject - matter was an amount of M4,620-91 which had been advanced and disbursed on behalf of the defendant by the plaintiff. It is not clear where this amount came from; but according to the correspondence which followed the granting of the default judgment on 4th February, 1985, it is clear that the amount involved concerned defendant's account trading as Lucky Shoes. (See Notice of Set Down dated the 31st January, 1985; a letter dated the 5th March, 1986 addressed to the Registrar from Messrs. Harley & Morris).

It can be argued that the parties were the same but the subject - matter was definitely not the same. In January, 1985 when the accounts were consolidated, the plaintiff did not include the Lucky Shoes account. (See pages 58 and 59 of the record). The present action cannot be res judicata because it deals with a different account or accounts which were consolidated.

In CIV/T/270/85 the parties were the same as in the present action. But the case was withdrawn and there is no fianl judgment. The question of res judicata does not arise where there is no final judgment.

In CIV/T/586/85 a provisiaonal sentence was refused on the ground that notwithstanding the certificate, the bond lacked sufficient liquidity for the purposes of provisional sentence. It is clear that the action was dismissed on a technical point and that the merits of the case were not canvassed. In any case even if the plaintiff had been successful I do not think that a provisional sentence is to be regarded as a final judgment.

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In the result the plea of res judicata fails.

On the 10th September, 1987 the defendant made payment into court in terms of Rule 38 (3) (6) and the notice reads as follows:-

> "Without prejudice or admission of liability, and by way of an offer in full and final settlement of the plaintiff's claim, defendant tenders the payment of an amount of M19,591-02 (Nineteen thousand five hundred and ninety -(two(sic) matoli and two lisente)."

This offer was rejected by the plaintiff because it was intended to be a full and final settlement. The amount offered by the defendant is the amount claimed by the plaintiff in the summons in the present case. The summons was issued on the 25th March, 1986 and claims interest from the 22nd January, 1986. It will be noticed that the offer was made about twenty (20) months after the issue of the summons and by then the amount owed by the defendant to the plaintiff was M26,143-72 (see page 61A).

It is the defendant's contention that the plaintiff is not entitled to any interest during those twenty months before he made the offer. He contends that the plaintiff had rejected several offers even before the last one made in September, 1987. I have not been able to see any offer before the one of September, 1987. What seems to have been going on before then were mere negotiations which fell through. Even in those negotiations it was clear that the defendant wanted to persuade the plaintiff not to charge any interest on the money advanced or lent to him (See pages 70, 72).

In his evidence before this Court the defendant admitted that the monies advanced or lent to him were subject to interest to be charged by the plaintiff at the prime rate plus five (5) percent. However he contended that because the offers he made were refused on no sound reasons the plaintiff is not entitled to any interest.

I am of the opinion that the rejection of the offer made in September, 1987 was not unreasonable. The plaintiff was entitled to charge interest from the 22nd January, 1986 to the date of repayment. During that period the defendant had plaintiff's money and was using it by investing it in banks or businesses. In other words the money was giving him interest or profits. Why should he not be charged interest by the plaintiff when he is making profits with plaintiff's money? It is an express or implied term of the oral agreement between a customer and his bank that when monies are advanced and lent to him he shall pay interest. In the present case the defendant agreed in his oral evidence that he was to pay interest at the prime rate plus five (5) percent. There is no substance at all in the defendant's plea that the plaintiff is not entitled to interest. In fact in the offer which he made interest was included up to the 22nd January, 1986. If he had made the offer immediately after the issue of the summons I have no doubt that the plaintiff would have accepted the offer.

Instead the defendant waited for about twenty months and then made the offer of the amount claimed in the summons without making any offer of costs and interest. This was altogether unjustified and unfair because the defendant is still earning the fruits of the plaintiff's money but he is not prepared to share them with the plaintiff.

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On the 18th February, 1989 the debt stood at M34, 831-26. It included interest at the rate of twenty-two (22) percent. It was clear from Mr. Kimane's evidence that he was unable to explain how the figure of 22% was arrived at. His evidence was that the plaintiff charged interest at the prime rate plus five percent at the end of every month. He told the Court that the Central Bank of Lesotho issues circulars to commercial banks from time to time telling them what the prime rate is. He handed in as an exhibit a Central Bank of Lesotho Quarterly Review, September, 1988 Volume VII, No.3 which shows what the prime rate was from 1980 to September, 1988. The period relevant to these proceedings is from January, 1986 to the date of repayment. The following table indicates the date, the prime rate and defendant's rate which includes 5%.

DATE	PRIME RATE	DEFENDANT'S RATE
JANUARY to FEBRUARY, 1986	15%	20%
MARCH to MAY, 1986	14%	19%
JUNE to DECEMBER, 1986	13%	18%
JANUARY to FEBRUARY, 1987	13%	18%
MARCH, 1987 to MARCH, 1988	11%	16%
APRIL, 1988	12%	17%
MAY, 1988 to AUGUST, 1988	14%	19%
SEPTEMBER, 1988	15%	20%

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Becuase the prime rate fluctuates from time to time no evidence was led beyond September, last year. However, the prime rate is something that can be ascertained from the Central Bank of Lesotho at any time.

I am convinced that there was no justification in charging the defendant interest at the rate of 22% except in 1984 and 1985 when the prime rate was 20% and 15% respectively but that is not the period with which the present proceedings are concerned.

The question of costs was also argued on the same ground that several offers were made to the plaintiff even before the matter was brought to court. That such offers were rejected on no sound reasons. I have already said that any offer which excluded interest was not a reasonable one and had to be rejected. Banks make money by lending money to their customers and then charging them interest.

The defendant has alleged that a demand upon him for the repayment of the amount owing to the plaintiff was never made and therefore the plaintiff's cause of action has not been completed. He refers to clause 5(1) of the mortgage bond which specifies that all payments in respect of any amount claimable at any time under the bond whether of capital or interest shall be made on demand. In Barclays Bank P.L.C. v. Lehlohonolo Khoboko, CIV/T/586/85 (unreported) Levy, A.J. said at page 2:

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> "I do not read this clause as specifying that demand is a condition precedent to the Defendant's liability. The mortgage bond contains an unconditional acknowledgment of indebtedness in such amount as may be certified by the Plaintiff's manager and in such a case demand is not necessary to complete the Plaintiff's cause of action. If it is, the summons is a sufficient form of demand. See Ridley v. Marais 1939 A.D. 5."

The learned Judge said this in reply to the present defendant's contention in that case. The defendant has again raised the same issue which was decided in his previous case. I agree with what the learned Judge said.

In the result there will be judgment for the plaintiff in terms of prayer (1) and (4) of the summons; the defendant shall pay interest at prime rate plus 5% as set out above and at prime rate plus 5% to the date of repayment.

J.L. KHEOLA
JUDGE

17th April, 1989.

For Plaintiff - Mr. Fick
For Defendant - Mr. Mphalane.