CIV/A/13/89

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

THULO MAHLAKENG Appellant

V

BASOTHO ENTERPRISES DEVELOPMENT CORPORATION Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 6th day of February, 1990.

The appellant has appealed to this Court against the decision of the learned magistrate in the court below given in favour of the respondent.

The parties will be referred to in their respective positions and designations of the applicant and the respondent according as they appeared in the court below.

In his grounds of appeal the applicant sets out his grievances as follows:

(1) The learned magistrate - misdirected himself in (sic) failing to apply his mind to the papers before him in as much (sic) as on the papers filed of record no objection has been raised by the respondent in its answering affidavit and no new matter had been added by the appellant (applicant) in his replying affidavit.

(2) The learned magistrate ... erred .... in holding that "a clear dispute of fact existed" in as much (sic) as on the papers filed of record no dispute of fact had arisen, the only dispute noticeable...

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on papers ... being the lawfulness or unlawfulness of the deductions effected by the respondent on the applicant's salary.

(3) The learned magistrate erred in holding that the loan agreement between the applicant ... and the respondent formed the basis of the application in as much (sic) as that is borne out by the fact put before him.

(4) The learned magistrate erred in holding ..... that the fact of the applicant owing a certain amount of money to the respondent was the basis of the application in disregard of all the facts disclosed on the papers .....

(5) The learned magistrate erred in purporting to have summarily dealt with the application when he had in fact entertained a full hearing of arguments on the merits.

(6) The learned magistrate misdirected himself in (sic) disregarding the provisions of Order No. XXI of the Subordinate Court Rules.

The facts of the case gathered from the affidavits filed in the court below show that the applicant was an employee of the respondent from 4th July, 1984 till 31st March, 1989. The service contract between the parties was governed by the terms and conditions set out in T M I.

It was in persuance of those terms and conditions that on 15th December, 1988 the applicant intimated to the respondent that he intended to terminate his contract of service with the latter with effect from 31st March 1989. Thus a three months' notice reckoned from 1st January, 1989 was duly given by the applicant and in turn acknowledged by the respondent.

At the time of the termination of his contract the applicant's gross salary was M2472.43 per month.

The applicant contends that at the end of February the respondent was obliged to pay him M1638.32 net salary but the respondent did not do so. Again, even though the respondent was obliged to pay the applicant

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an equal amount for the month of March 1989 the respondent once more failed to meet this obligation, save that it paid to the applicant only M877.32 a clear indication that it had deducted M761.00 from the applicant's salary.

The applicant accordingly submitted that both the deductions and withholding of his salary by the respondent were unlawful because the respondent was not authorised by him to either deduct or withhold his salary; further because the respondent in effecting these acts acted contrary to the provisions of the Employment Act NO. 22 of 1967 section 48.

On behalf of the respondent the deponent Tlepu Mahanetsa swore that he admitted virtually the entire averments made by the applicant save the last but one contained in paragraph 11 of the founding affidavit to the effect that the retention and deductions of the applicant's salary by the respondent were unlawful.

He denies that the retention and deductions were unlawful basing himself on annexure "B" which is a copy of the loan agreement entered into between the applicant and the respondent in respect of a vehicle purchased for the applicant through a loan granted him by the respondent.

The loan agreement obligated the applicant to repay to the respondent a monthly sum of M132.85 with effect from end of April 1987. It is an express term of the loan agreement that the M132.85 monthly instalment shall be deducted from the borrower's salary.

The respondent maintains that the loan agreement forms the basis of the present dispute before court.

The deponent for the respondent averred further that in terms of annexure B, the loan agreement, Clause 2(e) provides that

> "any arrear instalment shall be deducted from the Borrower's salary at the end of every month."

It is to me significant that the word "instalment"

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as reflected in the above sub-clause is in the singular.

The respondent further indicated that section 46 of the Employment Act No. 22 of 1987 does not say in what quantum or percentage the arrear instalments may be deducted in terms of the loan agreement and goes further to express the view that on the contrary this Act supports the notion contained in the loan agreement according as interpreted by the respondent in terms favourable to its side of the case.

The crucial issue centres on the respondent's averment in para (c) of the affidavit that

> "in terms of paragraph 2(e) the applicant has consented to the deduction of any arrear amount owing on his loan. In response to the respondent's contention the applicant denies that clause 2(e) of the loan agreement contemplates the deduction of any arrear amount."

As I stated earlier great significance is attached to the fact that the above clause speaks not of any arrear amount but rather any arrear instalment. Any arrear instalment is understood by me to mean any arrear amount not exceeding the equivalent of the M132.85 instalment as shown in Clause 2(d) of the loan agreement; whereas any arrear amount means an arrear instalment either in excess of or below the said M132.85.

Clause 2(b) of the loan agreement shows that the loan in the amount of M4000.00 was payable in thirty six months at the rate of M132.85.

The sum of the amounts on which the applicant's grievance is based is M1638.32 plus M761.00 making M2399.32. It seems that to liquidate the debt the applicant would have had to pay at least 18 instalments,

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meaning that he would have achieved this if he stayed 18 months in the respondent's employment inclusive of the period of the three months' notice or part of the period.

None of the papers shows the total sum of the arrear instalments. It is not shown for how many months the applicant was in arrears in his payments. The respondent merely says that

> "At the end of March, 1989 the applicant had failed to maintain regular payments in terms of the agreement and a build-up of his account had occurred."

However according to the loan agreement signed by the parties on 13th March, 1987 the first instalment was due and payable starting in April 1987.

Because of the nature of the loan agreement i.e. in terms of clause 2 (e) thereof that the respondent was entitled to deduct any arrear instalment from the applicant's salary it appears to me that if the respondent was diligent enough there would be no question of the applicant owing more than one month's instalment in arrears; for in respect of any month expiring without the applicant paying his instalment the respondent would in terms of the loan agreement have been entitled to deduct, during the subsequent month the amount of the instalment which should have been, but was not paid in the previous month, from the applicant's salary.

In my view taking account of the fact that due to the respondent's indiligence a build-up of arrears was allowed to occur, the respondent is entitled to retain an amount of the accumulated instalment arrears which would have brought the account up to date as of 31st March 1989. Any amount in excess of such figure should fall to be treated under section 48 (5)(c) of the 1967 Employmnet Act 22 saying :

> "Where
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> (a) an employer makes a loan to an employee;

(b) the total amount of the loan has been paid by the employer to the employee in cash or by cheque; and

(c) in any case where the loan exceeds an amount equal to half the employee's wage for one month, a memorandum of the transaction has been made and signed by or on behalf of the employer and employee providing for the repayment of the loan by two or more instalments, the employer may, ... deduct from the wages due to the employee such instalments at such times as are agreed in the memorandum:

Provided that nothing in this subsection shall be construed as permitting the recovery of loans irrecoverable under any other law."

It will be seen that provisions falling under (a) (b) and only to the extent that sub-paragraph (c) states that the loan envisaged under it qualified if a minimum of two instalments for repayment are required, apply in this application.

But as rightly stated by the respondent the Employment Act is silent about the manner of recovery of instalment arrears while the loan agreement itself specifies the manner of recovering being not more than one arrear instalment from an employee's salary.

But because arrear instalments are in any case loans or part of loans the proviso in section 48(5)(c) would apply to the extent that it prohibits the recovery of loans which are irrecoverable under any other law. And nothing in the loan agreement suggests that the accumulated arrear instalments cannot be recoverable under any other law.

It would seem therefore that the respondent apprehensive of the fact that the applicant's resignation made the respondent lose the only means of tying the appplicant to it and of compelling compliance with the terms of the loan agreement decided to treat the arrear instalments and the outstanding balance owed as if they instantly fell due and payable. But the loan agreement does

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not stipulate any such term authorising the attitude adopted by the respondent.

The applicant complained that the learned magistrate said he decided the application before him on the basis of there having been dispute of fact whereas he had heard the merits. I find no merit in this ground of appeal because nothing in the law prevents a judicial officer from reserving his decision on a point of law and hearing the merits subsequent to which he disposes the matter on the point of law reserved.

He also complained that Mahanetsa was not authorised to make his affidavit. See page 28 para 2(a) and para 4.1. But in C of A (CIV) No. 6 of 1987 The Central Bank of Lesotho vs E.H. Phoofolo (unreported) at p. 12. Mahomed J.A. said :

> "There is no invariable rule which requires a jurisdic person to file formal resolution, manifesting the authority of a particular person to represent it in any legal proceedings."

In the instant matter Mahanetsa's authority to represent the repondent is amply canvassed in his affidavit.

I must also point out that the respondent's averment that the loan agreement is the basis of the proceedings in this application is not without substance. It was on the basis of the contents of that document that I was able to achieve a semblance of success in determining the real issues betweeen the parties. The applicant ought to have supplied that document in the first place for it is not as if he didn't know why the respondent was withholding his salary or even refusing to pay part of his salary.

But because the loan agreement does not permit the respondent to deduct more than one arrear instalment at a time i.e. at the end of every month, it was wrongful of it to not only exceed th stipulated amount deductible but

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adopt what to me appears to be self-help by retaining the balance of the amount repayable to it. The law provides that the respondent could recover the balance due to it by going to court and that is what it should have done. This may sound a rather round about way of recovering the amount due to the respondent but it appears to be the only lawful way. The disadvantage is that it also will necessitate incurring of extra costs but a genuinely aggrieved party cannot be disobliged if he comes to court to ask for redress. Moreover it seems to me that by its conduct in allowing a build-up of arrear instalments the respondent is estopped from siezing and arrogating to itself any amount in excess of one arrear instalment per month plus at once the outstanding balance that falls to be cleared in the distant future if the instalments are kept up to date.

From my unaided calculations which are liable to be wrong though based on the armotization schedule at p. 26 it seems that with three more instalments if the applicant had been up to date with his payments reckoned from January 1990 he would have paid all that is owing. It would be a different story if clause (a) of the loan agreement applied. But nothing in the papers shows that the applicant was a subscriber to any pension scheme to which the respondent would have had resort in order to recoup itself from the benefits accruing therein.

In paragraph (a) of his application the applicant prays that the respondent be ordered to release to him the M2399.32. I cannot make such an order. I would rather order that the amount of the loan debt which would have been outstanding after the payment for last January bringing the account up to date has been effected be released and paid back to the applicant.

In the absence of a specific clause in the loan agreement entitling the respondent to recoup itself from the applicant's salary over and above the monthly deduction of one arrear instalment I find that the

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respondent acted unlawfully in committing the acts referred to in this judgment.

The applicant acknowledged in argument that he was liable to be sued by the respondent for the balance owed on the loan even if his present claim is to be upheld in these proceedings. A simple operation of set-off would be suitable to apply here for the applicant is keeping the car in any event. But he is insisting on his pound of flesh. Unfortunately costs have to be incurred in the process.

But because of the defects highlighted in the applicant's case; including more especially the fact that he did not place before this Court the loan agreement yet he must have known that it forms t of these proceedings as truly stated by the respondent, he will be awarded only 45% of his costs.

The decision of the court below is accordingly set aside and replaced by the above order.

J U D G E.

6th February, 1990.

For Appellant : Mr. Mahlakeng
For Respondent : Mr. Matsau.