

CIV\T\436\90

IN THE HIGH COURT OF LESOTHO

In matter between:-

LESOTHO LIQUOR DISTRIBUTORS (PTY) LTD Plaintiff

and

PITSO PHAKISO MAKHOZA Defendant

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 2nd day of December, 1991

This is an application in terms of Rule 30 (5) to compel the defendant to comply with the plaintiff's request for further particulars dated the 17th August, 1991.

The plaintiff claims payment of the sum of M388,557-58, interest thereon at the rate of 15% per annum a tempore morae, alternative relief and costs of suit.

It is alleged that the plaintiff sold and delivered liquor stocks to the defendant during the period 21st November, 1986 and the 30th June, 1989. The fullest

particulars are given as to such sales and deliveries in Annexure "B" to the plaintiff's declaration, being a series of invoices that record the relevant dates, the description of the goods, their quantities and prices and the debits in respect thereof. The dates of such invoices as well as their numbers and the debits thereon are listed on annexure "A" to the plaintiff's declaration.

It is alleged that payments were made by the defendant to the plaintiff during the said period in respect of the said liquor stocks sold and delivered. The fullest particulars are given as to such payments, namely dates and amounts, in the first and fourth columns of Annexure "A".

It is alleged that during the said period the defendant returned to the plaintiff empty containers relating to the said liquor stocks and that credit amounts in respect of the said returns are recorded in fifth column of Annexure "A". It is further alleged that in respect of certain of the said payments made by the defendant the cheques drawn by the defendant and made payable to the plaintiff were dishonoured, and the plaintiff debited the defendant accordingly, the amounts

are recorded in Annexure "A" in the fourth column in figures not in brackets and against references in the second column of Annexure "A" bearing the letters JV or in the third column bearing the letters RD.

It is further alleged that all debits and credits and balances are recorded in Annexure "A". It is further alleged that monthly summaries in regard to opening balances, invoice totals, payment totals, credits for empties returned and adjustments for dishonoured cheques are found in Annexure "C" to the plaintiff's declaration.

In his plea the defendant admits that the plaintiff sold and delivered certain liquor to Hotel Malunga and certain other liquor to defendant, but denies the alleged deliveries and says that the alleged debits are not justified. (See page 630 paragraphs 3.3, 3.4 and 3.5).

In its request for further particulars to the defendant's plea, the plaintiff asks in regard both to the liquor alleged to have been sold and delivered to the Hotel Malunga and also to the defendant for the names and description of such liquor, the dates of their sale and delivery, the place or places of such sales and delivery and the quantities and prices of each item of such

liquor.

Mr. Unterhalter, Counsel for the plaintiff submitted that in what purports to be further particulars to defendant's plea, the defendant advances an argument that the request for particulars constitutes a series of interrogatories. In effect the reply to the request for further particulars is a refusal of the information sought. Further particulars were sought as to:-

- (a) Liquor alleged not to have been delivered in respect of payments made;
- (b) What payments are incorrectly reflected on Annexure "A";
- (c) What credits in regard to returned containers are incorrectly reflected on Annexure "A";
- (d) Which debits, which credits and which balances reflected on Annexure "A" are incorrect;
- (e) The respects which the summaries in Annexure "C" are incorrect.

These particulars were similarly refused.

In his further particulars the defendant admits that during the period from the 21st November, 1986 to the 30th June, 1989 the plaintiff sold and delivered liquor stocks to the defendant who purchased and received these

from the plaintiff. When the plaintiff asks for the fullest particulars in regard to certain other liquor alleged to have been sold and delivered to the defendant, the defendant refuses to supply them.

The defendant admits that during the said period he returned to the plaintiff empty containers. He however refuses to give the fullest particulars of the empty containers alleged to have been returned to the plaintiff.

He admits that during the said period defendant made payments to the plaintiff. However, when the defendant is asked to give full particulars of payments made he refuses to do so.

Mr. Unterhalter submitted that it will be apparent from the above summary of the plaintiff's case literally hundreds of transactions are alleged. He referred to the case of *Kliptown Clothing Industries (Pty) Ltd. v. Marine and Trade Insurance Company of South Africa Ltd.*, 1960 (1) S.A. 446 (W.L.D.) in which Dowling, J. at p. 448 E said:

"It would not be fair and equitable to require the Plaintiff to be

prepared to vindicate each and every one of possibly hundreds of thousands of entries in his books. Every consideration of convenience in the administration of justice points to a duty to particularise on the part of a Defendant. And such convenience is a very important consideration in relation to procedural matters."

Mr. Unterhalter, submitted that the plea at page 630 paragraph 4.1 alleges that the liquor in respect of which payments were made was not all delivered and paragraphs 4.2, 5, 6.2 and 7 state that the information recorded in various portions of Annexure "A" to the declaration are not correct.

In *Lieberthall & Lieberthall v. South British Insurance Co. Ltd.*, 1959 (3) S.A. 81 (W.L.D.), Galgut, A.J. at page 834 said:

"Where a firm has a business and has a great number of transactions and keeps books in which the transactions are recorded, then, in the very nature of things, it will not know of the transactions which have not been recorded unless, of course, it deliberately fails to record them."

In the present case the plea alleges that the goods were not all delivered, I am of the view that it is the

defendant who should particularise. A party is not required to give particulars to a portion of his pleading which embodies no more than a traverse of averments in his opponents pleading (Kliptown's-supra- at p.448). However, in applying this principle, it must be born in mind that a statement in a plea which is in form of a denial may embody by necessary implication a positive averment of some fact; and in such a case it may be proper to order that particulars of the implied averment be given (Snyman v. Monument Assurance Corporation Ltd., 1964 (4) S.A. 376 (W) at p. 379; Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa, Vol. II 7th edition, page 133).

It seems to me that in the instant case some of the statements in the plea are in the form of a denial but may by necessary implication embody positive averments of some facts; see (a), (b), (c), (d) and (e) above. I agree with Mr. Unterhalter that where a plea alleges that goods were not all delivered, the details requested at page 633 paragraph 2 should be stated by the defendant. And similarly, as to what the plea alleges is incorrect, details should be stated by the defendant as requested at page 634 to 636 paragraphs 3 to 6. The defendant alleges

at page 630 paragraph 4.1 and 8.2 that liquor in respect of which payments were made was not all delivered. These are stated in context of denials but by necessary implication they are positive averments of payment and non-delivery (Pinson v. Lloyds and National Provincial Foreign Bank Ltd. 1941 (2) All E.R. 636; Van der Merve Beleggings (Edms) Bpk. V. Cohen, 1979 (4) S.A. 857 at page 863 B to D.). All the particulars requested at page 633 paragraph 2 and page 637 paragraphs 7 and 8 should be stated by the defendant.

In his plea the defendant states that he is not a hotelier trading as Hotel Malunga. However, Government Gazette No.75 dated the 28th October, 1988 under Government Notice No.110 of 1988 the defendant appears at page 244 and clearly trades as Hotel Malunga. It is very clear that Hotel Malunga was not a company. It appears that in terms of the proviso to section 8 (1) of the Liquor Licensing Act No.16 of 1976 the defendant was the hotel liquor licensee who moved the renewal of licence application.

In the result the application to compel the defendant to supply the further particulars requested is granted with costs. The particulars shall be supplied

within thirty (30) days from the date of this judgment.

J.L. KHEOLA

JUDGE

2nd December, 1991.

For Plaintiff - Mr. Unterhalter

For Defendant - Mr. Edeling.