

IN THE HIGH COURT OF LESOTHO

In the matter of :

DR Q.M. QHOBELA

Plaintiff

v

'MAMALEFETSANE QHOBELA

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on
the 31st day of May, 1994

On 27th May, 1994 judgment was entered for the plaintiff in the amount of M24 732-00 plus interest at 11% calculated from 17th June, 1991 to date of payment; and costs.

Furthermore the point of law raised by the defendant was also dismissed.

Here are reasons for judgment :

I propose to deal first with the application regarding the question of law leading to the dismissal thereof.

In her plea the defendant who is the plaintiff's sister-in-law had pleaded in limine that the cheque dated 1-2-84 for M5000-00 had prescribed by virtue of the provisions of Section 3 read with Section 4(b) of Act 6 of 1861.

The relevant sections read as follows, namely section (3) regarding action for liquid debts :

"Except as hereinafter is excepted, no suit or action upon any bill of exchange, promissory note or other liquid document of debt of such a nature as to be capable of sustaining a claim for provisional sentence shall be capable of being brought at any time after the expiration of eight years from the time when the cause of action upon such liquid document first accrues: Provided that nothing in this Act contained shall extend to or affect any mortgage bond, general or special, or any judgment of any Court in Basutoland or elsewhere"

for Basutoland above read Lesotho.

Section 4(b) is presaged by the phrase: The provisions of the last preceding section shall extend and apply to the respective suits and actions following, that is to say "for money lent by plaintiff to the defendant".

The plaintiff's suit is based on a series of alleged loans made to his late brother Talimo. It is in respect of the foremost of these in time that the defendant raised the above point of law. The loans consist of a series of cheques the first of which was drawn in the amount of M5000-00 for the benefit of T.M. Qhobela the deceased on 1-2-1984. See Annexure A. The summons was drawn on

19th March, 1992 and filed of record on 31st of that month. Clearly this was after 8 years had run. But a letter of demand "Exhibit B" had been addressed to the defendant on 3rd June 1991. The deceased died on 9-3-91. The defendant is sued in her capacity as sole heiress to the deceased estate.

In support of the exception raised on behalf of the defendant Dr. Tsotsi submitted that the debt became due and payable immediately upon the amount being advanced to the defendant. In my humble view this submission tends to ignore that there was a purpose for which the money was advanced to defendant's husband namely to build a restaurant and run a liquor store, a butchery and vegetable sales. This was so vital in the contract as never to be lightly ignored.

Should I be wrong in the view I have just expressed, I find Mr. Buys's submissions on the matter very persuasive as they are based not only on common sense but on what seems to be the intention of the law that disapproves of absurdity.

Regarding this alleged prescription Mr. Buys pointed out that the defence was not that money was not due and payable but that there was no loan. See Request for Further Particulars 1.3 read with Further Particulars paragraph 1 ad para 3 at 1.3.

Furthermore it seems that the defendant makes two fatal

mistakes in the view she takes of prescription. The proper view should be that when one pleads prescription one must make a calculation and say when exactly a debt prescribes. The Court should be placed in no darkness concerning whether a debt prescribed two days or two months before the issuing of summons. This the defendant has not done.

The 2nd flaw is that it is attempted on behalf of the defendant to make a big thing about what is called joint project or joint venture without giving a solution to the problem the parties seem to be entangled in.

I think therefore that the loan whose terms are not set out in writing but from what the plaintiff said in evidence would be payable when the deceased's business was operational, couldn't have been due and payable on demand but on deceased's death when it became definite that he would not fulfil terms agreed on orally at the beginning when the contract was entered into; and when indeed all liabilities of the estate become payable.

There is therefore an important part of Act 6 to take into account when calculating the period of prescription on expiration of 8 years from the time when a liquid document first accrues.

Section 4(b) extends "liquid" to include moneys lent and advanced.

It would seem then that calculation would properly start when a claim accrues not when a cheque was handed over.

The Court is alive to the unchallenged evidence of the plaintiff that repayment would have been on completion of the project that the deceased had started.

All the foregoing is exclusive of another important principle that stay of prescription is effected when action for the claim is instituted. Regard being had to the fact that letter of demand was on 3rd June 1991 it can successfully be argued that this was the date when the defendant was placed in mora.

Now turning to the merits. The plaintiff sues the defendant for :

- (1) payment of M24 732-00 being the amount due and payable to plaintiff in respect of monies lent and advanced by plaintiff to Talimo Mohlakazo Qhobela (the late husband of the deceased who is cited in her capacity as sole heiress in the estate of the said late Talimo Mohlakazo Qhobela) at the latter's special instance and request during or about the period February 1984 to April, 1986 which amount defendant has despite demand failed to pay;
- (2) payment of interest on the aforesaid amount at the rate of 11% per annum from 17th June, 1991;
- (3) costs of suit;
- (4) alternative relief.

In paragraph 4 of his declaration the plaintiff states that "Defendant, in her aforesaid capacity, is liable to plaintiff for payment of the aforesaid amount."

Reference to the defendant's capacity is to be found in paragraph 2 of the declaration which is to the effect that the defendant is the sole heiress in the Estate of the late Talimo.

Questioning this aspect of the matter the defendant in her Request for Further Particulars Ad Para 4 in paragraph 2.1 asks :

"Did the late Talimo Mohlakazo Qhobela leave a will in favour of the Defendant? If so, Defendant requires a copy thereof; if not in what way is it alleged that she is sole heiress of her late husband's estate?"

To cut a long story short at the beginning of this trial Mr. Buys stated and Dr Tsotsi confirmed that :

- (1) Payments reflected in the pleadings were made to the deceased.
- (2) Defendant's counsel has seen correspondence between plaintiff and the deceased - the defendant's husband.
- (3) It has now been admitted that the defendant is sole heiress of the deceased.

After these admissions the plaintiff gave oral evidence on oath. He stated that the defendant was married to the deceased Talimo.

It is common cause that Talimo was the plaintiff's brother. Therefore the defendant is the plaintiff's sister-in-law.

The plaintiff stated that the defendant is also sole heiress to the estate of the deceased who was predeceased by his only son Malefetsane Qhobela.

He went further to state that upon the deceased's death he personally took the defendant to the District Administrative Secretary at Maseru to confirm the defendant as sole heiress to the estate of the deceased Talimo.

The plaintiff further took the defendant to the Manager of Barclays Bank Maseru for the release of whatever assets were due to the deceased.

The plaintiff subsequently sued the defendant for M24 732-00 being the composite amount consisting of sums of money reflected in Exhibit "A".

These amounts are in the nature of cheques issued to the deceased at various dates and years,; to wit (a) 1-2-84, (b) 6-9-84, (c) 4-5-85 and (d) 29-4-86.

These cheques were credited into the deceased's various accounts. They were negotiated through the plaintiff's accounts.

A photocopy marked "A" attached to the pleadings was referred to in proof thereof.

The plaintiff indicated that since 1970 he has been living abroad for approximately 20 years. During this absence the deceased used to look after the plaintiff's interests. Indeed in evidence led it seems the deceased and plaintiff were very close and had a high degree of affection for each other.

It was in this posture of events that the deceased intimated to the plaintiff that he was due to retire soon and would wish to set himself in some commercial enterprise in Butha Buthe. For this he asked for a loan from the plaintiff. Hence the various cheques drawn on plaintiff's various Banks for the benefit of the deceased.

The plaintiff was emphatic that there was no written document to constitute the agreement between him and the deceased. The agreement was oral and he produced correspondence between him and the deceased as furnishing a basis from which the existence of the said agreement could be inferred.

The plaintiff was closely cross-examined in an endeavour to show that in fact these letters (correspondence) suggest the existence of a joint venture between him and the deceased. Reliance in that regard was reposed on the use of and reference to

frequent use on either side to the words "ours" "we" "our" and "us".

While Counsel for defendant made an adorable performance in ably dissecting contents of these letters it becomes an irksome task to determine what weight to attach to them in contrast with what plaintiff said about them and not gainsaid by any evidence from the defendant's side. The plaintiff was challenged and he gave his explanations. It is not the function of the Court to speculate on what evidence could have been adduced for the defendant to gainsay the only explanation given by the plaintiff. The Court cannot speculate on what the plaintiff meant when an explanation of what he meant is there. Thus it must stand. By this I wish to stress that the Court can only decide on evidence before it. If plaintiff's evidence stands alone, then that evidence if uncontradicted must stand.

In cross-examination of the plaintiff the defendant's counsel sought to make capital from a phrase appearing in Annexure "C" dated 2nd April, 1984 written by plaintiff to the defendant spelt out in the penultimate paragraph as follows:

"What is the progress of the project at BB, as I would like to budget for it in time".

It was contended that this shows that the plaintiff's interest extended beyond a mere loan and implied that the project at Butha

Buthe was a joint venture between the plaintiff and the defendant. But as I stated earlier short of any evidence to support this contention there can be no basis for the view that the form of contractual relationship between the deceased and the plaintiff was in the nature of a partnership. This is moreso when the explanation of the plaintiff which is not countervailed by any evidence is that all the monies he supplied to his late brother were a loan geared at securing the deceased's personal and sole business venture.

Having submitted in his heads of arguments at paragraph 6 that the onus is clearly on the plaintiff to prove on a balance of probabilities that the monies which were sent his late brother were for a loan, Dr Tsotsi for the defendant demurred at the fact that it is convenient for the plaintiff to claim at this stage when Talimo is no more and when questioned about the existence of the loan, to say only the deceased knows.

The plaintiff testified that after handing over the money to his late brother the agreement was that repayment of the loans could start being effected when the business was operational. However until the deceased's death the project had never gone into operation. The deceased had not progressed far beyond merely obtaining trading licences reflected in the correspondence placed before Court.

The plaintiff stated that before returning home he had known that the deceased hadn't a clean bill of health. Thus he was under constant medical treatment for high blood pressure which later led to heart attack to which he succumbed shortly after the plaintiff's arrival home from foreign service with WHO in Tanzania.

The plaintiff ruefully maintained that he had not been able to finalise arrangements with the deceased before the latter's death.

Faced with this unwelcome turn of events the plaintiff approached three of his relatives namely Mr. Letjea Qhobela, Mr. Mopeli Qhobela the plaintiff's brother and Theko and asked them to bring him face to face with the defendant concerning the unfinished business left by his late brother. The defendant is said to have listened carefully to the proceedings, made no comment and appeared to be unhappy.

Two more meetings were held without any success. The last of this was in the absence of the plaintiff. Thereafter he addressed a letter of demand to the defendant. The response was in the nature of a letter addressed to the plaintiff by the defendant's attorneys.

Because of his utter lack of personal interest in the business going on in Butha Buthe either through hire of business premises

by the defendant to someone or run by the defendant herself the plaintiff is ignorant of the state and use of those premises.

However the sole witness for the defence gave the Court an inkling of what business is going on there. He said the premises have been rented out by the defendant to someone who is running sales of liquor in those premises. Understandably the defendant stands to benefit from the rent collected for the hire of the premises.

Asked why he didn't ask Talimo to pay back the money on plaintiff's arrival from abroad in 1990 the plaintiff replied that the project had not yet been completed; the understanding having been that the deceased would pay when the project had taken off and it had not.

The plaintiff was taxed about his lack of knowledge of the extent of the construction of the project on his arrival and about the fact that he didn't go to see the construction. The plaintiff had contented himself with taking his brother's word and reposing his utmost faith in the latter's sincerity. The plaintiff denied that the project existed only in his imagination.

It was put to plaintiff that the project was not just Talimo's alone but was a joint one between the deceased and the plaintiff. The plaintiff replied that

"There was nothing joint about the project as shown by licences issued in the deceased's sole name. I gave him a loan".

In an attempt to buttress the contention that the letters seem to support the view that the venture was a joint one the cross-examination proceeded as follows :-

"I put it to you that this project was a joint project between you and Talimo and these letters are proof?....I deny that it was a joint project.

All letters produced bar one were written by you?.... Yes.

Is it the only letter he wrote?.... The letters were not primarily relating to the project. The project would come towards the end.

It is significant that only one letter is on the project. Were there letters relevant to the project?.... There were letters which had nothing to do with the project (Referenced to A1 for identification). Read the second sentence. What does it signify?.... It would have been for him to clarify.

But he is not here?.... Well it could have been he and you?... Yes, like it could have referred to him and others.

Like who for instance?..... He and his wife.

Our own building material refers to who?.... My answer is the same as above.

He refers to his financial problems in paragraph 3. He does not refer to you as source of financial assistance?... There was never a loan saying send me so much. Nothing like that in writing. the loan is inferred in the correspondence."

The plaintiff was later referred to document "B" dated 25-9-

83 :

"This is a letter from you to your brother (letter read). The 'we' shows you were in partnership with Talimo?....

The 'we' does not necessarily mean me, but Talimo and others.

You can't go round that one. You had given thought in detail to it?... My interest was in getting my loan reimbursed; if the project could refund my loan quickly-fine.

This letter was written on 25-9-83, the loan was on 1-2-84?.... The project was a proposed project.

Why say 'our' or 'we' instead of saying to Talimo as 'you' or 'your'?...."

The reaction to this question by the plaintiff was not satisfactory. I gained the impression that he was caught in an awkward position. But even so in the absence of evidence on which the defence basis its case an occasional moment of awkwardness reflected by a witness in an attempt to answer a question to which the reply is not satisfactory does not necessarily demolish the case which is being attacked.

The sole defence witness was DW1 Mr. Bereng Nathaniel Jameson Qhobela who testified that he and the plaintiff are relatives, their fathers being brothers. DW1 knew Talimo the deceased very well.

DW1 stayed with Talimo and the defendant from 1969 to 1970. DW1 said he and his sister were taken care of by the deceased. He maintains and his statement is worthy of credit that he and Talimo were very close.

However he said he didn't know anything about Dr. Qhobela lending M24 732 to Talimo. He maintains he would have known if this had been done because Talimo always communicated whatever instructions emanated from the plaintiff (the elder brother).

Under cross-examination DW1 stated that he had intimate knowledge of the affairs of the late Talimo because of discussions he had with him. He however qualified his statement by indicating that the discussion was on some and not all of the deceased's affairs. He didn't know how much money Talimo had in the Bank at the time of the latter's death. Nor did he know the extent of the deceased's debts.

He further stated that he knew that Talimo owed money in respect of a motor car and of a loan in the Building Finance Corporation but not of any other accounts, especially small accounts.

Asked "how much did he owe for the car?..." he said

"I recall that he deposited the old car and was given an advance by the Government"

"Where were you staying in 1984?.... I was in U.S.A.

How long for?.... I came back in 1985.

Where did you stay then?.... Maseru.

Had you contact on daily basis with the deceased Talimo?...Weekly at least.

How much money did Dr. Qhobela pay in respect of repairs to his house?.... I don't know how much.

Otherwise I know that plaintiff instructed Talimo to take charge of that.

Who eventually paid for repairs?.... I was told Dr. Qhobela did"

Asked how much was sent by plaintiff to Talimo in order for the latter to do some work for the former DW1 said Talimo just indicated that some money was sent to him without saying how much.

He recalls the number of occasions that this took place to be over five times according as the deceased told him. He didn't get to know of details of instructions given to Talimo by the plaintiff in connection with these occasions.

Cross-examination and corresponding replies proceeded as follows :

"Do you know of property that belonged to deceased at Likileng in Butha Buthe?.... I know of it.

You say it belonged to Talimo?.... Yes.

Today to whom does it belong?.... To defendant wife of Talimo.

Is it developed or undeveloped?.... It is developed. It has a building in it.

What happens in that building?.... There is a business of liquor being sold there. Something like a bar.

Do you go to this place from time to time?.... I usually go past because it is someone doing the business there.

Meaning it is being rented out by Mrs. Qhobela?... Yes.

If there was a family meeting after the death of Talimo would you be entitled to attend because of your

relationship with deceased?... I would be entitled because Mrs. Qhobela would call me.

Did she in fact call you?... No she just showed me a letter.

After Talimo died were you actively involved in the administration of deceased estate?... I was not directly involved but the wife used to call me and say what to do"

From the above summary of evidence that has mostly been quoted verbatim it seems clear that the plaintiff's case far outweighs that of the defendant on a balance of probabilities.

The plaintiff provided a solid background concerning relations between him and the deceased. He gave a background also of the claim largely based on the warm brotherly relations which existed between him and his late brother.

The defence on several occasions suggested that the agreement between the parties was a joint venture. On each such occasion this was denied. The test to apply in establishing whether there was a joint project or not would revolve on ascertaining what the plaintiff did in regard to the project during the deceased's life time and prior to his death.

Evidence shows that the plaintiff doesn't even know what is going on at the business premises in Butha Buthe. He took no action to make any claim to that property or even show any interest in it.

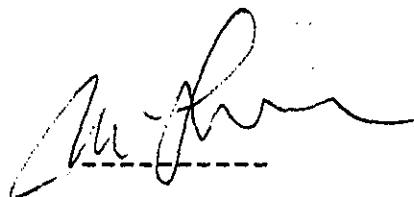
There is no evidence that the defendant herself either approached the plaintiff regarding the project.

If it was a joint venture it could only have been a partnership; in which case the law which says that at death of one partner the partnership is dissolved, would apply. But this didn't happen. DW1 says business is going on there and is for the benefit of the defendant in the sense that she has rented out the premises. This contrasts sharply with the suggestion put to the plaintiff that no business goes on in the project and that any business going on there is purely in the imagination of the plaintiff.

No evidence has been led on behalf of the defendant to challenge the plaintiff's denial of the existence of any joint venture between him and the deceased.

Though DW1 was a straightforward witness he did not advance the defendant's case in any material respect. He frankly indicated that much of what he was telling the Court was either hearsay or that he could not supply intimate details of what he otherwise claimed he knew. It is a lasting and favourable impression formed of DW1 by the Court that he did not seek to hide his ignorance of things material to this case by resorting to evasiveness or prevarications. He was truthful and ignorant.

For these reasons the Court entered Judgment as prayed in the summons for the plaintiff.

A handwritten signature in cursive script, written in black ink, positioned above a horizontal dashed line. The signature is somewhat stylized and difficult to read precisely, but appears to be a personal name.

J U D G E

31st May, 1994

For Plaintiff : Mr. Buys

For Defendant: Dr. Tsotsi