CIV/T/185/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

STANDARD CHARTERED BANK AFRICAN PLC	Plaintiff
and	
SIDWELL MAKOA MOHLEKWA	Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge on the 14th day of April, 1994

On the 23rd February 1994 Mr. Fisher for the Plaintiff and Mr. Nathane for the Defendant appeared before me. They advised that their case was such that there would be no need for viva voce evidence. They handed in by consent certain items of correspondence and that they wanted a case stated and would argue accordingly on the following point:-

To determine whether and to what extent Defendant is liable for interest where:

(a) Defendant says he is not liable for interest on the capital

amount by reason of two tenders he allegedly made on the following dates -

(i) On the 20th March, 1992.

(ii) On the 28th August, 1993.

Defendant says he is not obliged to pay interest on the capital sum from the date of the tenders. The rate of interest is not in dispute.

The twin concepts of tender and compromise are involved in the determination of this matter. This too we must state from the onset by way fixing the goal posts. It is however useful to say something about the background of the matter.

The Defendant was at all material times in the employ of the Plaintiff until about the 12th August, 1991 when he was dismissed by the Plaintiff. It is common cause that in January 1987 the parties entered into an oral agreement in terms of which Plaintiff lent and advanced to the Defendant from time to time an overdraft facility in respect of a housing loan. Plaintiff later secured the said loan by way of registration of a deed of Hypothecation in favour of Plaintiff in the the Deeds Registry in Maseru in about the 1st June 1987. It follows therefore that

after payment in full and final settlement this deed would have had to be cancelled. It also follows that the cancellation would take sometime after the actual payment. At the time of his dismissal the Defendant was owing to Plaintiff a certain amount of capital and interest thereon at a rate which is not disputed by the parties. We came to know that the Defendant sought and indeed negotiated a loan from his new employer the Lesotho Building Finance Corporation (LBFC), who also intended to register a Deed of Hypothecation to secure its own loan to Defendant. The loan was arranged in order to pay off the capital sum and interest owed to the Plaintiff. More will be said about the amount of capital interest, the time and the condition upon which this LBFC sought to pay the Plaintiff on behalf of the Defendant. This in return elicited a certain attitude from the Plaintiff as to when and how much money it ought to be paid "properly" as it demanded.

For ease of reference I have the correspondent handed in numbered as follows:

(a) Letter of undertaking for LBFC to Plaintiff - dated 20th March 1992 - referred to as IDA.

(b) Letter of statement of regret of still unpaid capital and interest from the Plaintiff to the Defendant -

dated 27th March 1993 - referred to as IDB.

(c) Letter inquiring about release of Defendant's lease and endorsing that delay can only accumulate interest - from L. Pheko & Co. (Attorneys) to Harley & Morris (Attorneys) - dated 2nd April 1993 - referred to as IDC.

(d) Copy of letter of undertaking "to pay the following amount M39,810.00 to Plaintiff" from LBFC referred to as IDD.

(e) Letter containing statements about summary judgment allegedly irregularly entered into referring to letter dated 2nd April 1993. It is only appropriated to reproduce these concerned portion in full thus:

"Your letter echos what we have indicated to you in writing on many occasions in the past in particular our letter to you dated the 11th of June 1992 our clients are ready. Willing and able to cede or cancel the Mortgage Bond against receipt of a valid guarantee from the Lesotho Building Finance Corporation which covers our client's position. We have prepared a draft guarantee for yourselves in the past and

forwarded same to you for signature by the Lesotho building Finance Corporation. We must however mention that the amount outstanding is the sum of M46 679 41 together with interest thereon at the rate of 25% per annum calculated from the 16th day of March 1992 to date of repayment and costs of suit. Our clients do not accept the contents of your client's Affidavit which alleged that an amount of M6 000 00 odd is not covered by their bond should be dealt with separately. You will of course understand that our clients are not prepared to accept anything less than the amount as set out in the Summons and if this principle is accepted by your client then movement will be made towards settlement of this outstanding matter. We should respectfully suggest that you table concrete proposals in regard to the settlement of the entire matter as set out in the Summons. Our clients are not prepared to accept your client's allegation that the amount of M39 810 00 is the full amount owing."

- dated 14th April 1993 - Referred to as IDE - from Harley and Morris to L. Pheko & Co.

(f) Letter in reply to a certain inquiry by Harley and Morris to the Plaintiff to Harley & Morris - dated

23rd August 1993 referred to as IDF

(g) Letter enclosing cheque in sum of M46,679.41. The cheque was from Lesotho Agricultural Development Bank. The letter was from L. Pheko & Co. to Harley & Morris - dated 28th August, 1993. The cheque was dated 24th August 1993 - referred to as IDG.

(i) Letter acknowledging receipt of IDG - in which the cheque in IDG is rejected and offering in turn M60,000.00 in settlement plus costs provided amount offered to be paid within 7 days - From Harley & Morris to L. Pheko & Co.

A submission made by the Plaintiff reveals that at no time did the LBFC on behalf of the Defendant put up a guarantee in which the capital sum owed would be paid up "<u>together with interest to the time of payment.</u>" This appears to be so when regard is had to IDA which undertakes "to remit to yourself the sum of M39,810.00 from the proceeds of advances "as <u>soon as the mortgage documentation has been completed and the bond registered in our favour</u>" (my underlining). This condition the Plaintiff found to be most unacceptable. It is clear that as at the date of IDB the debt had risen to M46,679.41 "though the application of interest up to 29th February, 1992." I find that it was not

correct that (as shown in IDC) the Defendant's Attorneys should seek to persuade the Plaintiff to release Defendant's lease on the strength of the guarantee given by Lesotho Building Finance Corporation. I believe that the Plaintiff would be entitled to reject any offer whether it be called a guarantee or not which spoke of liability to pay M39,810.00 without a further guarantee of payment of interest and costs to date of payment from the 16th March 1992. In this I include IDA and IDD.

It is clear that as far as Plaintiff is concerned this request of having the lease released and starting off with the procedures for drawing of bond documents and arranging for cancellation of the deed of hypothecation, was never a problem on the side of the Plaintiff, hence IDE which I need to quote as follows: "We enclose, herewith, a copy of our client's Bond together with a copy of the Lease in order that you may proceed with the drawing up of your Bond in the interim. May we receive the usual guarantee? We enclose, herewith, a draft copy of the guarantee which would be acceptable to our clients. What we suggest is that you draw your Bond documents in the meantime, and we shall also arrange for a consent to cancellation from our clients. Once the Bond documents have been drawn and the guarantee provided to our clients, our two offices can liaise and the transactions can be executed simultaneously in the Deeds Office." It is clear therefore that what the LBFC deemed to be

a condition ought not to have been so. The Plaintiff has always deemed the forwarding of a sufficient guarantee to be the only necessary condition. I make a finding that they were entitled to so demand: Payment in full refers to an unconditional offer to pay the full sum owing forthwith or at leas without delay or postponement (see MACLEAN vs HAAS BROEK 1956(2) SA 446 (O))

I would have to look at IDG as being, a second "tender" that the Defendant put forward. It speaks of a sum of M46,679.41. This is the sum of money or total calculation that seems to have been arrived as at the 27th March 1992 (see IDB). As long as then. This is one mark about the IDG. This means that the sum was being offered about 17 months afterwards. This also means that if the offer was acceptable to the Plaintiff he would either be doing so in a belief that it is all the capital and interest due or that Plaintiff was foregoing all interest that should accrue from the 29th February 1992. In the latter event that would be an offer to settle or to compromise. The Plaintiff refused to accept the cheque offered and therefore did not accept any of the two positions stated above. The offer was not accepted. In any event the onus would be on the Defendant to prove that the offer was accepted. Pursuant to the answer in refusal of the Defendant's offer as shown in IDI Plaintiff however went on further to offer to the Defendant as shown in IDG.

What is the status of the Defendant's offer to pay as contained in IDA and IDI and as referred to in Defendant's plea as specified at paragraphs 3 and 4? It is on the two occasions that Defendant alleged that he made tenders to pay in full and final settlement and to that extend he is only liable to capital and interest up to the 20th February 1992 and not afterwards. This should depend on whether, properly speaking, his offers of the 20th February 1992 and the 28th August, 1993 were tenders. The Plaintiff says this overtures can best be described as offers to settle or offers to compromise but not tenders at all. This is correct. Plaintiff was not bound to accept the offers.

I observe that while the Defendant's offer of the 24th August, 1993 can be described as an offer to settle it can certainly not be described as a tender and payment into Court in terms of Rule 38 of the High Court rules. The only effect of a tender in Defendant's plea would only protect Defendant against an order of costs (see De Beers v Versebering Van SA BPK 1971 (3) SA 614(O). See also Amlers Precedents in pleadings 4th edition at pages 302-303. It needs to be repeated that Plaintiff refused both offers as contained in the Defendant's plea and lastly in the letter of the 24th August 1993 (IDG). I am persuaded that should the Plaintiff have accepted payment of the cheque and the offer contained in the Defendant's letter of the 24th August 1993 that would amount to an acknowledgment that he has been paid in

full settlement (see Andy's Electrical vs Lourie Sykes 1979(3) SA 34(w). Payment in full refers to an unconditional offer to pay the full sum owing. Payment must be of a thing due and something else cannot be substituted without the consent of the Creditor. A debtor may not pay one thing for another against the will of his Creditor.

My finding is finally that there is no good ground why the Defendant shall not pay a sum of M46,679.41 plus interest reckoned from the date of the 20th March 1992 together with costs of suit.

T. MONAPATHI
Acting Judge

For the Plaintiff : Mr. Fisher

For the Defendant : Mr. Nathane