CIV/T/487/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LIKOTSI NTOAMPE — PLAINTIFF

vs

PHUTHIATSANA INTEGRATED RURAL DEVELOPMENT PROJECT — FIRST DEFENDANT
THE ATTORNEY-GENERAL — SECOND DEFENDANT

Before the Honourable Chief Justice B.P. Cullinan

For the Plaintiff : Mr L. Pheko
For the Defendants : Mr T.S. Putsoane, Senior Crown Counsel,
Mr T. Molapo, Senior Crown Counsel

JUDGMENT

The plaintiff is a farmer who farms in the Berea District. The first defendant ("the Project") is apparently an Authority established under the Development Projects Order, 1973 (No.9 of 1973). The parties developed a commercial relationship from 1985 onwards, that is, in the operation of the plaintiff's scheme of cultivation of lucerne on some 12 Hectares. The plaintiff received some assistance in the matter by way of a loan from the Lesotho Agricultural Development Bank ("LADB" or "the Bank"). Sometime in 1988 the plaintiff's irrigation machine, used in the irrigation of his lucerne crop, required repair, costing in the

region of M3,000. The plaintiff decided to enter into an agreement with the Project for the management of his lucerne scheme, a pre-condition of which was that he would pay M1,500 towards the repair of his irrigation machine. The agreement, in the form of a letter dated 25th July, 1988, addressed by the Project to the plaintiff and countersigned by him, reads as follows:-

> "We refer to our meeting on Monday the 18th July and our subsequent meeting with Mr Motseki of the LADB on Friday 22nd July regarding above irrigation scheme and report as follows:
>
> (1) Mr Motseki has in principle agreed that LADB pay the balance over and above M1500.00 for the overhaul of your engine by Lesotho Motor Engineering, Maseru, under the condition that the Project will be totally responsible for the management of your scheme until March, 1989.
>
> (2) *In order to enable you to repay the money owed to the Project*, the Project is willing (to) undertake the management of your scheme at no charge but running and harvesting costs will be deducted from the income of the sale of lucerne. In addition we will on your behalf repay as much of your outstanding loan to LADB as possible.

During March 1989 before this Project terminates we will organise a meeting with all parties concerned and will discuss the operation and performance of your scheme during the 1989/90 season.

If you agree with our proposal could you please countersign the attached copy of this letter return it to the office together with the M1500.00 which you pledged in order that we have your engine overhauled as soon as possible and obtain maximum yield from your scheme.

The Project will off course keep accurate records during the management of your scheme.

Yours sincerely,

(Signature)

T.J. LEDUMA

PROJECT MANAGER

Read and Accepted

(Signature)

T.L. NTOAMPE

cc: Mr Motseki - LADB" (Italics added)

The plaintiff duly paid over the sum of M1,500, and the Project took over the management of his lucerne scheme. The plaintiff testified that the meeting proposed for March 1989 never took place, and that for some three months thereafter he pursued a request for records of the scheme's operation without success. Thereafter he had recourse to his Attorneys, to whom the

Project Manager wrote on 6th July, 1989 thus:

"Attached is a statement of what has been achieved on Mr Ntoampe's Irrigation scheme at Ha Phoofolo during 1988/89 season.

According to an agreement between the Project Management and Mr Ntoampe the balance should be paid to Agricultural Development Bank".

The attached "Statement of Achievement" on the plaintiff's lucerne scheme reads as follows:

"1.	Credit Sales		2833.50
	Cash Sales		12862.50
			15696.00
2.	Less Payments		
	Spare Parts	141.82	
	Repairs	312.60	
	Casual Employment	1055.00	
	1985 Credit Scheme	2793.40	
	Farm Machinery Hire 86/87	2435.85	
	Farm Machinery Hire 88/89	2230.40	8969.07
	Balance Available		6726.93 "

On 15th July, 1989 the plaintiff's Attornies replied, observing that the information supplied by the Project was "scanty" and requesting the following information "accompanied by documentary evidence":

(1) How many bales the project made per cut during the contract period.

(2) The expenditure incurred per cut.

(3) The number of cuts during contract period.

(4) Payment to LADB on behalf of client".

The Project Manager replied on 5th September, 1989 thus:

"Please be informed that we are not in the position to furnish your office with the information you have requested.

Your Client has several times been requested to supply our office with some information so that we could reply to you. He has so far not done that.

Your Client's cooperation in this regard is mandatory."

Ultimately the plaintiff instituted this action. In his declaration, filed on 3rd December, 1990, he claims that he

complied fully with the terms of the agreement of 25th July, 1988. As to the part played by the Project he claims that,

> "First Defendant is in breach of the conditions and terms of the said agreement and Plaintiff has as a result suffered damages in the sum of Thirty Three Thousand Three Hundred and Eighty Maloti M33,380.00 being the net profit for 1988/89 lucerne period."

The Defendant's requested further particulars. The plaintiff complied, claiming that the Project was in breach of "all conditions" in the agreement. As to his calculation of the above damages, he supplied the following particulars:

> "EXPECTED YIELDING OF LUCERNE DURING 1988/89 WHILE MY PROJECT WAS STILL UNDER PHUTHIATSANA PROJECT MANAGEMENT
>
> NO. OF BALES ON AVERAGE ON EACH CUT. PRICE PER BALE
>
> 1400 BALES 6.50 =M9 100.00
>
> NO OF CUTS PER ANNUM 5*1400 = 7000 BALES
>
> TOTAL AMOUNT PER ANNUM = 7000 BALES * 6.50
>
> =M45 500.00
>
> COSTS OF MACHINERY PER CUT = M1289.00
>
> TOTAL COSTS PER FIVE CUTS =M 6 445.00
>
> IRRIGATION COST ON DIESEL 4000L * M1.00 =M 4 000.00
>
> IRRIGATION COST ON OIL 50L * M3.50 =M 175.00

CASUAL LABOUR	=M 1 500.00
TOTAL COSTS	=M12 120.00
TOTAL INCOME	=M45 500.00
LESS TOTAL COSTS	=M12 120.00
NET PROFIT	M33 380.00"

In their pleas the defendants denied that they were in breach of the agreement, pointing out that the agreement specified that the Project would "repay as much of (the plaintiff's) outstanding loan to LADB *as possible*", which the Project had done. The plea maintains that the Project did take over management of the plaintiff's scheme, with the following results:

> "The number of cuts during the period in issue were three (3) and sales amounted to M15,696.00. After deducting running and harvesting costs, amount owed by the plaintiff to the project i.e. First Defendant and paying some money to the Lesotho Agricultural Development Bank as part-payment of loan owed by the plaintiff, nothing was left of the sales."

The corner stone of the plaintiffs case is the claim that the Project did not supply accurate records. I have to say that the statement supplied by the Project on 6th July, 1989, some three months after the termination of the agreement, is

hopelessly insufficient as a record; even as a "statement of achievement" it is insufficient in detail, when compared with the estimate supplied by the plaintiff as further particulars. In any event, the agreement required the keeping of accurate records *during* the management of the scheme, which clearly involved the maintenance of regular accounting documentation. I would then have expected the Project to produce such documentation in support of any final 'statement of achievement'. Ultimately the only documentation produced, that is, at the trial itself, related, with one exception, to seasons other than that of 1988/89. As to the meeting scheduled for March 1989, the Project Manager Mr Gerard Sekatle (then an Area Extension Officer) testified that such meeting was held and that the plaintiff duly attended it and discussed *inter alia* the aspect of accurate records. I do not see that it is necessary to resolve the issue of credibility involved, as Mr Sekatle also testified in chief that the plaintiff, in any event, was never given any records which would reflect the operation of the scheme.

But the object of any such records would have been to support the set of figures finally produced by the Project. In brief, the plaintiff seeks damages not because he was not supplied with records, but because he challenges the figures produced by the Project. And there is the difficulty with the declaration. The plaintiff does not really state how the Project breached the agreement. What exactly is the plaintiffs case? If the Project's figures are less than the plaintiff expected, does the plaintiff say that there is an implied warranty in the

agreement that the Project would manage the plaintiff's scheme in an efficient manner and that the Project is in breach of such warranty? Or does the plaintiff say that the scheme was efficiently managed and that the figures supplied by the Project are therefore not correct? In this respect does he say that, as no proper records were maintained, the figures supplied represent guesswork? Alternatively, does he go as far as saying that although proper records were maintained, none were supplied, and the figures ultimately supplied by the Project are false?

As to the latter aspect, the plaintiff has not pleaded fraud, and neither for that matter has he adduced any evidence thereof. The Court then is left to decide whether or not the scheme was efficiently managed and whether or not (even if the scheme was otherwise efficiently managed) the figures ultimately supplied were guesswork.

The background to the agreement must be considered. The plaintiff made so specific mention in his declaration, nor did he make any mention in his evidence in chief of any previous course of dealings with the Project, though an inference thereof arises from the first line of paragraph 2 of the agreement. The figures supplied by the Project, reproduced above, indicate that the parties developed a working relationship no later than 1985, and that indeed the plaintiff was indebted to the Project in the amount of M2,793.40 in respect of a "1985 Credit Scheme".

The Court was ultimately informed that the plaintiff had

(although no counterclaim was filed by the defendants) that what he owed to the Project should be deducted from any damages, provided that the Project could substantiate its figures. Mr Pheko agrees that the Project did produce documentation in respect of the amount of M2,793.40 for 1985, and indeed the figure of M2,435.85 in respect of "Form Machinery Hire 86/87". Mr Sekatle testified that the plaintiff initially approached the Project in 1985, seeking its advance. He was advised that his crop of lucerne required to be 're-established', that is, replanted. The plaintiff said that he could not afford re-establishment. The Project then re-established the crop for the plaintiff, apparently on a credit basis. In this respect Mr Sekatle tendered documentation in the matter (Exhibit "F"), indicating that the plaintiff was charged,

M 48.75	for moving
465.50	for ploughing
1 752.00	for fertilizer (96 x 50kg)
66.30	for fertilizer spreading
216.45	for 'discing'
244.40	for planting
M2 793.40	TOTAL

The documents tendered indicate that these expenses were incurred between 8th March and 10th April, 1985. The total debt of M2,793.40 was not discharged however until 15th December, 1988, or at least it is so recorded in the documents tendered. Such documents appear to me to be completely authentic and Mr

Sekatle's evidence has a ring of truth about it, and I accept it.

There are two other debt items, in respect of "Form Machinery Hire" for 1986/87 and 1988/89, on the Project's "Statement of Achievement". The amount of M2,435.85 is substantiated by documentation, but in respect of the 1988/89 season and not the 1986/87 season. As for the latter season, the documentation produced shows an outstanding balance of M1,240.80. That balance, however, was discharged by a cash payment of M1,270.80 on 30th October, 1987. There were of course debit items for the season 1987/88 but there was a further cash payment of M1,288.80 on 4th February, 1988, leaving an outstanding balance of M965.40 on 31st March, 1988. The latter amount however is included in the outstanding balance of M2,435.85 as at 31st March, 1989. The documentation indicates that that balance was discharged "By Cash" on 30th June, 1989 but at that stage the Project had not rendered an account of its management, and the entry can only represent a book entry discharging the amount, rather than an actual payment by the plaintiff. I find therefore that the entry of, "Farm Machinery Hire 86/87 M2,435.85", should read, "Farm Machinery Hire 88/89 M2,435.85", and further that the entry, "Farm Machinery Hire 88/89 M2,230.40", has not been proved.

The documentation indicates that the plaintiff effected payments to the Project totalling M2,080 and M2,729.55 during the 1988/87 and 1987/88 reasons respectively. Nonetheless the fact remains that the plaintiff could not afford the cost of re-

establishment in 1985 and has since failed to pay the Project in respect thereof, that is, a sum of M2,793.40. As the agreement between the parties stands, the question arises as to what was the consideration therein for the Project: on the face of it, its management of the scheme (in terms of payment for service rendered) was gratuitous. The question is answered by paragraph 2 of the agreement and by Mr Sekatle, who testified that the Project took over the management of the scheme, as the plaintiff seemed unable to repay us" (the Project), with the intention of deducting the outstanding debt from the profit returned (although the agreement made no provision for such deduction. That is the background to the plaintiff's claim of an estimated annual profit, after payment of all expenses involved, of M33,380.

The plaintiff claims that he had regularly harvested five 'cuts' of lucerne every year, yielding a total of 7000 bales at a price of M6.50 each that is, a total yield of M45,500. The plaintiff has failed to produce a single document in the matter, reflecting anything like such a yield over the years. Much less has he adduced expert evidence to substantiate his claim. He testified that he visited the scheme during the 1988/89 season: "I went to that place five times during time of cutting", he said, "I do remember that I went there."

For his part Mr Sekatle testified that the Project had carried out the actual cutting of the crop for the plaintiff over the years since 1985, and he was most emphatic that the plaintiff had never attained to five cuts in one years. Mr Sekatle struck

me as a truthful witness, pragmatic in his approach and ready to make concessions when they arose. Suffice it to say that I prefer his evidence to that of the plaintiff, whose obviously straitened financial situation belies his claim to successful crop management. I am not satisfied therefore that the plaintiff ever achieved five cuts in a season.

Mr Sekatle testified in chief that initially it seems the project, itself expected, presumably with superior management, to obtain five cuts, but ultimately only three cuts were obtained in the season. Initially the plaintiff's crop was irrigated for a short period, but thereafter the rainfall was heavy, too heavy in fact, preventing the workers to harvesting the crop. In view of the fact, however, that irrigation would no doubt yield four crops, Mr Sekatle conceded that in the least the heavy rainfall would increase the growth, and give a heavier yield per cut, perhaps an increase of 20% per cut. As I see it, however, there is also the aspect of the costs of irrigation, so that with the heavy rainfall there was apparently no need to irrigate for most of the season. Taking that aspect into account, and doing the best that I can, I calculate that the ultimate yield should then have equated to that of some 3.7 cuts of an irrigated crop.

Considering the plaintiff's indebtedness to the Project, and his inability to afford the cost of re-establishment, and again his failure to produce a single item of documentary evidence in support of his estimate of the annual profit, again considering the relative modesty of the annual payments to the Project, in

the order of M2,500 on average, as compared with his estimate of M6,445 for the "Cost of Machinery" in the 1988/89 season, I am satisfied that the probabilities are that his estimate of an annual yield of M45,500 is greatly exaggerated.

Mr Pheko submits that the evidential burden falls upon the defendants of proving the contents of the Project's "Statement of Achievement". As I have indicated, the latter statement is hopelessly insufficient in detail: the Project has not informed the Court haw many bales of lucerne were harvested and what was the selling price, or even the average selling price of such bales: much less has it produced any documentation in the matter. It transpired that the reference to "some information" sought by the Project from the plaintiff, contained in the Project's letter of 5th September, 1989, addressed to the plaintiff's Attornies, concerned the fact that the plaintiff had arranged to market some 155 bales for the Project and had rendered no account in the matter. But I cannot see why the Project could not have struck an average price for such bales in its accounts, and why in particular no reference was made to such aspect in the "Statement of Achievement" supplied two months earlier on 6th July, 1989.

A further aspect which does not serve to engender any confidence in the Project "Statement of Achievement", is that the plea claims that after deduction of expenses and payment of debts owed to the Project by the plaintiff, and again payment of "some money" to the Bank, "nothing was left of the sales". In fact it transpired at the trial that two payments to the Bank, of

M3,890.00 and M1,858.00, were effected on 15th November, 1989 and 23rd November, 1989 respectively (over seven months after the end of the season), that is, a total of M5,748, which deduction from the figure of the "Balance Available" (M6,726.93) left a balance of M978.93 owing to the plaintiff.

Suffice it to say therefore that the Project's accounts leave much to be desired. Indeed, Mr Sekatle was constrained to concede under cross-examination that he did not think that the Project's "Statement of Achievement" (Exhibit "E") was "an accurate record of what is contained in (the Project's) records", and indeed that "there are some documents missing". As against that, however, the plaintiff has not put forward a single document is support of his estimate. There may be an evidential burden on the defendants in the matter, but, as I see it the overall burden of proving damages must lie on the plaintiff. While the Project's records are not accurate, they are at least supported by some documentation. In the case of the plaintiff's estimate of damages, I consider, as I have said, that it is greatly exaggerated. In brief, while neither party has given the Court any real assistance, I consider that the Projects records are of some assistance, and in the least offer a safer guide to the Court in its calculations than the plaintiffs' figures.

I can, incidentally, see no objection to the figures of M141.82 for spare parts, M312.60 for repairs and M1,055.00 for casual labour contained in the Projects "Statement of Achievement": they are modest in comparison to the plaintiffs'

figures for comparative items. As to the overall figures of M15,696 for the total yield for the season, there is no evidence of agricultural or marketing inefficiency on the part of the Project in managing the plaintiff's scheme. On the contrary, in view of the insufficiency of its records and the fact that some records are missing, I am satisfied that the figures of M15,696 represents no more than an estimate of an average yield from three cuts of an irrigated crop. For the reasons already traversed, I consider that a total yield from 3.7 cuts should be reflected. That being the case, again doing the best I can, I consider that the total yield should be represented by a figure of M15,696 x 3.7/3, that is, M19,358.40. I calculate therefore that the Project's accounts should have been reflected as follows:

Total yield for 1988/89 season		M19 358.40
Less Expenses:		
Spare parts	141.82	
Repairs	312.60	
Casual Employment	1 055.00	
1985 Credit Scheme	2,793.40	
Farm Machinery Hire 88/89	2,435.85	
Payments to LADB	5,748.00	12,486.67
Balance Payable to Plaintiff		M6,871.73

The Plaintiff then claims interest at 11%. He has not received any payment from the Project in respect of the 1988/89 season, that is, other than benefiting from the payment to the Bank and having the 1985 debt to the Project discharged. Had he received the benefit of the further amount of M6,871.73 payable to him, that is, had such amount been partially or totally utilised in payment to the Bank, as required by paragraph 2 of the agreement, he would no doubt have incurred less interest in his loan account with the Bank. In any event, the plaintiff has not received the benefit of the money payable to him and I can see no good reason to deny him interest. As to costs, I cannot see why they should not follow the event.

Accordingly I give judgment to the plaintiff in the amount of M6,871.73, with interest at the rate of 11% per annum, payable from the date of service of the plaintiffs summons instituting action, up until the date of delivery of this judgment. I grant costs to the plaintiff.

Date This 28th Day of October, 1995.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE

CRI/APN/641/95

IN THE HIGH COURT OF LESOTHO

In the application of :

TSELE RALEBITSO

vs

DIRECTOR OF PUBLIC PROSECUTIONS

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 21st day of December, 1995

This application has been brought to this Court by way of a notice of motion, for admitting the Applicant to bail pending appeal. This is in connection with an appeal filed on the 28th November 1995 against the decision of the magistrate of Maseru in his review of a Semonokong Local Court case number CR 45/95. The appeal is against both conviction and sentence in the matter which Appellant was charged with Abusive Language and Assault Common. He was on 14th November 1995 found guilty and sentenced to M1,000.00 or 1 year imprisonment by that local Court. The sentence was on the 16th November 1995 reviewed by the magistrate of Maseru and enhanced to M2,000.00 or 2 years imprisonment without the option of a fine. In the notice

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of motion 11th day of December 1995 was appointed for hearing of the application. My record reveals that it was subsequently brought before Court on the 14th December 1995 and then to today.

I recall quite well that I alerted Mr. Fosa as to a few problems that would confront him in this proceedings. First and foremost, it was the fact that the magistrate had in fact made a decision in which he refused the Appellant bail on the 29th November 1995. Normally and in accordance with practice and policy of the Court one would have thought that the matter would now come to this Court by way of an appeal against the magistrate's decision. This did not happen. This policy is followed despite the section 109 of the Criminal Procedure and Evidence Act 1981 which says : "The High Court may at any stage of any proceedings taken in any Court in respect of an offence admit the accused to bail". Even in the light of the wording of section 109 of the C. P. & E. an applicant would need to demonstrate good reasons why he would want to apply for bail in this Court not in a Subordinate Court. Amongst this would be a show of special circumstances. (See MAKHOABENYANE MOTLOUNG & OTHERS vs REX 1974-1975 L.L.R. 370) Due to the special circumstances of this appeal and the proceedings I am inclined to condone this irregularity or neglect by the Applicant. A perception therefore that

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I would be reluctantly allowing the application would be a fair one. I had intimated to Mr. Fosa that one of the ways of curing the defect would be to file a late notice of appeal and then ask for condonation. That he did not do.

This morning my attention was brought to Review Order No.7 in REX v MOKHELE MOKHELE CRI/A/21/95 in which the learned Judge M. L. Lehohla had made a remark at page two of the Order, that :

> "Consequently this Court relying in its inherent powers treats this matter as if on review. Therefore this Court directs that his conviction be quashed. ....."

It is clear that the matter had come by way of appeal. I must confess that without a complete perusal of the record on which the decision was made one would find it difficult to really gauge all the matters fully, more especially the undelying facts. But I am satisfied that when certain factors are considered which do not squarely fall to be treated as an appeal, those factors constituting such irregularities which could not have been anticipated or were overlooked the matter can be treated as a review. In this Mokhele's appeal Mokhele's co-accused who had been convicted but had not appealed. It was clear that the

conviction could not be supported even against Mokhele's co-accused. Firstly because the offence of which he has been convicted was non-existent. Next, because the evidence amply showed that he was innocent throughout the entire investigation of the case, its prosecution and its conclusion. I am not satisfied that this decision has relevance to this matter of the application. It may have relevance to the matter of the appeal itself.

I have seen the magistrate's written comments on his refusal to admit the Applicant to bail. He spoke of the absence of prospects of success in the appeal. But he did not address the central aspect of the irregular summons procedure that the Applicant complained about. It may be the matter was not brought to his attention. The record will clear all the doubts. If the issue of the summons was brought to the magistrate's attention I would not agree with the magistrate's conclusion. It is a seriously arguable matter that the Applicant/Appellant could have been called by a civil summons to a criminal proceedings without proper notice. I do not decide now, whether to believe the Applicant at this stage. Although we still labour under the problem of the absence of the magistrate's recorded ruling on review and secondly on the absence of the Applicant's attitude (protest) as recorded against this alleged irregularity on the record itself, the point taken

by the Applicant would be a good point. I am not saying it is valid. It is a point on which, if it succeeds, can result in the appeal itself succeeding and the proceedings of the lower court and the magistrate's ruling being quashed and set aside respectively. It is also a question of whether if the point is demonstrated, it was *bona fide taken*. For the present purpose I would decide that there are prospects of success in the appeal.

I have pointed out another problem that would be in the way of the Applicant. It is the absence of the record. I agree that this would heavily weigh against the Applicant in the appeal itself but not for the purposes of the present proceedings. Once the matter of the existence of prospects of success was successfully investigated, as in the instant matter, the real importance of the record itself can only relate to the argument of the appeal on merits. This is how I have, therefore, considered this absence of the original record and the magistrate's comments on review. This I have done having borne in mind the special problem that the record was not available, it having been sent back by the magistrate to the local Court. I did not think this should weigh against the Applicant. This I also felt having observed that it did not have a disabling effect on the application for bail itself.

I am satisfied that although this Applicant's Counsel does not in his paper speak about intention to appeal against the magistrate's refusal or an appeal strictly speaking, it is clear that his action was consequent upon his dissatisfaction with that decision. I have said that despite the defect in procedure I was prepared to have matter condoned, in the sense, that it be treated as another application (a fresh one rather) but not as an appeal. I say that this Court relying on its inherent power and on the special circumstances allow this Applicant to bail and hereby imposes normal conditions on an application for bail pending appeal.

I therefore imposed the following conditions of bail:

(1) The Applicant shall pay in a cash bail deposit in the sum of M200.00.

(2) The Applicant shall attend on the hearing of his appeal whose date is fixed as 3rd May 1996.

(3) The Applicant shall report at Semonkong R.L.M.P. post once a month on the last Friday of the month between 8.30 a.m. - 4.30 p.m.

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(4) Applicant undertakes to have the record of appeal prepared and filed in this Court.

T. MONAPATHI
JUDGE