

IN THE HIGH COURT OF LESOTHO

In the matter between:

CARL RUSSEL PRINGLE

Plaintiff

and

PORTUGUESE CONSTRUCTION (PTY) LTD

Defendant

J U D G M E N T

Delivered by the Honourable Chief Justice Mr Justice
J.L. Kheola on the 3rd day of February, 1995.

In this action the plaintiff is claiming:

- (a) Payment of the sum of M30,770.00;
- (b) Interest thereon at the rate of 18% a
tempora morae;
- (c) Costs of suit;
- (d) Further and/or alternative relief.

In his declaration the plaintiff alleges that on or about March, 1990 plaintiff entered into a verbal agreement with one Fernando Da Mota E. Silva in the latter's capacity as Managing Director of defendant in respect of a joint venture to build three (3) houses for the German Volunteer Service in Semonkong in the district of Maseru.

In terms of the agreement the plaintiff was to go to Semonkong and do the actual construction and completion of the said project while the defendant was to supply the necessary material and deliveries.

It was a further term of the agreement that the profits from the joint venture would be shared equally between the parties.

On or around August, 1990 plaintiff completed construction of two of the houses and parties realised a profit of M80,000-00 which was received by the said Fernando Da Mota E. Silva on behalf of the defendant.

On or around March, 1990 while at Semonkong the plaintiff had to spend M2,600.00 from his own pocket for the purpose and benefit of the joint venture.

Between May and August, 1990 the said Fernando Da Mota E. Silva, on behalf of the defendant, paid the plaintiff the sum of M11,830.00 and the parties agreed that he would pay the balance of the plaintiff's share of M28,170.00 plus the aforesaid sum of M2,600.00 by the end of August, 1990.

In its plea the defendant denies that it had a joint venture with the plaintiff. It avers that on the date alleged the

plaintiff approached the defendant for employment and it was agreed between the parties that the defendant would build three houses on behalf of the plaintiff. It denies that there was any joint venture.

The plaintiff was to be remunerated for his services by being paid an amount equal to half of the profit the defendant anticipated making in respect of the building project.

Defendant denies that the plaintiff completed construction as alleged or at all and avers that as a result of the plaintiff's failure to complete the building, the defendant terminated the agreement and completed the construction itself. It denies that a profit of M80,000.00 was realised. It admits having paid the plaintiff M11,830.00 but denies that a balance was to be paid.

So much about the pleadings.

The plaintiff testified that before they entered into an agreement of a joint venture the defendant took him to Semonkong in order to inspect the sites where the construction of the three houses was to be made. After the inspection of the sites the plaintiff expressed an interest in the joint venture. The terms of the joint venture were that the plaintiff would supply three of his own labour staff, he would provide his own tools,

equipment and his own transport. The defendant would provide three brick-layers, expenses money for casual labour.

The defendant (Mr. Silva) explained that the cost of building the three houses would be M217,000.00 and that they would share equally an estimated profit of M142,000-00. After each house was completed they would get a letter of acceptance from the developer. An inspector from Works would also be present as well as the engineer. If there were any faults the engineer and the inspector would prepare a list and corrections would have to be made.

The plaintiff says that he completed the construction of two of the three houses. He was unable to build the third house because the site was inaccessible by road. The L.C.U. was expected to construct a road to that area but that never materialised. With regard to the two houses completed a list of corrections was made (See Ex "A"). The corrections were made by him and Exhibit "B" and "C" are letters of acceptance of the two houses.

The plaintiff testified that as an experienced building contractor he was able to calculate the profit when he took into account labour costs, materials' costs etc. He was quite sure that they made a profit of M80,000.00 when all the costs are

deducted.

The defendant has not given any evidence.

Mr. Buys, attorney for the defendant, submitted that the plaintiff must seek out the right defendant. In his evidence he says that he entered into this agreement with Fernando Da Mota E. Silva and not with the defendant. It seems to me that Mr. Buys has forgotten his client's plea in CIV\T\316\91. In that case the plaintiff sued Fernando Moda trading as Lesotho Block and Paving. In his plea Mota said that his correct names were Fernando Da Mota E. Silva and he averred that any agreement which may have been entered into with plaintiff was entered into by the defendant in his capacity as the representative of Portugues Construction (Pty) Limited (present defendant) and not in his personal capacity.

It seems to me that the question of the right defendant in the present proceedings was established beyond any reasonable doubt by the defendant's plea in CIV\T\316\91. The defendant cannot again raise the question of who the right defendant is in the present proceedings.

The plaintiff has proved on a balance of probabilities that he and the defendant made a profit of about M80,000.00 and the

defendant has failed to rebut the evidence of the plaintiff. Why is the defendant not honest and not prepared to take the Court into its confidence and disclose what profit was made and how much it is prepared to share with the plaintiff?

The plaintiff has produced documentary evidence (Exhibits "B" and "C") that the two houses in question were completed and all major faults were corrected.

The plaintiff has proved that his payment when the building was completed was that they would share the profits. The defendant admits that payment was to be equal share of the profits but alleges that the plaintiff was a mere employee of the defendant. It is improbable that a building construction company of the size of the defendant could share its profits with its employees. That would mean that it is unable to pay its employees. I agree with the plaintiff that he was not an employee of the defendant.

The evidence of the plaintiff has not been controverted at all. The plaintiff was a very good witness who gave his evidence well and was never shaken in cross-examination.

In the result judgement is for plaintiff in the sum of M30,770.00 with interest at the rate of 18% a tempora morae with

costs of suit.

J. L. KHEOLA
CHIEF JUSTICE

3rd February, 1995

For Plaintiff - Mr. Nathane
For Respondent - Mr. Buys.