CIV\A\21\93

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

TSOKOLO MOHAI — Appellant

and

IAN FRASERS LTD t\a FRASERS CASH & CARRY — Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 6th day of April 1995

This is an appeal from the magistrate Court of Maseru, against a judgment of absolution from the instance. Counsels had to be recalled to make further submissions on the interpretation of Section 31 of the Subordinate's Court Order 1988 on the Court a quo's Order. The Appellant who was Plaintiff in the Court a quo claimed in action against the Respondent the following Orders:

1. Payment of M840.00 service pay.
2. Payment of M240.00 notice pay.
3. Payment of M840.00 leave pay.

4. Payment of M 40.00 balance on salary

5. 18% interest.

6. Cost of suit.

7. Further and or alternative relief

In its plea Defendant make the following admissions. Firstly, Defendant was employed by Defendant during 1st February 1984 to 1st January 1991 (contra June 1983 to June 1991). Secondly, that Plaintiff was being being owed the M240.00 for salary and thirdly Plaintiff was owed 51 days only for leave pay (contra 60 days). Forthly, Plaintiff was owed M840.00 service pay (as claimed). Fifthly, Plaintiff was owed M110.86 only (contra M240.00). Lastly, Plaintiff was owed M470.77 for leave pay (contra M480.00). In the end we have a Defendant's plea which reads (in part) -

" AD PARAGRAPH 5

5.1 Defendant admits it failed to make certain payments to Plaintiff but denies that such failure was wrongful or unlawful as alleged and Plaintiff is put to the proof thereof -

5.2 .....

5.3 In the premises Defendant denies liability for

> the amounts claimed but admits liability to Plaintiff for the lesser amounts referred to above."

In my understanding the admitted amount owed to Plaintiff should be M1661.63 + M35.09 + M204.91 = M1421.63. That is why Defendant ended up in its plea that:

> "5.4 Defendant avers that at the date of termination of Plaintiff's employment Defendant tendered payment to Plaintiff of the aforesaid amounts but Plaintiff rejected the tender.
>
> 5.5 Defendant hereby repeats the said tender unconditionally."

It stands to reason that the Plaintiff would have to prove the following things: Firstly, he was employed for a greater period than as admitted in Defendant's plea. Secondly, that he was owed a greater number of leave days than as was admitted by the Defendant, Thirdly, that he was owed more money in the nature of notice pay than was admitted by Defendant. And lastly, that he had not been paid the sum of M204.91 as salary for the month of January 1991 and that the Defendant was not entitled to deduct a sum of M39.05 for tax and pension contribution. It has to be borne in mind that a Plaintiff who claims payment has to allege

a failure by Defendant to have made the payment. It is however, for a Defendant who wishes to rely on a payment in defence to allege and prove the fact of payment. (see *Pillay v Krishna* 1946 AD 946)

It became common cause that on the 8th July 1992 this Defendant paid into Court a sum of M1421.63 as per receipt no. 508167 as by formal notice "in terms of Rule 2(1) read with Rule 5 of Order No. XII .....", which payment is made without prejudice by way of an offer of settlement of the Plaintiff in above matter. The Defendant disavowed liability to Plaintiff's costs on the grounds that a tender in the said amount was made to Plaintiff prior to the issue of summons. A tender is not a defence to an action but it has in law precisely the same effect as to costs as claimed by the Defendant in the last quoted paragraph of the notice.

The matter was finally set down for hearing before the Court a quo on the 22nd October 1992 and the parties were represented by Messrs A. Koornhof and K. Mohau. The Plaintiff was the only witness. He was cross examined after his evidence in chief and the Defendant's Attorney Mr. Koornhof thereupon applied for absolution from the instance the Plaintiff having closed his case. It did not appear that the entrenchment of the Plaintiff was being challenged by the Plaintiff. The Plaintiff was offered

certain retrenchment moneys which Defendant refused. I am inclined to believe that the refusal could only have been over some of the items included in the amoount of M1421.23, the Plaintiff having admitted that he got the cheque for pension money. I do not see on what basis the magistrate could accept any date other than the date of the 1st February, 1984, because the Plaintiff said: "I am not sure in what year, I know it is in 1983 June, but I do not know the exact year. I was never given a copy of the books, I was made to sign." It is possible that had the Defendant's evidence been tested, a correct date could have been proved or the Defendant would have been proved wrong. But this now amounts to speculation.

I do not see in the Plaintiff's evidence any basis for his claiming all in all this sum of M1,600.00. Indeed the amount offered was originally M1,340.84 but the amount tendered ended up being M1,421.23, which it became common cause was offered to Plaintiff in two bits. Plaintiff refused to accept the offers. I do not see why and on what grounds the Plaintiff would not be required to prove how (in his own evidence) the amount of M1,600.00 was arrived at. This he failed in his evidence-in-chief. I do not observe that he fared any better under cross-examination. That the poor literacy of the Plaintiff contributed to certain difficulties in the evidence of the Plaintiff there is no doubt. The magistrate may have over-emphasized this aspect

but this did not mar his objective view of the facts.On the basis that what Defendant admits the Plaintiff need not prove, the magistrate was correct and properly concluded that the amount of M178.77 was not proved. But that unfortunately is not the end of the story.

I do not however accept Mr. Mohau's submission that merely because the calculation of the Court of terminal benefits due to Plaintiff was governed by statute, this could be arrived at by a process none other than arithmetical computation, justification and the reconciling of the calculation with what the relevant statute prescribed. This was not forthcoming. To that extent the calculation of the amounts is not a matter of law. The proper way of describing the matter would be that the statute prescribes the principle and manner of calculation. But then the process of arriving at a particular sum or total is an arithmetical process.

My understanding of the magistrate's decision is that: "I find the amount of M1,421.22 proved but not the amount of M178.00 for which I order for absolution. I do not think that this is a case in which looking at all the Plaintiff's evidence a reasonable man might find for the Defendant in regard to the sum of M178.00. This is not a case in which a reasonable man would have said that he would have liked to hear the Defendant." This

may be so when regard is had to the admission as to the amount of M1,421.23 (see *Supreme Service Station v Fox and Goodridge (Pty) Ltd* 1971 (4) SA RAD at 92 B-F) All it means is that at the end of Plaintiff's case there was evidence upon which a Court applying its mind reasonably, could hold that the Plaintiff had established that Defendant was legally liable to part of the claim and not the other. The Court in the interest of justice ordered for absolution on the part it held not to have been proved. But there is authority against this approach. I did not see why the Court a quo should not be reproached for having allowed part of the claim and having disallowed the other by way of absolution. That is against principle

The learned magistrate was under a fundamental misunderstanding of his powers under section 31 of the Subordinate Court's Order No. 43 of 1988. The section reads as follows:

> "The Court may, as a result of the trial of an action grant
>
> (a) judgment for the Plaintiff in respect of his claim in so far as he had proved the same
>
> (b) judgment for the defendant in respect of his

defence in so far as he has proved the same.

(c) absolution from the existence it appears to this Court that the evidence does not justify the giving of judgment for either party.

(d) Such judgment as to Costs as may be just.

It appears to be well accepted that the Court may one of the possible judgments in (a) (b) (c) which are alternatives and in addition (d) and (e) which are supplementary to any of the three. It has been submitted that the Court may not grant a judgment which amounts in part to an award under (a) or (b) and in part to an award under (c). In other words the Court may not on the same claim grant a judgment which amounts in part to an award to one of the parties and in part to absolution from the instance (see *Akoon vs Kader* 1963 (3) 664 at 665) so that the best course would have been for the magistrate to refuse absolution, allow the defence put in evidence and then after the close of the defence case to make a total assessment of the evidence before him. In the end he could have reached a similar conclusion namely that he allows the sum of M1,1421.63 (as proved) and disallows the sum of M178.77 (as not proved). It was correctly submitted therefore that section 31 rules out the possibility of

granting absolution for a portion of the claim and granting another part of the claim. It is correct therefore that the impropriety of the Order of the Court below becomes even more glaring when it is considered that the judgment was made at the end of the Plaintiff's case and not even after the close of the Defendant's case. I toyed with the idea of substituting a different Order from the one I will make. This would be to the effect that in the interest of justice and finality in litigation that the Plaintiff's claim be allowed to the extent of the amount of M1,421.63 and be disallowed and dismissed for the amount M78.77. Appellant's Counsel would not accept this. He submitted that the Court a quo ought to be bound (as a creature of statute) to comply with the limitations imposed by the Subordinate Court Order 1988. Unfortunately this is correct.

Mr. Mpobole has submitted that "When an unconditional tender is made, the Plaintiff is entitled to judgment for at least the amount tendered even if it, in fact, has not proved he is entitled to as much". (see Beck's Theory and Principles of Pleading in civil cases Isaacs 5th Edition at page 94) There is no doubt that payment had in fact been paid into Court. I did not quite understand the distinction Mr. Mpobole wanted to make as between where the Plaintiff has accepted and when he has not accepted. In the instant matter the Plaintiff had in fact not accepted the tender. This according to Mr. Mpobole has a

significance. I do not want to debate this. Be that as it may, this would not resolve the hurdle that the Respondent had in the interpretation of Section 31 of the Subordinate's Court Order 1988 which I have discussed in the aforegoing paragraphs. Most apparently the Respondent would have wished that the Appellant accepted the M1,421.63 in full and final settlement. It has no wish that the matter be tried *de novo* even though this means that for the time being there would be no judgment against it.

In the circumstances I allowed the appeal with costs and ordered that the matter be sent back to the Subordinate Court to be tried de novo before a different magistrate.

T. MONAPATHI
JUDGE

For Appellant : Mr. K. Mohau

For Respondent : Mr. M. Mpobole