CIV\T\281\95

IN THE HIGH COURT OF LESOTHO

In the matter of :

THE STANDARD CHARTERED BANK **Plaintiff**

vs

E.R. SEKHONYANA **1st Defendant**
'MALEROTHOLI JOSEPHINE SEKHONYANA **2nd Defendant**
'MASENATE AGNES MOPELI **3rd Defendant**

RULING ON APPLICATION FOR ABSOLUTION FROM THE INSTANCE

Delivered by the Hon. Mr Justice M L Lehohla on the
4th day of November, 1998

The instant case which has eventually led to the present application for absolution from the instance, has a long history of delay.

Without alluding in detail to its handling by my other learned brethren Judges of this court and for purposes of avoiding prolixity I may only indicate that the file

cover reflects that the matter came before me as early as 11th September, 1995 when the defendants, at the time represented by Mr Buys of Messrs Du Preez Liebetrau and Co.; appeared seeking an order for withdrawal of an application for summary Judgment lodged earlier by the plaintiff. This application for withdrawal was granted on the same day to enable the defendants, as was claimed for them by their legal representative Mr Buys, to file relevant papers.

In August 1996 i.e. more than a year later the plaintiff obtained an order for costs against the defendants who were not successful in an application to discover lodged by the plaintiff.

On 2nd September, 1997 the matter was set down for hearing the main trial. Indeed the only witness for the Plaintiff PW1 Mr Rahlao gave only his evidence-in-chief while the cross-examination of this witness was reserved while the hearing of the matter was postponed to enable *Mr Mphalane* the current attorney for the defendants to prepare himself for the cross-examination of PW1 as *Mr Mphalane* had just shortly been briefed in place of Mr Buys who was no longer representing the defendants.

The matter was set down for resumption of its hearing exactly a year later i.e.

2nd September, 1998 whereupon it proceeded until about midday when, at the close of the plaintiff's case, the defence applied for an absolution from the instance. The ruling on this application was reserved until 28th October, 1998 but because of breach in communication, occasioned in part by the political turmoil that interrupted Court business for weeks on end, the transcripts which I had asked for, though having been forwarded to the office of the Registrar by the plaintiff's instructing attorneys never reached my desk until too short a time remained between my receipt of the substitute set of the transcripts and the date ear-marked for delivery of this ruling. Accordingly a further delay had to be incurred when the delivery of this was postponed for another week to 4th November, 1998.

In their invaluable works **Superior Court Practice** (Service 4\1995) H.J. Erasmus *et al* at B1-292 onwards in reference to Rule 39 of the Uniform Rules of Court in South Africa have this to say concerning applications for absolution from the instance at the close of the plaintiff's case :

> "When absolution from the instance is sought at the close of the plaintiff's case the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff".

At page 3 the plaintiff in paragraph 1 requires of the defendants jointly and

severally the one paying the others to be absolved, payment of the sum of M1 847 122-94. In Volume II at page 212 appears a Bank Statement on which is reflected the last figure in the amount of M1 847 122-44 representing the condition of the defendants' account as at the date 23rd January, 1995.

The summons seems to have been based on the condition of the account as at that date. This should be so because the same amount appears as the opening amount for the following month of February that year. The last figure as at 23-2-95 shows a considerably higher sum of M1 875 409-24 by which the defendants' account with the plaintiff was over-drawn.

Mr Mphalane's strong argument is based on the difference of 50 lisente appearing between the sum reflected in the summons and the amount appearing in the statement for January constituting what ought in effect to have formed the basis of the summons.

In the light of the evidence heard so far and the principle the above authorities strongly urge should be applied, it seems to me that saying ditto to the defendants' quest would go against the requirement that in applications of this nature the court should concern itself with whether there is evidence upon which it *could* or *might*

(not should or ought to) find for the plaintiff.

I find solace in my view of the matter from a further statement of the above authorities to the effect that

> ".....In deciding whether absolution should be granted at the close of the plaintiff's case, it must be assumed that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true".

What is plain and clear in PW1's evidence is that the 1st defendant in terms of an agreement with the plaintiff was granted overdraft facilities and moneys were advanced to him. All these moneys advanced to him on overdraft carried interest. Because it seems the 1st defendant was given favourable treatment by the plaintiff, he exceeded the limit of his overdraft. It does not seem to me that the 1st defendant was not aware of this state of affairs.

In substantiating the above view I should presently refer to the "Confidential" letter dated 29th November, 1994 addressed to the plaintiff with special attention of PW1 being drawn to that letter at page 103 of the record.

It reads :

"Att. Mr S. Rahlao

Sir,

Re: Overdue-Account-E.R. Sekhonyana
I have received several letters from you drawing me to the gravity of the status of abovementioned account.

I am aware that I have in the past few months promised you a partial injection of substantive funds towards a situation whereby a full settlement could be realised. I am aware that other attempts shall only partially meet my indebtedness to the Bank, and it is the latter situation which has led me to attempt securing overseas funds to cover the account. There is yet no basis to abandon this attempt and I am frantically working for a settlement at the latest by end of January\February 1995.

Once again please bear with me and I sincerely apologise for what may seem to have been lack of taking your warnings seriously. I take them very seriously indeed.

Sincerely

Signed: E.R. Sekhonyana"

On the basis of the substance of the 1st defendant's letter referred to above I am satisfied that he was aware he had exceeded his overdraft limit. Thus if, despite the fact that he had reached beyond his overdraft limit he kept on writing further cheques which the Bank met, he cannot be heard to say that the Bank is accountable for the financial embarrassment he found himself sinking further and further into. Truly speaking the Bank didn't have to give him facilities in excess of his overdraft limit but if he went over it, and the Bank allowed him that, it only shows that the Bank was giving him an indulgence. Thus I am not persuaded that

there would have been any relevance regarding what the limit was at any given date.

Another vital factor to bear in mind when considering the question of an absolution at the end of the plaintiff's case appears at B1-292 of the works of Erasmus *et al* as follows :

> "Questions of credibility should not normally be investigated at this stage of the proceedings, except where the witnesses have palpably broken down and where it is clear that what they have stated is not true".

I do not recall PW1 breaking down on a material or important point of relevance in the instant proceeding.

Even at the cost of being repetitive I find it important to highlight the importance attached by different authorities to absolution at the end of the plaintiff's case.

For instance at paragraph 314 of **The Law of South Africa** Volume 3 part I by W.A. Joubert *et al* reference is made to the fact that in terms of *High Court Rules* Rule 39(10)

> "At the close of the case for the plaintiff the defendant may apply for absolution from the instance .....(and that)..... If absolution from the instance ..... has been refused and the

> defendant has not closed his case, the defendant ..... may briefly outline the facts intended to be proved, and the defendant may then proceed to the proof thereof".

The learned authors proceed to re-iterate the test to which Erasmus *et al* referred earlier and go a step further to indicate that

> "..... Another approach is to enquire whether the plaintiff has made out a *prima facie* case. The application is akin to and stands on very much the same footing as an application for the discharge of an accused at the end of the state case in a Criminal trial".

I agree entirely with this comparison.

The learned authors go further to indicate that "the Court has a discretion to grant or refuse absolution from the instance". I may just add that the exercise of this discretion has to be judicial. In this is implied that the exercise should be undertaken with appreciation and knowledge of what is right according to law.

Of vital importance are the remarks of these authors to the effect that

> "In the exercise of this discretion it (meaning the Court) will not normally have regard to the credibility of witnesses unless the plaintiff's witnesses are so obviously lying or have so palpably broken down that no reasonable man could place reliance upon them.

As I pointed out earlier, in my hearing of this matter, I was far from forming even the remotest impression that PW1 was obviously lying or had broken down so

palpably as to render his evidence irretrievable in the eyes of a reasonable man.

Applying the above principles to the facts of the case would make it unnecessary to consider in detail other points raised in motivating this application.

I need put the matter in perspective by reference to the plaintiff's declaration and the defendants' plea.

Paragraph 3 page 7 of the declaration sets out that in terms of an oral agreement entered into between the plaintiff and First Defendant at Maseru, and at first defendant's special instance and\or request, plaintiff lent and advanced money to Defendant from time to time on overdraft facility, which oral agreement also provided for the payment of said money on demand.

In response to this declaration the plea entered on behalf of 1st, 2nd and 3rd defendants reads at page 66

"AD PARAGRAPHS 1,2 AND 3 THEREOF:

The contents of these paragraphs are admitted".

In paragraph 5 the plaintiff states that

"On the 9th December, 1994, and again on the 31st January, 1995, and at Maseru in the Kingdom of Lesotho, Plaintiff demanded in writing from First Defendant, payment of the sum of M1 847 122-94, being monies advanced in terms of aforementioned oral agreement, but notwithstanding such demand, first Defendant has failed and\or refused and\or neglected to pay said full amount or part thereof".

In response it is reflected on behalf of the defendants at page 67 that

"The Defendants deny and put the Plaintiff to the proof thereof. The Defendants specifically deny that the 1st Defendant is indebted to the Plaintiff in the amount of M1 847 122-94 or any other amount and put the Plaintiff to the proof thereof".

In paragraph 6 the plaintiff states that

"On the 18th June, 1993, and as continuing covering security for the indebtedness and obligations of First Defendant as principal debtor, Second Defendant as a surety and co-principal debtor, secured payment of aforesaid indebtedness of First Defendant by way of registration of a continuing covering Deed of Hypothecation No.23724 in favour of Plaintiff in the office of the Deeds Registry, Maseru, under the Deeds Registry Act of 1967. A copy of such continuing covering Deed of Hypothecation is annexed hereto, marked 'A'".

In response the defendants say **Ad Paras 6 through 14**

"The Defendants admit that Mortgage Bonds were registered over the property reflected in the Declaration and the Deed of Suretyship was signed by the 3rd Defendant but the Defendants plead that the 1st Defendant denies indebtedness towards the Plaintiff, the Plaintiff is not entitled to reply (*sic*) on the security set out in the Mortgage Bond or in regard to the Suretyship".

The plaintiff having stated that the three defendants have failed to pay their indebtedness to the plaintiff the latter claims against them jointly and severally payment of the sum of M1 847 122-94 plus interest at 18.5% calculable from 9th

December, 1994 to date of payment. The plaintiff prays for an order declaring the following properties especially mortgaged under the aforesaid Deeds of Hypothecation executable. These are Plot No.17684-009 situated at Lower Moyeni, Quthing Urban Area.... held under Deed Transfer No.22881, as registered on 15th November, 1991. Next Plot No.12281-008 situated at Maseru West, Maseru Urban Area ..... held under lease No.12281-008, as registered on 29th June, 1981.

As stated earlier the above scenario is only cited in this ruling to provide background relevant to the context in which the application for absolution has been moved.

Although Erasmus *et al* point out at B1-293 that in a case with multiple defendants as in the instant one the approach is somehow different in the sense that where there is only one defendant the inference is that at the stage when plaintiff has closed its case, the court has heard all the evidence which is available against the defendant, thus any further evidence that would be forthcoming if the case continued would be likely to operate only to the detriment of the plaintiff; and that being so it is considered unnecessary in the interests of justice to allow the case to continue any longer if, after the plaintiff has closed its case, there is no *prima facie* case against the defendant; however where the plaintiff has cited two or more defendants, each

of the defendants might have access to evidence adverse to the one or other defendant. But in the instant case since defendants 2 and 3 have pinned their colours to the 1st defendant's mast they have virtually reduced the number of the defendants to one, namely the 1st defendant in that they said

> "The defendants admit that the bonds were registered and that the deed of suretyship was signed but the defendants plead, as the first defendant denies indebtedness towards the plaintiff."

Plainly they rely on the 1st defendant's denial. Thus the distinction and the attendant caution adhering in respect of multiple defendants falls away.

It is in this context that it becomes important that the Court should take into account

> "that where the plaintiff has first adduced evidence because the burden of proving some of the issues was on him, but the burden of proving other issues was on the defendant"

absolution from the instance cannot be decreed at the end of the plaintiff's case.

This becomes even more relevant in the light of the fact that the bonds and suretyship are common cause in terms of the pleadings referred to above. Furthermore PW1's letters written to the 1st defendant are not placed in dispute. The only issue regarding them was how, according to the defendant's attorney, PW1 could prove the 1st defendant got them. Needless to say evidence of postage to the

addressee is held to be sufficient proof of receipt of such postage by the addressee.

Because the version of the 1st defendant was not put to PW1 concerning what, in contrast to PW1's evidence, he claims to be rather the amount owed, given that there was no dispute in the statements, and that in any case according to PW1's evidence, they were delivered in the normal way the Court would do well to stand poised to hear what the 1st defendant is going to say. That is only natural and therefore fair; coupled with the fact that it was never suggested to PW1 that the 1st defendant didn't write various letters in which he was begging for time and further and further indulgence as his debt swelled like a cucumber.

I have had regard to C. Of A. (CIV) No.4\98 ***Phori vs Elna Durow t\a J & e Enterprises*** (unreported) and have discovered that the case was one of a Summary Judgment in respect of which by virtue of its peculiarity as such the learned Browde J.A. very fittingly said at p.7 :

> "An application for Summary Judgment is an extraordinary remedy since it enables a Plaintiff to obtain judgment against a Defendant without a trial despite the Defendant having entered an appearance to defend. It is for this reason that Courts will be reluctant to refuse leave to defend where the transactions between the parties are complicated and the quantum of the Plaintiff's claim is not so clear as to be readily ascertainable. Accordingly Courts have widely and consistently held that the affidavit of the Plaintiff may only contain those matters which are expressly provided for in the Rule of Court which deals with

Summary Judgment".

In the instant case the Court is not dealing with cold, rigid and inflexible affidavits which cannot be cross-examined and therefore which call for strict application of the express provisions of a particular Rule. Here the Court is dealing with oral evidence where issues are ventilated and witnesses are subject to cross-examination which should enable the Court to decide what weight to place on whatever discrepancies in, qualifications to and retractions from statements which occur during that process.

The unreported case I was referred to i.e. CIV\T\586\85 ***Barclays Bank vs Khoboko*** does not advance the defendants' application one iota because like ***Phori*** above, though it dealt with something slightly different, namely provisional sentence, it is nonetheless in the same category in that it was based on inflexible affidavits as against oral evidence where the truth ultimately comes to surface through the age-old and dependable process of cross-examination which, among others, has the merit of enabling the Court of first instance to observe and study the demeanour of witnesses giving oral evidence - an advantage completely lacking in evidence on affidavits.

In fact in the light of evidence adduced on behalf of the plaintiff I derive a

fair amount of confidence and persuasion from the statement of Joubert *et al* to which deserved merit is to be ascribed that

> ".....The Court may also have regard to the possibility that the plaintiff's case may be strengthened by evidence emerging in the defendant's case".

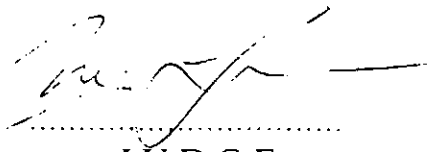
Another criticism levelled at the plaintiff's cause of action by learned counsel for the defendants is that the claims to have the properties executable are not couched in the alternative. The essence and merit of this submission simply escape me in the light of the fact that because the 2nd defendant has bound herself as surety and co-principal debtor in the first bond which is continuing covering bond, the plaintiff is at large to execute on the property declared executable. The whole point of moving Court to declare property executable is to enable the plaintiff to satisfy its claim against property so declared unless the surety and co-principal debtor pays the amount reflected on the writ on presentation thereof. It will be only if the surety and co-principal debtor fails to pay that execution will take place. A plaintiff will normally seek an order permitting execution against property in order to avoid having first to execute against movable property. Indeed where there is a bond this is standard on all accounts. Furthermore inasmuch as the 3rd defendant has bound herself as surety and co-principal debtor (see page 32) it is permissible to excuss all sureties and co-principal debtors as one excusses the principal debtor.

While on this point it might be fruitful to make a brief reference to the principle of Excussion in its original form. The full text of the principle is called *Beneficium Ordinis Seu Excussionis.*

This principle has to do with benefit of order or excussion and refers to the right of defence given to a surety, when called upon for payment by the Creditor, whereby he claims that the principal debtor shall *first* be excussed. However this benefit may be renounced tacitly or specially. Furthermore it cannot be pleaded after joinder of issue. It calls for emphasis to state that sureties are not entitled to plead non-excussion of the principal debtor. See ***Moosa vs Mahomed*** TPD 271 where after the defendant had denied in his plea that there was any contract of money loan at all between him and the plaintiff, alleging that the document placed in proof of the debt on the loan contract was by way of a jest only, the Court had found that it had been given by the defendant in pursuance of an undertaking of suretyship by the defendant, the plaintiff at a late stage amended his pleading by alleging facts showing that the transaction was in fact one of suretyship. The defendant sought to amend his plea by adding one of non-excussion. The Court, properly held that the defendant had had an opportunity of pleading the true facts in reply to plaintiff's original declaration, and should not be permitted at this stage to raise a defence which normally should be taken *in initio litis.*

Finally I may just warn that an application for absolution or for any inter-locutory relief should not be used as a means of securing the postponement of an evil day.

For the above reasons the Court declined to grant absolution from the instance with costs. And it is so ordered.



JUDGE
4th November, 1998

For Plaintiff : Adv. Hoffman
For Defendants : Mr Mphalane