CIV\T\442\94

IN THE HIGH COURT OF LESOTHO

In the matter of :

FRASERS LESOTHO LIMITED **Plaintiff**

vs

HATA-BUTLE(PTY) LIMITED **Defendant**

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on the 1st day of June, 1998

The plaintiff sued out summons against the defendant for :

1. Payment of the sum of M375 801-00

2. Interest thereon at the rate of 18% per annum from date of issue of summons to date of repayment.

3. Costs of suit

4. Further and\or alternative relief.

The plaintiff's declaration sets out that Frasers Lesotho Limited the plaintiff

is a company with limited liability, duly registered and incorporated in accordance with the laws of the Kingdom of Lesotho and trading as such being retail merchants and produce buyers with registered head office and\or principal place of business at Kingsway Maseru Lesotho.

The defendant is described as a company with limited liability duly registered and incorporated in accordance with the Laws of the Kingdom of Lesotho with principal place of business opposite Roma University(*sic*) Roma, Kingdom of Lesotho.

In paragraph 3 of its declaration the plaintiff states that on or about 6th December, 1980 and at Maseru in the Kingdom of Lesotho, the parties entered into a partly written and partly oral agreement of sale in terms of which the plaintiff undertook to sell and deliver merchandise to the defendant on open account from time to time at the agreed upon, alternatively the plaintiff's usual price.

In paragraph 4 the plaintiff states that it was a specific, alternatively implied term of the said partly written and partly oral agreement that :

> "4.1 the defendant would be liable for all such merchandise supplied from time to time by the plaintiff in accordance with orders placed by the store manager from time to time of the defendant;

4.2 the defendant would pay the price as per invoice being the agreed upon, alternatively plaintiff's usual price;

4.3 payment by the defendant would be effected within fifteen days of statement".

In paragraph 5 it is stated by the plaintiff that during the period up to and including the 30th of April 1994, and at defendant's special instance and\or request, the plaintiff, in terms of aforesaid agreement, sold and delivered to the defendant merchandise in the sum of M375 801-00 being the agreed upon, alternatively the plaintiff's usual price.

Finally in paragraph 6 the plaintiff states that a period of more than fifteen days has expired since date of statement and\or delivery and notwithstanding due demand, the defendant has failed and\or refuses to pay the sum of M375 801-00 whereupon the plaintiff prays for Judgment in terms reflected in the summons mentioned earlier at the beginning of this Judgment.

Having duly filed and served its notice of appearance to defend the defendant later filed its request for further particulars the more important aspects of which appear at page 000012 of the paginated record under paragraph 3 reflecting the following :

"AT PARAGRAPH 5 THEREOF

(a) Is this M275 801-00 the same indebtedness as the claimed indebtedness of defendant to Frasers Lesotho as per letter to defendant dated 18th March 1994 apparently reflecting the actual indebtedness as merely R125 338-85?

(b) If not so, a formal and written reconciliation of the matter is requested.

© Is the R375 801-00 the balance owing to Frasers Lesotho after the deduction (or crediting of defendant with (*sic*)) of R63 887-00 worth of stock caused to disappear mysteriously from defendant's stock by Frasers Lesotho as contracted manager and which was claimed from G.BRITS by letter dated 7th July, 1994?

(d) Finally, is this R375 801-00 part of, additional to, or in substitution of plaintiff's original claim of R1 011 282 as presented to defendant by M.F. LABUSGHAGNE in writing dated 19th November 1993? A full and honest reconciliation is required".

The defendant responded by making an application for Summary Judgment in terms of Rule 28. The director of the defendant in an answering affidavit vehemently denied at page 000022 that his company owed anything to Frasers Lesotho and put the plaintiff to the proof of indebtedness "to the very last cent".

At page 000024 paragraph 8(h) the defendant had indicated his bewilderment concerning the tendency for the indebtedness to change.

The defendant pointed out that about November 1993 the plaintiff's claim

against the defendant was a sum in the region of R1 011 282-00. The defendant complained about lack of specificity in this claim in that it was alleged to be owed to what were called Frasers companies.

Following a query or two the amount claimed dropped to R125 338-00 in March 1994.

Further queries still activated the plaintiff to change the claim to R375 801-00. The defendant complained that even this claim which is once more different from the two others shown above is supported neither in whole or part by any evidence at all.

The stand adopted by the defendant in this regard is consistent with the one it adopted in its request for further particulars to the summons. Needless to say the plaintiff's response was to withdraw the application for summary judgment as shown on a minute dated 12-12-94 upon a request moved before my Learned Brother Maqutu J by Mr Matsau at the request of plaintiff's regular attorneys. See inside flap of the file cover.

In its attempt then to address the defendant's queries raised in the request for

further particulars the plaintiff sets out the position at page 000032 as follows :-

> "Re 3(a)
> The amount reflected in the letter dated the 18th of March 1994 from the plaintiff to the defendant in the sum of M125 338-85 (....) was written by the plaintiff, without the benefit of a final audit and was consequently only an interim amount. This amount is not the correct amount owing by the defendant to the plaintiff. This amount is superseded by the sum claimed of M375 801-00 (.....) as per financial statements attached hereto.
>
> Re 3(b)
> See Balance Sheet attached hereto.
>
> Re 3©
> No. The alleged M63 887-00 (....) loss has not been deducted from the sum claimed. Plaintiff has no knowledge of the alleged loss of M63 887-00(....).
>
> Re 3(d)
> The amount of M1 011 282-00(....) was an amount reflected in the trading account at the time and the plaintiff has not claimed this amount from the defendant. This amount was the debit balance reflected in the trading account of the defendant, pursuant to the Management Training Consultancy Agreement on the company loan account, with the plaintiff, at the relevant time. However, this amount reflects a historical trading debit at the relevant time and has nothing to do with the plaintiff's present claim against the defendant as reflected in the pleadings. Plaintiff nevertheless relies on the defendant's Balance Sheet attached hereto".

The plaintiff has attached to its papers at page 000034 Annexure "A" i.e. Management Training and Consultancy Agreement between Hata-Butle Company(Pty) Ltd and Frasers Lesotho Limited.

The terms of the agreement in Clause 1 are as follows :-

"1.- 1.1 'the Company' means Hata-Butle Co. (Pty) Limited

1.2 'Frasers' means Frasers Lesotho Limited and its sister, associated, subsidiary and parent companies.

2.- It is expressly agreed by all parties that

2.1 The Company shall not be nor shall it be seen to be, a part of the Fraser Group

2.2 All merchandise will be ordered in the name of the Company.

3.2 Frasers shall act as consultants to the Company and shall have full managerial control of the business on the basis hereinafter set forth, save that they shall not engage in, agree to, perform or undertake any of the following acts, procedures or matters except by virtue of the prior resolution or delegation of the Board of Directors of the company;

3.2.1 borrow on behalf of the Company;

3.2.3 pledge, mortgage, hypothecate or encumber any of the Company's assets in any manner whatsoever;

3.2.8 appoint dismiss or alter the conditions of employment for the establishment or adjustment of salaries of the senior staff except as provided for herein;

3.3 the store manager shall, subject to the over-riding decision of Frasers;

3.3.1 place all orders for merchandise with a Frasers Wholesale, though if the store manager wishes to place an order with any other supplier, he may only do so with the consent of Frasers, which consent may not be unreasonably withheld; and he must comply with the managerial capacity and, in particular, send a copy of the order form and of the stock sheets to Frasers; and

he must comply with any instruction from Frasers regarding the placing of such orders particularly in regard to quantities.

3.4 ..... Frasers shall

3.4.6 report to directors of the Company as they may from time to time reasonably require in connection with the business of Frasers' functions and duties under this agreement;

3.4.7 procure and arrange the entire administration, staffing, merchandising, buying, selling, pricing policies and management of the business.

6.1 Frasers shall, from time to time, supply to the Company from its own stock the merchandise in accordance with orders placed by the store manager in terms of Clause 3.3.1 or as decided by Frasers in terms of its overriding decision in terms of its managerial power in terms of Clause 3.2.

6.2 In regard to merchandise supplied by Frasers, Frasers shall invoice the Company and the Company shall be liable to Frasers at the supplied price.

6.3 Payment of the purchase price for the merchandise ordered in terms of 6.2 shall be due to Frasers on the 15th day from the date of the relevant statement rendered for the merchandise.

13.1 On signature of this agreement the Board of Directors of the Company shall -

13.1.1 open a business trading account with a bank and at a branch nominated by Frasers;

13.1.2 nominate as the signatories to that account, any two persons signing jointly, a list comprising several persons nominated by Frasers;

13.1.3 undertake not to vary the signing powers on that bank account other than as requested by Frasers.

13.2 As and when required by Frasers the Company shall be obliged to pay into the bank account opened in terms of Clause 13.1 such amounts as are considered by Frasers to be necessary as working capital to run the business."

Before the start of oral evidence *Mr Lubbe* for the plaintiff intimated to the Court that the outstanding amount is that which appears in the Plaintiff's Declaration. He further stated that the cause of action arose out of the Commercial Agreement at page 36 paragraphs 2.2, 6.1, 6.2 and 6.3 referred to earlier in this judgment.

The first witness called for the plaintiff was PW1 ANTHONY MCALPINE who testified that he is a qualified Auditor. He is presently a partner in the firm KPMG having previously been a partner in the firm of auditors DELOITTE AND TOUCHE.

Deloitte and Touche acted as auditors for the defendant Company from 1980 to 1994. PW1 testified that because of the professional relationship he had with the defendant he insisted on being subpoenaed before he could come and testify in this matter before Court.

PW1 said on 8th July 1994 he reported to the defendant in terms of what is

contained in Exhibit A at page 73 of the record. This is a letter addressed to the defendant's directors and headed *Hata-Butle (Proprietary) Limited Indebtedness to Frasers Lesotho Ltd.* The period covered in the report extends from 1st July 1993 to 30th April 1994. At page 2 of this letter under paragraph 1.6 under the heading "Balance due to Frasers" the writer informs the defendant that

> ".....As at 30 April 1994, this amounted to M375 801, which is correct, unless any adjustment(sic) are required to other balance sheet accounts which do not effect (sic) the undistributed profit. .....Further information is therefore required from Frasers to reconcile the account balance with the residual M125 339 now claimed".

PW1 took the Court through Exhibits A and B being the report and the balance sheet respectively.

The witness indicated that an amount of M639 485 reflected on page 75 is the amount owed to Frasers in 1993. He indicated that the financial statements related to the amount in question were signed by the defendant's directors, thus signifying their acceptance of the figures as correct for the year 1993. On the same page is reflected M375 801 for 1994.

PW1 said as far as he recalls the directors of the defendant did not sign the 1994 financial statement. He is not certain if they accepted the amount due to

Frasers as correct or reached any final decision about that matter.

Although he was no longer doing any active work for the defendant PW1 indicated that his appointment had not been terminated and said he didn't know if the defendant's (directors) wanted him to continue.

A reconciliation of the account for July 1993 to April 1994 prepared by Frasers was shown to PW1 and handed in marked Exhibit "C".

PW1 testified that the result of the reconciliation made by Frasers tallied with the audit he himself did on the books insofar as the opening balance and the closing balance agree. He qualified his answer by stating that he has not had the opportunity to check all the transaction total figures on this reconciliation as he was only seeing it for the first time on the morning he came to testify.

PW1 was shown Exhibits "D" in which the first entry reflected as Frasers' current account is M639 485-27 as at 30-06-1993.

PW1 testified that as at 30-06-1994 based on the audit he did the amount due by the defendant to Frasers is M375 801-00. He indicated that he relied on normal

procedures to reach the conclusion that the amount owed is the one reflected above. He indicated that these procedures on which he relied are based on what he termed materiality. He explained that the concept of materiality means that within certain specified limits the procedures employed would be reliable. He cautioned that there might be some small error involved which he and his colleagues would not pick up. He re-assured the Court that as for large differences he and his company would be able to pick up.

Under cross-examination PW1 stated that in the instant case he is guided by his professional ethics in his endeavour to give the Court the true position. He indicated that it is not acceptable on a voluntary basis to use the defendant's books against the defendant's interest. He denied that he volunteered to use the defendant's books of account against its interest and insisted that he was subpoenaed to come to this Court. He emphasised that he refused to come on a voluntary basis. He said but for the fact that he was subpoenaed he would have chosen to protect the defendant as his client and not to testify against it.

It was put to PW1 that Frasers' claim is dishonest and based on records which are exclusively in the hands of the plaintiff. The defendant's counsel but it to PW1 that the defendant was never shown the original books of account and that

the defendant was shown only the end result without having been afforded means of checking the correctness and\or the truthfulness of the claim. PW1's response to this was that the defendant would have to rely on its auditors. He was asked if he thought the defendant had means of establishing that the claim against it was legitimate given that original books were in exclusive possession of Frasers. He replied that he and his fellow auditors took it to be their role as auditors to give their opinion as to whether Frasers had been keeping those books correctly. The witness ultimately understood the question being repeatedly asked of him and said "well, if they (meaning defendant) were not given access to those records, then they could not check".

I must indicate that the cross-examiner has a speech defect which makes it difficult even for us who are used to him to follow what he says. The next problem which may well be the off-shoot of the one stated above is that he tends to go on and on in his attempt to make himself understood instead of keeping his questions brief.

The Court however observed that PW1 decided to dodge giving a straight answer to a well articulated question by the defence counsel whether he thought the defendant was not entitled to check 100% the truthfulness of the claim in the amount

of upwards of M300 000-00 made by Frasers. He conceded that without access to cash receipt books, daily cash records, summary of cash received and payments, delivery notes, cheque books and deposit books the defendant would not be able to do 100% check.

PW1 was referred to Exhibit "C". He admitted that it is characterised as a loan reconciliation. He indicated that as defendant's auditor he never knew of the defendant having asked for a loan from Frasers. He stated that he didn't know why "they called it a loan". See page 25 of record. He stated that it never came to his notice that the defendant had told the plaintiff never to engage the defendant's account for any purchases or debt beyond M5000-00 without the defendant's written permission or consent.

Mr Seotsanyana for the defendant observed to PW1 that the business affairs of the defendant seemed to be intermingled with those of the plaintiff. PW1 however countered by saying that the records maintained by Frasers clearly showed the affairs of Hata-Butle listed separately within a computerised accounting system.

PW1 after hedging and dodging conceded at page 32 of the record that "In terms of the systems and the documentation and the management procedures, they

treated Hata-Butle store as a branch of Frasers".

PW1 conceded that although he did not volunteer to give evidence against his client the defendant, he only told its director outside Court when he saw him here at the Court outside and had never bothered to tell him before: He conceded that he never told the defendant's directors in good time that he had been approached to work against them in this case. Asked if he found it fair and in order that he treated his client like that he started beating about the bush and not giving a straight answer. He instead told the Court that he was subpoenaed only on Friday afternoon and that because the day of hearing is Tuesday it gave him only a Monday - one working day - in which he couldn't do anything.

I am satisfied that it couldn't have been right and proper that the defendant was denied access to the documentation on which the auditing was supposed to have been based. It is most unsatisfactory that even counsel who is representing the defendant was denied access to the original records, including books of account. To me it does not seem to be consistent with the basic elements of honesty that a man who is contractually bound to his client and is required to serve his client's interests can come to court and testify against that client without prior warning to his client.

PW1 again failed to come out straight as to whether it was his own decision or his firm's that he came to testify against his client's interests.

I think the strength of the defendant's case was manifested when during re-examination of PW1 by *Mr Lubbe* it was put to PW1 as follows :

> "Did you at any stage get the impression that Frasers are trying ..... to hide ..... documentation from? .....From me, no.
>
> My instructions are that original invoices, order books etc were in fact kept at the Hata-Butle store".

Clearly in this regard one's own witness was either being cross-examined or being invited to give new evidence given that PW1 had finally conceded that if the defendant was denied original documents it would not be able to do a 100% check. Suffice it to say proper procedure does not allow either of the things *Mr Lubbe* seemed to be bent on doing.

The next witness PW2 was JOHANNES BOTHA who testified that he has been the plaintiff's financial director since 1992. Otherwise he has been in the plaintiff's company for 18 years.

PW2 has been aware of the management agreement that existed between the

parties.

He stated that Frasers Lesotho consists of four different companies i.e. K Nolan Lesotho(Pty)Ltd, Frasers Lesotho Ltd, Lesotho Fruit Industries(Pty)Ltd and Fairways Supermarkets Maluti(Pty)Ltd. All these four companies are four independent units. PW2 stated that his company manages the accounts of Hata-Butle the defendant's business. He told the Court that during the subsistence of the management agreement period the defendant employed its own auditor to audit the books and draw financial statements. The auditors so employed were the firm of Deloitte and Touche. PW2 said that the plaintiff did not employ this firm but a different one called ATKIN AND PETE

PW2 said the management agreement terminated in 1994 because the plaintiff felt it could not manage the defendant any longer because of the interference from its directors with the staff there.

Consequently the defendant was asked to opt for either of the two alternatives : first to run the supermarket entirely on their own; or next to let Frasers buy the supermarket from Hata-Butle. The defendant elected to run the supermarket on their own.

Relying on a letter dated 9th May 1994 addressed to Mr Brits the chairman of Frasers Lesotho and signed by Matebele Mabathoana on behalf of the defendant, PW2 sought to show that the parties parted on friendly terms. In fact the author of the letter stated that he wished to "express our profound gratitude to the management and the directorate of Frasers Lesotho for having managed our business operations from 1980 to 1994 and also by assisting Hata-Butle to take off....." See Exhibit "E".

PW2 said a dispute arose in 1994 between the parties about an amount of money owing to the plaintiff. PW1 acting on behalf of the defendant investigated this amount. PW2 said he gave PW1 access to the necessary documentation to do this investigation.

On the basis of this investigation the conclusion reached was that the defendant owed the plaintiff M375 801-00.

PW2 was shown Exhibits "C" and "D". He identified Exhibit "C" as the reconciliation and Exhibit "D" as the list of creditors. He stated that he is the one who did the reconciliation. The reconciliation covers the period between July 1993 and April 1994. The last balance sheet for the Defendant was signed for the period

ending on 30th June 1993. April was the cut off date for the agreement.

The opening balance in Exhibit "C" is reflected as M639 485-00. Exhibit "D" reflects total creditors in the amount of M665 793-58. The current account of Frasers is reflected as M639 485-27. This is the figure that was used as the opening balance on Exhibit "C". PW2 agreed that he came to the same result as did PW1. He stated there was no other way to make the calculations except by adopting the method he and PW1 employed.

Under cross-examination PW2 said he was the most senior person from Frasers Lesotho to have given evidence in this Court.

He was asked if he would regard parties as having parted on friendly terms if after working together without queries for thirteen years they part on the fourteenth year, one party claiming either one Million Maluti or upwards of M300 000-00. His answer was "I cannot say that it is not friendly, because it is a debt that is owing".

When the question was put again with modifications aimed at highlighting that in fact the parting of the parties was prompted by disagreement on the claim

made by the plaintiff as owing against the defendant PW2 insisted that "we were not cross with them when we left them". He said he wouldn't know if the defendant's directors were unhappy with the work done for them by Frasers when they parted in 1994.

The question was repeated and the witness contended himself with saying "for fourteen years they never complained"

It was only when the question was put for the fourth time that PW2 said "I do not know whether they are happy or not. They do not want to pay, they are probably not happy, but I do not know why they are not happy".

Mr Seotsanyana suggested to PW2 that the directors of the defendant were very unhappy and further gave the reason why they had taken the plaintiff's claim so badly. He suggested that the defendant took the so-called claim by Frasers as a means of punishing the defendant for refusing Frasers' proposal to take over the defendant's business. Most amazing to behold, PW2 reacted to this by saying it is just a statement and that he didn't have to reply to it.

PW2 said PW1 was wrong to say Frasers treated Hata-Butle exactly as if it

were Frasers' own branch. When the same question was put again his answer was "He is right and he is wrong because there is (*sic*) two answers to that question".

PW2 explained that PW1 was wrong in saying Frasers treated defendant as if it was one of Frasers' branches. He said where PW1 was right was when he said Frasers used the same principles to manage Hata-Butle as they managed their branches. Quite frankly I do see where PW2 gathered anything that would lead to his second answer. Nowhere in the question put was it suggested PW1 said the same principles were applied by Frasers to the defendant as to Frasers' other branches.

PW2 after fencing with the question for a while was shown Clause 2 of the agreement saying :-

> "It is expressly agreed by all parties that :
>
> 2.1 The company shall not be, nor shall it be seen to be part of the Frasers group"

Learned Counsel for the defendant elaborated the question and said :

> "That is what I call a prohibition of the integration of accounts or businesses between yourselves and these people of Hata-Butle ..... I want to put it to you that it is the first point that shows your dishonesty as a company *vis-a-vis* the contracted management of another company's business .....? My Lord, the way we kept the

> books of Hata-Butle it was a total separate company and the integration that took place was where we supplied them with merchandise".

PW3 MABAKWENA CHEOANE testified that she is employed by Lesotho Bank as an accountant front desk. She indicated that the defendant has an account with Lesotho Bank under the number 1 0140209978. She said that the plaintiff and the defendant had authorised people to sign on their behalf. She stated that the Bank must receive the resolution from the owners of the accounts granting signing powers to others.

She said this practice was followed in the instant case. There were instances when cheques were returned because the people who signed were not properly authorised.

She denied that people who signed the cheque for M192 502-67 were unauthorised to sign it. She denied that she was part of the fraudulent conspiracy because she is a sister of a certain Mr Makeka who is a director of the plaintiff's company. She said she is Mr Makeka's sister but only got to know today, the day she gave evidence, that he is a director of Frasers Lesotho.

PW3 said she was not aware of any fact about a conspiracy between Lesotho

Bank and Frasers(Pty)Ltd to defraud Hata-Butle. She said PW2 was authorised to sign cheques on behalf of Hata-Butle. Under cross-examination by *Mr Seotsanyana*, PW3 said her brother never told her that he featured as mediator in this very dispute about moneys between the parties herein.

PW3 said she never knew that her brother as a legal practitioner was the defendant's regular lawyer even when this dispute arose. PW3 stated that at the relevant time she was the sub-accountant of the current account department. She never informed Mr Botha or Mr Brits or any person connected with the plaintiff about this state of affairs - neither by letter nor by any other form of communication.

It was put to PW3 that it would not require Lesotho Bank to inform Frasers people that any particular person in the employ of Lesotho Bank is particularly or personally in charge of the department in which PW3 was serving. Her answer was that Lesotho Bank can do that. Asked why there would have to be that need, it came to the Court's notice that PW3 could not have understood the essence of the question. The question was made clearer for the benefit of this witness by *Mr Seotsanyana* indicating that he as a lawyer deals with Lesotho Bank in big sums of money but was never told by the Management there that the current account department is personally manned by any particular individual. The witness

nonetheless insisted that the Bank could "tell Frasers that there is one person in charge". Told that the Bank did not tell the plaintiff she said she didn't know if the Bank did tell Frasers that she was the person in charge of current account. She agreed that it would occasion no problem if at the time Frasers wanted to change authorised persons they just wrote to the Bank informing the management accordingly. She was repeatedly asked if she oversaw the changing and substitution of signatories (including Mr Botha) done underhand by Frasers. She ultimately said she was given the instruction by her manager to do the changes. The manager at the time was a Mr T.R. Sopeng.

Asked if when she took the decision to change the signing originals she informed the owner of the money in the account she said she did not because the instruction was given by the person who was authorised to do that.

PW3 started weaving and ducking when asked a simple question to show the Court whether the document she was relying on as giving M.A. Currie the authority to change the instruction also authorised him to act alone in putting other people there to take the money by cheque or anything.

The question was repeated a number of times and I was certain that PW3

understood it. She nonetheless opted to dodge it. The question as put appears on page 181. Her answer ultimately appears on page 184 of the record in the form "No. On the letter, No. No, there is nowhere it stands on that letter".

At page 216 *Mr Seotsanyana* properly observed that *Mr Lubbe* by his objection was aware that PW3 Mrs Cheoane was bent on dodging the simple question put; namely whether the witness didn't "know that a person who is authorised to sign away funds in my account does not have authority to put other people to sign to take the money".

It was apparent to the Court then that PW3 was aware that PW2 and one D van Eeden were never introduced to the defendant yet she didn't take any step to inform the owner of the money in her custody of the introduction of these people who were operating the account.

The most pathetic response to get from a Banker was when PW3 told the Court at page 219 that she and others did not know that Lesotho Bank has a duty to tell the customer in the position of the defendant when any people are changing its instructions as to who can take the money from the Bank's custody.

It was no use PW3 trying to protect Frasers or PW2 because PW2 had conceded that he was the one who authorised PW1 to "stab his client at the back" as the question had earlier been put.

In her attempt to avoid giving a straight answer to the question put to PW3 at page 223 it became plain to the Court that it did not bother her or her Bank to alert the owners of the account of actions of newly introduced people dispensing funds in the Bank's custody as long as the owners were trusty or even foolish enough to think their funds are safe in the account under the care of PW3 in the Lesotho Bank.

When told that the defendant never authorised the two people in question to operate the account resulting in the withdrawal of M192 505-67 she said the defendants authorised it. I see no proof or evidence of this assertion by a Banker of fairly senior status.

In brief from the answers of this witness I was left puzzled to think how the defendant would know the state of the account if plaintiff didn't in turn send the statements to the owner of the account. I am also at sea to figure out why in evidence PW3 makes it appear that she knew that the defendant received these

statements when she only sent them to the plaintiff and not to the defendant.

PW3 conceded that nowhere is the name of Mr. Brits given as an authorised person to sign. She conceded that the signature of Brits does not appear among those authorised to sign. Yet his signature appears in the cheque for upwards of M192 000 paying the plaintiff from the defendant's account.

Mr Seotsanyana repeatedly stated that the plaintiff did not deal fairly by the defendant but engaged in chicanery to take advantage of the defendant's naivety or downright stupidity. He referred the witness to a resolution of Board of the defendant's directors. The portion in reference at page 239 of the typed record reads

> "Passed in accordance with the provisions of Article 108 of the Company's Articles of Association. This resolution shall be deemed to have been passed on 2nd August 1991 notwithstanding the dates of signature thereof by the signatories as indicated next to the signature of each signatory".

The defendant repeatedly indicated it did not authorise the plaintiff's conduct in purporting to deal in accordance with this resolution.

Mr Seotsanyana accordingly put to PW3 who replied in the following text

".....which Articles of Association do you take that communication to claim to act under. Is it Articles of Hata-Butle, the owners of the money, or of the operator of any of the companies.....? Of Hata-Butle.

Yes. Now you see, I just want to tell you that if you look at the copy of the Articles of Association of Hata-Butle you will in fact find that their Article 108 is merely being mentioned there, it does not deal with that kind of thing at all. It deals with the payment of dividends in the company. If you do not understand you tell me, because it is important; it is one of the things that we want to use to show that there has been chicanery..... in this affair .....? Yes.

Court: You agree with him .....? Yes

D.C. Yes. In other words actually just to be explicit, it does not deal with signing powers operating on any account of Hata-Butle at the Lesotho Bank at all or at a bank. It is totally internal to the company and tries to stipulate something about dividends .....? Yes, I agree with that.

..... Now what would you say to a person who claims he is acting under authority of an Article which has absolutely nothing to do with what he wants to do like that. He wants to operate.... introduce people to operate a current account of somebody else and he specifically claims authority under an Article which does not give any. It does not even talk about what he pretends to act under. Is there regularity or very good business practice or what .....? *Yes*".

I take the "yes" italiced above to confirm the assertion by the cross-examiner that the practice smacks of chicanery by the defendant.

At the close of the plaintiff's case the defence opened its case by calling

DW1 Motebele Joseph Mabathoana who testified under oath that he became a shareholder of the defendant in 1984. He is presently the chairman of the defendant's Board of Directors. He accepted that it is common cause that the relationship between the plaintiff and the defendant is controlled by the Management Consultancy contract. For upwards of ten years the parties worked agreeably and seemed to enjoy an absolute dispute free working relationship.

It is also common cause according to DW1 that in terms of the agreement it was necessary for the defendant to authorise a given set of people proposed to make withdrawals of money from a particular account of the defendant at Lesotho Bank. It seems to be common cause also gathering from PW1's evidence that he parted company with the defendant under some cloud; for he himself stated he was uncertain if he is still the defendant's auditor.

It was DW1's evidence that since the engagement by the defendant of Deloitte and Touche as its auditors, this firm of auditors right up to the instant dispute arose had done nothing to make the defendant dissatisfied with PW1's auditing.

As PW2 testified it seems to be the position as confirmed by DW1 that the defendant got to know about the state of affairs of its business from its auditor

throughout the years.

DW1 dubbed it as dishonest that the plaintiff without regard to the necessity of the defendant's authorisation, placed certain people to operate the defendant's account. He stated that the plaintiff throughout the years of dealing with the defendant always received 1% of the turnover as its fee and "never complained that they (Frasers Company) were unable to pay themselves management fees". DW1 stated that the plaintiff never claimed that it was owed management expenses by the defendant. In fact if the plaintiff had any claim against the defendant with regard to management expenses the defendant would be notified in the sense that the defendant would make transactions in terms of orders supplied and invoices and account to the Board of Directors. However this witness later indicated that the plaintiff didn't have to notify the Board of Directors of the expenses it incurred on defendant's behalf. In such situations the plaintiff was assumed to have paid itself, and then later the plaintiff was expected to account to the Board of Directors.

DW1 indicated his incredulity that PW3 claimed she didn't know the legal requirements that the owners of the account are to be informed of who is operating their account. Otherwise this witness was guided well on various aspects appearing in the pleadings including the fact that three claims had been made against the

defendant by the plaintiff who finally settled for one.

Under cross-examination DW1 tried without success to dodge the fact that Frasers Lesotho Ltd includes its sister associated subsidiary and parent company. He agreed that the defendant in terms of Clause 3.2 is in full control of the company except that it cannot do what is set out in 3.2.1 to 3.2.8 without prior resolution or delegation of the Board of Directors.

The witness was taken through the Management Training and Consultancy Agreement document and he agreed with the printed word therein.

DW2 and DW3 Motloang Lawrence Mohapi and Tsolo Lelala respectively didn't have much to offer beyond what DW1 had stated. They registered their joint dissatisfaction with the way plaintiff had gone about its so called claim. They were surprised how the debt came about.

It was argued for the plaintiff that the Court accept the evidence of the plaintiff's witness as credible because theirs was a satisfactory manner of giving evidence which moreover was supported by documentary proof. It was suggested that the witnesses who testified on behalf of the defendant based their evidence on

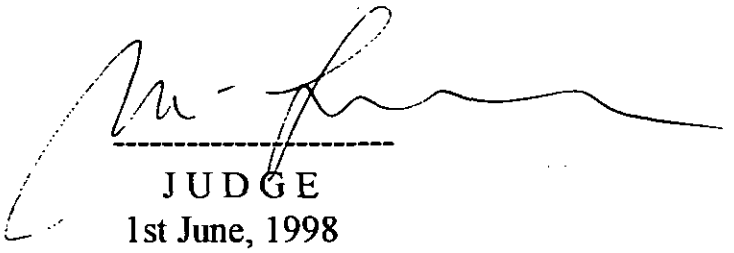
vague allegations and on an obviously incorrect interpretation of the Management Agreement.

My view however is that bad as the defendant's case may appear to be, the plaintiff's case which itself is not a perfect one, is bedevilled by defects which are not rendered less debilitating by weaknesses in the defendant's case. In fact *Mr Seotsanyana* candidly indicated that his clients have manifested an appalling degree of naivety and foolishness by not acting promptly and by their failure to do certain things they were required to do. I am persuaded to the view that the fact that the defendant acted foolishly does not imply that the plaintiff has, proved its case. The safety of the plaintiff depends on a perfect case, its downfall, on any defect whatsoever.

I have considered the evidence of PW1, PW2 and PW3 and found that none of it stood the cross-examination well. The challenges advanced by the defendant should in the circumstances be upheld.

However based on its assessment of the oral and documentary evidence and on the pleadings especially, the Court is of the view that the justice of this case would be met by absolving the defendant from the instance; plus costs.

It is so ordered.



JUDGE
1st June, 1998

For Plaintiff : Mr Lubbe
For Defendant: Mr Seotsanyana