CIV/T/436/90

IN THE HIGH COURT OF LESOTHO

In the matter between

LESOTHO LIQUOR DISTRIBUTORS (PTY) LTD. **PLAINTIFF**

and

PITSO PHAKISO MAKHOZA **DEFENDANT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on 20th day of August, 1998.

In this action Plaintiff claims payment from Defendant of the sum of M388,557.58 together with 15% interest and costs of suit for goods sold and delivered coupled with unpaid cheques in respect thereof. Summons was issued and filed with the Court on the 25th October 1990 and what started off as a simple run of the mill claim was dragged beyond all reasonable proportions for almost 8 years. As will become apparent in a short while the blame for this inordinate delay must be placed squarely on the defendant who started off by filing a bare denial to plaintiff's claim. This then triggered a series of technicalities which culminated in the Court of Appeal in case number C of A (CIV) No. 34 of 1995 in which Browde JA succinctly stated the résumé of the proceedings thus far as follows and I quote:

"(i). in the declaration dated 11 September 1990 the respondent set

out details of a series of invoices showing the date, the invoice amount, payments made in respect of each invoice, credits for "empties" and the balance due on each invoice.

(ii) After being served with a notice of Bar on 6 February 1991 the respondent's plea was served on 11 February. The defence raised in the plea was not much more than a bare denial. The best the pleader could apparently do was to deny that the annexure setting out the invoices "correctly reflects the payments", that "(respondent) failed to deliver all the liquor ordered" and "No liquor which was delivered remains unpaid".

(iii) A request for further particular to the plea followed asking, **inter alia**, for details of the liquor which the appellant alleged was not delivered. This request was served on 25 February 1991.

(iv) Having received no response to the request the respondent, on 15 April, served a notice in terms of Rule 30 (5) of the Rules of Court, that it intended making an application to court to compel the appellant to furnish the particulars sought. On 6 May 1991 some particulars were furnished but were so vague and inadequate that ultimately, and on 2 December 1991 the application in terms of Rules 30 (5) culminated in an order of Court compelling the appellant to furnish the particulars sought.

(v) On 14 February 1992 the appellant furnished particulars

including details of the invoices which he admitted and also the debits which he denied. At that stage he was not able to "identify the allegedly incorrect payments" and stated that when he could identify them he would make application to amend his plea.

I pause to say that one would have thought that the pleadings were then sufficiently detailed to enable the parties to air their differences in Court. That was in February 1992 and it is quite appalling that technicalities could be exploited for the next four years thus avoiding the trial court's pronouncement on the merits to this day.

(vi) On 31 March 1992 by order of Kheola J. (As he then was) the appellant's failure to file supplementary further particulars was condoned and the appellant was ordered to pay the costs.

(vii) The trial was set down to be heard on 23 August and ten days thereafter. However for reasons which do not appear from the record the matter was removed from the roll and set down again a number of times until, on 10 February 1995, it was set down for trial over the period 1 to 19 May 1995.

There can of course be no doubt that the appellant by that time had had more than sufficient time in which to do all the research he needed to say exactly what he admitted and what he denied receiving and paying for during the period covered by the claim

which was, as referred to above, 1986 to 1989.

(viii) A pre-trial conference was held on 21 April 1995 at which the respondent asked the appellant to admit that he was a hotelier trading as Hotel Malunga as pleaded in the declaration. The appellant said he "would revert". It was agreed between the parties that the respondent would compile a bundle of the documents it intended using at the trial and would serve the bundle on the appellant's attorneys while the defendant undertook to do the same and to effect service of his bundle on the respondent by 29 April 1995. It was also recorded that the matter would proceed on 1 May and that should the appellant decide to ask for an adjournment he would immediately notify the respondent's attorneys thereof. No reason was given nor, it seems, was there any suggestion at that stage as to what could arise which might cause the appellant to ask for "an adjournment."

(ix) The matter did not proceed on 1 and 2 May 1995 because those days were public holidays and on 3 May 1995 the appellant did indeed seek an adjournment to obtain the services of counsel and to accommodate the appellant, it was agreed to commence the trial on 9 May 1995.

(x) On Friday 5 May 1995 the first of two notices of amendment was served on the respondent and on Tuesday 9 May (the date on which the hearing was to start) the second notice of

amendment was served on the respondent.

It is quite inexplicable why the appellant should have come to court without counsel and then, after having had three years in which to consider the case, should have, at the doors of the court so to speak, then have sought to amend his plea on two separate occasions.

(xi) The respondent, having been given 158 cheques which the appellant now alleged had not been taken into account by the respondent, required time to consider them and asked for an adjournment for two days i.e. until 11 May. On the 9th however, the respondent filed a formal replication joining issue on the plea with the amendments sought. In the judgment of Mofolo J, against which this appeal has been brought, it is recorded that when the amendments were to be considered by the respondent, counsel stated that respondent reserved its right to oppose them. Despite this reservation of rights the appellant now contends that by filing the replication the respondent waived its right to oppose the amendments. I shall return to the submission made by Mr. Wessels on behalf of the appellant later in this judgment.

(xii) The period between 9 May and 11 May proved to be insufficient to enable the respondent to investigate the new allegations properly, and the matter was postponed by consent to 15 August 1995. On 26 June 1995 the respondent gave

notice of its intention to oppose the amendments.

One of the grounds for opposition was that as the amendments related to transactions "in excess of a period of 6 years ago" the respondent would be prejudiced if the amendments were allowed since the respondent was not obliged to keep records for that long a period. It seems to me, that although it is not expressly stated, it was clearly implied that the respondent had destroyed the documents which were necessary to contest the new ground sought to be covered by the appellant.

(xiii) On 17 July respondent filed its discovery affidavit with details of the documents which appear to be relevant to the claim which, as pointed out by Mr. Woker for the respondent, consisted of a series of sales each with its individual price, each invoiced separately and in respect of each of which delivery was alleged to have been made.

Although Mr. Wessels submitted before us that the affidavit of discovery did not strictly conform to Form O in the schedule to the Rules of Court the only response which seems to have emanated from the appellant at the time was, on 1 August 1995, to call for production of the documents referred to in the affidavit.

(xiv) The matter came before Mr. Justice Mofolo on 15 August 1995 and it was then that the questions arose which led to the

> findings of the court *a quo* and the present appeal against those findings with particular reference to the refusal of he learned judge to allow the amendments to the plea and the findings that the filing of the replication in the circumstances did not amount to a waiver by the respondent of its right to oppose the amendments."

The Learned Judge of Appeal significantly added the following remarks on page 10 of the judgment:

> "As respondent made discovery on 17th July 1995 i.e. a month before the trial was to start the complaint raised at the trial that the affidavit of discovery was defective for reasons set out above can only be regarded as one of many examples of the appellant's efforts to take every technical point in order to prolong the matter."

It was no wonder then that the Learned Judge of Appeal concluded his judgment with the following directive:

> "I would recommend to the Registrar that the trial in this matter be given preference on the trial roll in an effort to avoid any further delaying tactics which the appellant may have in mind."

Significantly the Court of Appeal dismissed the defendant's appeal against the decision of the High Court refusing his proposed amendments to his plea. That was in June 1996 as the judgment indicates.

I should mention at the outset that in the said proposed amendments disallowed by both the High Court and the Court of Appeal the defendant had sought to introduce new defences to his plea in the following respects:

(a) he now sought to allege that he had made overpayments to plaintiff totalling M158 696.91 for which he was not given credit.

(b) He sought to allege further that he made payments to plaintiff totalling M60 393.20 during the period 22 April 1988 to 30 May 1988.

(c). He further sought to allege that he made other payments by 158 cheques which were not credited to his account.

Amazingly and notwithstanding the fact that the Court of Appeal clearly disallowed these amendments the defendant persisted with the presentation of these "defences" during the trial before me despite objections and despite this Court's warning to him in the following words:

> "The Court will have to determine the issues and determine whether what you are doing was in fact part of the exercise before the Court of Appeal and if the Court comes to that conclusion, then that will mean that a lot of time would have been wasted on irrelevant evidence."

The defendant was undaunted by this warning and went on almost endlessly to traverse the amended defences thus disallowed.

For my part I can now say with confidence that having heard the entire evidence in the matter I have come to the conclusion that the defendant's evidence relating to the disallowed amendments is inadmissible by reason of the decision of the Court of Appeal therein. It is thus hereby rejected on this ground alone. Since a lot of time was deliberately wasted on this issue the scale of costs as shown below will reflect this aspect as a mark of the Court's displeasure.

In any event even if I am wrong in holding that the defendant's evidence relating to the disallowed amended defence is inadmissible it is my view that the alleged payments or cheques EX "G" do not assist the defendant for the following reasons:

(a) the defendant has failed to show that the alleged payments relate to the debt in question. Indeed he conceded under cross examination that "it is impossible" to tie up the cheques with the invoices;

(b) the defendant conceded that some of the cheques were in fact paid to an entirely different body namely Anglo Alpha and that they had nothing to do with the plaintiff;

(c). The defendant further conceded that some of the cheques could have been used to pay the brewery for cooldrink purchases which had nothing to do with the instant claim.

(d) the defendant made a further concession that some of the cheques could have been paid to the brewery in payment for

purchases where the payment corresponded exactly to the amount of the invoice thus creating neither overpayment nor underpayment.

Delivery

To the extent that the defendant denies delivery of the goods forming the subject matter of this suit it is necessary to examine the evidence in that regard. I should perhaps mention at the outset that because of the complexity of the matter the plaintiff's approach was to establish a ***prima facie*** case of delivery including plaintiff's system of operation in relation to the invoices making up its claim. It was then sought to persuade the Court to draw "an inference that that has been done which would in the ordinary course of business have been done" per Ramsbottom J in Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd. (II) 1946 TPD 226 at 234. The principle commends itself to me and I shall accordingly adopt it in this matter. I proceed then to examine plaintiff's evidence on delivery.

In this regard plaintiff called the following witnesses who testified as to the plaintiff's system over the relevant period:

PW1 Margaret Boithabiso Mabula
PW2 Njolo Leuta
PW3 Martin Rakaibe
PW4 Lawrence Motebang Moabi and
PW5 Tselane Seema.

At the outset I would say that the evidence of these witnesses was not

challenged and I accordingly accept their version which is to the following effect:

At the material time in question the plaintiff was the only wholesale distributor of liquor in Lesotho and this enabled it to put out a price list to all retailers which reflected the prices at which it would sell liquor to the latter. This indeed is common cause. Meantime the defendant was the biggest customer of the plaintiff and this in turn enabled him to receive preferential treatment such as paying by postdated cheques and being allowed to remove the goods on such payments effected by postdated cheques.

Plaintiff's system of operation was such that a customer would come to the plaintiff's premises and place an order basing himself on the plaintiff's price list. For his part the defendant invariably placed written orders. These orders would then be handed to one of the plaintiff's cashiers where the latter would capture the order on computer and in the process generate an invoice. Once more this is common cause.

There were 5 multi copied invoices in all bearing different colours namely white, blue, green yellow and pink. The price payable for the liquor ordered would be pre-programmed into the computer so that the total amount payable by the customer for his order would automatically be reflected on the invoice. The defendant concedes this.

Once the invoice process was completed the cashier would then collect payment on the invoice. As earlier stated the defendant almost invariably paid by cheques signed in advance. This meant that sometimes the face value of the cheque did not equate exactly to the total invoice value. In such instances then defendant's

account with plaintiff would be credited or debited with the difference as the case might be. Hence there were underpayments and overpayments with regard to the invoices in issue in these proceedings as reflected in Annexture A to plaintiff's declaration.

Once payment had been effected the cashier would then stamp the invoice with a "paid" stamp while at the same time issuing a receipt to the customer. She (the cashier) would then write the receipt number on the face of the invoice and sign such invoice usually in the block entitled "driver's signature". Sometimes the cashier's signature appeared elsewhere on the document.

The cashier would then retain the pink copy of the multi copied invoice and hand the remaining 4 copies to the customer who would then proceed to the warehouse where the liquor referred to in the invoice would be supplied.

The defendant would frequently return empties and in order to obtain credit for them he or his servants would take the empties to the empties return yard where they would be counted and checked and thereafter the defendant would be issued with an "empties return note" which would be taken to the cashier where a credit would be passed for the value of the empties. What happened then was that either this credit would be reflected on the customer's account if no liquor was purchased or it would be credited to the amount of the next order if more liquor was taken.

I accept the evidence that at the warehouse plaintiff's warehouse employees would draw the liquor reflected on the invoice after which it would be checked by a checker and also double checked by a member of the plaintiff's security staff. A "checked" stamp would be placed on the invoice to signify that the customer had

signed for his goods and had taken them. The customer himself would also check thus ensuring that he got what he ordered.

I should emphasise that such was plaintiff's system that once the order was met and everybody was happy or satisfied the customer would then sign the invoice in a special block entitled "customer's signature".

Indeed the evidence established and I accept that if a signature appeared in the block entitled "customer's signature" the customer had ***prima facie*** taken delivery of the goods. Moreover as it is common cause that in those days the plaintiff did not deliver to the customers' premises I believe the evidence that the customer was responsible for the removal of his goods from the plaintiff's premises after signing the invoice. I accept therefore that the plaintiff's invoices doubled up as delivery notes.

I further accept the evidence that when the customer left the plaintiff's premises with his purchases he would have with him: the original invoice, a receipt and if empties were returned, the original empties return note. It follows from this therefore that for each transaction in issue in these proceedings the defendant has or had a complete record yet amazingly he produced none of them during the plaintiff's case.

From the aforegoing and on the authority of Ebrahim's case (***supra***) I am satisfied and accordingly emphasise that plaintiff's system of operation was such that once the defendant's signature (or that of his servants) appeared on the invoices in question as is the case here then the plaintiff succeeded to establish a ***prima facie*** case that delivery had been effected. Indeed this is the most reasonable inference

one can draw from the circumstances of the case. It is my view therefore that if the defendant sought to challenge the delivery then it was incumbent upon him to put up some evidence to meet the ***prima facie*** case yet he failed to do so. I should mention at this stage that as a witness I found the defendant to be very unimpressive and untrustworthy. He was very evasive to questions put to him under cross examination even to the point of being downright insolent. I reject his evidence that there was no delivery in the matter.

I think plaintiff's evidence has for that matter gone further than establishing a ***prima facie*** case of delivery. Indeed the defendant himself conceded under cross examination that the check system at his own premises was such that if there was any short delivery "it is immediately found." It is significant for that matter that he never raised any query as to non delivery at the time.

Regarding the invoices of 21st December 1987 I believe the direct evidence of PW3 Martin Rakaibe and PW12 Dirk John Visser to the effect that the defendant personally collected liquor from the plaintiff's premises on the 26th December 1987. Significantly the defendant conceded under cross examination yielding to pressure that his own signature appears on this invoice of the 21st December 1987. I accept the evidence that he signed this invoice on the 26th December 1987 and reject his contradictory allegation that he was away in Durban on that day.

Indeed the defendant was finally forced under cross examination to concede that he was unable to dispute that the liquor referred to in the invoices forming the subject matter of the dispute was in fact delivered. Indeed I am satisfied that the defendant's case has actually bolstered the plaintiff's claim with regard to delivery. Thus the ***prima facie*** proof of delivery has in my view become conclusive proof in

the particular circumstances of this case.

Ex Parte: The Minister of Justice - In re: R v Jacobson & Levy 1931 A.D. 466 at 478-479 per Strafford J.A.

Payment: Onus thereof.

In paragraph 4.1 of his plea the defendant makes a veiled half hearted allegation of payment in the following terms:-

"It is denied that the liquor in respect of which payments were made, was all delivered."

The defendant repeats his veiled half-hearted allegation of payment in paragraph 8.3 of his plea in the following words:

"No liquor which was delivered, remains unpaid."

Now it is trite law that the onus of proving the defence of payment is on the person alleging such payment. See for example **Pillay v Krishna & Another 1946 AD 946 at 955-956.**

Indeed Zulman JA writing a unanimous decision of the Supreme Court of Appeal of South Africa reaffirmed the principle in **Pillay's** case in **Standard Bank of South Africa Limited v Oneanate Investments (Pty) Ltd. (in liquidation) 1998 (1) S.A. 811 at 823 (A)** in the following words:-

"The onus rested upon the defendant to prove the payment that it pleaded (Pillay v Krishna and Another 1946 AD 946 at 958)."

In my view not only does the defendant in the instant case bear the onus of proof of payment he alleges but he also bears the onus of proving that his payment actually related to the debt in question. This indeed is the natural and logical conclusion flowing directly from the principle that he who alleges must prove.

See **Italtile Products (Pty) Ltd v Touch of Class 1982 (1) S.A. 288 (O) at 290.**

As earlier stated the defendant sought to go about proving payment by resorting to the aforesaid amendment disallowed by the High Court and the Court of Appeal to the effect that he had allegedly paid the amounts owing to the plaintiff. I have already ruled the defendant's evidence in that regard inadmissible for reasons fully stated above. I reiterate, in any event, that the defendant failed to establish that the payments were tied up with the invoices forming the subject matter of plaintiff's claim. The defendant himself conceded this much. I remain unpersuaded for that matter that the defendant made any payments as alleged or at all. I simply do not believe his evidence in that regard.

During the course of his evidence the defendant made startling revelation to the effect that he made certain overpayments Exhibits "D" amounting to M158,691.91 to plaintiff as stated above. It follows, so the argument goes, that the plaintiff is indebted to him in this amount. He claims that he made this discovery after his release from prison in May 1986 for having "castrated a man." According to him he then went to the plaintiff to lay a complaint and after getting no favourable

response from Messrs. Visser (PW12) and Fraenkel (PW13) he placed an order for liquor, took the goods and then stopped payment on two cheques thereof totalling M165 918.60 on the advice of his bank manager in order to force plaintiff's General Manager Mr. Hall PW9 to the negotiating table. The defendant testifies that Mr. Hall then addressed his complaint and found that there was substance in it and that indeed plaintiff was indebted to him in the sum of M165 918.60 covered by the two cheques of M81 118.00 and M84 800.60 respectively. Thus the defendant submits that the matter was settled.

It is clear to me that the defendant is here trying to raise a defence of compromise for which he clearly bears the onus of proof. The purpose of a defence of compromise is to prevent or avoid or to put an end to litigation. If established the defence of compromise is an absolute defence to an action based on the original claim along the same lines as ***res judicata.***

See **Amler: Precedents of Pleadings, 4th edition P.76.**

Amazingly the only witness for the defendant in proof of the alleged settlement agreement was the defendant himself. On the other hand four witnesses gave evidence for the plaintiff and these were PW9 Mr. Hall, PW11 Mr. Matšela, PW12 Mr. Visser and PW13 Mr. Fraenkel. Without exception all these witnesses who appeared to me to be very candid and truthful categorically denied any knowledge of the alleged settlement agreement. It is significant that all these witnesses are no longer in the employ of the plaintiff. No reason was suggested why they should lie in the matter. Indeed I believe their evidence.

I have also borne in mind the fact that the defendant has failed to call a very important witness for him namely his bank manager Mr. Wright. I have no doubt

in my mind, and probabilities are that the defendant would have called him if his story was true.

Moreover the Court has not lost sight of the fact that in his opposition to the provisional sentence proceedings instituted by the plaintiff on the two cheques in question on 9 March 1988 the defendant made no mention whatsoever of the alleged settlement agreement which was allegedly concluded prior to the provisional sentence proceedings themselves. I am therefore driven to the inevitable conclusion on probabilities that the defendant's defence of a settlement agreement or compromise is a recent fabrication. I therefore reject it as such.

Nor does this Court believe the defendant's version that he "stopped" payment on the aforesaid two cheques of M81,118.00 and M84 800.00 respectively. I believe the evidence of PW13 Mr. Fraekel that the two cheques were actually dishonoured. This indeed is borne out by the earliest endorsements on the cheques to the following effect:

"Refer to Drawer."

It should be noted that the two cheques were indeed presented twice to the bank.

The Defendant's Acknowledgement of Debt.

It is significant that on the 21st April 1988 the defendant admittedly signed an acknowledgement of debt EX "H" in favour of the plaintiff.

In this regard the defendant was asked by Adv. Woker for the plaintiff the following question under cross examination (page 1116 of the record):

"Q: First of all I want to ask you this. We know that you signed the acknowledgement of debt?

A: Yes."

The defendant was asked by his attorney Mr. Redelinghuys in re-examination (page 1311 of the record):

"Q: You will remember your evidence was that you signed this acknowledgement of debt in April?

A: It is so."

It is necessary then to reproduce the acknowledgment of debt which is in the following terms:

"ACKNOWLEDGEMENT OF DEBT.

1. I, PITSO PHAKISO MAKHOZA an adult male mosotho residing at Ha Matala's, Lithoteng in Maseru and carrying on business ***inter alia*** as an hotelier under the name and style of Hotel Malunga or Malunga Offsales respectively at Pitso Ground Road and Eloff Street near the Taxi Station in the Maseru Urban Area, hereby acknowledge without any reservation whatsoever that I am well and truly and lawfully indebted to LESOTHO LIQUOR DISTRIBUTORS (PTY) LTD

of No.44 Industrial Area, Maseru (hereinafter called LLD) in the sum of M277,405-66 (Two Hundred & Seventy Seven Thousand Four Hundred & Five Maloti & Sixty Six Lisente), which amount is owed and due by me to LLD for goods sold and delivered.

2. I hereby promise to pay to LLD the full sum aforesaid, to wit M277,405-66 together with interest at the prime lending rate on the full amount from the day of 21 April 1988 to the 12th day of April, 1988, and with interest at the rate of one per cent (1%) over and above the prime interest rate per annum on the balance remaining due from the 13th day of April, 1988 and thereafter from time to time in instalments of M20,000- (Twenty Thousand Maloti) per week payable by bank guaranteed cheques or cash at or before 12 noon on Wednesday of each and every week until I have fully discharged my entire debt, the first instalment to be paid on Friday the 22nd April, 1988.

3. I acknowledge further that the entire debt is already due and payable notwithstanding the arrangement herein contained for payment by me in instalments and that failure on my part to pay anyone instalment on the due date or within seven days thereof will entitle LLD to payment of the whole amount at once without notice and in the latter event I undertake and hereby consent to the LLD obtaining a provisional sentence order for payment by me at once of the whole amount due.

I acknowledge in this regard that I issued certain cheques dated 28th December, 1987, 30th December, 1987, 6th January, 1988, 7th March, 1988 and 11th March 1988 drawn on Lesotho Bank, in favour of LLD towards payment of my debt, but that all of said cheques have been dishonoured by non-payment.

THUS DONE AND SIGNED BY ME AT MASERU ON THIS 21st DAY OF APRIL, 1988, IN THE PRESENCE OF THE UNDERSIGNED WITNESSES.

AS WITNESSES:

1. R. FRAENKEL (Signed)
2. ? (Signed)

PITSO PHAKISO MAKHOZA"
(Signed)

In his evidence before me the defendant tried to under play the significance of this acknowledgment of debt by making a veiled suggestion that he signed it under pressure by plaintiff's Manager because his (defendant's) cheques were "dishonoured" and therefore the plaintiff could come to Court and simply apply for provisional sentence. Well for my part I do not believe that undue pressure was put on the defendant to sign the acknowledgement of debt. That his cheques were dishonoured cannot in itself amount to undue pressure. I accept that the defendant signed the acknowledgement of debt freely and voluntarily without any undue pressure. That is precisely the reason why the defendant did not raise this complaint of undue pressure in his affidavit of the 8th August 1988 (page 63 of the pleadings) in which he significantly states as follows in paragraph 9 thereof:

"When I visited the Respondent's office on or about 21st April 1988, I met with ***inter alia,*** Mr. Matsela, the Managing Director of the Respondent, and Mr. Franken. They repeated that they were in serious trouble because of the cheques which were shown to me. Mr. Matsela and Mr. Franken assured me that I was indeed indebted to the Respondent in the amounts of all the cheques At (sic) that stage, I was not in a position to dispute their allegations that I was indebted to the Respondent and I was presented with an acknowledgement of debt which they insisted I should sign. I read the document and pointed out to them that it contained several typographical errors. Mr. Franken corrected the Acknowledgement of Debt in his own hand. Although it was a mystery to me how it could have happened that I owed such a large amount, I saw the cheques and believed Mr. Matsela and Mr. Franken aforesaid representation to the effect that the amount was correct and indeed owing to the Respondent. I was induced by the said representation to sign the acknowledgement of debt. My copy of the acknowledgement of debt is attached hereto marked annexure "PPM 1". At no time during our discussions was I informed of the fact that the Respondent had already issued a summons against me on 12th April 1988."

It is significant that pursuant to this acknowledgement of debt the defendant proceeded to pay an amount of M60,393.20 to the plaintiff in May 1988. There is no suggestion that he paid under duress and I am satisfied that he paid freely and voluntarily in an attempt to settle his debt with plaintiff.

The Defendant's Seven Dishonoured Cheques.

Apart from the aforesaid two dishonoured cheques of M81,118.00 and M84,800.00 respectively there are five more dishonoured cheques paid by the defendant to the plaintiff in an attempt to settle the latter's outstanding money for goods sold and delivered by it to the defendant. Thus there are seven dishonoured cheques in all. These remaining five dishonoured cheques are as follows namely a cheque for:

(a) M99,486.65 dated 28 December 1987

(b) M22,440.00 dated 30 December 1987

(c). M112,450.50 dated 6 January 1988

(d) M23,947.20 dated 7 March 1988

(e) M19,081.31 dated 11 March 1988.

In my calculation the total amount of the five dishonoured cheques is M277 405.66 which is the exact amount covered by the aforesaid acknowledgement of debt. Indeed I observe that in the last sentence of paragraph 3 in his affidavit of the 21st April 1988 the defendant specifically refers to those cheques and acknowledges the fact that they were all "dishonoured by non-payment."

The cheques for M99 486.65 and M22 440.00

It is plaintiff's case that these cheques related to the transaction of the 21st December 1987 and the invoices thereof. In his evidence before me the defendant sought to deny this but he was unable to point to the invoices to which the cheques related. I think the defendant was dishonestly trying to deny the obvious namely that both these cheques clearly related to the December 1987 transaction. For one thing it is common cause that the cheque for M99,486.65 is dated the 28th

December 1987 which ties up with the admitted evidence that the defendant was allowed to pay by post-dated cheques.

In any event, I observe that in his affidavit of the 8th August 1988 (pleadings file page 71 Vol. I paragraph 14.2) the defendant specifically stated that this cheque for M99 486.65 related to the transactions of the 21st December 1987. I accept this version as the true position.

Regarding the cheque for M22 400.00 I observe that it ties in exactly with the amount of the deposit in the invoice of the 21st December 1987. It is indeed common cause that the defendant's order itself is dated 21st December 1987. In any event I believe the direct evidence of PW1 Margaret Mabula and PW12 Mr. Visser to the effect that both these cheques for M99 486.65 and M22 440.00 respectively related to the transactions of the 21st December 1987.

I should mention for that matter that the cheque for M22 440.00 was paid to the brewery as part of the special arrangement relating to empties. This is common cause. I accept the unchallenged evidence of PW12 Mr. Visser and PW13 Mr. Fraenkel to the effect that this cheque constituted security in favour of the plaintiff for empties. If the defendant did not return the empties within seven days the plaintiff was entitled to deposit the empties cheque. Indeed the defendant failed to prove that he returned the empties within the stipulated time or at all.

In all the circumstances of the case therefore I am satisfied that the defendant owes the plaintiff the amounts referred to in the two cheques.

<u>The cheque for M112.450.50.</u>

It is plaintiff's case that this cheque relates to the invoice for M231,391.32 dated 30th December 1987. The defendant admits signing the cheque in favour of the plaintiff but claims that this was "a fraudulent cheque" which was never used to buy anything. I observe however that this version stands in complete contradiction to the version he gave in his affidavit of the 21st April 1988 (pleadings file page 73) wherein he states in paragraph 14.6 thereof that the cheque was in payment of the December order in question. I am satisfied on probabilities that the latter's version is the correct one and that consequently the defendant owes the plaintiff the amount reflected in this cheque as well.

Indeed the defendant was forced to admit under cross examination that he received all the goods referred to in the invoice for which the cheque for M112,450.50 was made. I find therefore that he simply has no defence to plaintiff's claim.

<u>The Cheque For M23,947.20</u>

It is significant that the defendant failed to deal with this cheque at all in his evidence in chief. Under cross examination he was unable however to show the invoice to which he claimed this cheque related. For my part I observe that PW1 Margaret Mabula was unchallenged in her evidence that the cheque was used to pay for the goods referred to in the invoice 160496 dated 7th March 1988 in the amount of M23 947.20. I believe her version and reject that of the defendant especially since all the documentary exhibits clearly tie up to the extend that there is an order, an invoice, a driver's receipt and a credit note in one and the same transaction.

it is common cause that this cheque was also dishonoured and once more I

find that the defendant simply has no defence to plaintiff's claim. Moreover I observe that this cheque is included in the defendant's aforesaid acknowledgement of debt in favour of the plaintiff. Nor indeed does the defendant dispute delivery of the goods at all.

The Cheque For M19,081.31

Once more the defendant failed to deal with this cheque in his evidence in chief. Under cross examination the defendant could not show the Court the invoice to which the cheque related nor could he deny the suggestion on behalf of the plaintiff that the cheque was in fact used to pay for the goods referred to in the invoices Exhibits B.5 and B.6 and that it bounced. Once more I believe the unchallenged evidence of PW1 Margaret Mabula to the effect that the cheque was indeed used by the defendant to pay for the invoice at Exhibits B.5 and B.6 namely invoice No. 161189 dated 11th March 1988 in the sum of M19 680.77. Moreover all the documentary exhibits tie up in as much as there is an order, an invoice, and a driver's receipt. Nor could the defendant dispute delivery at all.

It follows from the aforegoing therefore that the defendant is indebted to the plaintiff in the amount reflected in this cheque as well namely M19 081.31.

The Defendant's Allegation that he paid certain invoices twice.

The defendant suggested in his evidence before me that in regard to certain invoices he had paid twice for the same purchase. This version was categorically contradicted by the bank managers PW7 Mr. Teboho Sopeng and PW8 Mr. Samuel Liaho Rahlao. These witnesses were very impressive in their evidence and clearly

had no mill to grind. I believe their evidence and reject the defendant's unsubstantiated allegation that he paid twice for the same invoice. Significantly I observe that this "defence" was not even pleaded in defendant's plea. I am of the firm view for that matter that this is a recent fabrication by the defendant.

In all the circumstances of the case therefore I am satisfied that the defendant owes the plaintiff monies for goods sold and delivered. In its summons the plaintiff claims M388 557.58. The seven dishonoured cheques amount to the sum of M443,324.26 less M60 393.20 paid pursuant to the aforesaid acknowledgement of debt thus making a total of M382 931.06.

Since the plaintiff accepted the seven cheques in the first place I think if is safer to award the total amount reflected on these cheques namely M382 931.06 as opposed to M388 557.58 claimed in the summons. After all this is exactly plaintiff's prayer in the alternative as Adv. Woker's Heads of Argument show. The difference between this Court's award and the amount claimed in the summons is therefore M5 626.52. More about this later.

Interest

It is hereby recorded that by agreement between the parties the plaintiff is entitled to interest at the rate of 15% per annum on the sum awarded by the Court and such interest shall run from the date of the issue of the summons viz 11th October 1990 to the date of payment.

Costs

The defendant has won a reprieve for M5 626.52. That is a factor in his favour and the Court has taken it into account in determining the scale of costs in this matter. On the other hand I consider that if the defendant had promptly tendered the sum of M382,931.06 made up of the seven dishonoured cheques probabilities are that this protracted litigation might have been averted.

As earlier stated the defendant has unscrupulously and unreasonably engaged in time wasting in these proceedings. Such time wasting has continued unabated during the course of the trial before me notwithstanding the Court's warning. In my opinion this factor alone is sufficient to warrant punitive costs as shown below.

I have also taken into account the fact that the defendant simply had no ***bona fide*** defence to plaintiff's claim. Thus in my view he resorted to dragging the matter simply for the purposes of delay and to frustrate the plaintiff.

In all the circumstances of the case therefore I consider that this is a fit case where punitive costs on attorney and client scale are warranted as a mark of the Court's displeasure at the unbecoming attitude of the defendant which has prejudiced the plaintiff and is calculated to bring the justice system into disrepute. In my view it would be unfair for the plaintiff to be out of pocket in the special circumstances of this case brought about by the defendant himself by reason of his vexatious defence and unscrupulous conduct.

See **Ward v Sulzer 1973 (3) S.A. 701 (A) at 706-707 per Holmes JA.**

Before I close this judgment I should like to express my appreciation for the assistance rendered to the Court by Adv. Woker for the plaintiff. I have received full Heads of Argument from him which have certainly made the task of the Court

easier. Mr. Redelinghuys for the defendant on the other hand failed to file Heads of Argument. He duly tendered his apology which is not of much help to the Court any way.

In the result therefore there shall be judgment for plaintiff in the following terms:-

(a) Payment of the sum of M382 931.06.

(b) Interest thereon at the rate of 15% per annum to run from the date of the issue of the summons (11th October 1990) to the date of payment.

(c). Costs on attorney and client scale.

M.M. Ramodibedi

JUDGE

20th August 1998

For Plaintiff : Adv. Woker

For Defendant : Mr. Redelinghuys