CIV/T/202/98

IN THE HIGH COURT OF LESOTHO

In the matter between:

ANDREAS NTEBELE — **PLAINTIFF**

and

LESOTHO BANK — **1ST DEFENDANT**
TŠABELA TSUINYANE — **2ND DEFENDANT**

JUDGMENT

For Plaintiff : Mr. M. Mafantiri
For First Defendant : Mr. T. Matooane
For Second Defendant : No appearance

Delivered by the Honourable Mr. Justice T. Monapathi on the 18th day of April 2000

On the 2nd March 2000 when the two Counsel appeared to argue, there were two issues before Court. The first one was about an application for summary judgment and the second one was the First Defendant's exception to the claim. I dealt with the application for summary judgment first.

SUMMARY JUDGMENT

The record showed that after the Defendants were allegedly served the Second Defendant entered appearance to defend. This resulted in the application for summary judgment which was opposed as the Second Defendant's affidavit in terms of Rule 28(3)(b) showed. After about two postponements the matter of the application came before me on the 15th December 1999. That Defendant's Counsel had withdrawn. The Defendant undertook to secure the service of another Counsel by the date of the 2nd March, 2000 being the date to which the matter was postponed. On the 15th December 1999 the Defendant had appeared in person. On the 2nd March 2000 the Defendant had not appeared and neither had his Counsel appeared. The probability was that no Counsel had been secured. I did not make much of Mr. Mafantiri's statement that he met the Defendant some days before then when he promised to see Mr. Mafantiri at his office but never did.

Mr. Mafantiri then, in the circumstances, chose to apply for confirming the summary judgment after setting aside the opposition. This I allowed and I accordingly entered judgment against the Second Defendant in this claim for:

(a) Payment of M16,000.00 being outstanding balance of the purchase price.

(b) Interest thereon at the rate of 22.5% *ex temporae.*

(c) Costs of suit.

(d) ....." (My emphasis)

I had noted that the Plaintiff had prayed for a judgment against the Defendants jointly and severally one paying the other to be absolved.

EXCEPTION

The Court then proceeded to hear the Defendants' Exception to the summons and declaration which was couched in the following terms:

"1

That the combined summons do not disclose a cause of action on the following grounds:

(a) They do not establish any contractual relations between the parties.

(b) No duty of care is established between the parties.

(c) Under Aquilian action no claim can be made for purely pecuniary or economic loss."

I made my decision guided by the following submissions by Mr. Matooane : That the payment of M16,000.00 said to be balance of the purchase price did not have a basis in the declaration. The nature of the claim against the First Defendant had not been intimated. That was to say that:

"Consequently it is insufficient to state in the summons merely the relief claims. Plaintiff must set out what the case of action is and what it is based upon."

I was in that regard referred to the fourth edition of the work by Herbstein and Van Winsen called THE PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA at page 398. Counsel submitted that there should be a nexus between the relief claimed and the grounds supporting the claim. There was therefore no way one could claim balance of purchase price from a person who was not a party to a contract.

When damages are claimed (supposing this could be said to be the claim) those damages (Damnum)

> "only are awarded, however as flow naturally and directly from the breach of contract (general, or intrinsic damages) or as may be reasonably supposed to have been in the contemplation of the contracting-parties at the-time they made the contract....."

See Wille's PRINCIPLES OF SOUTH AFRICAN LAW D. Hutchison et al 8th Edition at page 525. The First Defendant would however argue that there was no connection between the loss and the misrepresentation, which misrepresentation as was allegedly said to have been done by the First Defendant.

Lastly Counsel for First Defendant would argue that "The rights and duties under a contract ordinarily attach only to the original parties to the agreements." And would refer in that regard to the sixth edition of the work Wille and Millin's MERCANTILE LAW OF SOUTH AFRICA at page 77.

It had been common cause that on or about the 1st July 1997 Plaintiff had entered into an agreement with Second Defendant. Second Defendant had

undertaken to buy Plaintiff's vehicle in the amount of M26,556.29. It had been a term of the agreement that the Second Defendant would pay M10,000.00 as deposit. This he duly did. As a result the Plaintiff delivered the vehicle to the Second Defendant. A document annexed as "A" evidenced the agreement and it had a fair translation thereto attached to the record of pleadings. The outstanding balance therefore became an amount of M16,556.29.

On or about the 30th September 1997, the Second Defendant signed a Standard Bank Lesotho Ltd current account cheque in the sum of M16,000.00 in part payment of the sale price. The cheque was duly presented to the First Defendant's Bank (the Second Defendant) on the 30th September 1997. The Plaintiff said the cheque was honoured and his account number 0010-13510-100 was credited with appropriate funds on the 1st October 1997. Then most importantly paragraph 8 of the declaration the Plaintiff said:

> "Acting upon the claims of defendant's cheque by the first defendant plaintiff duly signed documents changing ownership of the vehicle in question into the said defendant's names."

What was meant by the Plaintiff was that because his own bank had misrepresented that the Second Defendant's cheque was good he proceeded to transfer the vehicle into the Second Defendant's name which he would otherwise have not done. It meant that that Defendant had misled him. As Plaintiff said this was the beginning of the misinterpretation. This instant case was where the cheque was originally allegedly honoured as against the usual dishonoured cheque. In the former a bank would bear the onus of proving that payment was made in good faith and without negligence on its part. Where a cheque had been a bad one there again a Plaintiff can claim against the drawer of the cheque. Here the claim was not against First

Defendant as a drawee bank but as a collecting bank.

A quick answer was needed to the question of whether a collecting bank would be liable under Lex Aquilia. It was that despite the holding of our Courts and South African Courts for a number of years that the owner of a lost or stolen cheque ought to be protected by the Courts by holding that a collecting bank has a duty of case to that owner. Such opinion do not however support recovery of purely pecuniary loss. This means that negligence, causation and patrimonial loss would still have to be proved. As to a South African case on the liability of a collecting bank see INDAC ELECTRONICS (PTY) LTD v VOLSKAS BANK LTD 1992(1) SA 755(A) see also SOUTH AFRICAN LAW JOURNAL 110 (1993) 1: "Can a collecting Bank be held liable under the Lex Aquilia? Recent development and some thoughts on the future." - Michael Kidd.

Coming back to the facts in this case, it was almost five months later that is on the 4th February 1998 the First Defendant Bank returned the Second Defendant's cheque to Plaintiff as being "Return to drawer" and consequently denied Plaintiff to withdraw an amount of M16,000.00 from his account.

The Plaintiff then concluded in the paragraph 10 of the declaration and said:

> "Despite demand the defendants have failed, neglected and/or refused to pay plaintiff and amount of M16,000.00 which is due and owing to plaintiff as aforesaid."

Who was it that owed the Plaintiff "the balance of the purchase price?" The way I saw it it could only have been the Second Defendant who could have failed or neglected to pay in terms of the contract between the Plaintiff and the Second

Defendant.

The behaviour of the First Defendant did not mean that it could not have done a wrong of some kind more especially through a representation that funds would be available and payable to the Plaintiff. This I did not decide. One would be inclined to feel that the First Defendant as the Plaintiff's collecting bank did not owe a duty of care to the Plaintiff as to whom it was a drawee bank. It might even have been that the cheque from the Second Defendant was a bad cheque because of fraud or some other reason. The First Defendant or any bank would still have a right to impeach a fraudulent cheque or payment made on its strength. In the absence of a statement from the Plaintiff that the Second Defendant's cheque was good for funds I did not see why the First Defendant's action was assailable.

I did not see how the First Defendant guaranteed or made assurances that the funds would be paid except that it represented that there were funds collected from the Second Defendant's bank. It later changed its mind. That the First Defendant's conduct amounted to a representation which was equally deceptive was that it was close to five (5) months when the cheque was "referred to the Plaintiff as being R/D and denied Plaintiff to withdraw an amount of M16,000.00 from his account .....". How in the banking practice this would amount to the cheque as having been honoured on the 1st October 1997 is only subject to conjencture.

For my part I would be inclined to agree that an impression was given to the Plaintiff that the regulatory clearance period between the bank had been given for the cheque to enable the Plaintiff to have come to a conclusion that the cheque had been honoured. He acted upon the impression given by his own bank being the First Defendant.

The question although framed properly of course in the usual technical way as to whether or not there was a cause action the question would also really be: Are the facts or the law advanced against the First Defendant by the Plaintiff consistent with the claim? Or would the Plaintiff have rather instituted a second or a different claim directed at the First Defendant on the facts?

The reasons for above are clear. If there was privity of contract between the Plaintiff and Second Defendant there was no such privity between the Plaintiff and the First Defendant. If the Second Defendant be found liable for an amount for an amount for specific performance in the claim in (a) of the summons and in 11(a) of the declaration that cannot naturally be claimable against the First Defendant except on a different claim.

Secondly, even if the First Defendant would in another claim be found liable for the payment of damages in the sum of M16,000.00, whether there they were contractual or delictual damages, the way of arriving at the damages or the amount would be distinctly different from the way "outstanding balance of the purchase price" would be arrived at in the instant claim.

Lastly, even if one would conclude that there was a basis in law and in fact for deciding for the Plaintiff, in the absence of an indication in the pleadings as to how the damages would be arrived at, one cannot attempt to inquire into the quantum, as the pleadings stood. This is important for the following reason. If the Plaintiff's claim were to be based contractual damages he would have to claim for

> "*damnum emergens* or loss actually incurred, termed "actual damages " and *lucrum cessans* or loss of profits which would otherwise have been made ....." See Willes PRINCIPLES OF SOUTH AFRICAN

LAW, (supra) aat page 524-524.

The problem of assuming that the Plaintiff had a remedy somehow based on the facts in the declaration be it contractual or delictual damag, did not, most unfortunately, answer the question whether he could claim as against the Second Defendant for: "Payment of M16,000.00 being outstanding balance of the purchase price." It was because while second Defendant owed the Plaintiff, the First Defendant did not owe the Plaintiff. This meant that should the Plaintiff have had a claim against the First Defendant it would be based on their banker/customer relationship. The prayers in the summons and declaration were not supported by the facts and legal conclusions even if one were to be very kind to the obviously skeletal statements directed at showing the allegedly wrongful conduct of the First Defendant vis-a-vis the Plaintiff.

I did not have to discuss the question of the duty of care as between the Plaintiff and the First Defendant for an obvious reasons. It was that even if there was such a duty not only would it have to be pleaded. One would still have to grapple with the real problems of the cause of action and the absence of a claim or a prayer connected with such premised statements in the declaration. In the same way as I have avoided concluding positively on the issue whether an action between the Plaintiff and First Defendant would be sustained on representation. I did not venture to say whether or not there was such a duty of care in the circumstances.

It was clear that in all the circumstances the exception ought to succeed with costs to the First Defendant.

T. MONAPATHI
JUDGE

18th April, 2000