CIV/APN/249/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO HOTELS INTERNATIONAL (PROPRIETARY) LIMITED (IN JUDICIAL MANAGEMENT) **APPELLANT**

And

STANDARD CHARTERED BANK LESOTHO LIMITED **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 10th day of April 2000

The issue before court is one of costs only.

On the 19th July 1995 applicant brought an application in which it was claiming from respondent payment of the sum of M71 207-14, interest at the legal rate calculated from January 1992 and costs.

After the respondent had filed answering papers, applicant could not pursue its application, blaming respondent for creating a situation in which applicant found itself obliged to bring this application unnecessarily.

This court is being asked to depart from the normal rule that a party who brings an unsuccessful application must pay the costs at the end of the day. This is an unsuccessful application because applicant has found it cannot be awarded the sum of M71207-14 because of the facts supplied in respondent's answering papers.

In order to determine whether applicant is right or wrong, I am obliged to go into the merits and history of this dispute.

Applicant is a company that ran into problems because of bad management. It had been placed under judicial management because of the reasonable probability that it was not going to meet its obligations to its creditors. It might not be surprising to find that it did not keep its financial records properly. This therefore obliged the judicial manager to resort to the respondent (the applicant's banker) for bank statements and other information in order to work out what the real state of applicant's financial position ought to be.—See David Shrand *The Law and Practice of Insolvency Winding Up of Companies and Judicial Management* 3rd Edition at page 340.

Mr *Buys* an attorney of this court is the judicial manger of applicant. Consequently he was the real applicant. He therefore could not be emotionally uninvolved as he had written all the letters in applicant's name. Naturally (as he appeared personally) he felt respondent had badly treated him by not supplying the information he sought. The respondent also personalised the matter because as more fully appears in respondent's letter dated 23rd April, 1993: "over the past year, considerable unremunerative management time has been spent in endeavouring to locate allegedly missing credits to the above account"—ie. applicant's bank account. Respondent was not willing to oblige the judicial manager with the information he

required.

For convenience I will henceforth call applicant (as complainant) the "judicial manager" (because that is the real litigant) and the respondent will be simply referred to as "the bank". I will continue to refer to Lesotho Hotels International (Pty) Ltd. as "applicant" where I refer to it in its operations in its business activities.

The judicial manager virtually based his claim on the fact that he had said in an earlier letter that his investigations seemed to reveal that applicant had not been credited with deposits amounting to M71 207-14, and in reply the bank had said:

> "Please note that whilst our Internal Auditor agreed that the amounts involved have not been credited, he has not agreed that the bank has any liability to the amount claimed. Statements were sent to the hotel on a regular basis and our client appears to be negligent in not following up the missing credits. In addition although we have accepted the deposit of vouchers from the hotel, this in itself does not create a debtor/creditor relationship between ourselves and the hotel."

There can be no doubt that the bank in this portion of the letter implies that it has indeed not credited the applicant with the amount of M71 207-14 as alleged. This passage appears to confirm that the bank's auditors confirm this, but say the bank is under no obligation to rectify this error, because applicant did not query its bank statements timeously. I am not sure of what the term "our client" in the above passage means, because applicant is referred to as the hotel. I underlined these words "our client" because they have introduced an element of ambiguity. However, it would seem those

words refer to applicant,—that is how they were interpreted by both sides.

Mr *Malebanye* argued that applicant in not checking its statements was negligent because the bank's deposit slips exonerate the bank from all liability because they have the following words in small print:-

> "Cheques, etc handed in for collection will only be available as cash when paid. While acting in good faith and exercising reasonable care the bank cannot accept responsibility for ensuring that depositors/account-holders have lawful title to cheques etc collected.

In even smaller print which is virtually hard to read, the following words appear on the bank statements that the bank used to send to applicant:-

> "Please examine this statement at once, if no error is reported to us within 15 days after receipt, the statement will be considered as correct.

Mr *Malebanye* argued that what appears in the bank statements exonerates the bank from liability 15 days after the account holders of receipt of the bank statements. When I tried to find out whether the bank were entitled to be unjustly enriched by errors that it commits in posting monies in the bank statements, Mr *Malebanye* conceded that this could not be correct.

It could not be otherwise because in *Big Dutchman (SA)(Pty) Ltd v Barclays National Bank Ltd* 1979(3) SA 267 at page 283A

> "A customer's duty to his banker is a limited one. Save in respect of

drawing documents to be presented to the bank and in warning of known or suspected forgeries—he has no duty to the bank to supervise his employees, to run his business carefully or detect frauds. (Spenser-Bower and Turner *Estoppel by Representaiton* 2nd Ed paras 64 and 207-209; Cowen *op cit* at 374); *Standard Bank v Kaplan* 1922 CPD 214 at 222, 223 and 224 - 225:

"The same authorities make it clear that the customer has no duties to the bank to check his bank statements."

The customer owes himself a duty to be careful in the way he manages his financial affairs. He also owes his bank a duty of care in the way he uses his banking cheque facilities to avoid forgeries and frauds, but the bank will not avoid liability merely because the conduct of the customer enabled fraud to be committed. See *Holzman v Standard Bank Ltd* 1985(1) SA 361. In other words it was a gross over simplification of the legal position to suggest that the bank could get away with not crediting application with the M71 207-14 where it was clear that it had been deposited into the bank and not credited to the customer.

This bad advice from the auditors of the bank triggered a belief in the judicial manager that the bank was swindling applicant and the creditors for whose benefit he was acting. There was a smouldering resentment against the bad customer service that he bank had exhibited against him as he was trying to discharge his judiciary duties as judicial manager. This bad customer service is exhibited in the bank's letters to applicant which show what cannot be proper customer service.

The relationship between the bank and a customer was neatly summarised by Selkowitz J in *Standard Bank SA v Oneanate Investment (Pty) Ltd* 1995(4) SA 510 at pages 530 and 531 GH:

> "The law treats the relationship of banker and customer as a contractual one. The reciprocal rights and duties included in the contract are to be great extent based upon custom and usage. Although historically the original objective of a depositor was to ensure the safe keeping of his money,—over time jurists have considered to characterising and explaining the relationship as one of *depositum mutuum* or agency. All these approaches have proved to be inadequate...
> "As between the bank and its customer a payment by cheque is governed primarily by the law of agency. Thus even in normal and every day activity the relationship described as one between debtor and creditor includes aspects - often described as 'superadded obligations'—which are regulated by the law of agency."

From the aforegoing, it is clear that the bank and its internal auditors were wrong in saying the deposits in themselves "did not create a debtor/creditor relationships between the bank and applicant. The bank acted as applicant agent in collecting the money that applicant had deposited as cheques. It had to account to applicant who was its principal. The fact that problems arose was not a ground for the bank's excessive irritation which is displayed in its letters of 10th March 1995 and 23rd April 1995. This was particularly so where (due to mismanagement or exigencies of business) applicant's business had been failing and had consequently to be put under a judicial manager who is a sort of trustee. Queries that implied the bank had shortchanged applicant unless satisfactorily explained were justified. The bank ought to have been dealt fully to the satisfaction of the judicial manager. The bank itself initially agreed that it had not credited applicant with sums that are now claimed.

I find it curious that the applicant's auditors in 1992 should have shared the belief

with the bank auditors that the deposits amount to M71 207.14 as more fully appears in paragraphs 18 and 19 of applicant's founding affidavit and the bank's letter of 10th March 1995. Indeed the bank's letter of 10th March in its tone and contents reflect an incompetence in the handling of applicant's banking account that in my view is unheard of, if it had in fact taken place. The banker's subsequent answering affidavit together with the bank statements show clearly that it was simply untrue that applicant was never credited with the M71 207.14 as the bank itself and auditors of both parties had alleged. The bank statements show clearly that each deposit was duly credited by the bank to applicant on the very day it was made. The normal banking practice was in fact adhered to.

In *Absa Bank Ltd v Blumberg and Wilson* 1995(4) SA 403—Cameron J outlined the procedure ordinarily followed by banks and customers in the operation of customers bank accounts. It is simply that all deposits are credited to the customer as soon as they are deposited. Nevertheless, the customer may not draw cheques against deposited cheques which have not been cleared. If he does so, he runs the risk of the cheques being dishonoured. Indeed the applicant's deposit slips clearly state that, "cheques, etc handed in for collection will only be available as cash when paid". Therefore in the normal course of banking practice, the bank reverses such a credit when the cheque is dishonoured. This was common cause in *Absa Bank Ltd v Blumberg and Wilkinson* as it is in fact common cause in this case.

The amounts credited to applicant in the bank statements were never reversed. I am therefore puzzled as to how the commonly shared belief between applicant and the bank that it was never credited with the amount it claimed gained ground. The bank, after having admitted on the 10th March 1995 that the amount claimed had never been

credited, suddenly vaguely stated in its letter of 23rd April 1995 that the amounts were credited to applicant and that information conveyed to applicant's auditors in January 1992. The bank does not provide the judicial manager with the relevant information. The bank merely dares the judicial manager to institute legal proceedings as he has been threatening to do to claim the amount that the bank had in fact admitted was not credited.

If the information was all along in bank statements that had subsequently been attached to the bank's answering affidavit, how did the bank's auditor and applicant's auditor agree that the amount was not credited? Why did the bank claim it was still locating the amounts and that it was enlisting the services of Barclays Bank? There is an element of mystery. The mystery is deepened by the fact that from applicant's records at least M27 000.00 of the amounts deposited by applicant was in cash or a specially cleared cheque. Therefore no collection or clearance should have posed any problems. In the bank's deposit slips which include a few more that applicant has not annexed the amount of cash deposits including a specially cleared cheque is over M35000.00. I do not understand why these amounts were ever found not to have been credited to applicant. Is it a comedy of errors. I therefore do not understand why on the 10th March 1995 the bank wrote to the liquidator a letter whose paragraph 2 stated:

> "Investigations in respect of the missing credits have continued and it has been established that the bulk of the credits related to items sent on collection to Barclays International Ltd in Maseru. These were mainly credit cards debits. Barclays Bank were requested to assist us in tracing the proceeds of these items, but due to the fact that between 3 and 6 years have elapsed since those items were processed, Barclays Bank has been

unable to assist."

It is hard to reconcile the bank's letter of the 23rd April 1995 with that of the 10th march 1995. The problem is compounded by the failure of the bank to give any explanation or admit any mistake if there had been any. Could it be that the Bank's Managing Director had and the auditors of both sides had an inadequate knowledge of banking practice? Such a conclusion cannot be correct.

It was argued on behalf of the bank that the judicial manager proceeded by way of application at his own risk, knowing this matter would be contested and a serious dispute of fact had already arisen even before this application was brought. The judicial manager says in the absence of any information he did not (at the time he instituted legal proceedings) believe the dispute was genuine, in view of the bank's admission of failure to credit applicant for those deposits. Once the information that could have resolved the dispute was supplied together with the bank's answering affidavit, it became unnecessary to proceed further.

The bank wants to be awarded costs because it has succeeded and costs must follow the event. The judicial manger of applicant says he is entitled to costs because he was pushed into this litigation by the bank's conduct and unco-operative behaviour in concealing vital information. This is what I must decide.

It seems to me that the judicial manager could not be visited with the faults of applicant in not keeping its financial records and bank statements properly. Even if applicant had kept its records badly, the bank was obliged to deal with its queries and disabuse him of whatever misconceptions that it had been shortchanged by the bank.

This is standard practice not only in banking transactions involving cheques where there is element of agency, but all business transactions in which financial statements have to be given from time to time. There has to be exchange of information so that both participants can adjust their records to their mutual benefit in order to keep the wheels of commerce going. If the bank had apologised for its error of the 10th march 1995 and supplied the judicial manager with the relevant records and bank statements, this case would not be before the courts to-day.

In order to resolve this issue of costs in this case, we must resort to general principles. Herbstein & VanWinsen *The Civil Practice of the Superior Courts in South Africa* 4th Edition at page 701 says this about costs:

> "The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation as the case may be."

I have underlined the words "unjustly compelled to initiate or defend litigation because this is the real issue before me in this case. These words are virtually a quotation from Innes CJ's judgment in *Texas Co SA Ltd v Cape Town Municipality* 1926 AD 467 at page 488. I think Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* have overstated the position at page 703 where they say "The award of costs is a matter wholly within the discretion of the court. What they are distilling from many authorities on the question is that although costs should follow the event, the trial court has a discretion which must be judicially exercised and must be conditioned by the circumstances of the case. Therefore De Villiers JP dealing with a trial court's discretion on costs in *Fripp v Gibbon & Co* 191 AD 354 at 363 said:-

> "Questions of costs are always important and sometimes complex and difficult to determine, and in leaving the magistrate the discretion, the law contemplates that he should take into consideration the circumstances of each case, the conduct of the parties and any other circumstance of the case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties. And if he does this, and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon the wrong principle, I know of no right on the part of the court of appeal to interfere with the honest exercise of his discretion."

As a trial court I have to exercise my discretion judicially after weighing all relevant facts. In the light of what I have said above, I have come to the conclusion that although the bank can so to speak have ground for saying it has been successful, but its conduct and the circumstances surrounding this case oblige me to deny it costs. A judicial manager who is doing his best to *bona fide* recover monies for the company he is managing for creditors and the shareholders may sometimes be ordered to pay costs personally if he deliberately acts in an ill-advised manner. In this case I believe he has reasonable grounds for blaming the bank for pushing him into litigation, although he should not have immediately claimed the amount of the deposits.

The judicial manager claims costs on the very grounds that I have decided to deny the bank costs that would have been automatically awarded when the judicial manager decided not to proceed with his application. In the first place, I am of the view that the judicial manager should not have rushed to court like bull in Spain does when a matador waves a red cloak before it, as the bank did (by word and conduct). The judicial manager should have stopped to reflect. It now transpires that what he really wanted was the information that the bank claimed was available, but which the bank was withholding from him. If applicant had made a formal demand for the information

before instituting legal proceedings, his legal position would have been considerably enhanced. What the judicial manager demanded in his letter of 4th April 1995 was the money which is the subject of this litigation. In reply he was told by the bank in the letter of the 23rd April 1995 that the information showing the deposits were in fact credited to applicant's bank account had been available since January 1992. That is the information the judicial manager should have demanded. Indeed if this application had been made to obtain the information that the bank now said it had, the judicial manager would have been within his rights and his application would have been unassailable.

The other reason the judicial manager has a problem in his application for costs is that he came to court by way of application fully aware that the bank claimed the said sums had been credited. He knew the matter would be contested, but nevertheless took a risk. The judicial manager should have been aware that his application may be dismissed if turned out that the bank was right, the deposit had in fact been credited. Even if there was a realization at the launching of the application that a serious dispute of fact was likely to develop,—for that reason, if it in fact developed, the application could be dismissed (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949(3) SA 115 at 1162. Yet applicant persisted with the launching of this application.

Awarding him costs might be rewarding the judicial manager for an error of judgment. He believed the bank had no genuine defence. It turns out that it had a good defence. It is neither liable for payment of the said sum or interest. I am saying this although both the internal auditors of the bank and those of the applicant say the said amount is owing. This fact that the money is not owing, the judicial manager now accepts and that should be the end of the matter.

It would not be right for the judicial manager to get costs for bringing a futile

application, which was risky from the start. He had been warned by the bank that it was based on the wrong grounds, there was information which should have been in his hands but might still be with applicant's former auditors. This information the bank could have been forced to divulge.

The only appropriate order is for this court to order that each party pay its own costs. It is so ordered.

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WCM MAQUTU
JUDGE

For the applicant :
For the respondent :