

CIV/T/247/95

IN THE HIGH COURT OF LESOTHO

-In the matter between

ABEL MOLATI

PLAINTIFF

AND

SHELL OIL LESOTHO (PTY) LIMITED

DEFENDANT

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. GUNI  
On the 30<sup>th</sup> April, 2002

Plaintiff is ABEL MOLATI, a male adult MOSOTHO businessman of MAKOPPO in Botha-Bothe district. Defendant is SHELL OIL LESOTHO (PROPRIETY) LIMITED, a company incorporated in accordance with the laws of LESOTHO, with its head office at L.N.D.C. Centre, MASERU CITY.

The plaintiff's case is to the effect that the parties-(Plaintiff and defendant) entered into an oral agreement of sale. The broad terms of that agreement are that plaintiff was to place orders to the defendant for the supply of petroleum products to him by the defendant. Plaintiff was to pay cash in advance of delivery of the goods ordered. This contract of sale between the parties was a "stop gap" measure temporarily when the dispute between PHAPHAMA DISTRIBUTION (PROPRIETARY) LIMITED and LESOTHO BUSINESS CHALLENGE was being resolved.

The brief history of this dispute discloses that PHAPHAMA DISTRIBUTION (PROPRIETARY) LTD (hereafter referred to as PHAPHAMA) was locked in dispute with its parent company - LESOTHO BUSINESS CHALLENGE (hereafter referred to as Business Challenge). PHAPHAMA was in 1992 operating a filling station called HIGHLANDS AUTO SERVICES at MAPUTSOE. The problems between PHAPHAMA and its parent company became acute round about the middle of July, when BUSINESS CHALLENGE obtained a court order restraining PHAPHAMA from continuing to run its operations at

HIGHLANDS AUTO SERVICES at MAPUTSOE. At the beginning of August 1992 while that filling station was closed for business in terms of the court order obtained by BUSINESS CHALLENGE against PHAPHAMA, plaintiff and the then Managing Director of SHELL OIL LESOTHO discussed an interim business arrangement for the purpose of keeping that SHELL OIL outlet operational. They agreed that plaintiff will run the operations of that filling station as an individual, independent of PHAPHAMA and/or BUSINESS CHALLENGE.

Plaintiff was one of the directors and shareholders of PHAPHAMA. He held the position of the chairman. The Managing Director of SHELL OIL LESOTHO at that time was one Mr. MAQACHE . The discussions which culminated into an agreement being reached took place telephonically and at times face to face when plaintiff paid a visit to the offices of SHELL OIL LESOTHO. Mr. MAQACHE undertook to send his junior officer then - Mr. Monnapula to HIGHLANDS AUTO SERVICES - MAPUTSOE to collect from the plaintiff - orders for the sale of the product and cash payment for the same.

It appeared from Mr. Monnapula's evidence that he routinely went around the country more especially the Northern region, primarily concerned with paraffin sales and distribution. He collected cash and orders from Petrol Filling Stations if asked to do so but filling stations were the exclusive responsibility of the managing director - Mr. MAQACHE. Regularly in the past Mr. Monnapula collected orders and cash payments for the orders made from the plaintiff who then represented PHAPHAMA. The cheques collected by Mr. Monnapula from plaintiff at HIGHLANDS AUTO SERVICES - MAPUTSOE, were mostly bank cheques issued by AGRICULTURAL DEVELOPMENT BANK - commonly called AGRIC BANK. According to Mr. Monnapula at times as in the instance case he received payment by cheques issued by plaintiff from his bank. No other prior instances were mentioned by Mr. Monnapula, when this plaintiff paid out of his own pocket for PHAPHAMA or any company.

On this particular occasion Mr. Monnapula received two cheques from plaintiff at that HIGHLANDS AUTO SERVICES, filling

station at MAPUTSOE. The total value of the two cheques was forty-eight thousands eight hundred and forty maloti (M48 840.00). The first cheque was dated 17<sup>th</sup> November 1992 and was for an amount of (M18 480.00) eighteen thousands, four hundred and eighty maloti. The second cheque was dated 3<sup>rd</sup> December 1992 and was for thirty thousands, three hundred and sixty maloti (M30 360.00). These two cheques were drawn on LESOTHO BANK from the plaintiff's own personal bank account.

The defendant despite its acknowledgement of receipt of cash payment from plaintiff failed to deliver the goods as agreed. It was a term of agreement between plaintiff and defendant that plaintiff will be paid some rebate for this cash payment before delivery of the goods. This rebate according to plaintiff was intended by the defendant to relief him of pressure that is brought to bear upon him by competition in the market place because of paying cash in advance of delivery of goods purchased. Evidence further showed this court that there was a written agreement between PHAPHAMA and this SHELL OIL LESOTHO with similar clause and to the same effect. It

seems PHAPHAMA was as a company entitled to receive rebates from the defendant, when it paid cash for its own orders for which cash payments were made in advance.

The rebate as regards cash payments of the two cheques in question was paid by the defendant to the plaintiff personally -not as a representative of PHAPHAMA. Nevertheless defendant has failed to deliver the goods ordered and paid for to the plaintiff. Plaintiff is therefore suing the defendant for the cancellation of their agreement; the payment of M48 840.00 with interest and the cost of suit.

In its defence of this action the defendant company has pleaded that it never entered into any agreement with plaintiff in his personal capacity. Defendant denies that plaintiff placed the said orders for petroleum products in his personal capacity for his own account as an individual trader. It is further averred on behalf of the defendant, that plaintiff represented PHAPHAMA which was then trading as LESOTHO BUSINESS CHALLENGE and therefore the delivery of the

goods ordered and paid for by plaintiff was made to PHAPHAMA on plaintiff's instructions.

The issues as gleaned from the defendant's case, have become apparent as:-

- (1) was there an agreement between the parties (i.e. plaintiff and defendant).
- (2) What are the terms of that agreement?
- (3) Was plaintiff acting as an individual in his personal capacity or as a representative or agent of PHAPHAMA?

Plaintiff testified before this court on his own behalf.

He told the court that immediately after the closure of business of HIGHLANDS AUTO SERVICES by the messenger of court on the authority of the court order obtained by The BUSINESS CHALLENGE against PHAPHAMA, he negotiated with his colleagues in PHAPHAMA, to operate that filling station personally as an individual separately and independently from PHAPHAMA, in the interim period while PHAPHAMA and BUSINESS CHALLENGE are settling their internal dispute. They agreed. Plaintiff then discussed the same

business proposition with the Managing Director of SHELL OIL LESOTHO. According to the plaintiff the proposition of keeping SHELL OIL outlet operational appealed to its Managing Director MR. MAQACHE. He agreed to supply plaintiff with SHELL OIL products for sale and distribution at that outlet only on conditions that plaintiff paid cash in advance for the orders he placed before the Defendant Company. MR. MAQHACHE undertook to send one MR. MONNAPULA who was his junior officer at that time, to plaintiff at HIGHLANDS AUTO SERVICES - MAPUTSOE for them to arrange how they operate. MR. MONNAPULA collected from plaintiff the two cheques in question and the orders for the products which were paid for by the said two cheques.

It seems there was some degree of uncertainty in Mr. Monnapula's mind regarding the payment made by the two personal cheques of the plaintiff. Mr. Monnapula telephoned the Managing Director who ordered him to accept the two cheques together with the orders from the plaintiff. There appear to have been no discussion at all between Mr. Monnapula and the plaintiff. Mr. Monnapula in his

evidence on behalf of the defendant, told this court that he knows nothing at all as regards the alleged agreement between plaintiff and defendant. He further told this court that he was primarily concerned with the commercial sites of the Defendant Company. That commercial site sold or distributed paraffin only. He had absolutely nothing to do with regard to Petrol filling stations, which was the business at hand at HIGHLANDS AUTO SERVICES – MAPUTSOE at the time the two cheques and orders came into his hands.

Mr. Monnapula told the court that he was never involved nor concerned with Petrol Filling stations. He however collected from petrol filling stations cash when it was available. He gave me the impression that he was no more than a conveyer belt. The agreement between the parties if at all it was made, the defendant was represented by its Managing Director - MR. MAQACHE. MR. MONNAPULA appeared to have expressed no opinion nor participated in any kind of discussion, with regard to that deal. It was put to the plaintiff under his cross-examination that both MR. MAQACHE and Monnapula will be called to testify and they will deny that there was

an agreement between the plaintiff and the defendant. Mr. MONNAPULA was called. He did deny any knowledge of the agreement between the parties. MR. MONNAPULA has taken over the position of MR. MAQACHE who has now retired.

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So far the evidence led disclosed that the discussions which led to the conclusion of an agreement took place between the plaintiff and the Managing Director of the Defendant Company. MR. MONNAPULA told the court that MR. MAQACHE is available here in MASERU and had been seen by him on the morning he came to court to testify in this case. Defence counsel requested postponement in order to call more witnesses.

On the appointed date for the continuation of the hearing of the defence case, the counsel indicated that they are no longer calling any witnesses. Defence case was closed - taking the court by surprise, particularly considering the fact that the defence counsel requested the postponement specifically to call more defence witnesses. This trial has been going for a long time and there have been several

postponements at the instance of the defendant mainly in an effort to try to present their case before this court. The counsel for defendant pointed out that the witnesses whom they intended to call remember nothing that would assist their case. Therefore this court has to determine this case with the evidence which has been led before it so far.

The Onus of proving whether there was agreement between the plaintiff and the defendant rests on the plaintiff. The plaintiff must allege and prove the terms of the contract – *Mc WILLIAM V FIRST CONSOLIDATED HOLDINGS (PTY) LTD 1982 (2) SA (1) (A)*.

Plaintiff told the court that he discussed the business proposition of maintaining the SHELL OIL OULET-HIGHLANDS AUTO SERVICE petrol station operational with the then Managing Director of the Defendant Company. They reached an agreement that defendant will supply the plaintiff with the products provided plaintiff paid cash in advance of delivery of the goods purchased. The defendant was represented by its Managing Director. This evidence of plaintiff on

this point remains uncontradicted. Therefore I must accept that an agreement was reached by the parties. Furthermore, the party with whom the defendant had entered into such contract involving cash payment in advance of delivery of the goods purchased, receives rebates from the defendant on the amount paid. Plaintiff testified that he received a rebate as stipulated in their agreement with the defendant. The defendant has partly performed in terms of their agreement by making that rebate to the plaintiff. Plaintiff is entitled to full performance which included the delivery to him of the goods purchased by him from the defendant. There is no evidence that plaintiff was acting on behalf of anyone. He had not instructed the defendant to deliver the goods to anyone other than himself at HIGHLANDS AUTO SERVICE – MAPUTSOE. There is no evidence that the delivery of the goods was made.

The defendant's plea is to the effect that the delivery was made to someone else at the instructions of the plaintiff. The plaintiff has told the court that he was acting as an individual not a representative

of any company. He denied that he paid for or on behalf of PHAPHAMA. The mode of payment was by means of his personal cheques. This was in compliance with the terms of their agreement that plaintiff makes payments himself by cash prior to delivery of the goods purchased. The standard of proof in this matter is on the balance of probabilities. It is more probable that agreement was reached by the parties. That is why orders were placed and paid for by plaintiff. That is why defendant accepted both the orders made and their payment. Therefore it is the finding of this court that there is an agreement between these parties.

It is because of this part performance of paying the rebate only to the plaintiff that defendant must be held liable to full performance or return of purchase price as a result of its failure to perform fully – COMBRRINK V. MARTIZ 1952 (3) SA 98.

It was put to plaintiff during the cross-examination by counsel for the defendant, that plaintiff paid out of his own pocket the debt owed by PHAPHAMA. Plaintiff denied that. It was put to him that

PHAPHAMA had financial problems and he came to its rescue in its indebtedness with the Defendant Company. The plaintiff denied that too. Plaintiff insisted that he was making orders for himself and was paying for those orders for his own benefit on his own account.

MR. MAKARA testified for the defendant. He was one of the directors and shareholders of PHAPHAMA. According to his evidence he was incharge of PHAPHAMA'S finances. He was a financial director. He was in control of PHAPHAMA's finances. He claimed that the company's bank account was frozen. They – directors of the company decided to transfer the funds out of the frozen account into the plaintiff's personal bank account. It was agreed that plaintiff should issue his own personal cheques for payment of PHAPHAMA's debts. MR.MAKARA swore that plaintiff agreed to this arrangement. The evidence of this witness – MR. MAKARA came by surprise. It was never put to the plaintiff that he agreed to issue out his own personal cheques from his own personal bank account to bail out PHAPHAMA or BUSINESS CHALLENGE which allegedly run the operations at that HIGHLANDS AUTO SERVICES after closing down of the business

operations of PHAPHAMA by court order thereat. MR. MAKARA even though claiming that he was in control of PHAPHAMA's finances, did not know how the funds from its frozen account were transferred into the plaintiff's personal bank account. He claimed it was by cheque. He did not know how much was in fact transferred. Why? He had no interest to know. He said the account into which PHAPHAMA's funds were transferred was held in STANDARD BANK by the plaintiff. It was put to him that plaintiff never had such an account. He persisted. It was pointed out to him that the cheques in question were drawn on LESOTHO BANK from the plaintiff's personal bank account. He insisted that it may be so but he knows the funds were transferred into plaintiff's Personal bank account held at STANDARD BANK from which the plaintiff made cheques to pay for PHAPHAMA's debts.

MR. MAKARA'S evidence is unreliable. As the director of Finance of PHAPHAMA he must be seen to be in full control of that company's finances. He must have full knowledge of the movements of the said company's funds. His lack of knowledge regarding the exact or even estimated amounts transferred makes his evidence

unreliable. His errors with regard to the exact bank account into which the alleged funds went, make his evidence questionable. He does not know how much already was in the plaintiff's bank account, which they decided to use while they were arranging to open an account for the company. They were so happy to use plaintiff's own personal bank account that they eventually never opened any bank account for the company. This whole episode of MR. MAKAR'S evidence is incredible. It cannot be accepted as showing this court that plaintiff acted on behalf of PHAPHAMA or Business Challenge.

MR. MAKARA would like this court to accept that plaintiff had accepted to pay PHAPHAMA'S debts with PHAPHAMA's own money which was in plaintiff's personal Bank account. He claims that this arrangement was a temporary one. When he was pressed on the duration of the practice he gave me the impression that there was no time limit. It could have been for ten to twenty years. In the circumstances surrounding this case that indefiniteness makes nonsense. MR. MAKARA had started by alleging that the use of the

plaintiff's personal bank account was for the time being while they were to open the company's own bank account.

The plaintiff's action must succeed. It is granted as prayed with costs.

K.J. GUNI  
JUDGE 

For plaintiff:	Mr. Teele
For defendant:	Ms Mahabeer