IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 22/2009

In the matter between:

MPOTA MOILOA **APPELLANT**

and

RAOHANG BANNA LE BASALI **RESPONDENT**

CORAM: RAMODIBEDI, P
SCOTT, JA
GAUNTLETT, JA

Heard : 12 October 2009
Delivered: 23 October 2009

Summary

Claim for pure economic loss – defendant in possession of books of account - court will grant damages on best evidence plaintiff able to produce.

JUDGMENT

SCOTT, JA

[1] The respondent is an association which was registered as such in July 1992. Until his expulsion in January 1997 the appellant was a member. The two issues in this appeal are first, the proprietorship of a brick-making enterprise, and second, if the court *a quo* was correct in finding that the respondent was the proprietor, whether the respondent was entitled to the various orders made in its favour by the court

a quo.

[2] The objects of the respondent as stated in its constitution are:

> "(a) To unite, co-ordinate and promote individual artisans, craftsmen, local entrepreneurs and other skilled persons in the Qacha's Nek district under an umbrella organization.
>
> (b) To educate and assist members in proper marketing techniques and skills regarding the disposal of their handicrafts, products, produce and goods".

[3] In short, the respondent's case in the court below was as follows. In July 1994 it purchased a brick-making machine to

facilitate the making of bricks by what was termed its brick-making division which comprised two members, the appellant and Mr. Refuoe Ramphoma. From the proceeds of the sale of the bricks the respondent was able to pay each a salary of M500 per month and in this way provide them with an income. Both the machine and the bricks it produced were the property of the respondent, as was the income from the sale of the bricks.

[4] It was common cause that the respondent applied to the Basotho Enterprises Development Corporation (BEDCO) for a loan in order to purchase the brick-making machine and that the loan was granted and financed by the Lesotho Bank. It was also common cause that the machine was purchased by the respondent from an engineering company in Maseru for the sum of M19,200-00 on 14 July 1994 and that it was duly installed on property occupied by the respondent at Qacha's Nek. Two bank accounts were opened at the Lesotho Bank. One, account number 7001011910, was the account into which repayments on

the loan had to be made. The other, account number 2708236116, was a savings account operated by the appellant and Ramphoma into which the surplus was to be paid after paying the monthly installment on the loan.

[5] The appellant's version was in essence that the loan which enabled the machine to be purchased was procured by the respondent with the object of assisting the appellant and Ramphoma to set up a brick-making business so that they could operate it for their own account. As the appellant expressed it, the respondent's debt was "passed onto" the appellant and Ramphoma who were to repay the loan from the proceeds of their endeavours as brick-makers. The appellant pointed to the objects of the respondent and contended that the assistance rendered to him and Ramphoma was consistent with those objects. It is necessary to observe at this stage that the appellant's version was not supported by Ramphoma who gave evidence on behalf of the respondent.

[6] The operation appears to have continued reasonably well until some time towards the end of 1996 by which time, it would seem, the loan had been repaid. There was then, as the appellant expressed it, “a clash” between himself and Ms Maedward Masao, (PW2) the secretary of the respondent.

[7] Regrettably much of the evidence adduced was vague, confusing and in some instances misplaced. A considerable amount of time was devoted to minutiae and make-weights rather than the essential issues between the parties. What does emerge, however, is that at some stage the appellant was locked out of the yard in which the bricks were made. He responded by seeking and obtaining on 8 January 1997 a spoliation order in the subordinate court. In terms of the order, which was returnable on 16 January 1997, the respondent was interdicted from locking out the appellant and was directed to restore to the appellant the books of first entry pertaining to the brick-making business. It

appears that on the return day the matter was postponed. What became of this litigation is not clear. Whether the respondent brought a counter-application and, if so, what became of it is also not clear. What is apparent is that the appellant resumed his brick-making activities for a short while and then left, taking with him the brick-making machine and the books relating to the brick-making enterprise.

[8] The court *a quo* accepted the respondent's version of the relationship between the parties and rejected that of the appellant. In my view it was justified in doing so. It appears from the evidence of Mr. Limpho Makhetha (PW5) that the Lesotho Bank was in possession of a printed "resolution by an informal body to open an account" which was addressed to the manager and signed by both the appellant and Ramphoma. The account in question was the savings account, number 270823616. Significantly, attached to the resolution was a minute of a meeting of the members of the respondent at which it was resolved to

open the account and to appoint the appellant and Ramphoma as the persons having signing power to operate it. Both documents bore the Bank's stamp dated 2 September 1994. To my mind, this is the clearest indication that the appellant and Ramphoma were conducting the business on behalf of the respondent and not on their own behalf. As previously observed, this was also the evidence of Ramphoma.

[9] I turn to the second issue. The court *a quo* granted judgment in favour of the respondent as prayed in the summons. In addition, it ordered the appellant to return to the respondent the "bank books, block-making machine and other exhibits". The latter order was not asked for, nor was the feasibility of such an order raised or considered in evidence. It must accordingly be set aside. See eg *Mophato oa Morija v Lesotho Evangelical Church* LAC (2000-2004) 356 at 360G-J. The orders sought and granted were for payment of the following:

"(a) M250 per day since February 1997 until date judgment will be handed down;

(b) M43 558-33 being money stolen by the defendant;

(c) M7 596 travelling expenses from Qacha's Nek to Maseru;

(d) M7 000 [being] money which could have been accumulated from seized blocks;

(e) interest at the rate of 18% per annum;

(f) costs of suit."

It was apparent from the Declaration that the M250 per day referred to in (a) was in respect of loss of profit "in [the respondent's] operation and production" of brick-making by reason of its loss of the brick-making machine. The travelling expenses referred to in (c) were said in further particulars supplied to be in respect of travelling to and from Maseru to instruct attorneys. I shall deal with each claim in turn.

[10] The claim in (a) is a claim for pure economic loss. Although not explicitly stated, the cause of action is theft of the respondent's machine. Theft necessarily involves *dolus*. A delictual claim founded on *dolus* will entitle the claimant to recover

a pure economic loss he or she may have suffered. See *Minister of Finance and Others v Gore NO* 2007 (1) SA III (SCA) at paras 81 -90; *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA) at para 14. Counsel for the appellant, however, attacked the award under (a) on two grounds. The first was that the loss in an amount of M250 was not established. It is true that the amount in question was little more than an estimate. The reason, of course, was that the appellant had removed the books of account relating to the brick-making business. In proof of the claim the respondent relied on the evidence of Ms Mamorapeli Letumanyane (PW3) who shortly before the machine was removed worked in the brick-making division for three months while the person who normally assisted on the financial side of the enterprise was away on maternity leave. She estimated that the daily profit was between M360 and M500. The appellant did not challenge this evidence, although in a position to do so; nor did he tender any evidence to the contrary. In *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 970E-G

Diemont JA quoted with approval the following passage in the judgment of Stratford J in *Hersman v Shapiro & Co.* 1926 TPD 367 at 379:

> "Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages. It is not so bound where evidence is available to the plaintiff which he has not produced; in those circumstances the court is justified in giving, and does give, absolution from the instance. But where the best evidence available is produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still if it is the best evidence available, the court must use it and arrive at a conclusion based upon it."

In the light of Letumanyane's estimate the amount of M250 per day is conservative. If it exceeds the profit the brick-making machine was actually producing, the appellant has only himself to blame.

[11] The second ground upon which the award in (a) was attacked was that it was grossly excessive. Counsel for the appellant pointed out that judgment was ultimately handed down more than 10 years after the daily rate referred to in (a) began to

run and that this resulted in an award of over M1,000,000-00. The respondent's answer was that the appellant had not pleaded that the respondent had failed to mitigate its damages and that the appellant was accordingly the author of his own harm. But it is not as simple as that. The date of judgment is an arbitrary date. Had the matter, for example, been disposed of expeditiously within a matter of a few months the award would have been relatively small. Merely because the amount claimed is a *conditio sine qua non* of the loss does not mean that it is necessarily recoverable. As pointed out by Corbett CJ in *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765 A-B, the test for where to draw the line:

> "… is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens,* legal policy, reasonability, fairness and justice all play their part."

I agree with counsel that an award exceeding M1,000,000-00 is grossly excessive. The question is where to draw the line in the present case.

[12] It seems to me that the award should not exceed the sum of the cost of replacing the brick-making machine and the loss of profit during the period it would have taken to procure a new machine. I say this because had the respondent formulated its claim in this way there would have been no objection. The purchase price of the machine removed by the appellant was M19,200. I shall assume for the purpose of the present exercise that the respondent could have obtained a substitute machine for the same price. In other words, I shall disregard the likelihood of inflation resulting in an increase in price. The respondent would have had to apply for and obtain another loan. The brick-making machine would also have had to be imported. This would all have taken time. I think a period of three months, say 65 working days, should be allowed for this process to be completed. To this period must be added a further 76 days which would result in a total of M19,000, which is M200 less than the purchase price. In the result the award under (a) should, in my view, be limited to a period of 141 days, which would result in a figure of M35,250-00.

[13] I turn to the claim in para (b) for M43,558-33 in respect of money stolen by the appellant. Masao (PW2) testified that the procedure adopted for the sale of bricks was for payment to be made in advance. A receipt would be issued and subsequently when the bricks were delivered an endorsement to that effect would be made on the reverse side of the receipt. Following the appellant's departure with the machine the respondent was confronted by a number of customers with receipts which had not been endorsed. The respondent was unable to supply them with bricks and was obliged to refund what they had paid. The receipts were produced in court and totalled the sum of M21,456-93. The appellant's response was simply to deny all knowledge of the receipts. In addition, Letumanyane (PW3) testified that she recalled handing the appellant cash in an amount of M7,000 which she had received from a customer. She also recalled handing him two cheques, one for M4,800-00 drawn by the Rankakala High School and another for M13,000-00 drawn by the

Christ the King School. She later found that neither the cash nor the cheques had been deposited in either of the two bank accounts referred to in paragraph 4 above. These amounts, including the refunded receipts, total M46,256-93. However, the amount actually claimed in para (b) was M43,558-33 and this was the amount awarded. There is no cross-appeal.

[14] No evidence was tendered by the respondent in support of its claim in paragraph (c) for payment of M7,596 in respect of travelling expenses. Counsel for the respondent sought to place some reliance on a statement by the appellant that the petrol for a return trip from Qacha's Nek to Maseru and back cost him M700. This was clearly insufficient to establish the respondent's claim and no explanation was advanced why evidence in support of it could not be tendered.

[15] I turn finally to the claim in para (d) for M7,000 "[being] money which could have been accumulated from seized blocks".

The only evidence tendered in support of this claim was that of Masao who said that the appellant had removed bricks from the yard. There was no estimate as to the quantity of bricks involved or as to how the amount of M7,000 was arrived at. The witness who could have provided some assistance was Ramphoma. He was the person who together with the appellant was involved in the brick-making. Yet he gave no evidence relating to this issue. There was accordingly insufficient evidence to justify the granting of the claim.

[16] In the result the appeal against the court *a quo*'s finding on the central issue of the proprietorship of the brick-making venture must fail. The appellant on the other hand has achieved some success with regard to the relief granted by the court *a quo*. In the circumstances, counsel were agreed that no order should be made as to the costs of appeal. This strikes me as fair.

The following order is made:

The appeal succeeds to the limited extent that the order granted by the court *a quo* is altered to read:

> "The defendant is ordered to pay the plaintiff:
>
> (a) M35,250-00 being the sum of M250 per day for 141 days;
>
> (b) M43,558-33 being the sum misappropriated by defendant;
>
> (c) Interest at the rate of 18 percent per annum calculated from 17 June 2009 to the date of payment;
>
> (d) Cost of suit."

D.G. SCOTT
JUSTICE OF APPEAL

I AGREE:

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I AGREE:

J.J. GAUNTLETT
JUSTICE OF APPEAL

For the Appellant : Q. Letsika

For the Respondent: D.P. Molyneaux

Webber Newdigate, Maseru