IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) No. 51/2011

In the matter between:

THATO JOSEPH RANKOANE
T/A PRO LINK SYSTEMS **APPELLANT**

AND

THE LIQUIDATOR LESOTHO BANK
(IN LIQUIDATION) **RESPONDENT**

CORAM: SMALBERGER, JA
SCOTT, JA
MOSITO, AJA

Heard: 17 APRIL 2012
Delivered: 27 APRIL 2012

Summary

Appellant alleging he had repaid a loan to respondent in December 1996 when loan became repayable – respondent claiming payment for first time 6 years later –

delay unexplained – held appellant had discharged burden of proving repayment.

JUDGMENT

SCOTT, JA

[1] This is an appeal against the judgment of Lyons AJ sitting in the Commercial Division of the High Court.

[2] On 31 October 1996 the Appellant entered into a written agreement of loan with the Lesotho Bank, now in liquidation ("the respondent"). The loan was for M22 000 and bore interest at the rate of 22 percent per annum. It was repayable in two monthly instalments of M11 034.55 each. The first was payable at the end of November 1996 and the second at the end of December of that year.

[3] In November 2002 the respondent issued summons against the appellant in which it alleged that no monthly instalments had been paid and that as at 5 September 2002 the amount owing had grown

to M45 207.33. Default judgment was subsequently taken against the appellant but was set aside on 28 August 2006.

[4] The appellant pleaded that he had repaid the loan in full in December 1996 but was unable to produce written proof of payment as all his records, which were kept in his office at the Sanlam Centre, Maseru, were destroyed by fire during the riots of 1998. It was accepted by the court a quo that the appellant bore the onus of proving on a balance of probabilities that he had repaid the loan see **Pillay: v Krishna and Another 1946 AD 946** at 958, **Standard Bank of SA LTD v Oneanate Investments (PTY) LTD (In Liquidation) 1998 (1) SA 811 (SCA)** at 823 D. The issue in this appeal is whether the appellant discharged that onus.

[5] In terms of the loan agreement, the loan and interest were to be paid *"into account number 6516268615 held in the name of the borrower with the Bank."* The accounts relied upon by the respondent to establish the amount outstanding and that no payments had been made bore different numbers. The explanation

given for this was briefly as follows. The computerised system of accounting on which the respondent operated in 1996 was commonly known as the *"T.C.3"* system. Under this system the appellant's account number was 6516268615, being the number referred to in the loan agreement. In June 1997 the respondent changed from the so-called *"T.C.3"* system to a more sophisticated computerised system known as *"The Equation 3"* system. The change resulted in the respondent being given a new account number, namely, 0010-061358-300. In addition, and because the respondent did not have an ordinary current account from which repayments of the loan could be deducted, an additional account, called *"a loan funding arrears account"* was opened in which all repayments would be reflected. The court a quo appears to have understood this account to be opened only when the borrower defaulted. This is not correct. The evidence of Mr Teboho Sopeng, a retired executive of the respondent, is clear. A loan arrears funding account is opened whenever there is no current account. In the present case the respondent's loan arrears funding account number was 00100631358-800. The conversion of the accounts relating to

loans to the new system was done manually and over a period of some time. In the case of the appellant's account, the conversion was only carried out in February 1998. The manual conversion process was effected under the supervision of the head of the loan division. Neither he or the persons actually doing the conversion gave evidence, and there was accordingly no evidence as to what the process involved and how the work was carried out.

[6] The amount claimed in the summons, i.e M45 207-33, was stated to be the amount due on 5 September 2002. According to the loan arrears funding account, however, that was the amount due as early as March 1999. No explanation was forthcoming as to why the account became frozen in March 1999. It could not have been on account of the *in duplum* rule (as to which see **Standard Bank of SA v Oneanate Investments,** supra, at 827H-829H) because the sum of M45 207-33 included the sum of M23 207-27 in respect of interest which exceeded the capital amount of the loan.

[7] There is also no explanation as to why it took the respondent until November 2002 to issue summons, in other words a delay of almost 6 years. According to Mr Sopeng, the procedure adopted by the respondent was to telephone a customer in the event of his failing to make payment of an instalment within 30 days after its becoming due. If another month went by the customer was sent a written demand and after 3 months the matter was handed over to the respondent's lawyers. The appellant insisted that he had received no word from the respondent of its lawyers prior to the issue of summons and there was nothing to gainsay his evidence. It is true that the respondent went into liquidation and that this could account for some delay, but that only happened in January 2001, some 5 years after the repayment became due.

[8] The appellant testified that he had borrowed the M22 000 from the respondent in order to be able to supply certain goods to the Government. There was a delay in receiving payment from the Government with the result that he was unable to pay the first instalment to the respondent at the end of November 1996.

However, on being paid by the Government in December 1996, he repaid the full amount of the loan, which he did by depositing the amount in account number 6516268615. He said his copy of the loan agreement and all records which would enable him to prove payment were lost when his office was destroyed by fire in the riots of 1998. The destruction of his office, which was situated in Sanlam Centre, was not challenged and must be accepted as true.

[9] The learned judge criticised the appellant as a witness, describing him as evasive and rejected his evidence that he had repaid the loan. A reading of the record does not support the finding that he was evasive. Admittedly when asked what the *"level of [his] education"* was, he queried the relevance of the question. But that in my view did not justify the finding that he was evasive. The line of cross examination adopted by respondent's counsel was, to say the least, somewhat unrealistic. It was this: because the appellant had a legal training he therefore must have appreciated the importance of corroborative evidence as far as proving payment was concerned and yet he failed to obtain such evidence

when his office was destroyed. The appellant's response was that after the lapse of more than a year since he had repaid the loan the last thing he would have expected was that the respondent would suddenly accuse him of not having paid. This strikes me as eminently reasonable. In similar vein, the court a quo criticised him for not going to the government department concerned to get corroborative evidence of its dealings with it. It noted that the appellant had testified that he had taken the cheque he received from the government to the respondent and repaid the loan with it, and considered it to have been *"highly likely that the very cheque he said he had banked would have been returned to the department endorsed as paid – and with the account/banking details."* Based on this reasoning the judge drew an adverse inference against the appellant citing as authority for doing so an Australian and a Canadian decision. In my view the inference was wholly unjustified. It was not the evidence of the appellant that he repaid the respondent with the very cheque he had received from the government, in other words, by endorsing it in favour of the

bank. The passage on which the judge relied for finding that it was, reads as follows:-

> "HL: He borrowed money to finance the upcoming government [contract], the government paid slowly and everybody is not surprised by that. He was hoping that they would pay in November and December that is why he took a short loan and they didn't pay until December, when you got the cheque it was December 1996 his evidence is that, he used that cheque to pay the loan, that is your evidence isn't it?
>
> DW: That is my evidence My Lord."

This question, in the form of a statement addressed by the judge apparently to both cross examining counsel and the appellant, purported to comprise a cryptic summary of the appellant's evidence. It was not simply directed at how the appellant had effected the repayment; it covered a number of other issues as well. Importantly, the appellant had at no stage in his evidence previously said that he had repaid the loan with the very cheque he received from the government. His evidence was as follows:-

> "I was waiting for the government to pay because I took a loan to supply some goods to the government of Lesotho and the cheque was delayed for sometime. I only got my money in December and I paid up the loan in December 1996."

Clearly when agreeing with the judge's cryptic summation of his evidence, the witness understood the judge to mean by the phrase *"used that cheque to pay"* that he used the proceeds from the cheque to pay the loan. He did not understand that what was being put to him was that he had literally used the very cheque received from the government to repay the loan. The court's finding that this was his evidence constituted, in my view, a clear misdirection. In any event, as pointed out by the appellant's counsel, it would be a most remarkable coincidence if the amount of the government cheque was the precise amount that had to be repaid to the respondent.

[10] As to the appellant's failure to adduce evidence of his government contract, proof that he had a contract with the government and was paid in December 1996 was hardly corroborative evidence of his payment to the respondent. Again the fact that the appellant had a legal training did not in my view render unreasonable his explanation that after a lapse of more than

a year since repaying the loan and not having heard anything further from the respondent the last thing he expected was to be accused of not having paid.

[11] The appellant testified that when he received the summons (in November 2002) he went to the office of the respondent's attorneys and explained to a woman who attended to him that he had long since repaid the loan. He said that she undertook to go into the matter and come back to him. This evidence too, was criticised as being *"quite unsatisfactory for a legally trained person [who] must have been aware of the proper procedures to take once served with a summons."* I cannot agree. After a lapse of more than 6 years even a legally trained person would be reasonably entitled to assume that the summons had been issued in error and to seek to sort the matter out without having to formally oppose the action which would probably require him to incur the expense of engaging an attorney.

[12] In the result, the court a quo went to some lengths to find fault with the evidence of the appellant. In my view it misdirected itself in doing so. And yet, the court had nothing to say about the extraordinary failure of the respondent to take action against the appellant for some 6 years. Had the appellant indeed not repaid the loan it would seem almost inconceivable that the respondent would have done nothing about it for so long. Yet no evidence was tendered to explain the delay which gives credence to the appellant's version that he repaid the loan. In the circumstances it is probable that his single payment was either erroneously not recorded or the record of the repayment was subsequently lost. As to the latter possibility, it is noteworthy that the evidence adduced by the respondent to establish the non-payment of the loan was based entirely on the accounting system of the respondent as it presently exists. No evidence was tendered as to how the *"conversion"* of the appellant's account in February 1998 was carried out and whether or to what extent the possibility of error was excluded. All the court a quo was told was that the process was carried out *"manually".* In these circumstances, and given the

absence of an explanation for the delay I can see no proper basis for rejecting or finding improbable the evidence of the appellant. On the contrary, in my view the probabilities favoured his version. It follows that the court a quo should have dismissed the respondent's claim with costs.

[13] The following order is made:-

(1) The appeal is upheld with costs

(2) The order of the court a quo is set aside and the following substituted in its place.

"The plaintiff's claim is dismissed with costs."

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D.G SCOTT
JUSTICE OF APPEAL

I agree:

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J.W SMALBERGER
JUSTICE OF APPEAL

I agree:

_____

K.E. MOSITO
ACTING JUSTICE OF APPEAL

For the Appellant : Adv R.J. Lesenyeho

For the Respondent : Mr. H.P.J. Mabathoana