

IN THE HIGH COURT OF LESOTHO

In the matter of :

JOHN WOODCOCK & ASSOCIATES

Plaintiff

V

DR. P.W. TABIRTH

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 23rd day of February, 1988.

Plaintiff herein filed with the Registrar of the High Court Summons commencing an action in which he claimed against the defendant payment of the sum of M7169.30, interest at the rate of 11% per annum, costs of suit, further and/or alternative relief.

Defendant intimated the intention to defend the action and duly filed his plea. In his declaration to the Summons Plaintiff alleged that defendant was indebted to him in the amount of M7169.30, being in respect of professional services he (Plaintiff) had rendered to the defendant at the latter's special instance and request. Notwithstanding demand Plaintiff, however, refused and/or neglected to pay. Consequently Plaintiff claimed as aforesaid.

In his plea defendant denied Plaintiff's allegation that he (defendant) requested him for any professional services which he (Plaintiff) had rendered for him. He denied therefore, that he was indebted to Plaintiff in the amount of M7169.30 or at all. Wherefor, Defendant prayed that Plaintiff's claim be dismissed with costs.

It appears from the evidence that P.W.1, John Woodcock, is a professional consultant engineer trading

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under the firm styled "John Woodcock and Associates" in Bloemfontein the Republic of South Africa. The defendant is also a practicing consultant in Maseru, operating under the name "Tab Consultant (Pty) Ltd."

It is common cause that, some time in 1984, P.W.1 and a certain Terry Fraenkel, who testified as P.W.2 in this trial, were in Botswana where they met the defendant and a certain Dr. Prack who was however, not called as a witness.

According to him prior to 1983 defendant worked with a firm named Atlanta in Germany. After he had left Atlanta in 1983 he established his own firm Tab Consultant (Pty) Ltd in Maseru. In 1983 he was in Germany when he visited Atlanta. He was then introduced to Dr. Prack. According to defendant Dr. Prack's firm "Prack Consultant" had tendered for a large irrigation job in Botswana. Dr. Prack needed someone based in Southern Africa Region to do the follow up for him. The defendant agreed to do the follow up for Dr. Prack in Botswana on conditions that he would be paid the expenses of going to and from Botswana and in the event of "Prack Consultant" winning the contract in Botswana "Tab Consultant" in Maseru would be given some little jobs. Apart from that defendant had no legal business relationship with Dr. Prack. In particular there was no partnership between him and Dr. Prack.

The defendant told the court that some time during the second half of 1984 he went to Botswana. He was to meet Dr. Prack who was also temporarily in Botswana during that time. The defendant and Dr. Prack were in the former's room at President hotel when P.W.2 came in. He was in the company of P.W.1 who was introduced as an engineer. Although he had been expecting P.W.2, Dr. Prack was not prepared to discuss business with P.W.2 in the presence of P.W.1 and so the latter had to leave the room. After P.W.1 had left the room Dr. Prack and P.W.2 discussed their business in the presence of the defendant. From what defendant gathered in the discussion the business that P.W.2 was

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interested in was that of drilling wells in the North Eastern part of Botswana. Nothing was discussed about the recruitment of staff and the search for business place in Maseru. Nor was there any intimation that defendant would contact P.W.2 in some future time.

Although P.W.1 said it was in August 1984 when he and P.W.2 went to Botswana, P.W.2 told the court that it was in July 1984. I do not consider the discrepancy on the month very material because defendant himself conceded that during the second half of 1984 he and Dr. Prack did meet P.W.1 and P.W.2 in Botswana. What I consider to be important is that in their testimony both P.W.1 and P.W.2 told the court that while in Botswana they did meet defendant who was in the company of Dr. Prack in a certain room at President hotel.

According to him P.W.1 was made to understand that the defendant and Dr. Prack were in partnership under the name "Prack and Associates". He then discussed with defendant and Dr. Prack about the possibility of "Prack and Associates" being awarded large contracts in Botswana. In the event of "Prack and Associates" winning the contracts it would require personnel to implement the work. Although he entertained hopes that as a result of the discussion some work would be coming his way P.W.1 was not given any definite instructions by the defendant and Dr. Prack. He and P.W.2 returned to their homes in Bloemfontein and Maseru, respectively.

In his evidence P.W.2 testified that he was the owner of two companies in Maseru. One of the companies was Maluti Irrigation Company (Pty) Ltd whose main concern was irrigation and instalation of pumps thereof. He had known P.W.1 since 1979 whilst working in the Republic of South Africa. He had also known defendant and Dr. Prack from 1983 and 1984, respectively. In 1983 he was in fact doing irrigation work for the defendant in Mohale's Hoek. Between June and October 1984 he had a discussion with Dr. Prack and the defendant who were both contemplating to open an office

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in Maseru. They asked him to assist in finding an office space and various staff members. He subsequently arranged for various premises to be visited by the defendant and Dr. Prack here in Maseru. As he was already doing work for the defendant in Mchale's Hoek P.W.2 considered it unethical for him to recruit staff members. He therefore, recommended the name of P.W.1 as the right person to recruit staff members required by the defendant and Dr. Prack. The recommendation was accepted by both the defendant and Dr. Prack.

I must say it is not very clear from the evidence where P.W.2 had this discussion with the defendant and Dr. Prack. There can be no doubt from the evidence that at the time P.W.2 allegedly discussed with Dr. Prack and the defendant about the office space and the recruitment of staff members the latter already had business in Maseru. If it were true that Dr. Prack and the defendant needed office space in Maseru the simplest thing for them to do would have been to ask the latter to find the required office space in Maseru rather than ask P.W.2 to do it.

Be that as it may, P.W.2 went on to say in July 1984 he and P.W.1 went to Botswana when they met the defendant and Dr. Prack at President hotel. He confirmed the evidence of P.W.1 that the defendant and Dr. Prack were working in Partnership. According to him P.W.2 discussed with the defendant and Dr. Prack about irrigation business in North Eastern part of Botswana and also in Lesotho. However, nothing definite came out of the discussion he had with the defendant and Dr. Prack although he too was confident that some work would be coming his way at some future time.

According to him during September/October 1984 P.W.2 received instructions from the defendant that P.W.1 should go ahead and recruit staff members required by him (defendant) and Dr. Prack. P.W.2 then communicated the instructions to P.W.1 by telephone. Shortly thereafter he had a meeting with P.W.1 and the defendant when the latter verbally confirmed the

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instructions to P.W.1. That was confirmed by P.W.1 who told the court that defendant personally assured him that he would be paid at the rate of M60 an hour and his actual expenses would also be reimbursed.

P.W.1 then went ahead with advertising exercise and interviewed prospective candidates. By 7th November 1984 he had compiled a preliminary report a copy of which was EXH.A. He handed exhibit A to P.W.2 for onward transmission to the defendant. That was confirmed by P.W.2 who told the court that on the following day 8th November, 1984 he was due to leave for Germany. He therefore suggested to P.W.1 that he should give him a copy of EXH.A for Dr. Prack in Germany. P.W.1 did give him a copy of EXH.A which he (P.W.2) delivered to Dr. Prack in Germany. On 22nd November 1984 he had compiled the final report of which copy is EXH.B. According to him P.W.1 handed the original of EXH.B to defendant himself, a fact which is, however, denied by the defendant.

It is significant to note that EXH.B was addressed to the managing Director, Maluti Irrigation, and for the attention of P.W.2. Indeed, it is common cause that exhibit A was accompanied by a forwarding letter which was also addressed to P.W.2. I find it unlikely that, P.W.1 would have handed to defendant the original of EXH.B which was clearly addressed to P.W.2 as the managing director of Maluti Irrigation Company. In all probabilities the defendant was testifying to the truth when he said P.W.1 never handed the original of EXH.B to him and P.W.1 was not being truthful when he said he did. Indeed, P.W.2 told the court that EXH.B was, in fact, given to him by P.W.1.

P.W.1 told the court that after he had, compiled EXH.B he prepared his fee accounts EXH. C1, C2 and C3 which he handed to P.W.2 for onward transmission to the defendant who, however, did not settle the accounts. According to P.W.1 the reasons why he addressed to P.W.2 documents that were meant for the defendant were firstly because he found P.W.2 more readily

available than the defendant in Maseru and secondly because defendant's instructions had been communicated to him through P.W.2. Both P.W.1's and D.W.2 told the Court that when the defendant failed to settle the accounts a meeting was arranged at Boccaccio restaurant. Present at that meeting were P.W.1, P.W.2, the defendant and his wife who testified as D.W.2 in this trial. The defendant and D.W.2 admitted participation in that meeting.

It is common cause that the purpose of the meeting at Boccaccio was to persuade the defendant to agree to settle P.W.1's fee accounts as per exhibits C1, C2 and C3. According to P.W.1 the defendant admitted liability and promised to pay the M7169.30. That was, however, denied not only by the defendant but by both D.W.2 and P.W.2. I am prepared to accept as the truth defendant's evidence corroborated by that of P.W.2 and D.W.2 that he never admitted liability to pay the M7169 30 and reject as false P.W.1's story that he did.

Considering the evidence as a whole it seems to me reasonable to accept that P.W.1 did receive instructions to recruit staff members. However if he received the instructions from the defendant as he wants this court to believe P.W.1 would not have addressed exhibits A, B, C1, C2 and C3 to P.W.2 but to defendant whom he knew had an office in Maseru. His story that defendant who had an office in Maseru was not readily available is totally unconvincing.

The fact that P.W.1 addressed the abovementioned exhibits to P.W.2 leaves no doubt in my mind that P.W.1 knew that the instructions did not come from the defendant but from Dr. Prack who lived in Germany and did not, therefore, have an office in Maseru. It was only after Dr. Prack had failed to settle the accounts that P.W.1, with the connivance of P.W.2, turned to the defendant.

As regards the alleged partnership between the defendant and Dr. Prack it is significant to observe that this is denied by the defendant. Both P.W.1 and

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P.W.2 produced nothing to substantiate the allegation. There is not even a letter head produced to show that any partnership existed between the defendant and Dr. Prack. In my view the onus was squarely on the shoulders of the Plaintiff to prove, on a balance of probabilities, that at the time P.W.1 received, through P.W.2 instructions from either of them the defendant and Dr. Prack were in partnership. Plaintiff has not satisfactorily discharged that onus. Consequently I come to the conclusion that no partnership existed between the defendant and Dr. Prack. In the absence of any such partnership the defendant cannot be held liable for the debts incurred through the instructions of Dr. Prack.

In the result I take the view that Plaintiff's claim ought not to succeed and it is accordingly dismissed with costs.

B.K. MOLAI

JUDGE

22nd February, 1988.

For Plaintiff : Mr. Molloa
For Defendant : Mr. Addy