

IN THE HIGH COURT OF LESOTHO

In matter between:

ROSALEEN T. NASKHOKIGWA

PLAINTIFF

and

LESOTHO AIRWAYS CORPORATION

DEFENDANT

R U L I N G

Delivered by the Honourable Chief Justice Mr Justice  
J.L. Kheola on the 6th day of May, 1997

The application for an absolution from the instance is usually made when after all the evidence has been led the plaintiff has not discharged the ordinary burden of proof. If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man might find for him, the defendant is entitled to absolution from the instance.

In his submission **Mr. Molyneaux** says that the plaintiff has not proved that her baggage reached the defendant's airline before it left Johannesburg for Maseru. It is hearsay evidence when the plaintiff says that she was told by a certain person working for KLM Airline that the baggage was loaded on

defendant's aircraft before it left for Maseru. Surprising enough when the defendant's aircraft arrived at Moshoeshoe I Airport no such baggage was found. It is very doubtful that the person who told the plaintiff that he or she saw when the baggage was loaded was telling the truth. The defendant's aircraft flies straight from Johannesburg to Maseru and does not stop anywhere on the way.

It seems to me that this crucial point of whether baggage was loaded on the defendant's aircraft ought to have been proved in a convincing way. What the plaintiff told the Court is hearsay on which the Court cannot rely.

The plaintiff alleges that she was in transit when she came to Johannesburg Airport because her final destination was Maseru. She had two return tickets, exhibits "E" and "F" respectively. Both tickets were issued by the defendant on the 30th September, 1986. Exhibit "E" was Johannesburg to Nairobi and back to Johannesburg. Exhibit "F" was Maseru to Johannesburg and back to Maseru. Under normal circumstances the plaintiff was under an obligation to claim her baggage when she arrived in Johannesburg from Nairobi because that was the final destination of her journey as per Exhibit "E" which is her ticket between Nairobi and Johannesburg.

Having claimed her baggage she would then be under an obligation to check in at the defendant's desk in Johannesburg and to have her baggage registered and then taken to defendant's

plane. New baggage tags would then be issued and be attached to her baggage. This would be a clear indication that the defendant received the pieces of baggage the plaintiff gave to the airline. Exhibit "G" are the three tags of baggages she had when she left Nairobi for Johannesburg. There is no proof that those three baggages ever reached Johannesburg. If they did reach Johannesburg there is no proof that they were delivered to the defendant. Convincing proof would have been production of baggage tags of the defendant issued when the plaintiff checked in at Johannesburg Airport proceeding to Maseru. Exhibit "G" do not prove that the defendant received the three baggages mentioned therein or identified by the numbers therein.

The true position as I see it is that when the plaintiff boarded the defendant's plain in Johannesburg she did not check in with her baggages and did not receive any luggage tags indicating that her three pieces of baggages were on the same plane she was boarding. She merely assumed that her baggage would be taken to the defendant's plane. How would the defendant know that she had any baggage without she informing the defendant's staff that she had a baggage? If she had informed them it would be their duty to trace if before they left Johannesburg for Maseru.

It would have been a different story if the plaintiff had a return ticket between Maseru and Nairobi because in that case it is the duty of the airlines to transfer the baggages of the passengers from one airline to another until the passenger

reaches her final destination. For instance if you travel from Maseru to Vancouver in Canada via London, You check in at Moshoeshoe I Airport and the baggage will be directed to Vancouver. When you come to London and transfer to another airline, it will be the duty of the airlines to see to it that your baggage is taken to the right airline.

As I have said above the final destination for the plaintiff's baggage was Johannesburg and it was the duty of the plaintiff when she checked in in Johannesburg to make sure that her baggages were weighed and given a new registration number. She must understand that when she boarded the defendant's plane in Johannesburg she was regarded as a new passenger and not as a passenger in transit because her ticket (Exhibit "F") did not so indicate. She was just like any person who had visited Johannesburg and was returning home. There was no duty on the defendant to trace her luggage because nothing indicated that she was in transit. It was her duty to tell the defendant's staff that she had a luggage when she boarded the defendant's plane.

Carriage by Air Act No.35 of 1975 is relevant to these proceedings and incorporates the Warsaw Convention 1929 as amended by other Conventions which unify rules relating to International Carriage by Air signed at Warsaw in 1929.

Article 4 of the First schedule to the Carriage by Air Act 1975 reads as follows:

- "(1) For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.
- (2) The luggage ticket shall be made out in duplicate, one part for the passenger and the other part for the carrier.
- (3) The luggage ticket shall contain the following particulars:-
- (a) the place and date of issue;
  - (b) the place of departure and of destination;
  - (c) the name and address of the carrier or carriers;
  - (d) the number of the passenger ticket;
  - (e) a statement that delivery of the luggage will be made to the bearer of the luggage ticket;

- (f) the number and weight of the packages;
  - (g) the amount of the value declared in accordance with Article 22 (2);
  - (h) a statement that the carriage is subject to the rules relating to liability established by this Convention.
- (4) The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts luggage without luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (d), (f) and (h) above the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability."

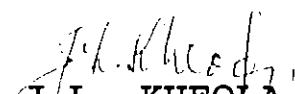
In the present case the defendant, as the carrier, never delivered any luggage ticket because the plaintiff never presented her luggage to it and the defendant never accepted the luggage. It was the plaintiff's duty to claim her luggage from KLM and to present it to the defendant when she boarded its plane.

Mr. Ntlhoki, attorney for the plaintiff, submitted that there is evidence on which a reasonable man might find for the plaintiff. He submitted that it was the duty of the defendant to ascertain whether the plaintiff had a luggage when she boarded its plain at Johannesburg Airport. Plaintiff was a transit passenger and she testified that in those days passengers from Africa were confined to the international lounge. I do not agree with these submissions and it seems to me that it was the duty of the plaintiff to hand over to the defendant's staff her baggages when she boarded its plane; or if she had no access to her luggage to inform them where they could find it.

The Courts have frequently emphasised that absolution should not be granted at the end of the plaintiff's case except in very clear cases, and that questions of credibility should not normally be investigated until the Court has heard all the evidence which both sides have to offer.

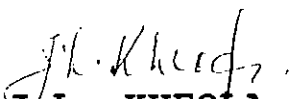
I have come to the conclusion that the present case is one of those clear cases where absolution should be granted.

The application for absolution is granted as prayed.

  
**J.L. KHEOLA**  
**CHIEF JUSTICE**

6TH MAY, 1997

Any party wishing to apply for costs may do so because that issue was not argued before me. Notice must be given to the other party and the matter be set down.

  
J.L. KHEOLA  
CHIEF JUSTICE

6TH MAY, 1997

For Plaintiff - Mr Ntlhoki  
For Defendant - Mr. Molyneaux