

IN THE HIGH COURT OF LESOTHO

(Commercial Division)

CCT/65/2007

In the matter between:

THE LIQUIDATOR OF LESOTHO BANK

PLAINTIFF

and

TAMUKU MICHAEL MOLEFE NKALAI

DEFENDANT

JUDGMENT

Coram : Honourable Justice J.D. Lyons (a.i)

Date of Hearing : 28 – 29 September 2010 and
10 May, 2012

Date of Jugment : 10 July, 2012

Summary

Case decided on facts.

LYONS J. (A.I)

[1] The plaintiff is a bank (in liquidation). It went into liquidation in late 1999/early 2000.

- [2]** The defendant was a customer of the bank
- [3]** On 20 September 1996 the plaintiff and defendant entered into a hire purchase agreement. The defendant as purchaser, purchased a 1996 model Toyota Venture minibus. The purchase price was M91,097.03. After payment of deposit and other charges, the defendant was left to pay M77,109.00 over a 3 year period. The first instalment was to be paid on 28 October 1996 and monthly thereafter for 36 months. The monthly payment (35 months) was M2141.92 with the final payment being M2141.80.
- [4]** The agreement was due to finish with the final payment on 28 October 1999.
- [5]** By summons filed 24 August 2002, the plaintiff alleges that the defendant defaulted on the loan. From the accompanying declaration it is pleaded that the default was “as at 29 July 2002” (para 6).
- [6]** The amount claimed is M94,715.00. It also appears as if the plaintiff brought a separate action for repossession of the minibus in action CIV/APN/402/02.
- [7]** The defendant pleads that he has paid the loan. This was his evidence given to the court. He said that he had bank receipts but he lost these when his minibus became trapped

in a flooded river sometime in 1998/1999. He produced some other receipts but these were mostly unreadable (being poor quality photocopies).

[8] For the plaintiff, I heard from Mrs Mooki. She is the accountant employed by the liquidator who has the responsibility to supervise the liquidation of the plaintiff bank. Mrs Mooki's evidence was mainly for the purpose of presenting the bank records that she had gathered in her position as the liquidator's representative. She did have some direct contact with the bank prior to its liquidation as her firm provided auditing services to the bank, but she had no direct contact with the defendant's account prior to the liquidation.

[9] I also heard from Mr. Sopeng. He gave evidence of the purported record keeping of the bank. He did not have any direct contact with the defendant's account prior to the bank's liquidation. I note that the bank went into liquidation in late 1999/early 2000. Reasonably then, the entire dealings on the defendant's account were most probably during the time the bank was a "going concern".

[10] Mr. Sopeng explained the procedure when a customer made a deposit, be it to a savings, current or loan account. The customer filled out a deposit slip. This was taken (with the deposit) to the teller. The teller was then to take the deposit and slip and enter the details into the bank's computer. He

then explained how, over the years, the computer was upgraded and how the records were transferred to the new system

[11] The obvious area where there could be a glitch is that which leaves open the possibility of human error – when the details on the deposit slip were entered by the teller into the computer at the first instance.

[12] It is, I suppose, reasonable to assume that the reason a bank goes into liquidation is because it was poorly managed. Rather surprisingly this trial was the first time that actual evidence was put before me that supported the reasonable suggestion that something was awry with the running of the Lesotho bank. And I have heard many trials involving its post-liquidation claims.

[13] Introduced into the defendants' evidence by his experienced counsel were the contents of a letter dated 17 January 2003 under the auspices of Lesotho Bank (1999) Limited and referring to an account of one Khotsang Lechesa.

[14] The letter is addressed to the liquidators. It reads (as read into the record):

[15] “We advise that as you are aware, most of the Banks records prior to June 1997 were destroyed and no registers as such exist any more.....”

[16] Mr. Ntlhoki submitted that this destruction of records refers across the board. Mr. Mabathoana submitted that it only applied to the Lechesa account.

[17] I find that, on balance, this applies to the records on the defendant's account. The print outs and statement presented by Ms. Mooki coincidentally commence in June 1997 although the actual loan commenced before then. It is reasonable to infer that the reason the statement (particularly ex 6) does not precisely reflect the pre-June 1997 entries is because they were destroyed.

[18] The pertinent point concerning the destruction of these records is one pertaining to the running of the bank pre-liquidation. Bank records, and the accuracy and maintenance of them, is the life blood of any bank. Not only does the bank rely on the records, but the customers (who seldom keep all deposit/transaction slips) trust a bank to keep the accurate records for them.

[19] The reasonable expectation is that a bank keeps these records for at least 7 to 10 years if not more. That the records were destroyed so soon as 2 years prior to liquidation points not only to a reason for the liquidation, but importantly to mismanagement on a grand scale. Either the records were destroyed deliberately or at best, in an act of astonishing carelessness. Assuming the best, that

it was carelessness, how is a court some decade or more later, supposed to rely on the records as kept by an institution plagued with such carelessness. The question must be asked; - if a bank staff are so carelss as to destroy the records and life blood of the bank, how can one rely on that staff to perform the task of entering initial data (the deposit slips) correctly into the computer system and be somehow or other free of any carelessness?

[20] In my view, faced now in this particular case with that evidence of unbelievable carelessness I am not able to bring myself to the point of relying on the competence of the then bank staff to properly and accurately enter the correct details from deposit slip to computer in the first instance.

[21] Given this considerable doubt concerning the pre-liquidation staff competence, I cannot rely on the accuracy of the bank records pertaining to this defendant's hire purchase account. I am not able to fine that the plaintiff has proven that the defendant failed to pay his loan account.

[22] There exist some apparent oddities with the plaintiff's documentary evidence. I refer in particular to exhibit "6", the statement of account.

- [23]** The account balance shown in June 1997 is M49,337.09. No payments are reflected for June 1997 through to February 1998 (inclusive).
- [24]** The opening account balance (September 1996) was M77,109.00. The monthly payment was M2,141.92. Thus by June 1997 the defendant had paid M27,771.91.
- [25]** The total of the contracted payment due for the 8 months from October 1996 to May 1997 (inclusive) was M17,135.36 (M2,141.92 x 8). The defendant, on the plaintiff's evidence, had overpaid M10,636.55. This represents 5 payments (rounded off – it is 4.9658 payments).
- [26]** The loan was a 'straight line' term loan. The defendant should have been credited with these 5 payments thus showing payments for June 1997 to October 1997 (Inclusive). This, if properly recorded, should have allowed for an accelerated interest payments with appropriate credits. With no records though, it is impossible to accurately calculate this.
- [27]** This is assuming the entries made by the bank staff during this period were accurate. That this oddity exists and is not accounted for by the plaintiff in the rest of the evidence is a pointer to the unreliability of the original data collection. The defendant did say that he paid extra post 1998 to catch up on his missed payments during the civil strife that

plagued the country during tht year. But this does not explain the extra payments in 1996-97. In my view this oddity suggests some uncertainty in the plaintiff's record keeping and data entry such that I am disinclined towards reliance on the plaintiff's records as being accurate.

[28] The plaintiff's exhibit to also shows the defendant having paid regularly from March 1998 through to July 1999 (inclusive). The exhibit shows that the defendant missed the August and September 1999 payments, before finally finishing of with 5 payments from October 1999 to Frebruary 2000. These final 5 payments total M10,795.32. The amount the defendant was actually obliged to pay for these final 5 payments was M10,709.48.

[29] In all then, the defendant, as reflected by the plaintiff's own record, has made 35 of 36 scheduled payments. Taking into account the possibility of a credit for accelerated interest payments plus the additional M94.84 (see para 28 above), the defendant may well have paid sufficient in total to pay the original loan.

[30] The defendant also said he didn't make payments in 1998 due to the civil insurrection. I tended to believe this. It is, afterall, an admission against interest. Yet the plaintiff's record shows that, save for the first two months, he paid right through 1998 well into 1999.

[31] It all appears rather odd and unreliable to me.

[32] Curiously, despite that the defendant, on the plaintiff's case missed only 5 payments (M10,795.32), the claim is for M94,715. This is well in excess of the original balance outstanding at the commencement of the contract, and considerably in excess of outstanding amount given that the defendant, on the plaintiff's case, is only short just over M10,000 plus. This amount presumably includes outstanding interest and capital. It seems the interest has been allowed to accumulate unrestrained.

[33] The *in duplum* rule was neither pleaded nor argued but I would think that this case could have supported an argument on this rule. The rule has been applied by the South African courts – see **LTA Construction Bpk vs Administrator Transvaal 1992 (1) SA 73 (A)** and **Gardner and another vs Margo and another [21010] ZASCA 110** (17 September 2010). I see no reason why it would not apply in Lesotho.

[34] Even had I been satisfied as to the reliability of the Plaintiff records, I would not have been likely to find it had properly proven the quantum of its claim.

[35] For the above reasons I dismiss the plaintiff's claim. I should add that this is not to imply that in every instance where these Lesotho Bank (in liquidation) come before the

courts, that the court would fail to be satisfied that the plaintiff's records were reliable. It is case specific. The fact that records have been destroyed by carelessness (presumably) coupled with the odd entries spoken off above, lead me to reject the plaintiff's claim in this specific instance, as (on balance) unproven.

[36] The defendant is entitled to his costs to be taxed if not agreed.

[37] I so order.

J.D. LYONS

JUDGE (A.i)

For Plaintiff : Mr. Mabathoane

For Defendant : Mr. Ntlhoki