CIV/T/543/2003

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO BANK (In liquidation) **Plaintiff**

and

TEBOHO A. MPHAHAMA
t/a Joala Boholo Restaurant **Defendant**

JUDGMENT

Coram: **Hon. Hlajoane J**

Date of Hearing: **9th May, 2011, 19th October, 2011, 5th September, 2013, 6th November 2013, 28th November, 2013.**

Date of Judgment: **27th May, 2014.**

Summary

Plaintiff having brought defendant to Court for outstanding amounts for some three accounts with plaintiff – Defendants producing documentary proof of payments in respect of all the three Accounts – Plaintiff having brought insufficient evidence - Plaintiff sought to

withdraw the case after both sides had given their evidence - The procedure in contravention of Rule 43 of the High Court Rules 1980. Plaintiff's claims dismissed with costs on Attorney and client scale.

Annotations

Statutes

1. **High Court Rules No.9 of 1980**

Books

1. **Jones and Buckle, The Civil Practice of the Magistrate Courts in South Africa 6th Edition. 1957, 748**

Case

[1] Plaintiff issued summons against the defendant in which it claimed the following:

(a) Payment of the sum of M88,305.38.

(b) Interest thereon at the rate of 18.25% per annum calculated from the date of issue of summons to date of repayment.

© Costs of suit.

[2] After the pleadings were closed the matter was set down for hearing and evidence on both sides was duly led. The particulars of claim showed that defendant was operating some three accounts with the plaintiff.

[3] It was alleged that in respect of account no.0110-002220-001 defendant owed plaintiff M31,005.36. In respect of account No.0110-002220-000 he owed M27, 618.32. Also that plaintiff extended another overdraft facility to the defendant in the amount of M29,681.50, making the total amount owing of M88,305.38.

[4] In an effort of establishing their case the plaintiff led evidence of one witness who showed she worked for Lesotho Bank in Liquidation and was in possession of the Bank's files. What plaintiff's witness presented in her evidence was not what was alleged to be owing in the declaration. So that what was contained in the declaration was not supported by evidence. The figures for amounts owing were different and account numbers also different.

[5] However plaintiff's evidence was to the effect that they did not have in their possession information about the defendant prior to 1998. Plaintiff's witness had submitted in her evidence a memorandum of loan agreement between plaintiff and defendant which reflected that defendant had been paying since 1995 and that defendant's last payment was in 1998.

[6] In one of defendant's accounts plaintiff's only witness could only access information from 1997 to 1998. The reason she gave for that was that it was because of the limitation from their system.

[7] Plaintiff's witness had under cross examination admitted that there had been changes made by the Bank to defendant's accounts hence there being two different account numbers for one account. She further did not deny that those changes were made without having consulted the defendant as according to the witness the consultation was not necessary.

[8] The defendant's testimony on the other hand had been that indeed he had applied for a loan with plaintiff's Bank in January of 1995. He was to service his loan for a period of three and half years. He secured his debt by a bond registered over some plot in favour of the Bank.

[9] In his evidence the defendant produced receipts which showed that he had been servicing his loan with the Bank. Since there were three accounts involved, the defendant also involved his former employer, Metropolitan in a Bond taken over from plaintiff. He produced a documented proof for that transaction. He also produced proof that Metropolitan paid off the said amounts. He also exhibited proof showing credit balance as nil.

[10] Defendant in his evidence produced a bundle of documents which evidenced payments to the plaintiff. Working out the figures from his receipts he even claimed that he had even made overpayments to the plaintiff. Defendant managed to produce proof of having settled his indebtedness on all of his three accounts with the plaintiff.

[11] After the close of both the plaintiff's and defendant's case the matter was postponed for addressed. Both sides had to file their heads, but it was only the defendant who filed his heads. The defendant even took the trouble to file a notice of set down for that date.

[12] On the day set for addresses counsel for plaintiff filed a notice of withdrawal of action. The notice of withdrawal was vehemently opposed by the defendant and they filed a formal application in terms of **Rule 30 of the High Court Rules**[1] for setting aside as irregular the notice of withdrawal.

[13] In his application the defendant submitted that the notice of withdrawal was not only irregular but also contemptuous as was filed against the order of Court which directed parties to file their heads in preparation for addressing the Court.

[1] High Court Rules No.9 of 1980

[14] Defendant has correctly argued that filing a notice of withdrawal of action by the plaintiff was an abuse of Court process. Plaintiff was beginning to realize that they had no case against the defendant. They did not even want to voluntarily make an offer of costs. We are now in 2014 and this case started as far back as 2003, more than ten years ago. It has been dragging at the instance of the plaintiff.

[15] Even before the Court could deal with that notice of withdrawal which was opposed, plaintiff filed a notice of withdrawing their intention to oppose the defendant's application in terms of **Rule 30 of the High Court Rules**. The prayers as contained in the application in terms of **Rule 30** were thus granted. That effectively meant that the notice to withdraw was set aside as null and void.

[16] At any rate **Rule 43 (i) of the High Court Rules** only allows the withdrawing of a matter before the matter has been set down, otherwise thereafter the withdrawal can only be by consent of both parties or by leave of Court. The rule is framed thus:

"A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or by leave of Court, withdraw such proceedings."

[17] After this withdrawal issue the plaintiff left the matter at that. The defendant filed her heads and asked the Court to make judgment on the issue of costs for having been unnecessarily dragged to Court by the plaintiff when it was clear that he had serviced all his indebtedness with the plaintiff.

[18] The defendant wanted this matter to reach finality moreso because he alleged he still has a house bonded in respect of the same accounts as plaintiff claimed he was still owed the amount of M88,305.38

[19] I have already earlier on indicated that defendant in his evidence produced documentary proof that he no longer owed the plaintiff any monies. Based on that evidence, the Court finds that it would only be proper to dismiss plaintiff's case.

[20] On the question of costs, the Court has to demonstrate its displeasure at the conduct of the plaintiff in handling the affairs of defendant as was their client. The conduct of the plaintiff in this case is considered to have been unreasonable in that they dragged the defendant to Court before making sure that they had their facts straight.

[21] Defendant's counsel referred to **Jones and Buckle**[2] where various scenarios were given of justifying an award of costs on an Attorney and client scale. To mention but a few of such instances, as where the losing party had litigated unnecessarily and where he has shown contemptuous disregard for the opponent's rights. The other scenario being where the loser showed malice or made reckless charges of incompetence and impugned the winning party's honour.

[22] In *casu*, the defendant has demonstrated that he had been brought to Court unnecessarily. The defendant provided documentary proof that showed he had indeed settled all his debts with the plaintiff. But plaintiff on the other hand brought incomplete information for their claim.

[23] As a general rule costs follow the event, and the basic rule being that the Court has an unfettered discretion in awarding costs. The purpose for awarding costs is well known. It is to indemnify the successful party for the expenses to which he had been put through by having been unjustly compelled to litigate or defend litigation. And in our case the award has to be full indemnity. The circumstances of this case therefore warrants an awards of costs to the defendant on an Attorney and client scale.

[2] Jones and Buckle, The Civil Practice of the Magistrate Courts in South Africa 6th Edition 1957 748

A. M. HLAJOANE
JUDGE

For Plaintiff: Mr Makhabane

For Defendant: Mrs Manyokole