

IN THE HIGH COURT OF LESOTHO

In the matter between:

CIV/T/593/2010

PHUTHI TRANSPORT (PTY) LTD

PLAINTIFF

AND

RAMOTIKOE KHIBA

DEFENDANT

JUDGMENT

CORAM:

HON. J.T.M. MOILOA

DATE OF HEARING:

26 SEPTEMBER 2016

DATE OF JUDGMENT:

06 MARCH 2017

ANNOTATIONS

Cases:

1. Kholoanyane & Another vs Rahae and Others CIV/T/372/96
2. Gascoyne vs Paul and Hunter 1977 TPD 170
3. Claude Neon Light (SA) v Daniel 1976 (4) AD 403

[1] Background

Plaintiff in this matter instituted an action against Defendant for payment of M144,866.54 plus interest and costs. At the end of plaintiff's case, the defendant applied for absolution from the instance. The claim arises out of a number of cash and bearer cheques received by defendant which he was alleged by Plaintiff to pay to the Lesotho Revenue Authority (LRA) for and on behalf of Plaintiff in relation to Plaintiff's indebtedness

thereto. Plaintiff alleges that Defendant did not pay the said money to LRA as he ought to have done. Despite demand, to return the M144,866.54 to Plaintiff the Defendant has failed, refused and/or neglected to do so. In its declaration Plaintiff alleges and it is common cause, that during or about the period August 2008 to December 2009 the Defendant was engaged by Plaintiff as its Accountant.

[2] In pleading his defence to the claim Plaintiff admitted to being Plaintiff's Accountant during the relevant period. Defendant however denied ever being given the alleged sum of money by Plaintiff to pay over to LRA. Pre-Trial Conference (PTC) was held. The issue for determination was whether or not Defendant received from Plaintiff the alleged sum which was supposed to be paid over to LRA.

[3] **PW1'S Evidence**

The two witnesses for Plaintiff Company are Mr. Taumane Makoko (PW1) and Mrs. 'Manyali Libuseng Lephoto (PW2). PW1 is the Managing Director of Plaintiff Company. He and Defendant are neighbours. He testified that around 2007 he had problems with the LRA concerning the books of accounts of the Plaintiff's Company. He was initially assisted by one Stan Moloji who delayed in filing returns with LRA. He met Defendant who volunteered to assist him with the issue of LRA. Defendant was at the time studying in Bloemfontein. PW1 testified further that Defendant suggested that he be given money to pay directly to LRA and also to hire people to assist him (Defendant) in the job. That was done. Defendant was given cash and sometimes cheques drawn in his favour. Approximately M150,000.00 was given to Defendant in instalments and at his request. It was also PW1's testimony

that he had an arrangement with Defendant that he financially assisted the latter with rentals, food and transport while in Bloemfontein. PW1 also says that he later received shocking estimates from LRA which did not reflect the money which the Defendant had taken. None of the money given to him for transmission to LRA appeared in the assessment report. PW1 says he confronted Defendant and the latter assured him that everything was in order. In his evidence PW1 stated that the payments did not relate to the services rendered by Defendant, that the services were voluntary. He in turn assisted him financially while in school.

[4] **PW2 Evidence**

A clerk of the Plaintiff company, one Mrs. 'Manyali Libuseng Lephoto was PW2. She stated that she had been working as Clerk to Plaintiff Company since 1987 to date. She also doubled up as an office assistant, filing clerk, cashier and also responsible for filling in cheques for various payments which cheques were signed by the Managing Director, PW1. She testified that Defendant worked for Plaintiff as its Accountant. Further that Defendant was given money and sometimes cheques were drawn in his favour so as to transmit same to LRA and all these cheques were drawn by her as instructed by PW1.

[5] **Both witnesses were cross examined**

Cross examination of PW1

It was established during the cross-examination of PW1 that defendant was already qualified as an Accountant and earning a living as such; he was pursuing a higher Degree in Bloemfontein and fully sponsored by the Lesotho Government. It is upon cross examination of PW1 that

Defendant put it to him (PW1) that the cheques he issued to him (the cheques he received) were for his remuneration in respect of work that Defendant had done to put right Plaintiff's books and records to a standard of accounting satisfactory to LRA. He testified that Defendant had volunteered to assist him sort out his problems with LRA for free. He denied outright that he hired Defendant for remuneration and testified that he gave Defendant the money for onward transmission to LRA. He also testified that he never required receipts from Defendant as proof of payment to LRA because he trusted him (Defendant) as they are neighbours. PW1's cross examination also revealed that LRA did not accept payment by cheques and insisted on cash payment.

[6] **Cross Examination of PW2**

PW2 confirmed that she could not dispute that Defendant was a qualified Accountant who earned a living as such and that he was a fully sponsored student pursuing a senior Degree. She said that sometimes PW1 just paid Defendant out of his (PW1) pocket. She conceded that there had been no record exhibited before court for the payments in question. She also conceded that no cheque stubs had been handed in by Plaintiff in support of the alleged payments meant for LRA; nor did she receive receipts from LRA as proof that the Defendant had paid. She said she believed such receipts were kept by Defendant. PW2 indicated further that she never demanded or requested proof of payment from Defendant to LRA but simply obeyed instructions from PW1 who had his own arrangement with Defendant. She did concede that the best proof of the alleged payments to LRA would be the receipts. But assumed that the receipts were with Defendant since he kept all records. PW2 denied that the monies received by Defendant was remuneration for services rendered but was

meant for LRA. Nowhere in her testimony did PW2 say that she was present when and where PW1 and Defendant entered into their alleged arrangement. All she did was take instructions from PW1 to issue cheques in the names of Defendant and she did so without question.

[7] At the end of PW1 and PW2's evidence Defendant's Counsel intimated that they want to move the Court for absolution from the instance. Defendant gives various grounds upon which he wants to be absolved at this stage, mainly that Plaintiff's case is full of inconsistencies and is unreliable. He argues that apart from the words of the two witnesses for Plaintiff there is no evidence that the said monies were intended to be paid over to LRA by Defendant on behalf of Plaintiff Company, there being no cheque stubs to indicate as alleged nor are there claims from LRA in respect of those cheques. The other ground advanced by Defendant is that no plausible reasoning has been put forth as to why cash payments could not be made directly to LRA instead of first issuing cheques out to Defendant. One other ground relied upon by Defendant is failure by Plaintiff for a period over a year to demand proof from him (Defendant) that he had actually paid over to LRA the money he was expected to.

[8] **The Law on Absolution**

Authorities have held that Defendant may, at the close of Plaintiff's case but before commencing his own, apply for absolution from the instance. Monapathi J. in **Kholoanyane and Another vs Rahae and Others CIV/T/372/96** pointed out that the principles of absolution from the instance are almost similar to an application for a discharge after close of prosecution's case in criminal proceedings (although in that case the

debate was mostly about credibility of witnesses). Both Counsel in *casu* have made helpful heads of arguments. They are in agreement that the decision that is authority on the subject is **Gascoyne vs Paul and Hunter 1977 TPD 170 at 173** to the effect that:

“at the close of the case for Plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately the question for the Court would then be “is there such evidence upon which the court ought to give judgment in favour of the plaintiff.”

In **Claude Neon Light (SA) v Daniel 1976 (4) (AD) 403** it was held that:

“when absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should, or ought) find for the plaintiff.”

[9] I find it difficult to link the drawing of these cheques to LRA. It is all haphazard. There is no particular order in terms of amounts and/or dates drawn. For instance on 12/01/2009 a bearer cheque was drawn for M2,000.00 and a day later 13/01/2009 another cash cheque was drawn in the amount of M3,800.00. Also on 14/08/2009 a bearer cheque was issued for M1,000.00 and almost 2 weeks later on 25/08/2009 another one was issued for M2,000.00. No particular order. No sequence. No invoice. No receipt. Just a chain of monies drawn in Defendant’s favour.

[10] It is common cause that a relationship existed between PW1 and Defendant. Not only are they neighbours but Defendant also acted as an Accountant for Plaintiff. It is also common cause that a number of cheques were issued to Defendant by Plaintiff. Question is what were

those cheques for? Plaintiff has testified that he had an agreement with Defendant that they be transmitted to LRA, which is denied by Defendant. Reality is that these cheques were issued to Defendant personally and not to LRA. If as Plaintiff's PW1 attempted to persuade the Court, Defendant was to cash the cheques and pay over cash to LRA, Plaintiff did not demand that Defendant bring back receipts as evidence of payments to LRA. He says he trusted Defendant. No invoice has been handed in to support claims by the LRA to correspond to the payments. No single payment has been receipted. PW2's evidence does not help the situation much as she is not in the position to say that she was present when PW1 and Defendant entered into the alleged oral agreement. All she did was to fill in cheques as instructed by PW1. More importantly, I find no reason why PW1 kept signing all these cheques for a period exceeding a year, without proof of claims from LRA nor proof of payment from Defendant. What I see is an experienced businessman who acted in a strange way (unbusiness-like) in making these payments which according to him were meant to settle a troublesome debt with LRA. The evidence before court as we have it now taking into account both the evidence in chief PW1 and PW2 and their cross-exam Plaintiff failed to establish a case for Defendant to answer.

- [11] Plaintiff has not established that the cheques were intended for LRA which would warrant an enquiry as to why/how then they changed route and what their fate was. As a result I find that Defendant has to be absolved at this stage and grant him absolution from the instance.

J. T. M. MOILOA
JUDGE

For Plaintiff : Adv. Setlojane

For Respondent : Adv. Nathane KC