CIV/T/89/82

IN THE HIGH COURT OF LESOTHO

In the matter between :

E.M. NKHETSE — Applicant

and

SANTAM BANK LIMITED — 1st Respondent
VRYSTAAT MOTORS — 2nd Respondent
M. JONKOMANE — 3rd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 19th day of April, 1983.

The applicant seeks an order of this Court rescinding a default judgment given against him on 4th May, 1982 in CIV/T/89/82; granting him leave to file notice of appearance to defend and directing the Respondents to pay costs of this application in the event of opposition.

In support of this application, applicant filed an affidavit in which he averred, inter alia, that on 4th May, 1980 and at Bloemfontein in the Republic of South Africa he and 2nd Respondent entered into a Hire Purchase Agreement whereby 2nd Respondent sold a certain Datsun E 20 motor vehicle to him at a total price of R8,901.05 payable in 35 monthly instalments of R247.25. The conditions of the said agreement were embodied in a document styled Hire Purchase Agreement which was duly signed by the parties. They included:

> "3. The Buyer shall be liable to the Seller for payment .....
> .....
> (d) any expenses actually incurred by the Seller as a result of the Buyer's non-compliance with any provision of this agreement, including tracing costs and all the legal costs on attorney and client basis, inclusive of collection commission should any amount which the Buyer may owe to the Seller in terms of this Agreement be collected by attorneys on behalf of the Seller; .....
> .....
>
> 7. While this agreement is in force or while any amounts are still due by the Buyer, the

2/ Buyer shall .....

Buyer shall:

.....

(g) insure the goods and keep them insured under the agency of the Seller and immediately advise the Seller of any claim thereunder, it being understood that the Seller's interest in the goods will be endorsed on the policy. If the Buyer fails to ensure the goods and to keep them insured under the Seller's agency, the Seller shall in his discretion and without prejudice be entitled but not obliged, to arrange such insurance and debit the account of the Buyer with the cost thereof plus finance charges and stamp duty costs. The buyer shall be responsible for repayment of these amounts as determined by the Seller;

.....

14. In terms of section 45 of Act 32 of 1944, the parties agree to the jurisdiction of the magistrate's court of any district having jurisdiction by virtue of section 28(1) of the said Act, in respect of any legal proceedings in connection with this agreement provided that the Seller shall in his discretion be entitled to institute any such proceedings in the Supreme Court."

The applicant further averred that after the conclusion of the agreement, he took possession of the vehicle. 2nd Respondent subsequently ceded his rights to 1st Respondent. The vehicle was on 4th April, 1980 involved in an accident which was reported on 5th April, 1980 in compliance with the terms of the agreement. The costs of the damages on the vehicle amounted to R1,383.00.

It was the understanding of the applicant that since the vehicle had been comprehensively insured the costs for the repairs would be paid by insurer. However, to applicant's surprise 1st Respondent required him to pay R750 which he paid because he required the vehicle for his taxi business. Applicant then continued to pay his instalments and in May 1981 was left with a balance of R1,079-64 when 1st Respondent stated that he was terminating the agreement, repossessing the vehicle and applicant was under no obligation to make further payments.

On 14th March, 1982, summons in CIV/T/89/82 in which applicant and 3rd Respondent were cited as

3/defendants were ..

defendants were served upon the applicant. Applicant immediately went to Bloemfontein to see 1st and 2nd Respondents who referred him to their attorney Messrs Du Preez Liebetrau & Co of Maseru. On several occasions applicant tried to contact Respondent's attorney but all in vain as he was each time told that the attorney was absent. The next thing he found himself served with a warrant of execution.

Applicant averred that he was not in wilful default for he was entitled to explain to Respondents' attorney that he was not indebted to the Respondents; he had a valid defence in that he had already paid off more than 80% of the value of the vehicle and in the circumstances judgment was eroneously sought and granted. Wherefore he prayed for an order as aforementioned.

The application was opposed by 1st Respondent. The opposing affidavits were filed by Frans Jacobus Labuschagne and Christiaan Ernst Van Tonder, the Credit Manager and the former clerk of 1st Respondent, respectively.

The opposing affidavits admitted the averments made by applicant but denied applicant's suggestion that since the vehicle had been comprehensively insured, the insurance would have to pay for the full amount of the damage as it was the universal practice for policies of insurances of motor vehicles to contain a clause providing that the insured should be liable for a certain compulsory excess payment. In fact in the insurance policy (annexure "D") involved in this case there was a compulsory excess payment to be effected by the applicant.

According to the affidavit of Van Tonder, on 21st May, 1980, applicant consulted him in Bloemfotein in order to obtain funds which would enable him to pay a firm of panel beaters which had carried out repairs to the vehicle referred to in the Hire Purchase Agreement in this matter. A cheque to the tune of R750, as evidenced by a copy thereof (annexure "E") was drawn by 1st Respondent in applicant's favour. Accordingly

4/ applicant's .....

applicant's account (annexure"C") was debited with this amount as reflected by the entry in annexure "C".

The opposing affidavits further averred that the insurance for the vehicle for the period 1981 to 1982 became due on 3rd March, 1981. In terms of clause 7(g) of the Hire Purchase Agreement (annexure "B") 1st Respondent renewed the policy on behalf of applicant for the amount of R1,079,64 and debited his account with the said amount as reflected in the entry dated 3rd March in annexure "C". Applicant was advised thereof by annexures "F" and "G". Applicant's averment that in May, 1981 he was left with a balance of R1,079.64 was denied and it was submitted that applicant was confusing this amount of R1,079-64 with the balance outstanding on his account at that time.

Applicant's averment that in May, 1981, 1st Respondent terminated the agreement was also denied and it was averred that in fact on 13th May, 1981, applicant visited 1st Respondent at the latter's offices in Bloemfontein when he accused 1st Respondent of stealing his money and stated that he refused to continue with the agreement. An attempt to reason with and pursuade applicant to continue with the agreement in his own interest was unsuccessful. He was advised that he was in arrears with his monthly instalments for the months of March, April and May, 1981 in the total amount of R994.81 plus interest. Applicant was however, adamant that he wished to terminate the agreement.

At the request of 1st Respondent, the parties then signed a written agreement (Annexure "H") terminating the Hire Purchase agreement. Applicant also signed a document of Voluntary Surrender annexure "I". The parties further agreed that 1st Respondent would send somebody to Maseru to collect the vehicle and then sell it for the best available price. On 18th May, 1981, 1st Respondent then gave the Voluntary Surrender form (annexure "I") to one Mr. Schroeder and sent him to Maseru to collect the vehicle. Mr. Schroeder returned with the vehicle,

5/ annexure "I" ...

annexure "I" signed "E.M. Nkhetne" and a cheque for R764.64 which he said he had received from applicant in respect of arrear instalments. Applicant's account was credited with the said account as reflected by the entry dated 19th May, 1981 on Annexure "C". On 17th June, 1981, the cheque was returned unpaid and applicant's account accordingly debited with the said amount as reflected by the entry dated 17th June, 1981 on annexure "C".

The vehicle was valuated at R2,500 by a sworn appraiser (see annexure "G") but subsequently sold by 1st Respondent for R3,200 with which amount applicant's account was credited as reflected in the entry dated 17th June, 1981 on annexure "C". As of 25th November, 1981 the amount outstanding on account was R2,136-39 plus interest.

No replying affidavit was filed by applicant.

It is common cause that applicant was on 14th March, 1982 served with summons in CIV/T/89/82. He did not enter appearance to defend and on 4th May, 1982 judgment was entered by default. Rule 27(6)(a) of the High Court Rules 1980 provides that :

> "Where judgment has been granted against defendant in terms of this rule or where absolution from the instance has been granted to a defendant, the defendant or plaintiff, as the case may be, may within twenty-one days after he had knowledge of such judgment apply to court on notice to the other party, to set aside such judgment."

In the present case applicant has not disclosed the date on which he became aware of the default judgment he wants this Court to have rescinded and it is for this reason impossible to know whether when, on 27th May, 1982, he filed his application for the rescision of this judgment he was within the time limit stipulated by the Rules.

In any event the important question for the determination of this Court is whether the applicant has made out a case for the relief under Rule 27(6)(c) of the High Court Rules 1980 which permits that judgment obtained under the provisions of sub-section (5) thereof may on good cause shown, be set aside. In Grant v. Plumbers (Pty) Ltd 1949(2) S.A. 470 at pp. 476-7 Brink J. expressed the view that in order to succeed in an application of this nature the applicant must satisfy the following requirements:

(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence, the Court should not come to his assistance.

(b) His application must be bona fide and not made with the intention of merely delaying Plaintiff's claim.

(c) He must show that he has a bona fide defence to Plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

Applicant's explanation for his default to enter appearance is that after he had been served with the summons he went to Bloemfontein to see 1st Respondent who referred him to their attorney in Maseru. He had been trying to contact the attorney until he found himself served with a writ of execution after judgment had been entered against him.

At page 2 of the summons with which he was admittedly served on 14th March, 1982, the applicant was clearly advised that if he disputed 1st Respondent's claim and wished to defend the action he should enter notice of appearance to defend not later than 14 days after service of the summons and that his failure to to so would result in judgment being given against him. The applicant deliberately chose not to follow this advice and his default was to that extent unreasonable in the circumstances. However, that does not necessarily mean that on the papers before me applicant was prima facie acquiescent to 1st Respondent's claim and on that reason alone the application would not be refused. See Scott v. Trustee, Insolvent Estate Coinerma 1938 W.L.D. 129 at p. 136 where Murray J. is reported as having said :

"Though the personal responsibility of the defendant for the default may be a factor for the Court's consideration in exercising its discretion, on general principles there seems no sound reason for excluding a defendant from relief merely because he, and not his agent was at fault."

Ad para 12 of his particulars of claim in the summons 1st Respondent had averred that as of 25th November, 1981 his claim or the amount which applicant owed him amounted to R2,130-39 (excluding interest). He explained how the claim was arrived at :

Additional finance charges	:	R 82,06
Insurance	:	1354,31
Expenses	:	105,85
Instalments	:	588,17

In his founding affidavit applicant stated that he had valid defence to 1st Respondent's claim in that he had already paid off more than 80% of the value of the vehicle. That in my view is no denial that the amount of R2,130.39 was owing to 1st Respondent. It is therefore no defence to 1st Respondent's claim. In order to succeed in his application, it is necessary that applicant states sufficient facts upon which he basis his defence. In the words of Graham,J. In Ngcezulla v. Stead EDL 110 at p. 115

> "Sufficient must be alleged to enable the Court to conclude that the Respondent, who already has the benefit of his judgment, is not merely to be harrassed by unnecessary and expensive litigation, which can only result in the piling up of costs,which the Respondent may not be in a position to recover."

I take the view that on the papers before me there is nothing to convince me that applicant has a bona fide defence to the claim in respect of which 1st Respondent obtained judgment against him on 4th May, 1982. The granting of this application will serve no other purpose but to delay 1st Respondent's claim.

It has been argued by Mr. Kolisang, who represented the applicant in this matter that another ground on which applicant basis prospect for success in the main action is that Respondent has not complied with the requirements of the Lesotho Hire Purchase Act No. 27 of 1974 of which s. 13 (b) provides :

> "no seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce .....
>
> (b) any provision in the agreement for the payment of any amount as damages,.

8/ or for any ....

> or for any forfeiture or penalty, or for the acceleration of the payment of any instalment unless he has by letter handed over to the buyer or sent by registered post to him at his last known residential or business address, made demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than ten days and the buyer has failed to comply with such demand."

On behalf of the Respondent Mr. Erusmus pointed out that s.3(1)(a) of the Lesotho Hire Purchase Act No. 22 of 1974 which deals with the application of this Act provides :

> "The provisions of this Act shall -
>
> (a) subject to the provisions of paragraph (b) of this subsection and any notice in terms of subsection (2) apply to agreements relating to movables under which the purchase price does not exceed four thousand rand."

In the present case the purchase price was R8901-05 and therefore exceeded the limit of four thousand rand. For this reason even if the agreement had been concluded in Lesotho, the Lesotho Hire Purchase Act would not apply. I agree. That does not, however, mean that this Court has to enforce the provisions of the South African Hire Purchase Act which is a foreign law in this country. Indeed, Clause 14 of the conditions of the agreement concluded by the parties has specifically provided that

> "in terms of S.45 of Act No. 32 of 1944 the parties agreed to the jurisdiction of the magistrate's court of any district having jurisdiction by virtue of section 28(1) of the said Act, in respect of any legal proceedings in connection with this agreement provided that the seller shall in his discretion be entitled to institute any such proceedings in the supreme court."

This Court is neither the magistrate's court nor the supreme court within the meaning of the South African Act. It seems to me that in the absence of anything else the agreement entered into by the parties can only be treated as an ordinary agreement before this Court.

One other criticism that may be levelled against the application is that there is no indication in the affidavits that applicant has furnished security for costs in compliance with the provisions of Rule 27(6)(b) which reads as follows:

"The party so applying must furnish to the satisfaction of Registrar for the payment to the other party of the costs of the default judgment and of the application for rescission of such judgment"

(My underlining)

I have underscored the word "must" to indicate that in my opinion the requirement for payment of security for costs in applications of this nature is mandatory. Non-compliance with the provisions of paragraph (b) of sub-rule (6) above renders the papers in this application not properly before this Court and the Court should really decline to entertain this matter - Musinyambiri v. Molapo -CIV/T/207/81 at p. 3 (unreported)

The application must be dismissed with costs.

B.K. MOLAI
JUDGE

19th April, 1983.

For Applicant : Mr. Kolisang
For Respondents : Mr. Erusmus