CIV/APN/280/87

IN THE HIGH COURT OF LESOTHO

In the application of :

WILLIAM CLEMENT LEPOTA Applicant

v

IVAN HYLAND Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 16th day of September, 1991

With commendable and terse lucidity Mr. Matooane for the applicant drew the attention of the Court to the fact that what is to be decided in this application is whether the question of prescription raised by the respondent can truly stand in the light of the fact that such prescription pertains to the South African Law.

The South African statute on which the applicant relies is Act No. 68 of 1969 Section 12(3) thereof reading:-

> "When prescription begins to run .... a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises : Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care".

Referring to the facts the learned Counsel crisply

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outlined them as follows :- First that the respondent through a firm known as Pandora Motors sued the applicant. The learned Counsel further explained that it was at the stage of sequestration that the debt had been ceded to the respondent. This state of affairs, the learned Counsel submitted, only came to be known by the applicant after the debt had prescribed.

He accordingly argued that the applicant couldn't have known that the debt had been ceded to the respondent until 1985.

Mr. Matooane argued in the alternative that the Court should decide which law is applicable in this case, pointing out that the contract was entered into in the Republic of South Africa and the debt ceded there. He brought to the Court's attention the fact that the vehicle (the subject of an earlier contract of sale) was detained in South Africa without a Warrant of Repossession. A warrant to that effect was secured two months later the effect of which was to legitimise the unlawful detention. The applicant thus claimed the loss of earnings for the two months during which the detention of the vehicle was without warrant.

Having done this he sought to persuade the Court by reference to Private International Law by Forsyth and Bennet that the proper law to apply is the lex fori as against the lex Loci delicti.

With reference to page 285 of the above book Mr. Matooane sought to indicate that there is no cut and dry rule as to what law to apply, for as Forsyth et al show :

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(in M'Elroy vs M'Allister 1949 S.C. 110)

> "The widow, in her capacity as executrix of her husband's estate, instituted three claims against the driver in Scotland. First, relying on the rule of English law (but not Scots) that the deceased's cause of action survived to her, she sued on his behalf. Secondly, she claimed solatium which she was entitled to under Scots but not English law. And third she sued for funeral expenses,
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> Her first claim failed for claim on her husband's behalf was not actionable under the lex fori; her claim for a solatium failed too for it was not actionable under the lex loci delicti. Only her claim for funeral expenses was common to both English and Scots law; she succeeded and was awarded a paltry £40 damages!"

At page 286 the learned authors go further to say:-

> "For the time being it is sufficient to remark that where plaintiff and defendant have a common residence, domicile, nationality and some other link between them - such as being travellers in the same vehicle, as was the case in Babcock vs Jackson and M'Elroy vs M'Allister - the case for deviation from the lex loci delicti is strong."

Thus Mr. Matooane submitted that the lex loci delicti doctrine leads to bizarre results therefore the Court should avoid its strict application in this case as it would lead to injustice because the claim has lapsed in the Republic of South Africa by virtue of Section 11 of Act 68 of 1969 stating

> "Periods of prescription of debts shall be the following -
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> (a) .....
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> (b) .....
>
> (c) .....
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> and (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt".

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I was referred to Chaplin vs Boys 1971 AC 356 in an endeavour to illustrate to me that even the House of Lords have recognised that the lex loci delicti is not flexible enough. At this stage I must confess the perspicuity of Mr. Matooane's argument had become somewhat muddied to me and regrettably lost some of its initial lustre.

In response to the foregoing Mr. Harley for the respondent outlined the facts as follows :-

First, that Pandora Motors was a company owned by the respondent in the Republic of South Africa. This company sought and obtained judgment against the applicant in four cases in 1981.

In 1985 the respondent purchased the claims of Pandora Motors. The applicant tried to have the applications rescinded but to no avail. Hence this application.

The applicant says he suffered damages in South Africa as a result of attachment of his vehicle for two months by the respondent.

It follows therefore that if the delict occurred it was in South Africa that it did. The facts reveal that a Lesotho National, domiciled in Lesotho is locked in this dispute with a South African domiciled in the Republic of South Africa.

The question that immediately leaps to mind is : will the courts in Lesotho entertain damages claim arising in the Republic of South Africa by virtue of the jurisdiction the Lesotho Court has acquired over the Republic of South Africa citizen by reason of the attachment of debts which arose in the Republic. Surely in such a case the Lesotho

Court would have to apply the lex loci delicti of the Republic of South Africa.

Mr. Harley submitted that if this were to be so then there wouldn't be any case to entertain in the applicant's benefit because the damages have prescribed both in Lesotho and in Republic of South Africa. In respect of South African Law the cause of action took place on 2nd September 1982 and accordingly prescribed on 2nd September 1985 because the rule provides that a claim for damages prescribes within three years of the debt becoming due. In respect of Lesotho the cause of action became extinct because the applicable law is that in South Africa.

I should indicate that affidavits show that the vehicle was taken by the applicant for assessment of its value at Ficksburg L.T. Motors on 5th April, 1982. The respondent seized it without any lawful warrant till 2nd September, 1982 when he obtained one. How this period between April and September is reckoned by both Counsel to constitute two months escapes me.

However at page 59 the respondent admits taking possession of the vehicle at Ficksburg until 2nd September 1982 but strenuously denies that such possession within South Africa was illegal thus further denies that during such period the applicant suffered any damages. The respondent further avers that he took that vehicle on specific authorisation by the applicant who requested that respondent should hold the vehicle on his behalf for safekeeping until such time as the arrears had been paid.

The applicant had brought the instant application in terms of Rule 6(1),(2) and (3) which provide respectively that

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the Court may grant leave for property of a peregrinus which is in Lesotho to be attached, for purposes of founding jurisdiction, if the Court is satisfied further (a) that the property belongs to the peregrinus, (b) that the applicant is an incola (c) that applicant has prima facie cause of action against the peregrinus.

The respondent in turn made an application to this Court in terms of Rule 6(4) providing that

> "the peregrinus may at any time before judgment apply to court on notice to the plaintiff to set aside the attachment on good cause shown and the court may make any order it deems fit".

It was argued for the respondent that the applicant failed to comply with the rule requiring that he should satisfy the court that he is an incola. Mr. Matooane sought to show that this has been made out at page 30 where it could be inferred from the address given of the applicant described as a Mosotho male adult of Lithabaneng Maseru that he is an incola. I doubt that mere supply of a postal or residential address suffices to establish that one is an incola. In any event Mr. Harley was quick to indicate that even that reference to applicant as a Mosotho male adult of Lithabaneng Maseru with Postal address P.O. Box 1246 Maseru has not been made in the instant application, but relates to a copy of a Declaration concerning one of the previous actions between the parties.

With regard to the attachment ad fundandam jurisdictionem I was referred to Herbstein and van Winsen The Civil Practice

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of the Superior Courts in South Africa 3rd Ed. p.798 where it is stated :

> "The application can be set down in open Court in the usual way, but if there is danger in delay, then application can be made to a judge. If the application is granted, a Writ is drawn up and handed to the Sheriff, who will thereupon proceed to arrest the person of the defendant or the property specified in the Writ. The Writ need not specify a return day as in the case of a Writ suspectus de fuga issued in terms of the Rules of Court. It is nevertheless open to the person arrested to move at any time to have the Writ set aside".

Clearly the procedure here does not contemplate a return day, but grants the remedy of a motion at any time to have the Writ set aside.

The upshot of the authority in Estate Brownstein vs Commissioner for Inland Revenue 1957(3) SA 512 AD at 524 shows that an incola is held to be capable of suing a peregrinus after attachment ad fundandam jurisdictionem, regardless of where the cause of action arose.

It was submitted that the effect of the attachment is therefore that the applicant is entitled to sue the respondent out of the High Court of Lesotho, regardless of the fact that the cause of action arose within the Republic of South Africa.

It would seem important therefore that the applicant is laid under the necessity to satisfy the Court that he has a prima facie cause of action.

I was referred to Ex Parte Acrow Engineers(Pty)Ltd 1953(1) SA 662(T) where it was held that the remedy of

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attachment ad fundandam jurisdictionem for purposes of creating it where otherwise such jurisdiction might not exist, is an exceptional remedy which should be applied with care and caution. Thus the Court should be wary and not grant an order of attachment if prima facie the applicant has not made out his case.

Turning to the applicant's affidavit Mr. Harley indicated that one looks in vain for a statement that the applicant is an incola of Lesotho.

Learned Counsel sought to bring to the Court's attention that the applicant's submissions regarding his cause of action is that he has a genuine claim against the respondent in terms of the Particulars of Claim marked "NM2". The bais of his cause of action is repeated in broad terms on oath, but boils down to the simple allegation that on or about 6th April 1982 and at Ficksburg in the Republic of South Africa, the respondent illegally took possession of the applicant's bus and remained in illegal possession thereof until the 2nd September 1982, consequent upon which the applicant suffered damages.

Mr. Harley invited the Court camping on the applicant's trail and relying on his very version to consider if it can be said he has made out a prima facie cause of action. It was submitted that indeed if the applicant's right of action has prescribed, it cannot be said that he has made out a cause of action. However, if the South African Law applies to the applicant's claim, then it becomes clear that the South African Law of Prescription would apply and that in that case the applicant would clearly be out of Court.

In an endeavour to persuade the Court that in fact

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the applicable law is the South African one as opposed to that of Lesotho whose prescriptive period in similar circumstances is 8 instead of three years, Mr. Harley referred the Court to Kuhne and Nagel, A.G. Zurich vs A.P.A Distributors(Pty)Ltd 1981(3) SA 536 where a principle to be extracted is that the question of prescription is a matter of substantive law and that the lex causae, i.e. the Law of South Africa is the one to be applied on the basis that the cause of action arose in that territory. Indeed it was held in that case that

> "it was settled law that procedural matters were governed by the law of the place where the action was brought (lex fori) whereas matters of substance were governed by the proper law of the transaction (lex causae). Further, that the extinction (or creation) of a right by prescription was a matter of substantive law and accordingly the lex causae applied. Further that ..... the prescriptive period of the lex causae ..... and not that of the lex fori ....., would apply to plaintiff's claim".

It would seem then in respect of the instant matter the lex causae which the persuasive force of the above authority says is applicable is the South African and not the lex fori which is the law of Lesotho.

The above proposition is further buttressed by the authority in Laconian Maritime Enterprises Limited vs Agromar Lineas Ltd 1986(3) SA 509 where at page 521 the text says :

> "It seems to be a well settled principle of the Private International Law of this Country and many other countries that the Court should distinguish between rules of procedural law and Rules of substantive law and that procedural matters are governed by the lex fori whilst matters of substance are governed by the lex causae".

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It would be productive to pay proper attention to a further statement of the law enunciated at pages 523 and 524 to the effect that :

> "It seems to be settled law that statutes of limitation merely barring the remedy are part of the law of procedure whereas they are part of the substantive law if they extinguish altogether the right of the plaintiff (Kuhne and Nagel's case and cases there quoted). I agree with respect that the South African Act 68 of 1969 contrary to its predecessor is substantive in character".

On the above basis and because the ownership of these claims is in any event not disputed it seems only proper that the application by the respondent to set aside the attachment on his goods ought to succeed with costs. The Court so finds.

J U D G E

16th September 1991

For Applicant : Mr. Matooane

For Respondent : Mr. Harley