CIV/APN/161/90

IN THE HIGH COURT OF LESOTHO

In the Application of:

DORBYL FINANCE (Pty) Ltd Applicant

and

ABEL SELLO MOLATI Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on the 12th day of October, 1995.

On 22nd June, 1990, the applicant herein obtained, ex parte, an interim order framed in the following terms:

> "1. That the forms and provisions of the Rules of Court are dispensed with.
>
> 2. That a rule nisi do issue calling upon the Respondent to show cause on the 23rd day of July 1990 at 9.30 a.m. (or so soon thereafter as the matter may be heard) why an order in the following terms should not issue:
>
> 2.1. That the Deputy Sheriff for the district of Maseru alternatively any Deputy Sheriff of

the above Honourable Court in whose area of jurisdiction the hereinafter described goods be found, is hereby directed, authorised and empowered to search for, seize and attach and retain in his possession the goods hereinafter described pending the outcome of an action to be instituted by the Applicant against the Respondent within a period of 45 days from the date of this order alternatively within a period of 45 days from the date upon which the goods hereinafter described are attached by the Deputy Sheriff, whichever date is the later, to wit:

2.1.1 IX used 1987 Mercedes Benz 1113 Bus Engine Number: MB01038SA034861N chassis Number: 35808226003772

2.1.2 IX New 1988 Isuzu JC R500 Engine Number: MC01004SA033599N Chassis Number : FTR49LT356383SMCG

2.1.3 IX used 1985 Isuzu JCR 500T Engine Number :SA018903L Chassis Number: 5296467

2.2 That the Respondent be ordered to pay the costs hereof on attorney and own client scale.

2.3 Alternative relief.

3. That the order referred to in 2.1, supra, operate with immediate effect pending the outcome of this application."

The Respondent intimated intention to oppose confirmation of the interim order. The affidavits were duly filed by the parties.

Inasmuch as it is relevant it is common cause from the affidavits that the parties concluded a written agreement styled "Instalment Sale Master Agreement" (annexure "B"). The agreement was signed by the applicant and the Respondent at Johannesburg on 20th March, 1987 and at Bethlehem on 19th March, 1987, respectively.

In pursuance to the agreement (annexure "B") applicant sold and delivered to the Respondent the three vehicles referred to in paragraphs 2.1.1., 2.1.2 and 2.1.3 of the above cited interim order. The transactions relating to each of the three vehicles were attached to annexure "B" as first schedules and marked annexures "C", "D" and "E". In terms of the provisions of clause 6 of annexure "B" ownership in the vehicles was not to pass to the Respondent until receipt by the applicant of all amounts payable by the

former under the agreement (annexure B).

According to annexures "C", "D" and "E" a total amount of M74,245-44 plus interest was payable to the applicant by the Respondent in 24 monthly instalments of M3,093-56 commencing from 5th October, 1989 in respect of the vehicle referred to under paragraph 2.1.1. of the above cited interim order. As regards the vehicle referred to in paragraph 2.1.2 of the above cited interim order, a total amount of M110,333-16 plus interest was payable in 36 monthly instalments of M3,064-81 with effect from 5th April, 1988. Starting from 5th October, 1989 a total amount of M88,638-00 plus interest was to be paid in 24 monthly instalments of M3,693-25 each in respect of the vehicle referred to in paragraph 2.1.3 of the above cited interim order.

In its affidavits, the applicant averred that after the parties had signed the "Instalment Sale Master Agreement" (annexure "B") and the first schedules thereto (annexures "C", "D" and "E") the respondent defaulted in his regular payments of monthly instalments and was, therefore, in arrears. As proof thereof, the applicant attached annexures "F", "G" and "H" being the details of payments and arrears in the account of Respondent, as of 23rd May, 1990, in respect of the transactions marked annexures

"C","D" and "E", respectively.

The applicant further averred that it intended to institute, against the Respondent, an action based on the "Instalment Sale Master Agreement "(Annexure "B") read with the first schedules, claiming an order for payment of all the amounts due, alternatively an order cancelling the agreement, the return of the vehicles forming the subject matter of the agreement and damages. In its contention, the applicant could only elect which cause to pursue if it were placed in possession, and obtained a valuation, of the vehicles retained and used by the Respondent. However, notwithstanding demand, Respondent refused/neglected to either settle the arrears or restore the vehicles to the applicant. In the circumstances, the applicant was unable to elect whether or not to cancel the agreement and sue for damages as it had no means of ascertaining the conditions of the vehicles forming the subject matter of this dispute. Hence the institution of these proceedings for an order as aforesaid.

In his answering affidavit, the Respondent averred that the "Instalment Sale Master Agreement (annexure "B") concluded between him and the applicant in March, 1987 was cancelled by an order of this court under CIV/APN/76/89 and, therefore, no longer existed.

According to the Respondent, after the "Instalment Sale Master Agreement" (annexure "B") of March 1987 had been cancelled he and the applicant concluded other agreements whereby the applicant sold to him vehicles referred to in annexures 'C" "D" and "E". However, in its replying affidavit, the applicant denied the averment that the "Instalment Sale Master Agreement" (annexure "B") concluded in March, 1987 was cancelled by the Order of the Court under CIV/APN/76/89 and reiterated that the vehicles referred to in the transactions marked annexures "C","D" and "E" were all sold and delivered to the Respondent pursuant to the "Instalment Sale Master Agreement" (annexure "B") which it had signed in Johannesburg on 20th March, 1988.

I must say I have had the occasion to look at the decision in CIV/APN/76/89 and I am satisfied that it did not cancel the "Instalment Sale Master Agreement" (annexure "B") concluded between the applicant and the Respondent in March 1987. The Respondent's averment that it did cannot, therefore, stand.

It is significant that the transactions marked "C","D" and "E" are First schedules to "Instalment Sale Master Agreement". The Respondent avers that the "Instalment Sale Master Agreement (annexure "B") of March, 1987 was cancelled. Thereafter, he and the

applicant concluded other agreements pursuant to which he bought the vehicles referred to in the transactions marked annexures "C","D" and "E". Assuming the correctness of his averments that he and the applicant concluded agreements, other than the one of March, 1987, pursuant to which he bought the vehicles referred to in the transactions marked annexures "C","D" and "E", the onus of proof vests with the Respondent, on the well known principle of "he who avers bears the onus of proof", to show the existence of such other agreements. He has not. On the contrary annexures "C","D" and "E" clearly show that they are all First Schedules of the same "Instalment Sale Master Agreement" dated 20th March, 1987. That being so, I am not satisfied that the Respondent has discharged the onus that vests on him. Consequently, I accept as the truth the story of the applicant that pursuant to the "Instalment Sale Master Agreement" (annexure "B") the vehicles referred to in annexures "C","D" and "E" were sold and delivered to the Respondent and reject as false the latter's version/denial on this point.

The applicant's averment that the Respondent defaulted in the regular payment of his monthly instalments and was, therefore, in arrears was denied by the latter who averred that he was up-to-date with his payments of the monthly instalments. As proof of

his averment that he was up-to-date with his payments, the Respondent attached, to the answering affidavit, annexures "NM1" to "NM17" being copies of cheques and deposit slips by which he had allegedly made payments of his monthly instalments.

I have had the occasion to look through annexures "NM1" to "NM17". It is worth mentioning that annexures "NM1" to "NM9" are in fact notcopies of cheques but copies of counterfeits of cheques. Counterfeits cannot, in themselves, be conclusive proof of payments. Indeed, a careful examination of annexures "NM 1" to NM17" reveals that annexure "NM5" is a counterfeit of the cheque marked annexure "NM12" whilst annexure "NM15" is a duplicate of the deposit slip marked annexure "NM16". To its replying affidavit the applicant also attached annexure "A", a debit note showing that the cheque of which annexure "NM6" is a counterfeit was, in fact, dishonoured by the Respondent's bank. Annexures "NM1" to "NM17 which clearly include duplications of deposit slips and dishonoured cheques cannot, in my view, be proof of the Respondent's averment that he was up-to-date with payments of his monthly instalments.

As it has been pointed out earlier, a certificate (annexure I) that the Respondent was indebted to the applicant in the amounts of arrears therein disclosed

was, on 18th June, 1990, issued in terms of the "Instalment Sale Master Agreement" (annexure "B") of which clause 14.1 provides:

> "14.1 A certificate under the hand of any director or manager, whose appointment it shall not be necessary to prove, for the time being of the Seller as to any indebtedness of the Buyer hereunder, or to any other fact shall be prima facie evidence of the Buyer's indebtedness to the Seller and/or of such other fact, for the purpose of provisional sentence or summary judgment proceedings or for any other purpose."
> (My underlining)

I have underscored the word "shall" in the above cited clause 14.1 of the "Instalment Sale Master Agreement" (annexure "B") to indicate my view that the provision thereof that a certificate under the hand of any director or manager of the Seller as to indebtedness of the Buyer shall be prima facie evidence of such indebtedness is mandatory. The Certificate (annexure I) that the Respondent is indebted to the applicant in the amounts of arrears therein disclosed was issued under the hand of the applicant's manager. It is, therefore, a prima facie evidence that the Respondent is so indebted to the applicant. If the Respondent disputes the contents of

annexure 1 and avers, as he does, that he is up-to-date with his payments, the onus is on him to prove that he has been making regular payments of his monthly instalments and is, therefore, not in arrears. He has not, on a preponderance of probabilities, discharged this onus. That granted, I am satisfied that the Respondent had defaulted in the regular payments of his monthly instalments and was, as of 18th June, 1990, in arrears in the amounts disclosed in Annexure I.

It is significant that in his answering affidavit the Respondent denied applicant's averments that it intended instituting, against him, an action claiming, inter alia, an order cancelling the "Instalment Sale Master Agreement" (annexure "B") read with annexures 'C", "D" and "E", the return of the vehicles (the subject matter of this dispute) and damages. I find it difficult to understand the basis of the Respondent's denial where the applicant itself says it intends to institute action against him. In any event, it is worth noting that on 7th September, 1990 the applicant did file, with the Registrar of the High Court, summons commencing an action against the Respondent. In my finding, there was no substance in the Respondent's denial that the applicant intended instituting an action against him.

It was not really disputed that, at the time the applicant instituted the present proceedings, the vehicles, which are, in terms of clause 6 of annexure "B", its proprty, were in the possession, of and being used by, the Respondent. I have found, on affidavits, that one of the claims the applicant contemplated, in its action against the Respondent, was a claim for damages. That being so, it was of utmost importance that the vehicles which were admittedly under the control and use of the Respndent were returned to the applicant to enable it to determine, for purposes of assessing damages, the difference between the amounts outstanding, in terms of the agreement, and the value of the vehicles upon their return.

On the foregoing, it is obvious that the view I take is that the application succeeds. The interim order is accordingly confirmed, with costs to the applicant, as prayed.

B. K. MOLAI

JUDGE

12th October, 1995.

For Applicant : Mr. Koornhof

For Respondent : Mr. Mphalane.