CIV/APN/84/95

IN THE HIGH COURT OF LESOTHO

**In the matter between:**

**DORBLY VEHICLE TRADING AND FINANCE COMPANY (PTY) LIMITED** — **Applicant**

**and**

**MAOELA KUNI SEKHOANE** — **Respondent**

J U D G M E N T

**Delivered by the Honourable Chief Justice Mr Justice J.L. Kheola on the 24th day of April, 1995.**

In this **ex parte** application the applicant sought an order in the following terms:

1. Dispensing with the forms and provisions of the Rules of Court and dealing with the matter as one of urgency as contemplated in terms of Rule 8 (22) of the Rules of Court.

2. That a Rule Nisi do issue calling upon the Respondent to show cause on a date to be determined by the above Honourable Court why an Order in the following terms should not be issued:-

2.1 Declaring the Instalment Sale Agreement marked **"B"** to the Applicant's Founding Affidavit, to be cancelled;

2.2 Directing the Respondent to deliver to the Applicant, 1 X 1992 Model AAD 17/290 Sheerline Bus bearing engine number V401015SA002088 and chassis number 910011 ("the Bus");

2.3 Failing the return of the Bus to the Applicant forthwith, the sheriff or his

Deputy be authorised and directed to take possession of the Bus wherever the same may be found and to deliver same to the Applicant;

2.4 That the Respondent pay the costs of this Application on the scale as between attorney and client, alternatively, directing that the costs of this Application be costs of the action or application to be instituted for the determination of the relief set out in 2.1, 2.2 and 2.3 above;

2.5 alternatively to 2.2 to 2.4 above, and pending the outcome of this Application, alternatively proceedings for the determination of the Applicant's right to the return of the Bus, the Sheriff or his Deputy attach and remove the Bus wherever the same may be found and to hold the Bus in his possession under attachment;

2.6 Granting the Applicant further or alternative relief.

3. That pending the return day herein, the Order in terms of 2.2 and 2.3, alternatively 2.5, operates as an Interim Order with immediate effect.

4. Granting further or alternative relief.

On the 3rd March, 1995 the application was granted as prayed. The rule nisi was made returnable on the 29th May, 1995. On the 14th March, 1995 the respondent anticipated the return day to the 17th March, 1995. On that day the return day was extended to the 23rd March, 1995 when the matter was argued before me.

In its founding affidavit the applicant avers that on the 30th April, 1992 and at Johannesburg, the applicant and the respondent entered into an instalment sale agreement (Annexure "B" to the founding affidavit) in terms of which the applicant sold to the respondent a bus for a purchase consideration of **R627,657-84**. In terms of the agreement the ownership of bus

would not pass to the respondent until all the purchase price was paid in full; the respondent was to pay all monthly premiums punctually; in the event of the respondent defaulting in the punctual payment of any instalment/s or any other amount due in terms of the agreement, or fail to observe or perform any of the terms, conditions and/or obligations of the agreement, the applicant would then be entitled without prejudice to any other rights, to claim immediate payment of all amounts payable in terms of the agreement, irrespective of whether or not such amounts are then due, or immediately terminate the agreement, take possession of the bus, retain all payments already made by the respondent and to claim as liquidated damages payment of the difference between the balance outstanding and the value of the bus.

The applicant avers that the respondent has failed in payment of the instalments in terms of the agreement and that as at the 23rd February, 1995, the respondent was in arrears in the amount of **R220,491-34** and is indebted to the applicant in respect of interest on arrears in the amount of **R77,257-67** (See Annexure "C" which is the arrears record).

The applicant submits that it is necessary that the applicant be afforded the relief sought herein, failing which the applicant will suffer irreparable harm. The respondent operates a bus service and the bus is being used on a daily basis, continually for the transport of passengers. Such continual and extensive use causes deterioration of the bus with the result

that the applicant's proprietary interest in the bus is being eroded on a daily basis. The applicant submits that on account of what is set out above, this application is one of urgency. With each passing day the risk of loss and/or damage to the bus persists and the applicant has no alternative other than to take immediate steps to protect its interests. The respondents's attitude is simply one of refusal to honour his obligation while continuing to use the bus.

The respondent has raised points of law in **limine**. The first point is that there is no urgency in this application. He avers that when one looks at Annexure "C" it is clear that the arrears have accrued over a considerable length of time. However the applicant has waited for a long time without having the agreement cancelled but suddenly he alleges that the matter has become urgent. I do not think that there is any substance in this submission. Clause 17 of the agreement provides:

> **"No relaxation or indulgence granted by the Buyer shall be deemed to be a waiver of any of the Seller's rights in terms hereof, and such relaxation or indulgence shall not be deemed a novation of any of the terms and conditions of this Agreement."**

Under the terms of clause 17 the applicant did not lose its right to bring this application **ex parte** and on urgent basis. The application was urgent because the respondent was continually using the bus on daily basis to transport fare paying passengers and yet he was not paying the monthly instalments in terms of the agreement. The bus was deteriorating and its value was coming

down every day. On the 2nd March, 1995 when this application was launched the respondent's last payment had been on the 27th December, 1994. On the 25th January, 1995 the respondent paid with a cheque which was not paid by the bank but was referred to drawer. As on the 1st February, 1995 the arrears and interest amounted to **R297,749-01** which is a very large amount. It seems to me that the matter had become extremely urgent.

In **Republic Motors (Pty) Ltd. v. Lytton Road Service Station (Pty) Ltd.** 1971 (2) S.A. 516 (R) at p. 518 Beck, J said:

> **"The procedure of approaching the Court ex parte for relief that affects the rights of other persons is one which, in my opinion , is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of audi alteram partem. It is accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or of well-grounded apprehension of perverse conduct on the part of a respondent who is informed beforehand that resort will be had to the assistance of the Court, that the course of justice stands in danger of frustration unless temporary curial intervention can be unilaterally obtained."**

The present application was brought **ex parte** on the basis of urgency. I have indicated above the reason why it was treated as a matter of urgency.

The second point of law raised by the respondent is that the buyer (respondent) has consented to the jurisdiction of the Magistrate's Court. This allegation is based on the terms of clause 23 which reads as follows:

> **"The Buyer hereby consents to the jurisdiction of the Magistrate's Court having jurisdiction over its person in respect of all proceedings in connection with this Agreement."**

In Jones and Buckle 'The Civil Practice of the Magistrates' Courts in South Africa, 8th edition Vol. I at p. 173 the learned authors say:

> **"Concurrent jurisdiction:** The consent envisaged under s 45 does not necessarily oust the jurisdiction of the Supreme Court, and in the absence of a clear intention to make the magistrate's court the exclusive forum, the Supreme Court retains concurrent jurisdiction. A plaintiff may, therefore, in the absence of a clear agreement debarring him from so doing, bring action in the Supreme Court and recover Supreme Court costs. This will in particular be the case where the consent is intended for the benefit of the plaintiff: the defendant consents to be bound by the plaintiff's election to sue in the magistrate's court, but the jurisdiction of the Supreme Court is not excluded."

See **Union Cities Agency & Trust Co. (Pty) Ltd v. Makubo,** 1942 W.L.D. 261; **Standard Bank of S.A. Ltd v. Pretorius** 1977 (4) S.A. 395).

It seems to me that in the present case there is no clear agreement debarring the applicant from bringing the application in the High Court of Lesotho. The consent was apparently intended for the benefit of the applicant; the respondent consents to be bound by the applicant's election to sue in the magistrate's court, but the jurisdiction of the High Court is not

excluded. Section 6 of the High Court Act 1978 has no application in the present case because there is no clear agreement debarring the applicant from bringing this case in the High Court. Clause 23.1 refers to the fact that the respondent consents to the jurisdiction of the magistrate's court, it does not say that the parties agree that the magistrate's court shall have jurisdiction. It clearly imposes an obligation on the respondent to accept the applicant's election of the forum.

The third point of law raised by the respondent is that the procedure followed by the applicant encroaches on the right of the respondent to be heard by a competent court. He submits that when one reads prayers 2.2 and 2.3 of the Notice of Motion they entitle applicant to remove the bus from the jurisdiction of the High Court of Lesotho without furnishing security and without giving the respondent a chance **to** present his story. It seems to me that this point of law has been dealt with under first point of law. The answer is that in **ex parte** application where urgency has been established a rule nisi is usually granted and the respondent is heard on the return day. It is a procedure provided for by our Rules of Court. It is irrelevant that the bus has been taken out of the jurisdiction of this Court. If the respondent succeeds in this application the rule will be discharged and that will mean that the bus must be restored to the respondent. It is most unlikely that the respondent which has a substantial business transactions in this country can defy the order of this Court.

On the merits the respondent avers that on or about January, 1995 he met an agent of the applicant and he appraised him of his difficulties and it was orally agreed that the arrears would be cleared in three months' time i.e. end of April, 1995. It came as a surprise to the respondent when the applicant moved this way. Furthermore, this was so agreed because the respondent was disputing the amount of the arrears and the agent promised to re-check and give an accurate reflection of the arrears in the meantime. However, the accurate reflection has not come, instead this application was instituted.

The agreement allegedly reached by the respondent and the alleged applicant's agent was a breach of the terms of the agreement because it was not in writing. Clause 18 provides that 'this agreement constitutes the entire agreement between the parties hereto. No agreement at variance with the terms and conditions of this agreement shall be of any force or effect unless it is in writing and signed by the parties to this agreement.' The agreement which was allegedly reached by the respondent and the alleged applicant's agent was at variance with the terms and conditions of the original agreement under which the respondent was to pay monthly instalments. Under that agreement he was given a grace to pay the instalments at the end of this month.

The respondent says that he is disputing the amount of the arrears given by the applicant, but he does not state the amount of the arrears according to his own records. He has not answered

paragraph 10 of the applicant's founding affidavit. The procedure requires that the answering affidavit should deal with the founding affidavit paragraph by paragraph. The respondent has not done this and I am rather at a loss as to which amount of arrears he is talking about. According to the affidavits before me the allegation made in the founding affidavit that the arrears are in the amount of **R220,491-34** and that the interest on arrears amounts to **R77,257-67**, has not been challenged.

The rule is confirmed in terms of prayer 2.3. It is ordered that the costs of this application shall be costs of the action to be instituted for the determination of the relief set out in prayer 2.1.

J.L. KHEOLA
**CHIEF JUSTICE.**

**24th April, 1995.**

**For Applicant - Mr. Fischer**
**For Respondent - Mr. Matooane.**