CIV/APN/410/01
IN THE HIGH COURT OF LESOTHO

In the matter between:-

KPMG/HARLEY AND MORRIS JOINT VENTURE LIQUIDATORS OF LESOTHO BANK (In Liquidation) APPLICANT
and
THABANG ALBERT MOTHAE RESPONDENT

Before the Honourable Mrs Acting Justice Hlajoane on the 11th Day of December, 2001

RULING ON POINTS RAISED IN LIMINE

This is an Application moved ex parte on an urgent basis, where the Applicant is seeking an order for repossession of a vehicle presently in Respondent's possession.

A brief synopsis by the Applicant is to the effect that, on the 8th April 1998 and at Maseru, the Applicant and the Respondent entered into a written Hire Purchase Agreement in terms whereof a truck was sold by the Applicant Bank and delivered on its behalf to the Respondent. Applicant alleges that the Respondent is in breach of the said Agreement and therefore is seeking to enforce his rights to repossess the vehicle under the Agreement.

The Application is opposed and the Respondent has anticipated the return date. The Application is couched in the following terms:-

1) Dispensing with the forms and provisions of the Rules of the High Court and dealing with the matter as one of urgency as contemplated in terms of Rule 8(22) of the Rules of the High Court.
2) That a Rule Nisi do issue, returnable on the 17th October 2000, calling upon Respondents to show cause why an order in the following terms should not be issued.

2.1 The sheriff of this Honourable Court or his Deputy, be ordered to immediately attach and take into his possession the following motor vehicle at the premises of the Respondent or wherever it may be found and to retain the same in his custody pending the final determination of this application. To give effect to this order, the sheriff is authorized to enter upon the premises of the Respondent at Tšenola, Majoe-a-Litšoene, in the district of Maseru or any other location and if entry is resisted to engage the assistance of the Lesotho Mounted Police.

NISSAN CW45 TRUCK, Year of manufacture 1990 Engine No. GC 02199SA021221T Chassis No. CWB 46H 00383N

2.2 That the Sheriff or his deputy be authorized and directed to take into his possession the said vehicle wherever the same may be found, and hand it over to the applicant..

2.3 That Rule 2.1 and 2.2 shall operate as an interim interdict with immediate effect pending the final adjudication of this application
2.4 That the Respondent pay the costs of this Application on the scale as between Attorney and Client.
2.5 Granting further or alternative relief

Anticipation of the Rule

In addressing the Court on the anticipation of the Rule, Counsel for the Applicant showed that the Respondent has failed to comply with Rule 8(18) of the Rules of this Honourable Court in that his notice falls short of the 48 hours notice stipulated in the rule.

Rule 8(18) "Any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than 48 hours notice."

In answer, Counsel for the Respondent argued that urgency has been created by the Applicant himself by choosing to approach the Court ex parte. To make the 48 hours required by Law an hour to two, still remained, but most importantly the issue would be whether or not the difference in time has caused the Applicant any prejudice. Applicant never alleged any prejudice suffered. Because of that, the

Court invoked the provisions of Section 59 of the High Court Rules 9 of 1980.

Section 59: "Not withstanding anything contained in these Rules the Court shall always have discretion, if it considers it to be in the interests of justice, to condone any proceedings in which provisions of these rules are not followed."

On Contempt of Court

Applicant contended that the Respondent was in contempt of Court as he has willfully and mala fide refused to comply with the order of Court. He went further and showed that the Court was entitled to refuse to hear any person who disobeyed its order until he has purged his contempt. This Application was moved from the bar.

Rule 8(1) of the High Court Rules clearly spells out that every Application must be brought on notice of motion.

Rule 8(1) "Save where proceedings by way of petition are prescribed by any Law, every application shall be brought on notice of motion supported by an affidavit setting out the facts upon which the applicant relies for relief."

The application was therefore improperly brought before court, it cannot be moved from the bar no matter what the return of service may have said. A proper application ought to have been filed to allow Respondent chance to come prepared

and respond.

IRREGULAR STEP

Applicant here alleges that Notice of intention to oppose was filed on the 22nd October, 2001 one day before service was effected upon the Respondent. The explanation was that the order was granted on the 10th October, 2001 and the matter was placed on the roll for the 22nd October, 2001 and that was how the Respondent came to know about it as the Rolls of the High Court are public documents.

This point was also raised from the bar by the Applicant who did not also allege any prejudice suffered. This point ought to have been made on notice by way of replying not from the bar. This point in limine also fails for the reasons given above.

After making decisions on the points in limine raised by the Applicant on the anticipated return date, the Court went further to make a determination on points in limine raised by the Respondent in the main Application.

Wrong Procedure

Respondent contends that the Applicant is attempting to enforce a contract

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by way of motion proceedings which is not permissible in law as it amounts to a disguised action. The Applicant on the other hand submits that in fact the true position is that Applicant only enjoys the rights flowing from the contract, the right to repossess the vehicle. This being in terms of the provisions set out in the Hire Purchase agreement.

In the case of Lesotho National Development Corporation vs Shelter Development and Construction Lesotho (Pty) Ltd CIV/APN/250/90 (Unreported] Applicant and Respondent had entered into a sublease agreement in respect of Applicant's plot. There was an agreement as to when the contract was to commence, being the date from which rental would apply. In raising points in limine Mr Buys for the Respondent contended that the nature of those proceedings was disguised action.
The Court was referred to a passage of the Uniform Rules of Court by Nathan which reads;

> "The ordinary procedure for setting disputed questions of fact is not by affidavit but by viva voce evidence (Meyers vs Branndo 1927 TPD 393), and an applicant who deliberately initiates proceedings by way of Application when he knows that a real dispute of facts must inevitably arise, and for which an action is the appropriate procedure, does so at his peril."

The point in limine succeeded as the Applicant was taken to have followed

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the wrong procedure by opting for motion proceedings instead of trial action.

In our case the Applicant in his papers shows that he is entitled to a remedy of intervention by the High Court by virtue of Common Law rights as well as per the agreement between the parties without going into expensive and time-consuming litigation. He could definately

foresee that there was going to be a dispute of fact which cannot be resolved on affidavits. Merely alleging that one is in arrears without proving it is not enough, as the Respondent on the other hand concedes that he has in fact paid in full and produced Bank deposit slips to support his case.

It is a well established principle that a party stands or falls by his founding affidavit. Applicant has only attached to his founding papers the Hire Purchase agreement as annexure "B" and also annexure "C" styled customer's statement for T.A.M. Industries (Pty) Ltd not Thabang Mothae who signed as purchaser under the agreement. It has not been explained how the alleged outstanding balance of one hundred and seventy three thousand, one hundred and sixty seven maloti, sixty Iisente (M1 73,167.60) is arrive at.

Locus Standi

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It is the Respondent's contention that the Applicant as presently cited in these proceedings has not been appointed as such to be liquidators of Lesotho Bank, as according to Applicant's annexure "A" the appointee is KPMG/Harley and Morris and Company and not KPMG/Harley and Morris Joint Venture.

In responding to that, the Applicant shows that in fact the entity stated as KPMG/Harley and Morris Joint Venture is the same body as KPMG/Harley and Morris and Company. This, he is saying not in his founding papers but when submitting his heads of argument. Rule 8(1) of the High Court Rules clearly shows that "every application shall be brought on notice of motion supported by an affidavit setting out the facts upon which the applicant relies for relief." Respondent contends further that such statements of facts must contain amongst others, Applicant's right to apply i.e. Locus standi.

Rule 6p at B1-B37 in Erasmus - Superior Court Practice, has stated that "It is trite law that appropriate allegation to establish locus standi of an Applicant should be made in the launching affidavits and not in the Replying Affidavits." The same pronouncement was made in the case of Scott and Others vs Hanekom and Others 1980 (3) S.A 1182 at 1188. The Court went further in the above case to show that,

> "thus if it is indeed so that the challenged passages in the replying

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> affidavits are not legitimate responses to the 1st Respondent's allegations and have been included solely to remedy an omission in the launching affidavits, they are liable to be struck out."

In our present case there has been no chance to remedy the omission since the rule has been anticipated and no answering and replying affidavits therefore to be filed.

The above cited case goes further to show that, "it is however not necessary in every case and the Court must still decide whether enough evidence has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its

behalf. When one looks at the letter of appointment by the then Acting Minister of Finance the address for the appointee KPMG/Harley and Morris and Company is P. O. Box 7755, Maseru, whereas the founding affidavit the address of KPMG/Harley and Morris Joint Venture is 3rd Floor Christie House, Orpen Road, Maseru.

On looking at the two entities one is not sure as to whether we are still talking about one and the same thing. The Court is therefore unable to say for certain whether KPMG/Harley and Morris and Company is the same entity as

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KPMG/Harley and Morris Joint Venture as there is no explanation from the papers particularly the founding papers.

Applicant has been duly authorized to depose to the affidavit, there is no question about that, see the case of Mall (Cape) Pty Ltd and Merino Ko-operasie Bpk 1957 (2) S.A 347 at 352. But the authority which in our case has conferred authority on him is different from that which in fact was appointed under Annexure "A" of the notice of motion.

Appointment of Liquidators

The appointment of KPMG/Harley and Morris and Company is considered by the Respondent to be void ab origine, in that the letter of appointment was issued before Act No. 2 of 2001 Lesotho Bank (Liquidation) Act, came into force.

On the papers, the letter of appointment as liquidators is dated the 29th January, 2001 whereas the Act giving effect to the appointment came into force on the date of its publication which was 31st January, 2001. In response to this the Applicant avers that in fact the appointment of liquidators letter of the 29th January, 2001 constituted the appointment from the first of February until the winding up process is completed. Meaning that the commencement of the powers flowing

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from the letter dated 29th January, 2001 is the first day of February, 2001 which is a day after the resolution was passed dated 31st January, 2001. Unfortunately I did not see that resolution which it is alleged is attached and marked "AR2". Even if I did, would not change the position.

Quoting from paragraph 3 of his founding affidavit, Attorney for the Applicant says;

> "The Applicant is KPMG/Harley and Morris Joint Venture Liquidators of Lesotho Bank (In liquidation) duly appointed in terms of the Lesotho Bank (in liquidation) Act No. 2 of 2001, as read with a letter of appointment dated 29th January, 2001 marked "A"

The paragraph quoted clearly shows that the appointment as liquidators has been effected in terms of the provisions of the Act. Under the said Act No.2 of 2001 interpretation of the word liquidator is as follows;

"It means the person appointed under Section 5 and includes a provisional liquidator."

Section 5 of the Act.

APPOINTMENT OF THE LIQUIDATORS

"The Minister shall appoint a liquidator on such terms and conditions as the Minister may determine".

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The Preamble to the Act, Act No. 2 of 2001 Lesotho Bank (Liquidation) Act 2001 reads as follows:

"An Act to make provision for the voluntary liquidation of the Lesotho Bank and for connected purposes."

I would be making a serious omission if I should fail to mention one other important section in the said Act, Section 3 .

"The Minster shall, upon commencement of this Act, take such measures as may be necessary for the purpose of winding up the affairs and for effective dissolution of the Bank."

The section referred to above clearly shows that the Minister shall only act in preparation for the liquidation of the Bank upon commencement of the Act. The appointment of liquidators clearly therefore ought to have been made in terms of the provisions of the Act, Section 5 of the Act. Though in his letter the Minister made no reference to any law that gave him power to appoint, the appointment was pre-maturely made as it ought to have been made in terms of section 5, after the coming into effect of the Act.

In Cresto Machines (Edms) Bpk vs Die Afdeling Spemoffsier, SA Polisie, Noer-Transvaal 1972 (1) S.A. 376, the Court held that the issuing of a notice prohibiting pin-tables, before the commencement of the empowering statute, was null and void on account of the fact that such issuing of the notice was not

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necessary to put the enactment into operation.

In our case, as rightly pointed out by counsel for the Applicant, the Minister derives his powers to appoint under the Act and cannot therefore purport to act before the relevant law giving him power came into effect. The appointment was therefore a nullity, void ab origine.

Conditional Locus Standi

The point raised here in limine is that, the Minister of Finance ought to have made a determination and publish in a gazette as to which assets (which include debts due) of the former Lesotho Bank now in liquidation, are to vest in the new Lesotho Bank known as Lesotho Bank (1999) limited. That until this statutory provision has been complied with

Applicant, if properly appointed, is in no position to proceed with liquidation or any action against Respondent. Section 10 of Act No. 1 of 2000 Lesotho Bank (1999) limited (Vesting) Publication of transferred assets and liabilities;
Section 10: "The assets and liabilities referred to in the agreement which shall be vested in, and transferred to, Lesotho Bank (1999) limited shall be assets and liabilities of Lesotho Bank as may be prescribed by the Minister by notice published in the gazette.

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ActNo.2 of 2001, Lesotho Bank (Liquidation) Act 2001 Section 8(1)

> "Upon appointment, the liquidator shall take control of all the affairs of the Bank except those referred to in section 10 of Lesotho Bank Vesting Act."

On this point, the Applicant strongly argues that, he sees no relevance between the two pieces of legislation, in particular the Sections quoted above. According to him what the vesting Act achieved amongst others was a division of assets and liabilities between the Lesotho Bank (in liquidation) and the Lesotho Bank (1999) limited. The Applicant argues further that in fact a resolution in terms of Section 210 of the Companies Act 25 of 1967 has been validly passed which alone is sufficient to place the Lesotho Bank (in liquidation) in voluntary liquidation.

I have already stated that the resolution referred to as "AR" is not part of the documents that are filed of record, so that there is no proof that any resolution was ever made. I would there fore not agree with the suggestion by the Applicant that Section 10 of Act No.1 of 2000 and Section 8(1) of Act No.2 of 2001 are not related. Unless and until the Minister has made his determination in terms of Section 10 of Act No. 1 of 2000, the liquidator properly appointed is in no position

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to act in terms of Section 8 of Act No.2 of 2001.

Dispute of Fact and Ownership

It is the Applicant's case there that under the Hire Purchase agreement ownership remains vested in the Applicant until payment in full has been made, so that ownership could not be said to be in dispute. Respondent on the other side avers that the issues of ownership of the vehicle and whether or not payment has been made in full were clearly foreseeable disputes. The dispute in fact arises as Respondent claims to have paid in full and has attached to his answering affidavit deposit slips to prove his point. He also claims to be the owner by virtue of statutory provisions under the Road Transport Act No.6 of 1981.

The interpretation of "owner" under the Act is given as follows:-

> "Owner, in relation to a vehicle includes a joint owner of a vehicle and when a vehicle is the subject of a hire purchase agreement, includes the person in possession of the vehicle under that agreement."

It would therefore seem that even under the hire purchase agreement the purchaser is also still considered to be the owner. Owner in our case is even being

strengthened by the fact that the Respondent claims to have paid in full the purchase price.

In Khauoe vs Attorney General and Another 1995-96 LLR & LB 470 at 487 where the case of Associated South African Bakeries (Pty) Ltd vs ORYX & Vereimigte Backereien (Pty) Ltd en Andrere 1982 (3) S.A. 893 has been cited, the Court had this to say;

> "Where in proceeding on notice of motion disputes of fact have arisen on the affidavits, a final order may be granted if those facts averred in applicants' affidavits which have been admitted by the respondent together with the facts alleged by the respondents justify such an order."

Lack of Urgency

Respondent submits that the matter is not urgent as in terms of Annexure "C" to the founding affidavit, which is styled "customer's statement", it is clear that the plaintiff waited for three months before bringing the matter to Court. The statement is dated 30th June, 2001 and the Application was filed on the 10th October, 2001.

Applicant on the other hand insists that the matter is urgent and given the nature of the subject matter. He speaks of risk which if notice was given would

defeat the course of justice as Respondent continues to enjoy the use of the truck, thus denying applicant the benefit of setting off the loss against payment.

It is worth noting that in fact the Applicant has not shown as to when the Respondent started falling into arrears or when he ceased to make any payments. I have already indicated that the Applicant has followed a wrong procedure by opting for motion proceeding, instead of trial action in order to enforce a contract. Now this, coupled with the delay in bringing the proceedings to Court plaintiff should consider himself to be standing on a very slippery ground and chances of him not following are zero. See the case of Kingsborough Town Council vs Tuirlwell and Another 1957 (4) S.A. 533. The reasons for the delay have not been given by the plaintiff.

Vague Prayers

The Respondent contents that Prayer 2.1 and 2.2 are not only vague but also contradictory. The other prayer is for the deputy sheriff to take possession of the vehicle and retain it in his custody, prayer 2.1, whilst on the other hand prayer 2.2, the deputy sheriff is to take possession of the vehicle and hand it over to Applicant. The two prayers were to operate with immediate effect as interim interdicts.

This point is not to be considered in isolation, it has to be considered together with other points already raised as that one on dispute of fact. The respondent has submitted that he has

paid in full and has submitted his slips. The Applicant on the other hand only makes allegations of varying Bank accounts without giving us any documentary proof. It is trite law that where there is a glaring dispute of fact Respondent's version is to be preferred to that of the Applicant. Supreme Furnishers vs Molapo 1995-96 LLR - LB 377 is the authority on that point.

Applicant could not be said to have had no other remedy safe to go by way of motion proceedings alone. Where there is an existing remedy with the same results for the protection of the applicant, an interdict will not be granted, this proposition comes from Prest Interlocutory Interdicts at 51.

In the premise, the points in limine raised by the Applicant on anticipation of the return date fail and the points in limine by the Respondent on the main Application succeed. The rule is therefore discharged with costs.

A.M. HLAJOANE
ACTING JUDGE

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For Applicant: Ms. Makhera
For Respondent: Mr Ntlhoki

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