CIV/APN/127/02

IN THE HIGH COURT OF LESOTHO

In the matter between:

KPMG/HARLEY & MORRIS JOINT VENTURE
LIQUIDATORS OF LESOTHO BANK
(IN LIQUIDATION) **Applicant**

and

MAMOFOKA LADYSIA MOHALE **Respondent**

For the Applicant : **Adv. H. Sefako**

For the Respondent : **Adv. N. Makhera**

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 24th day of May 2002

I dismissed this application with costs on the 23rd April 2002. I said my reasons for judgment would follow.

This was an application moved *ex parte* on urgent basis. The Applicant

(hire-purchase seller) was seeking an order for cancellation of hire-purchase agreement copy whose was attached to the papers. He also applied for repossession of a vehicle which was then in possession of the Respondent (hire-purchase buyer).

Applicant averred that his prayers were grounded on the two terms of the contract between the parties which were recorded as follows:

> " 9.1 Should the purchaser 9.1.1 default in the punctual payment of any instalment or any other amount tally due in terms thereof or part to observe and perform any other of the terms, conditions and or observations of this Agreement, or ----------."
>
> 9.1.2 .....
>
> 9.10 Then upon the happening of any of the events, the seller shall, subject to the provisions of the Hire Purchase Act No. 27 of 1974 or any amendment or substitution thereof (the Act) in so far as the Act may be applicable to this Agreement be entitled in its election and without prejudice to any other rights to.
>
> 9.1.10.1 .....".
>
> 9.1.10.2 Immediately terminate this Agreement and take whatever legal steps available to obtain repossession of goods, retain all

amounts already paid in terms hereof by the Purchaser and claim liquidated damages calculated in accordance with the following provisions.

9.1.10.2.3 .....". (My emphasis)

Respondent filed answering affidavit accompanying a notice of anticipation of the rule, set for the 15th April 2002. This ended up being argued on the 16th April 2002. In the meantime the Applicant had filed a replying affidavit of Anthony Scott Mcalpine which was supported by the affidavit of Ntsoaki Mooki.

I noted with significance that the Respondent did not deny that she was indebted to Applicant, had not paid and did not state how much she had paid if she had paid full payment of either interest or capital, except to say that: "..... to the best of my recollection I have continued making payment as agreed." It was not stated how much had been paid and when the last payment was. Respondent had had an onus to discharge in this respect. There was no doubt in my mind that she failed in the light of the evidence put up by Applicant to show an alarming failure to pay in instalments.

On the date of hearing Counsel agreed that it was convenient that the

points raised in-limine be argued together with the merits. The points in-limine had been as follows: Firstly that the Applicant ought to have foreseen that its application would contain disputes of fact in as much as the ownership of the vehicle was contested by the parties.

Secondly, that the Applicant in a disguised form was seeking to enforce a contract by way of motion proceedings where it ought to have instituted action proceedings.

Thirdly, the *locus standi* of the Applicant was conditional upon the Minister complying fully with section 10 of Act No.1 of 2000 and section (1) of the Lesotho Bank (1999) Limited (Vesting) Act No.2 of 2001 read with section 8 of Lesotho Bank (Liquidation) Act 2001. The Minister had not complied therewith.

Fourthly, Annexure "C" to the founding affidavit was not admissible as evidence in that its contents could be "construed" as being hearsay.

Fifthly, that the matter lacked urgency inasmuch as annexure "C" reflected January 2001 as the last date when the statement was updated, if indeed it was, it was an authentic document. The reasons for delay had not been

stated.

Lastly, no demand had ever been made to the Respondent.

I would fail if I did not note that it has increasingly been difficult recently, for Counsel to rely on a fairly genuine points-in-limine that are akin to exceptions. A point-in-limine has to settle a question of law which is apparent on the face of the pleadings. Secondly, a point may only be raised if does not depend on resolution of a question of fact by the Court. This is so in deciding either an action or application proceedings.

I dealt with the second point-in-limine. My first impression was that enforcing a contract meant a remedy in a contractual relationship such as specific performance as against cancellation claim for damages and so forth. On the other hand I did not have to decide whether repossession and cancellation did or did not amount to enforcing the contract in relation to the point raised by the Respondent. It sufficed to focus on whether cancellation or repossession were competent in motion proceedings. Applicant responded to say that the procedure in motion remedies sought by Applicant by way of motion proceedings was permissible. Indeed Mr. Sefako was hard put to say whether enforcement of contract was *per se* impermissible.

It is unarguable that motion proceedings are resorted to by reason of expeditiousness and the inexpensive nature. The test is simply whether a matter is such that it can be resolved without a serious dispute of fact, developing on the papers, that cannot be resolved on affidavits. In the case of **Room Hire Co (Pty) Ltd v Jeppe Street Mansons** 1949(3) SA 1115 at 1161. The only exceptions stated to this rule are matrimonial proceedings and illiquid claim such as in damages. See also **The Civil Practice of the Supreme Court of South Africa** Van Winsen et al 4th Edition at page 234. And **Beck's Theory and Principles of Pleadings in Civil Actions.** I. Isaacs, 5th Edition at page 303.

Was there a real or genuine dispute of fact? I would summarize the elements of a real or material dispute of facts as outlined in **Room Hire** case (supra) to be forseability, reality (genuineness), and that a dispute has to relate to the core facts not peripheral issues and finally that Court must be disabled or unable to resolve the dispute on the affidavits filed alone without aid of oral evidence.

Reality as one of the elements shown above has been interpreted to mean the following: Respondent must place an alternative version of the facts against those related by an applicant. A respondent must tell a story that brings out a real conflict on the facts that make his denial (if he denies) issuable. He must not

just deny without making necessary averments. Such averments must seek to positively change the nature of the facts related by an applicant even on the surface. Then it can be said a respondent has his own version. It should not be less than that. The operative words it would seem are "real and/or genuine."

Before coming to the reason put forward for the alleged existence of a dispute of fact, this Court taxed Respondent's Counsel whether the Respondent could be said to have put up any *bona fide* defence based on his bare denial that he was indebtedness to the Applicant without having said more. I thought that the bare denial demonstrate a clear case where the Court had, indeed, not been given a version from the Respondent.

While I agreed that where a dispute of fact exists in motion proceedings a final relief can only be granted if the facts state of respondent together with applicant's averment justify such order I thought the principle was premised on a respondent having a real version. I was referred in that regard to the following cases **Khauoe v Attorney General** 1995-96 LLR-LB 470 at 486. **Stellenbosch Farmers Winery Ltd v Stellenvale Winery Ltd** 1957(4) SA 234 at 235 and **Hyperama (Pty) Ltd v OK Bazaars (Pty) Ltd** 1991-92 LLR - LB 183. Having said that the Respondent did not have a basis for challenging the Applicant's story I would have problems with accepting that these authorities would support

Respondent's case.

Be that as it may be, what Respondent called a dispute of fact appeared, really, to be a legal point. He put it as follows: "Ownership of the vehicle, the subject matter hereof was contested inasmuch as these rights have been conferred upon the Respondent by statute." Reference was made in that respect to section 2(b) "Interpretation" of Road Traffic Act No.6 of 1981. The section reads:

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

The position in law is more clearly summarized in **Vaal Transport Corporation v Van Wyk Venter** 1974(2) SA 577(T) 577 at E-H where Claasen J make a distinction between the rights of seller under hire-purchase and a buyer under a hire-purchase contract. The hire purchaser seller remain the legal owner until the purchaser "shall have paid all instalments due." Then he will become legal owner. At all times when the hire-purchaser was in possession of the vehicle he had been acting "towards all parties as if he were the true owner." Despite my difficulty in understanding why this point is reflected as a dispute of fact I would remark to say that clause 4.1 of the parties agreement shows abundantly that until instalments and all charges are paid in full ownership of the goods

remain vested in the seller. The point taken by the Respondent herein would therefore not succeed.

There was yet another intractable proposition by the Respondent. It was that a bank statement annexure "C" (bank statement) which was a computer print-out annexed to the founding affidavit was hearsay unless proof was given by a bank official on affidavit. See analogy in section 245 of the Criminal Procedure and Evidence Act 1981. Mr. Mcalpine said on affidavit he was a member of the liquidator (venture) of the Applicant. He would in my view be in the same position as director, manager or official of a bank in the analogy of the said section 245.

The contents of the bank statement annexure "C" were not even being challenged either as to principal, interest or other changes. Ntsoaki Mooki (Applicant's accountant) deposed to how Annexure "C" was reconciled to produce the final customer's statement which reflected the amount of M81,041.33 shown on page 52 of the record. Miss Mooki said she familiarized herself with the records of the Hire Purchase account of the Respondent with the Applicant. I did not see why it was urged that Miss Mooki should necessarily have been a former employee of Lesotho Bank. May be she was not. I did not find any reason why I should investigate the aspect since it was neither

important nor relevant. I surely did not see how the statement was flawed or in any way "an inadmissible hearsay." I therefore rejected the motion that I should find otherwise.

The next point taken was as follows: That the *locus standi* of the Applicant was conditional upon the Minister complying with section 10 of Lesotho Bank (1999) Vesting Act No.1 of 2000 (Vesting Act) and section 8(1) of Lesotho Bank Liquidation Act No.2 (Liquidation Act) of 2001. That the Minister had not complied with the said laws. I was referred in that regard to the judgment of Hlajoane AJ in **KPMG Harley and Morris Joint Venture, Liquidators of Lesotho Bank** (in liquidation) **v Mothae** CIV/APN/410/2001, 11th December 2001. I will appear to be belabouring this point by the reason that Counsel appeared not to be able to articulate sufficiently. More of a reason was that the Applicant was (as submitted) said to have its powers to operate under section 8 of the Liquidation Act only on condition that the Minister complied with section 10 of the Vesting Act by publishing a notice in the gazette of those assets and liabilities which shall be vested in, and transferred to, Lesotho Bank. This suggested (as contended) that there was an unreconcilable conflict between the two mentioned sections as long as the Minister was not complying with the said section 10.

If I fully understood the above submission as it must have been put forward before Hlajoane AJ, it was this. That for the Applicant to have been enabled to deal with assets of the bank-in-liquidation the Minister must have made a determination of 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 prescribed in the gazette." (See section 10 of Vesting Act).

I thought the above provision dealt with three issues. Firstly, it is to say that there has been an "agreement between the Government of the Kingdom of Lesotho, Lesotho Bank, Lesotho Bank (1999) Limited and Standard Bank Lesotho Limited" for the sale and trusted to Lesotho Bank (1999) Ltd of assets and liabilities and business of Lesotho Bank (See section 2 of the Vesting Act). This agreement must have existed and predicated every statutory instrument that followed, more particularly the Liquidation and Vesting Acts.

Secondly the provision in the said section 10 was recognizing that the legislature had already established a new entity called Lesotho Bank (1999) Ltd which could only possess or own assets and liabilities of the old Lesotho Bank

after those had been vested in the said new entity. The understanding being that vesting means:

> "1. ..... bestow or confer (powers, authority, etc) on a (person). 2,. ..... confer (property or power) as a (person) with immediate fixed right of immediate of further possession. 3. ..... (of property, right etc) come into possession (of a person)." See Concise Oxford Dictionary.

That is why then follows provisions as "the share holding" (sec 3) "Transfer of Business" (section 4) "Transfer of Assets" (sec.5) and "Assumption of Liabilities" (sec.6). In simple words "becoming vested" means "becoming owner of". See **Konyn v Viedge Bros (Pty) Ltd and Others** 1961(2) SA 816 (E.C.D.).

Thirdly, it is well and good that the Minister may prescribe by notice published in the gazette." "Assuming that the interpretation is that the Minister is bound to make a determination which surely is part of "the Agreement", is that publication a pre-condition for the Liquidator (whose appointment was not being questioned) performing his duties under section 8 of the Liquidation Act? What must be published? Is it the assets and liabilities? Let us assume for argument sake it is those. Section 16(a) of Interpretation Act 1977 reads as

follows:

"16 Every Act shall -

(a) be published in the Gazette

(b) .....".

It means that only laws need be published and promulgated in the Gazette. Not every order directive or notice by the Minister as a "a person endowed by the legislature with authority to give that Order ....." need be published. See **Interpretation of Stututes G E Devenish,** 1st edition, page 259. This section cannot mean that every determination by the Minister should be promulgated for it for such assets and liabilities to be transferred to the Lesotho Bank (1999) Limited. The best that can be said that the section authorized a "method of publication". It does not provide for notification as a prerequisite to the validity of all acts done by Minister or other public officer." See **Jajhay v Rent Control Board** 1960(3) SA 189 (T) 195 C.

That the powers and functions of the Liquidator cannot be held up by the absence of a notice published by the Minister is confirmed by section 8(2) of the Vesting Act which reads:

8. (1) .....

"(2) without "derogation" from the generality of subsection (1) the Liquidator shall -

(a) take possession of the assets of the Bank.

(b) collect debts of the Bank.

(c) .....

(d) .....

(e) .....

(f) .....".

The most important aspect is to look for the meaning of "derogation" in order to answer the question as to whether the rights and functions of the Liquidator would be limited by the absence of a publication (in the said section 10 of the Vesting Act) by the Minister. For guidance it is said in **African National Congress (Border Branch) and Another v Chairman, Council of State of the Republic of Ciskei and Another** 1992(4) SA 434 at 455 F-H:

> "Derogation on the other hand denotes cancellation, or negation of a right. Compare in this respect The Concise Oxford Dictionary which describes it as 'detract, take away part, from".

It is clear at this stage that in no way would the Liquidator be constrained to

perform his duties just because of the absence of the Minister's notice. I concluded that there was no conflict such as to stultify the operation of section 8 on the ground contended by the Respondent. The conflict was not real.

The only significance of section 10 of the Vesting Act would be to indicate that there will be two categories of liabilities and assets of Lesotho Bank. First those that were transferred to Lesotho Bank (1999) Limited and those that are taken possession of by the Liquidator.

I was therefore bound to disagree with the decision by Hlajoane AJ in the case mentioned on page 10 (supra) to the extent that it concluded that the effect of non-publication the said notice by the Minister was that the present Applicant would not have any *locus standi*.

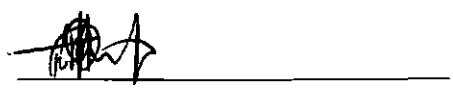
Insofar as the two Acts complement each other I needed not to investigate further whether there was any conflict or contradiction between them.

I was addressed on the alleged absence of a demand from Applicant. I concluded that it was not necessary for the Applicant to have issued out any demand before proceeding against the Respondent as it did. Absence of such a demand "..... does not afford a defence to the action." And "..... the rules apply

not only to actions initiated by someone but also to proceedings brought by way of application." See **The Civil Practice of The Supreme Court of South Africa, Van Winsen et al, 4th Edition,** page 195.

The Court next dealt with the alleged absence of urgency. I was satisfied that as long as it was agreed that the purpose of proceedings by the Applicant was to prevent further deterioratio through use and to avoid the vehicle being disposed of in the meantime there would be a continuing harm or a reasonable fear of such harm. The Applicant was saying its interest had to be protected because of the risk of loss or damage and deterioration "each passing day." It was accordingly proved, as I concluded, that there was urgency in the matter despite that there could have been a delay in immediately resorting to Court proceedings. In my view this was more so where, as against what the Applicant averred to justify that the matter was urgent, there had been nothing tangible to counter that from the Respondent.

As I decided the application should succeed with costs.



T. Monapathi
Judge

24th May, 2002