LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.: 09/2024**

CCA/0048/2018

In the matter between:

WESBANK a division of FIRST NATIONAL BANK OF LESOTHO LIMITED
APPELLANT

and

HIPPO TRANSPORT INC. (PTY) LIMITED **1ST RESPONDENT**
THE COMMISSIONER OF POLICE **2ND RESPONDENT**
THE ATTORNEY GENERAL **3RD RESPONDENT**
THE COMMISSIONER OF TRAFFIC **4TH RESPONDENT**

CORAM: SAKOANE CJ
DAMASEB AJA
MUSONDA AJA

HEARD: 15 APRIL 2024
DELIVERED: 3 MAY 2024

SUMMARY

Default by a debtor under a hire purchase agreement – Whether an order by a judge of the High Court ordering a debtor under a hire purchase agreement to make good on its outstanding indebtedness, or failing that, to restore the assets to the lender, is interlocutory in nature and thus amenable to reconsideration by another judge of the same court?

JUDGMENT

PT Damaseb AJA

Introduction

[1] The first respondent (Hippo Transport) purchased 13 vehicles on hire purchase financed by the appellant (Wesbank). It is common cause that Hippo Transport had a rewarding contract with Eskom in South Africa and some of these vehicles were used by it in connection with a transportation contract it had with Eskom. Wesbank was aware of Hippo's Transport contract with Eskom. As fate would have it, Eskom cancelled the contract with Hippo Transport and that meant a loss of a significant revenue stream for Hippo Transport.

[2] Wesbank became concerned that because Hippo Transport lost an important revenue stream it might default on its hire purchase obligations. Wesbank's official, a Mr Roos, expressed concern to Hippo Transport's owner. Wesbank wanted to protect its interests because, in terms of the hire purchase agreement, it retained ownership in the vehicles,

the risk in the assets however having passed to Hippo Transport until the vehicles were paid in full.

[3] A series of discussions and written exchanges then ensued between the parties-some of it acrimonious. Hippo Transport offered to return the vehicles to Wesbank but the latter advised against that and called for discussions to resolve the matter.

[4] At all events, in June 2018 Wesbank approached the High Court on an urgent *ex parte* basis to secure physical control over the vehicles, principally seeking an order that Hippo Transport disclose the whereabouts of the vehicles and to surrender them to Wesbank; including an order of cancelation of the hire purchase agreement.

[5] In fact, Wesbank considered the matter so serious and urgent that it sought a court order that the police be directed to assist in the recovery of the vehicles.

[6] The High Court granted an interim order in the terms sought in the notice of motion. Wesbank then proceeded to execute but failed in its endeavour to repossess the vehicles, except for a trailer. The deputy sheriff filed a return of service recording that Hippo Transport's agents resisted execution of the court order.

[7] The upshot is that, Wesbank did not achieve what it went to court for. Hippo Transport in the meantime filed an

answering affidavit to oppose final relief being granted. It deprecated Wesbank's conduct: It maintained that it had all along been meeting its obligations under the hire purchase agreement and was not in arrears. It accused Wesbank of material non-disclosure that it had in fact paid off 6 of the vehicles and received confirmation of that fact from a senior Wesbank manager who is named in the affidavit. It attached documents appearing on Wesbank's stationery confirming that fact and what purports to be proof of payments.

[8] Hippo Transport also alleged material non-disclosure by Wesbank that on 18 December 2017, the parties had agreed to new terms of repayment. It produced a letter dated 18 December 2017 authored by a Wesbank official recording the following:

> *'Re: Proposed loan repayment terms*
>
> *We refer to our discussions on the 29th November 2017, and thank you once more for making the time to meet with us.*
>
> *We undertook to consider your proposed repayment and revert shortly in writing, hence this letter. We are agreeable to the following arrangements as discussed with you.*
>
> - *Monthly repayments of a minimum M350,000 to made (sic) with effect from December 2017 until March 2018. The instalment for the month of November, being a minimum of M300,000 in line with the recent past, should also be serviced.*

- ***All security documents, as attached, to be perfected and signed with a bank official signing as witness thereto.***
- *With effect from April 2018 and monthly thereafter the total outstanding debts, arrears included, are to be repaid over the term of the longest outstanding loan. As at April 2018 this is estimated at 22 months.'*

[9] It is common cause that on the same date of the letter, Hippo Transport indicated to Wesbank that it accepted the proposed repayment terms except for the part appearing in bold.

[10] Based on its denial of any default in the past, including the alleged material non-disclosure by Wesbank, Hippo Transport asked the court to discharge the *rule nisi*.

[11] In reply, Wesbank denied the authenticity of the documents purporting to prove that Hippo Transport had paid off 6 of the vehicles. It also denied failing to disclose the 18 December 2017 letter because, according to it, the terms proposed in that letter never became an agreement on account of Hippo Transport refusing to accept the requirement for security which formed part of the letter proposing the new terms of payment.

Two judgments of the High Court

[12] At the heart of the present appeal are two judgments by two different judges of the High Court, one given in 2018 (Molete J) and the other in 2024 (Kopo J).

[13] It is critical to a proper appreciation of the issues in this appeal that I quote extensively from these judgments to provide proper context to what was before each judge and how each dealt with the issues before them.

Proceedings before Molete J

[14] After Hippo Transport filed its answering papers, the matter first came before Molete J on 14 November 2018 and the learned judge made an order with written reasons on 13 December 2018.

[15] In the course of his judgment, Molete J recorded as follows:

> *''[1] This is an application for repossession of thirteen vehicles. The vehicles, were mostly Mercedes Benz and Volvo heavy duty trucks; other heavy duty vehicles and equipment referred to as Tridem Pneumatic Bulker and Tridem Comp Bridger vehicles and equipment.*
>
> *[2] They were all bought under separate hire-purchase contracts and each was priced at about 1.5 Million Maloti excluding interest and charges.*
>
> *[3] The usual hire-purchase terms applied to all the vehicles. Ownership remained with the Applicant until the full amounts owed would have been paid, and if the debtor should default in payment of instalments the bank had the right to cancel and reclaim possession of the vehicles and*

equipment; as well as the total outstanding, together with interest and costs.

[4] It is the Applicants case that as at 17th May 2018 1st Respondent was in arrears and the amounts outstanding were in excess of 1 Million Maloti on each of ten vehicles and equipment sold and almost a million and half in respect of the remaining three.

[5] Applicant then approached the Court for the interim relief to `repossess the vehicles and called upon Respondents to show cause why the order should not be confirmed and consequent relief granted.

[6] The Court granted the interim relief based on the foregoing; and upon receipt of the order the 1st Respondent opposed the matter and filed the answering affidavit.

. . .

[12] Respondent had raised several points of law in limine relating to various incidents and information that Applicant had failed to disclose. Such failure had resulted, according to 1 Respondent in the matter containing;

(a) Lack in urgency and abuse of Court process.

(b) Material non-disclosure.

(c) Disputes of fact which cannot be resolved on the papers.

[13] On the grounds set out above it was argued by ***Mr Teele*** *that the Court ought to dismiss the matter. He however also set out his full arguments on the merits of the matter. This*

was very appropriate since it enables the Court to deal with the matter and dispose of it, once and for all.

[14] There are indeed a number of instances of non-disclosure of important information that seems to have been taken for granted by applicants in making the application. A lot of omitted information was only revealed in the answering affidavit.

[15] For example, there was a number consultations between the parties in an attempt to resolve the matter, which resulted in a variation of the original terms; and in particular the payment schedule. There was also communication from an official of the Applicant that six of the vehicles had been paid in full and the banks interest had ceased; and the fact that at some point 1st Respondent volunteered to surrender all the assets immediately and sought an address from the bank to deliver them to. All these were not revealed in the application.

[16] This information which was withheld from the Court, could lead to the conclusion that it is the applicant who in fact repudiated the contract and was responsible for what followed thereafter. It was argued that at the very least, the Court would not have granted the repossession order and should dismiss the application.

[17] Applicant's Counsel, Mr Mpaka, on the other hand argued that there are two issues for determination; ie whether or not the 1st Respondent is in breach of both the original and the variation agreements, and secondly whether in those circumstances the applicant would not be entitled to an

order of cancellation and repossession of the vehicles and equipment.

. . .

[19] It is common cause that;

(a) The parties entered into the various agreements on the vehicles and equipment which are subject of this matter.

(b) Contracts were signed in respect of each and every vehicle separately, though it was agreed that a single instalment be paid.

(c) At a certain point in time the 1st Respondent experienced difficulties in making the instalment payable. It then volunteered to surrender all vehicles to Applicant.

(d) Applicant discouraged this and suggested the parties should restructure the agreement payment schedule.

(e) Various communication between the parties show that there was in fact some suggestions, offers and counter offers on the terms of the restructured payment schedule.

*(f) There were six letters from one official of the Applicant one **Mantseng Tsepe** who is described as a Senior Business Development Officer and Acting Sales Manager. They are addressed "to who it may concern". The letters specified six vehicles and their precise identification then gave the information that they were paid in full and the bank interest has ceased.*

. . .

[21] The Court's only duty is to determine exactly how the intentions of the parties may be given effect to and how in

the circumstances the agreement or what is left of it should be given effect to or terminated on justifiable terms.

. . .

[24] After refusing the surrender, and attempting to revive the contract, Applicant says 1st Respondent still failed to comply with the new and restructured terms of payment therefore it had to reclaim back its property. The question is, will it be entitled to do so, and the answer is; under the contract that is permissible. On the part of 1st Respondent I must ask myself is it able, or willing to pay; (which it must); if so then the agreement can be reinstated, if not then it must be terminated and the goods returned to the owner.

[25] Counsel insisted that the matter should not even be referred to oral evidence because of the many irregularities and misinformation to the court. However, the 1st Respondent does not dispute that substantial amount is still owed on the vehicles. It only relies on the six letters to show that the six vehicles had been paid in full. The positive averment is that six had been paid off.

[26] The result is that the Court ought not to concern itself with all the vehicles. 1st Respondent must pay the balance outstanding on the admitted debt. It is still a substantial amount and if 1st Respondent is still prepared to honour the terms of the contract it must pay. The only material dispute of fact is whether the six vehicles that the Applicant's representative confirmed have been paid really are paid in full because in the affidavits, the bank denies this.

[27] The fact that it does not disown the agent who wrote the letters, that the communication is on the bank's letterhead

and duly stamped with the official stamp of the division makes it authentic. The bank does not allege fraud or deny that the writer of the letters is its employee.

[28] The dispute then is were those six vehicles indeed paid in full or did the Acting Sales Manager make a mistake? What was placed before him to enable him to write the six letters which are quite self-explanatory and do absolve the 1st Respondent from any further payments? Why would such a serious step have been taken by the official without making the necessary consultations to verify the position.

. . .

[30] I therefore find that it would be fair to order payment in terms of the FNB letter to Hippo Group of Companies dated 18th December 2017; which agrees to a minimum of M350,000-00 to be made from December 2017 to March 2018 and thereafter with effect from April 2018, monthly instalments which should settle the balance over 22 months.

[31] It means the total amount may be liquidated probably in less than 22 months depending on the outcome of the issues referred to oral evidence. It also means that the first Respondent is already in arrears and must pay up all instalments arrears to date as agreed in that letter or immediately surrender the vehicles except the six on which I will call oral evidence.''

[16] Molete J made the following order:

"[32] I therefore make the following order:

(a) That 1st Respondent is to pay Applicant all arrears of the letter dated 18th December 2017, failing which to surrender the vehicles within 14 days.

(b) That the question of whether or not the six vehicles have been paid in full is referred to oral evidence.

(c) The costs shall be in the cause".

[17] Molete J regrettably passed away after making that order. He could thus not proceed to hear the oral evidence as directed in para (b) of his order. That fell to Kopo J.

Proceedings before Kopo J

[18] What transpired before Kopo J and the resultant order is what is now before this court by way of appeal by Wesbank.

[19] It is common cause that the parties prepared and filed a pre-trial minute ('PT minute') which was to be the basis for the referral to oral evidence as directed by Molete J. The PT minute subsequently became the subject of dispute between the parties as Kopo J records. The learned judge considered not bound by it as will presently become apparent. Therefore, the PT minute does not require detailed treatment here especially in the view I take that what Wesbank sought to achieve through it was to reopen an issue determined to finality by Molete J.

[20] Kopo J heard the matter on 9 December 2023 and delivered judgment on 5 February 2024. In his judgment the learned judge stated:

“[3] I am now seized with the part that has been referred for adjudication through oral evidence. It is as a result of the foregoing that in preparation for the hearing of the said matter the parties held a pre-trial conference on which they reached a deadlock. Subsequently and as a result of the said deadlock, the court driven pre-trial conference was set down for me to preside on the 01st day of November 2023.

[4] On the 01st day of November, 2023, it became apparent that there was a serious deadlock and divergence on the status of the findings of the late Justice Molete and on what issues were common cause. The parties could not come to an agreement on "the status of the judgment and reasons of the order of Molete J and the implications of the common cause facts reflected in paragraph 19 of the judgment." The parties were therefore directed to prepare written submissions on the said issues and on the timing of the ruling on those issues.

[B] APPLICANTS CASE

[5] It is the Applicant's case that the finding of common cause facts was, prima facie and only preliminary. Such a finding, argues the Applicant, does make the matter res judicata because coming to such a conclusion would render the referral of remaining issues to oral evidence brutum fulmen. Advocate Roux SC therefore argues that the common cause findings may be disturbed by further evidence.

[6] It is also the Applicant's case that the Judgment by Molete J is not final and therefore he was not functus officio. The

Applicant argues that this judgment may be amplified by this court after hearing oral evidence.

…

[C] THE 1ST RESPONDENT'S CASE

[7] The 1st Respondent on the other hand argues that the common cause findings by Justice Molete are final and cannot be revisited. It is the 1st Respondent's view that the court should restrict itself to the determination of issues as in paragraph 32 (b) of the judgment by Justice Molete.

. . .

[9] It is important to understand that these are the facts that Justice Molete based himself on in making the order in paragraph [32] (a). Needless to say, these are not the only facts that he found to be common cause and that he relied on in making the said order.

[10] In coming to his decision, Justice Molete decided that he did not need to concern himself with all the vehicles or machinery. This is because the 1st Respondent admitted liability on them. The issue is therefore on the six (6) vehicles on which he made a ruling that there is a dispute of fact that would prevent him to come to a decision. Paragraph [32] (a) is therefore a final order and need not be revisited by this court. If it is not, it would mean that this court is being called upon to reopen that issue which would be analogous to starting the entire matter de novo.

[11] Advocate Roux argued that the said order is not final. He, among others, bases his argument on paragraph [31] of the judgment. The said paragraph states as follows;

> *"It means the total amount may be liquidated probably in less than 22 months depending on the outcome of the issues referred to in oral evidence. It also means that the first Respondent is already in arears and must pay up all instalments arrears to date as agreed in that letter or immediately surrender the vehicles except the six on which I will call oral evidence."*

[12] The emphasis he places on the above quoted paragraph is on the words "depending on the outcome of the issues referred to oral evidence". I do not agree. The words of Justice Molete only show that depending on results of the issues referred to oral evidence, the entire debt by the 1st applicant may be liquidated in twenty-two (22) months.

. . .

[14] Perhaps the most burning issue is with regard to paragraph [19] in general and I in particular in the judgment of Justice Molete. It is my considered view that this paragraph or sub-paragraph means nothing more than that the said letters do exist. The oral evidence will determine the truthfulness or otherwise of their content. In as far as the finding that the existence of such letters is common cause, it need not be revisited. What remains is captured succinctly in paragraph [28] of Justice Molete's judgment. It reads thus;

> *"The dispute then is were those six vehicles indeed paid in full or did the Acting Sales Manager make a mistake? What was placed before him to enable him to write the six letters which are quite self-explanatory and absolve the 1st Respondent from any further payments? Why would such a*

serious step have been taken by the official without making the necessary consultations to verify the position.

[15] These are the questions to query. The answer to these and other questions that may come to the fore will inform the finding on the truthfulness or otherwise of the content of the letters.

[16] The issue as to whether 1st respondent has complied with the order of Justice Molete per paragraph [32] (a) of his judgment is not one to be determined by this court. That order is final, clear and does not have a bearing on the issue referred to oral evidence. Moreover, the common cause findings by justice Molete need not be revisited. They are findings in this matter. Finding otherwise can cause the order of this court to be at cross-purposes with each other and that is what this court should avoid . . .''

[21] Kopo J's resultant order reads:

"a) The issue whether the 1st Respondent is in breach of paragraph [32] (a) of the order by Justice Molete is not an issue to be determined by this court in oral evidence.

b) The facts found to be common cause appearing in paragraph [19] of his judgment are final and shall not be revisited.

c) Costs shall be costs in the cause".

Grounds of appeal

[22] Wesbank's grounds of appeal read:

"The court a quo erred/alternatively should have found, in one, more or all of the following respects: –

*3.1 The court a quo failed to contextually and purposefully interpret the judgment by the late Molete J and should have found that the common cause facts in the Molete judgment (per paragraph [19]) **was, in law preliminary and prima facie at best, given the status of the proceedings,***

*Because, the order referring certain issues for oral evidence, which, as of necessity and for parity of reasoning, will influence any further proceedings to finality depending on the answer to **the question in paragraph [32] (b)** which is relevant to [32] (a).*

3.2 The final decision in the Court a quo (given the context, scope and ambit of the relief claimed by the Appellant, the evidence presented prior to the judgment by the late Molete, J and the further evidence to be deduced, relevant to the issues referred to for oral evidence (relating to allegations of fraud and dishonesty that could not be adjudicated on affidavit).

3.3 It is reliant on receiving further evidence which will enable the Court to bring the entire matter to finality - exactly in accordance with the phased initial relief asked by the Appellant in its Notice of Motion, it presupposed interim issues to be decided and ultimately a monetary judgement in favour of the Appellant.

3.4 That further oral and documentary evidence in relation to, not only the veracity of the six letters, but also any payments made such as referenced in [32] (a) post the initial order by Molete J and overall indebtedness concluding and finally disposing of the matter will be relevant and material to fulfil the function of finality before Court.

3.5 By not contextually interpreting the judgment by the late Molete J with reference to the evidence before him and the structure and context of the judgment viz-a-viz the evidence presented. It warranted a finding that further evidence may disturb the prima facie view uttered in the judgment by the late Molete J.

Thus, those issues referenced in the judgment will influence a final judgment on the matter relating to the indebtedness of Hippo Transport Limited viz the Appellant, or not.

3.6 The court a quo should have found that the Molete J order was not intended to be final but rather prima facie and preliminary at best, with an obvious need thereafter to establish a) whether payments were made and b) if not, what the overall indebtedness would then be.

3.7 The court a quo ***should have found*** *that Hippo Transport Ltd is bound by its admission in the judges-held pre-trail, held before Kopo J on 1 November 2023, agreeing that 32 a).*

3.7.1 This agreement at a pre-trial rendered the court a quo duty bound to receive evidence in relation to paragraph [32](a) of the judgment in order to arrive at a final judgment, to consider the effect of a finding in respect of paragraph [32](b)".

Submissions

[23] The parties' submissions on appeal mirror those made before Kopo J and are so ably summarised by the learned judge in his written reasons. In Wesbank's case they are repeated in the grounds of appeal. I find it unnecessary

therefore to rehash them here. I will where necessary refer to them in my discussion and disposal of the matter.

Discussion

[24] On Molete J's view of the case before him, two disputes arose which he had to resolve: Whether the payment obligations of Hippo Transport towards Wesbank were varied by the letter of 18 December 2017 and whether Hippo Transport had paid off 6 of the 13 vehicles under hire purchase. Paras 32(a) and (b) of Molete J's order are directed at those issues.

[25] If Wesbank was dissatisfied with the outcome, it should have appealed Molete J's order. It is not permissible for Wesbank to suggest that issues raised by it in the application that served before Molete J remained unresolved and should be addressed in the referral to oral evidence.

[26] I will cite some passages from Mr Roux SC's heads of argument on behalf of Wesbank to show that at the core of this appeal is an attempt to reopen issues that were before Molete J and should have been appealed against if Wesbank felt aggrieved that they were improperly or insufficiently dealt with.

[27] By way of context, in its notice of motion, Wesbank had sought the following relief, amongst others:

"8.4 Judgment against [Hippo Transport] for the payment of the full outstanding balance due in terms of the Hire Purchase Agreement; and or in the alternative;

8.5 Judgment for payment of the difference between the balance outstanding of the Hire Purchase Agreement and the assessed market value or sale price of the aforesaid vehicles and/ or equipment, in the event of there being an outstanding balance due by [Hippo Transport] to [Wesbank]".

[28] Further, according to Mr Roux in the heads of argument:

"1.6 The relief sought in para 8.4 and 8.5 of the Notice of motion requires a determination of inter alia compliance with paragraph 32(a) [of Molete J's order] and of course the outcome of paragraph 32(b) of Molete J's order.

1.6.1. It becomes clear ...that the Court order dated 13 December 2018, is clearly an interim order, susceptible to amelioration[1] depending on the remaining questions of fact that are yet to be tendered (either on affidavit or through oral evidence)".

[29] The PT minute by which Mr Roux places great store was therefore intended to 'ameliorate' [make better the bad or unsatisfactory] order of Molete J.

[30] Again, according to Mr Roux in his heads of argument:

[1] The *Concise Oxford English Dictionary* meaning of the verb 'ameliorate' is make (something bad or unsatisfactory) better.

> *"1.8.1. In particular the parties agreed that an issue requiring determination was whether Hippo Transport had been in breach of paragraph 32(a) of the Molete J order (which relates to paragraph 8.4 and 8.5 of the Notice of Motion that was postponed sine die), together with the ancillary consequences thereof".*

[31] Kopo J is then criticised for not giving effect to the PT minute in these terms:

> *"2.4. Respectfully, the Court a quo erred by failing to consider the fact that notwithstanding any interpretation afforded to the late Molete J's order, the parties had seriously agreed that the matter should be finalised and that a range of issues were to be determined in oral evidence before the Court a Quo in a pre-trail conference, reduced to writing".*

[32] As a matter of law, one cannot cavil Mr Roux's forceful submission that the parties were bound by their PT undertakings and admissions unless, in the context of this case, those had the effect of permitting Kopo J to thereby sit on appeal or review of Molete J's order – which they did.

[33] Wesbank's proposition on appeal that when oral evidence is to be led on the 6 vehicles, what remains due in terms of para 32 (a) of Molete J's order should also be determined, is to rewrite Molete J's order. The proposition implies that Hippo Transport could ignore para 32 (a) of the order after it was made. That cannot be: Hippo Transport had

to pay all unpaid arrears from 18 December 2017 to 13 December 2018, within 14 days or to surrender the vehicles.

[34] It is clear from para 32 (a) of Molete J's order that Hippo Transport became liable to pay Wesbank 'all arrears' which were due to Wesbank when Hippo Transport accepted the payment terms spelled out in the letter of 18 December 2017. The arrears due and payable on 18 December 2017 were to be paid as directed by Molete J. That liability was to be made good within 14 days. If not, Hippo was required to surrender the vehicles at the end of 14 days from 13 December 2018.

[35] Fourteen days after 13 December 2018, the issue between Hippo Transport and Wesbank had become one of enforcement by Wesbank against Hippo Transport. Molete J had separated the issue of the 6 vehicles from the liability that attached to Hippo under para 32 (a) of his order.

[36] It must be apparent from all that I have said so far that there is no merit in Mr Roux's submission on behalf of Wesbank that para 32 (a) of Molete J's order was interlocutory in nature.

[37] The argument that the parties had agreed in the PT minute that Kopo J should determine what Hippo's liability was overall is inconsistent with para 32 (a) of Molete J's order having final effect and being enforceable on its own terms.

[38] If what was intended post 13 December 2018 was to seek an interpretation of Molete J's order, there is a recognised procedure for doing so.

[39] As the learned authors of Herbstein and van Winsen write:

> *"Application may be made by one of the parties, on notice to the other, for an interpretation by the court of a judgment or order made by it in a suit between them. It is not necessary that the application should come before the same judge or judges who made the order or delivered the judgment, but it has been held that the proper court to determine the interpretation to be placed upon an order or judgment is a court of the same division that made it".*[2] (Footnote omitted)

[40] That did not happen here. It is therefore not open to Wesbank to argue, as its counsel did, that the PT minute was the parties' agreement to interpret Molete J's order.

[41] That Wesbank is trying to use the referral to oral evidence to reopen the entire case, is also apparent from Mr Roux's suggestion that rule 45(1)(b) of the High Court Rules could well become relevant in those proceedings. In the 'supplementary note on argument' Mr Roux argues that the judge seized with hearing oral evidence has the discretion under the Rules of the High Court:

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[2] Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th ed,Vol 1 at p 936.

". . . by virtue of Rule 45(1)(b) that empowers the Judge to mero moto rescind or vary an order or judgment in which there is ambiguity or a patent error or omission, to the extent of such ambiguity or omission. This may take place in the future proceedings foreshadowed by Molete J, once the full conspectus of evidence is heard to finally dispose of the lis between the parties".

[42] The rule provides:

"45 (1) The court may, in addition to any other powers it may have mero motu or upon the application of any party affected rescind or vary –

(a) . . .

(b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission…

(c) . . .''

[43] Despite Mr Roux's protestation to the contrary, reliance on the rule demonstrates that Wesbank considers that there is some ambiguity or patent error in Molete J's order. It could only pursue that line of attack by properly raising the issue in the High Court or by way of an appeal to this Court.

[44] By trying to make it an issue for determination before Kopo J in the PT minute and before this Court in its grounds of appeal, Wesbank is seeking a disguised appeal against para 32 (a) of Molete J's order. That is impermissible.

[45] The only *lis* between the parties after 13 December 2018 is whether Hippo Transport had paid off the 6 vehicles in respect of which Molete J found that he could not resolve the disputes on the papers.

[46] The appeal is therefore meritless. The parties are bound by para 32(a) of Molete J's order of 13 December 2018 to set the matter down for adjudication - by means of oral evidence – solely of the question whether the following vehicles had been paid off by Hippo Transport:

"1. Name of owner:	*Hippo Transport (PTY) Ltd*
Description:	*Volvo FH13 6x4*
Year Model:	*2015*
Chassis Number:	*YV2RSWODXGM931086*
Engine Number:	*D13558935*
2. Name of owner:	*Hippo Transport (PTY) Ltd*
Description:	*FH13 6x4*
Year Model:	*2015*
Chassis Number:	*YV2RSWOD6GM931084*
Engine Number:	*D13558930*
3. Name of owner:	*Hippo Transport (PTY) Ltd*
Description:	*Volvo FH13 6x4*
Year Model:	*2015*
Chassis Number:	*YV2RSWOD7FM927804*
Engine Number:	*D13530706*
4. Name of owner:	*Hippo Transport (PTY) Ltd*

Description: *Mercedes Benz Axor*
Year Model: *2015*
Chassis Number: *WDB9525636L933142*
Engine Number: *906927C1090195*

5. Name of owner: *Hippo Transport (PTY) Ltd*
Description: *Mercedes Benz Axor*
Year Model: *2015*
Chassis Number: *WDB9525636L933273*
Engine Number: *906927C10899000*

6. Name of owner: *Hippo Transport (PTY) Ltd*
Description: *Mercedes Benz Axor*
Year Model: *2015*
Chassis Number: *WDB9525636L879747*
Engine Number: *90627C107752".*

Practice guidance

[47] To avoid the kind of unnecessary disputes that have since arisen, it is always desirable when a matter is referred to oral evidence, for the court to give clear directions to the parties not only on the specific issue referred but the procedure to be followed in its adjudication. It is within Kopo J's inherent power to regulate the procedure to be adopted.

[48] Had I sat at first instance I would have given the following directions for the hearing of the oral evidence:

> *"(i) The application is referred for hearing of oral evidence in terms of Rule 8 (14) of the High Court Rules soley on the issue whether Hippo Transport Inc. (Pty) Ltd had paid off the*

following six vehicles [identify vehicles] in terms of the hire purchase agreement with Wesbank a division of the First National Bank of Lesotho.

(ii) The evidence to be led shall be that of any competent witness whom the parties or either of them may elect to call in compliance with the Rules of the High Court.

(iii) The parties will be entitled to procedural rights in terms of rules 34 and 37 of the High Court Rules.

(iv) Either party may subpoena any person to give evidence at the hearing in compliance with rule 40 of the Rules of the High Court, whether such person has consented or not.''

Order

[49] In the result, the following order is made:

1. The appeal is dismissed, with costs.

P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree:

S.P. SAKOANE
CHIEF JUSTICE

I agree:

P. MUSONDA
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV. J ROUX SC

FOR THE 1ST RESPONDENT: ADV. M.E TEELE KC