Hon Mofokeng J

CIV/T/160/79

IN THE HIGH COURT OF LESOTHO

In the Matter of :

TRUST BANK OF AFRICA LTD Plaintiff

v

PALEO TLELAI Defendant

JUDGMENT

Delivered by Hon. Justice F.X. Rooney
on the 8th day of July, 1980

In this action the plaintiff claims :

"(a) The cancellation of a Hire Purchase Agreement entered into by and between the plaintiff and the Defendant on or about the 15th day of December, 1977.

(b) Delivery by the Defendant to the Plaintiff of
(a) Toyota Tipper Truck, Engine No. 2D132976, and Chassis No. 33746.
(b) Toyota Tipper Truck, Engine No. 2D130798, and Chassis No. 32657.

(c) Payment as damages of the difference between the value of the said goods and the outstanding balance in terms of the said Hire Purchase Agreement.

(d) Costs of suit on an attorney and client scale."

The action commenced on the 12th July, 1979. On the 16th July, the plaintiff obtained a rule nisi from Cotran C.J. in terms of which the Deputy Sheriff was ordered to attach the trucks. On the 15th October, 1979 I made the rule nisi absolute subject to the plaintiff giving security to make restitution in the event that it was not successful in the action. The trucks are still in the possession of the Deputy Sheriff.

2/ In the .....

In the declaration the plaintiff alleged that the cash purchase price of the trucks was R12,000, and finance charges amounted to R3,162.72. The plaintiff further averred :

> 4(d) "Insurance was paid for the plaintiff in the sum of R2,761-20".

It was alleged that the defendant had paid a deposit of R4,000 and that he was "in default of his obligation under the agreement and at the date hereof is in arrears with his instalments under the agreement in the sum of R2,764.57". It was further alleged that the defendant was indebted to the plaintiff in respect of the balance of the purchase price in the sum of R9,011-86, but, no relief was claimed on account of that indebtedness.

In his plea delivered on the 25th September, 1979 the defendant admitted the agreement and those of its terms set out in the declaration, but, he denied that he was in arrears in his instalments to the extent of R2,764.57 and "puts the plaintiff to the proof thereof". This was an objectionable method of pleading in that by implication it qualified the denial to an extent that was left uncertain. It was in fact an attempt to avoid the real issue in dispute as will afterwards appear. The defendant went on to allege the existence of a "stop order arrangement with the Lesotho Bank" for the payment of instalments and went on to set out "evidence" of this arrangement in complete disregard of the well established rule that evidence, should not be pleaded (see Becks "Theory and Principles of pleading in Civil Actions" second edition) (I. Isaacs Q.C.) at P.33 and the cases referred to therein.

Further evasive pleading is to be found in paragraph 3 of the plea where defendant "admits that there is a certain balance outstanding and due to the plaintiff but denies that it amounts to R9,011-86". There followed an averment that there was "no legal basis" for the cancellation of the Hire Purchase Agreement. The plea abounded in denials which were either "vehement" or "emphatic", terms which added nothing to defendant's case. The use of such superfluous words is a waste of time and attorneys who prefer to indulge their taste for such phrases run the risk of being penalised by being deprived of or ordered to pay costs.

The defendant counterclaimed for R20,000 damages for the wrongful attachment of the two tipper trucks, arising out of the interlocutory proceedings already referred to. The counterclaim was denied.

3/ It was not ....

It was not until the hearing that the real issue between the parties came to light. "The whole purpose of pleading is to bring to the notice of the Court and the parties to an action the issues upon which reliance is to be placed. (Tredgold J. as he then was) in Durbach v. Fairway Hotel Ltd. 1949(3) S.A. 1081 at 1082. In the instant case the pleadings were so framed by both parties that the real issue was obscured.

The plaintiff ought to have alleged that the insurance premium paid on the vehicles was in the first instance for one year only and in the second instance for a further period and that it was the insurance and not the monthly instalments specified in the agreement that the defendant had neglected or refused to pay. If in his plea the defendant wished to challange these payments or their effects in relationship to the agreement he could well have done so. However I am quite satisfied that although both sides well knew the nature of the dispute, the case was presented to the Court in a manner which concealed the real issue between the parties.

The Hire Purchase Agreement Exhibit A contains a schedule indicating the money payable thereunder. It refers to insurance "Santam (1 yr. or 1 yr.) at R2,760. It provides for a total debt of R13,923.92 payable in 29 instalments of R464.13 a month and a final payment of R464.15 on the 14.6.80. Paragraph 6 (g) reads :

> "While this agreement is in force or while any amounts are still due by the Buyer, the Buyer shall·
>
> (g) Insure and keep insured the goods under the agency of of the Seller and advise the Seller of any claim arising thereunder immediately, it being understood that the Seller's interest will be endorsed on the policy. Should the purchaser not deliver proof of renewal of insurance to the Seller on the due date, the Seller shall, in his own discretion and without prejudice, be entitled to arrange insurance and debit the account of the Purchaser with the cost thereof plus finance charges and stamps. The Purchaser shall be responsible for payment thereof as determined by the Seller."

"Paragraph 7 reads :

> Should the Buyer fail or neglect to carry out any of the conditions of this agreement punctually or commit any breach threof, or fail to pay any instalment or other amount on due date, or assign his estate for the benefit of, or compromise with his creditors, or is sequestrated or liquidated, or die, or shall have made any incorrect or untrue statement or representation, or suppressed information in

4/ connection .....

connection with this agreement, or the proposal form, or do or suffer to be done any act or thing which may prejudice the Seller's rights, then the Seller shall be entitled, without prejudice to any other rights he may have (but subject to the provisions of the Hire Purchase Act, no. 36 of 1942 as amended, if the said act applies to this agreement):

(a) to demand forthwith payment of the total balance of the purchase price and any other amounts payable by the Buyer in terms hereof or

(b) to terminate the agreement forthwith in which event he shall have the right to·

(i) obtain the return and repossession of the goods and

(ii) retain all amounts paid by the Buyer and

(iii) claim payment of all instalments and other amounts still due by the Buyer in terms hereof or

(iv) in the alternative to (ii) and (iii) above, claim damages."

Paragraph 12 reads

" All monies paid by the Buyer in terms hereof shall be applied in the first place to the payment of any additional amounts payable by the Buyer and the balance shall be applied to the payment of the purchase price set out in the schedule. The Seller may further, in his own discretion and without notice to the Buyer, apply any monies received by him from the Buyer to the payment of any other amounts due by the Buyer to him whether in respect of goods sold, services rendered, monies advanced or any other debt whatsoever. The Buyer shall forthwith settle any shortfall which may arise in this manner in the amounts due in terms hereof."

Replying on these provisions the plaintiff, at the end of 12 months renewed the policy of insurance, paid the premium, appropriated the instalments received from the defendant to the settlement of that extra amount, allowed the instalments under the agreement to fall into arrear and proceeded to Court on the basis that it could exercise its rights to cancel the agreement etc. The plaintiff could have sued the defendant for the recovery of the amount due without resorting to the cancellation of the agreement and its consequences, but, it chose the more drastic remedy, no doubt because it believed that it would be more effective.

5/ The plaintiff .....

The plaintiff called one H.J. Coetzer who described himself as the Credit Manager of the plaintiff's bank. He did not know the defendant and had taken no part in the negotiations that led up to the Hire Purchase Agreement. According to his records, the defendant at the date of the trial in May 1980 had paid 26 instalments. He said that instalments due in September 1978 and October, 1979 had not been paid. He said that the plaintiff had renewed the insurance policies on the vehicles on the 9th December, 1979 at a cost of R2,369.00. He produced a letter dated the 10th January, 1979 (Exhibit B) addressed to the defendant which advised him of the payment and informed him that in consequence his monthly instalments had been increased from R463.13 to R686.54 a month.

Mr. Coetzer agreed in cross-examination that the defendant was not in default in respect of the instalments specified in the agreement (apart from the missing payments which he appears to have discovered only during the trial). He denied that the sum of R2,760 specified in the agreement as insurance was intended to cover the whole 30 months' period during which the agreement was extant. Coetzer could not comment on the cost of the premium. The defendant paid the original instalments by stop order directed to the Lesotho Bank and the payments were supposed to be transferred to an account at the plaintiff's bank. In its declaration the plaintiff claimed that arrears of instalments amounted to R2,764.57 as at that date (12th July, 1979). This figure comprises the R2,369.00 premium and interest thereon at 21% per annum. This is what the plaintiff claimed was due at the time the action commenced and I propose to ignore the claim that there was a default in payment by the defendant in September, 1978.

To assist in the calculation of the plaintiff's damages the plaintiff called Mr. C.R. Household an architect and sworn appraiser of this Court. He examined both trucks and estimated their present value as R1,050 and M3,100 respectively. Although it was the plaintiffs' intention to deduct this value, namely M4,150, from the damages it claims it has suffered by reason of the defendant's breach of contract. Mr. Household's evidence was attacked by Mr. Masoabi, who appeared to place some reliance upon the damaged and dilapidated state of the vehicles in question.

In his evidence the defendant said that he had been told, when he signed the agreement, that the insurance premium covered the whole period of 30 months. He further suggested that the premium was too high. He said that the cancellation of the agreement and the attachment were unlawful as he was not in arrears under his contract. He calculated his

loss at R99 a day from the time the vehicles were seized by the Deputy Sheriff.

Cross-examined, the defendant said he did not notice the abreviation (1yr or 1jr) on the Hire Purchase Agreement when he signed it. He was referred to a letter dated 25th April, 1979 written by his accountant Mr. Moloi and copied to the plaintiff. That letter reads as follows:

"Dear Sirs,

re: INSURANCE POLICY NO. 202-1904551 IN FAVOUR OF MR. PALEO TLELAI FOR TWO TIPPER TRUCKS.

We refer to the above comprehensive insurance policy for our client, Mr. P. Tlelai, for two tipper trucks purchased from Layland South Africa, Bloemfontein, in December, 1977, and financed by the Trust Bank, Bloemfontein.

We would like to have detailed explanation on the following:

1. The Hire Purchase Agreement form signed with the Trust Bank shows insurance premium with yourselves as R2,760.00 and the repayment period of the balance is thirty (30) months. Our client has been notified by the Trust Bank that the premium is for twelve months only. We find this premium to be exceptionally too high for the value of the vehicles involved for one year. This works out to 23% of the insured values.

   Would you kindly look into this and let us know soonest if this was in fact for one year or thirty months, and if it is correct, why is the premium so high?

2. Up to the present moment our client has not received a copy of the insurance policy in question. Would you kindly mail it to him without delay.

Your urgent attention to the above shall be greatly appreciated as our client is withholding payment for the premiums for 1979 that are now being claimed by the Trust Bank.

Yours faithfully,

(Sgd) V.M. Moloi."

The defendant said that this letter had been written because he realised that the claim being made by the plaintiffs was contrary to the agreement. Mr. Moloi wrote in the course of his duty without specific instruction from the defendant.

The defendant agreed that one of the vehicles had been damaged in an accident. He had advised the insurers but, not the plaintiffs.

7/ Nowhere in .....

Nowhere in the pleadings does the defendant contend that the agreement provided for 30 months and not 12 months insurance or that the premium paid by the plaintiffs was too high. Although the plaintiff failed in his declaration to specify the exact nature of his claim, this did not prevent the defendant from raising in his plea that the plaintiff had miscalculated the amount due by reference to the terms of the contract.

On the face of the contract is the abreviation (IY) or (IJ). It is clearly written. It limited the period covered by the policy to one year or one"jaar" in afrikaans. It was a notation which ought to have been obvious to the defendant and put him on enquiry as to its precise meaning. If the defendant considered at that time that the premium of R2,760 was too high he had the right to question it and make other arrangements satisfactory to the plaintiffs at his own expense.

The defendant was required by paragraph 6(g) of the contract to keep the vehicles insured. The plaintiffs had the right under the same paragraph to arrange insurance and debit the defendant with the cost thereof and determine the method of payment. The plaintiffs chose to collect the premium by increasing the monthly instalments payable. Clauce 12 gave the plaintiffs the right to appropriate monies received from the defendant to the payment of any additional amounts due by the defendant. They were thus entitled to accept the defendant's instalments and apply them to the recoupment of the premium paid, instead of to the purchase price of the vehicles.

By the preceedings instituted in July 1979 the plaintiff elected to cancel the agreement and obtain the return and possession of the vehicles. It claimed damages for breach of the agreement. This remedy is stated to be an alternative to the right to retain all payments made by the defendant and to claim payment of all instalments and other amounts still due by the defendant.

In his prayer to the declaration the plaintiff calculated its damages as being the difference between the value of the trucks and the outstanding balance in terms of the Hire Purchase Agreement. I do not think that such a formula can be applied as it implies that the plaintiff is entitled to retain what was paid prior to the cancellation of the agreement.

By virtue of Clause 7 the plaintiff had certain remedies to pursue at its election once it become aware that the defendant was in breach of the agreement. On the 12th July, 1979 the plaintiff issued a summons claiming cancellation and damages. That was an election to treat the contract as cancelled (Botes v. de Lange 1952(2) S.A. 655). A complicating factor is that the plaintiff although electing to treat the agreement as at an end has not only retained the monies already paid by the defendant, but, has continued to collect from him further instalments, as if the agreement

8/ was still .....

was still in force. Such conduct might have led to the plaintiff being non-suited at an earlier stage of the proceedings (see Sacher v. African Canvas and Jute Industries (Pty) Ltd 1952(3) S.A. 31 and Underhay v. Human 1959(1) S.A. 567. No plea of waiver was raised by the defendant. It is quite clear to me that the plaintiff cannot reprobate and approbate, it cannot cancel the contract and demand damages and at the same time retain all the benefits it has derived from the agreement.

The plaintiff sold the defendant the vehicles for R12,000. There are according to the evidence now worth only M4,150. On this account it has suffered damages to the extent of the difference, namely R7,850. In addition the plaintiff advanced the defendant R2,761.20 on the 15th December, 1977 and a further R2,369.00 on the December 1979 in respect of insurance premium. It may claim these sums as damages arising directly out of the contract, which brings the total capital involved to R12,980.

The finance charges stipulated under the agreement, which covered a period of 30 months, amounted to R3,162.72. I accept the proposition in Diemont and Marais "law of Hire Purchase in South Africa" 3rd Edition at 124 that a seller is entitled at common law to compensantory not merely restitutional damages, i.e. compensation both for the loss actually incurred and for the loss of profits (id quod interest). The loss of this interest (which includes the interest on the first insurance premium) must be allowed as damages. I am also prepared to allow the plaintiff R395.57 interest on the second premium between the date of payment and the commencement of the action. The plaintiff is entitled therefore to a total of R16,538.49. As against this there must be deducted the amount admittedly paid by the defendant under the contract which is as follows :

The deposit of	R 4,000 00
26 instalments of R464.13	12,067.38
Total	16,067.38

The difference is R471.11. There remain four instalments 3 of R464.13 and one of R464.15 in dispute. An instalment of R464.15 is said to have not been paid prior to the commencement of this action. The other 3 payments may or may not have been made since the proceedings began. The evidence either way is unsatisfactory.

The plaintiff is awarded an order :

(a) confirming the cancellation of the Hire Purchase Agreement.

9/ (b) .....

(b) the return of the two Toyota trucks

(c) damages at M471.13 with interest thereon at the rate allowed by the rules of Court.

In the absence of Agreement the defendant may not set off any of the disputed payments against the damages, but, he is free to recover such monies in separate proceedings.

The plaintiff claims costs on an attorney and client scale by reason of paragraph 1 of the agreement which contains an undertaking by the defendant to that effect. No doubt such a term in the contract would be binding upon a court which was concerned with a simple matter of debt collection. This was a defended action and a counterclaim. In all such cases costs remain a matter for the discretion of the trial court.

The previous orders for costs made on interlocutory proceedings must stand. The course of these proceedings was adversely affected by the plaintiff's failure to set out the exact nature of its claim in the declaration coupled with its failure to tender the amount already paid by the defendant on cancellation of the agreement. For these reasons I shall not award costs in fovour of the plaintiff.

The counterclaim was without merit and is dismissed with costs to the plaintiff on a party and party basis.

F.X. ROONEY
JUDGE

8th July, 1980.

For Plaintiff : Mr. Harley
For Defendant : Mr. Masoabi