IN THE HIGH COURT OF LESOTHO

In the matter between:

DORBYL VEHICLE TRADING FINANCE CO. (PTY) LTD. Plaintiff
(Formerly Commercial Vehicle Finance (Pty)Ltd.)

and

MAISA JOHANNES MATSABA Defendant

R U L I N G

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
Acting Judge on the 30th day of August, 1996

This is an application for absolution from the instance. The facts of the case are briefly as follows:

On 31st May, 1994 the plaintiff filed amended particulars of claim praying for payment of the sums of R369 806-63, R223 757-62 and R352 900-45 respectively as being balances arising out of written instalment sale agreements it had entered into with the Defendant. The said written agreements were duly attached as annextures "A", "B" and "C" respectively.

The Defendant in his plea filed of record on 20th May 1994 admitted the said agreements adding that the agreements were "cancelled by mutual agreement between the parties."

It is common cause from the pleadings that on 30th July 1992 the Defendant notified the Plaintiff in writing of his intention to terminate with immediate effect, the aforesaid agreement and that the latter accepted defendant's repudiation of the agreements on the same date.

In paragraph 3 of his plea the defendant further admits that he duly delivered the vehicles to the plaintiff who took possession thereof.

It is in paragraph 4 of his plea that the Defendant sets out his defence in the following words:

> **"Defendant avers that at the time of cancellation of the agreements aforesaid there was a further verbal agreement between the Plaintiff and himself to the effect that the value of the motor vehicles all of which were in very good condition would be used to defray the entire debt outstanding. This the Defendant avers was done and as such there is no money owing by Defendant to Plaintiff as alleged or at all."**

The Defendant further "avers that there is no balance outstanding and or due to Plaintiff as alleged or at all." This is in paragraph 5 of his plea.

Plaintiff called two witnesses in support of its case namely PW1 Reymond Marcel Kemp and PW2 Nevil David Smith after which it closed its case.

The evidence of PW1 Reymond Marcel Kemp is briefly that he is employed by Plaintiff as General Manager. He joined

the Plaintiff company in February 1994. He is also a director of the company. As Director and General Manager he is in control of documents relating to the matter before court. The accounting and financing functions fall directly under him as well as legal matters affecting Plaintiff company. He is the custodian of records of the company. He refers the court to and hands in with the consent of Mr. Matooane for the Defendant a certificate Ex. "A" of which he is the author. He executed the said certificate in terms of Section 16 of the agreements between the parties.

I pause here to observe that section 16 of the aforesaid agreements between the parties bears the heading "Certificate of indebtedness" and its full text provides as follows:

> **"A certificate under the hand of any director or manager for the time being of the Seller in respect of any indebtedness of the Buyer hereunder or in respect of any other fact shall be prima facie evidence of the Buyer's indebtedness to the Seller and/or of such other fact, it shall not be necessary to prove the appointment of the person signing any such certificate."**

I observe further that the said certificate Ex. "A" is in a form of an affidavit in which PW1 states inter alia, that the Defendant is presently indebted to the Plaintiff in the amounts claimed in the summons. In each of the three contracts concerned PW1 deals in his affidavit with figures relating to the balance as per contract, finance charges, less insurance refund, less valuation, agents costs valuation fees, plus

interest at the rate of 29%.

PW1's response to Defendant's plea that there was a further verbal agreement between Plaintiff and himself to the effect that the value of the motor vehicles would be used to defray the entire debt outstanding is that as far as he is aware there is no such agreement adding that "at that stage it would have been impossible to say what the value of the vehicles would be. At that stage we were waiting for the assessors to say what the value was."

The evidence of PW2 Nevil David Smith is briefly that in July 1992 he was employed at Busaf. He is aware of the case before court and he personally knows the Defendant. He had dealings with the latter. In 1992 he was instructed by his superiors to take three voluntary surrender documents to the Defendant for his signature. It is common cause that those documents related to the three written agreements between the parties as earlier stated. PW2 specifically told the court that those documents related to the three motor vehicles in dispute. He identified the signatures at the bottom of each documents as belonging to the Defendant and himself. The Defendant voluntarily surrendered the three motor vehicles in dispute and even signed. It is PW2's evidence that there was no agreement that the surrendering of the motor vehicles would extinguish the debts owing. PW2 handed the three voluntary surrender documents in question as evidence and they were marke EX "C" collectively.

It is against the background as briefly outlined above that Mr. Matooane for the Defendant applied for absolution from

the instance at the close of Plaintiff's case.

Now the law, as I conceive it to be, is that the test to be applied in determining whether absolution from the instance should be granted at the close of the case for the Plaintiff is whether there is evidence upon which a court, applying its mind reasonably to such evidence might (not should) find for the Plaintiff. The leading case in this regard is Gascoyne v Paul and Hunter 1917 TPD 170 at 173 per De Villiers JP.

It is further instructive to note that "the courts have frequently emphasised that absolution should not be granted at the end of the Plaintiff's evidence except in very clear cases, and that questions of credibility should not normally be investigated until the court has heard all the evidence which both sides have to offer -" Hoffman & Zeffertt: The South African Law of Evidence p.508.

Yet despite this clear principle of the law as propounded above Mr. Matooane for the Defendant seeks to rely on credibility. As I understand his argument he submits that Defendant's version appearing in paragraph 4 of his plea as aforesaid should be believed at this stage namely that "the value of the motor vehicles all of which were in very good condition would be used to defray the entire debt outstanding."

Mr. Matooane relies heavily on EX "B" and the main part of his cross examination of PW1 was directed at this exhibit.

I deem it convenient to reproduce the said exhibit which is a telefax emanating from Plaintiff's credit controller, one Mrs. Susan Buchling (Busaf). It is dated 6th May 1992 and it reads as follows:

"To : Mr. M.J. Mats'aba
Date : May 6, 1992
From : Susan Buchling (Busaf)
Re: Leyland Buses Settlements

Your settlement on the 3 Leyland buses is as follows:-

1990 Leyland 17/280 = R574057-39
1990 Leyland 17/280 = R390132-40
1990 Leyland 17/280 = R571993-50

Settlements are valid until the 27th May 1992.
The 4 ERF buses are fully paid for.

Yours faithfully,

Mrs. S. Buchling
Credit Controller."

PW1's response to this exhibit is that any reasonable person would doubt it because it is on Busaf's letter heads and that Busaf is a different company from Plaintiff. Moreover Mrs. Suzan Buchling had no authority to commit the plaintiff comapny as alleged in Ex. "B". It is further PW1's evidence that the said Mrs. Suzan Buchling is currently serving a term of imprisonment for having defrauded the plaintiff company in some insurance claims. It seems to me therefore that it may well be that she fraudulently executed Ex. "B" or that she did so bona fide. Her honesty and authority to bind the plaintiff are at stake. Whatever the case may be this court refuses to be drawn into matters of credibility at this stage.

I consider that the evidence of PW1 and PW2 as outlined above is such that a reasonable court properly advised thereto might find for the plaintiff. I attach due weight to the fact that PW1 was not challenged on his evidence based on EX "A" which is a clear prima facie proof of Defendant's indebtedness to the Plaintiff.

I have also not lost sight of Defendant's acknowledgement of indebtedness to plaintiff in EX "C" in which he states:

> **"I do hereby agree and undertake to pay to the Company, upon advice received from them or on their behalf, the amount of the difference between the balance of the purchase price due by me on termination (inclusive of Interest on Arrears, expenses and legal charges of whatsoever nature incurred by the Company arising directly or indirectly out of my default in respect of any of the terms and conditions of the said Agreement) and the Appraised Value of the said motor vehicle/ trailer or the nett proceeds of the sale thereof at the Company's option."**

There is again the aspect of the evidential burden as I see it arising from Defendant's aforesaid averment in paragraph 4 of his plea alleging a "further verbal agreement" that the other four buses (which are not the subject matter of this dispute) would be used to defray the entire outstanding balance. It is Defendant's case that these other four buses have been fully paid for but this is denied on behalf of plaintiff. It seems to me on the principle of he who alleges must prove it is logical that Defendant bears the evidential burden of proving the alleged payments particularly as Mr. Matooane put the following question to PW1:-

"Q: Is there a possibility that there might be bogus receipts issued and the money was not received by Dorbyl?

A: After investigations done there is no such possibility."

I am fortified in the view that I take in this matter by the judgment of Harcourt J. in Desai v Innan & Co. 1971 (1) S.A. 43 at 51 in which the learned judge had this to say:-

"Now it is clear that the onus in the general sense of the duty on a person claiming something from another in a court of law to satisfy the court that he is entitled to it (Pillay v Krishna and Another, 1946 A.D. at p 951) is on the judgment creditor. But where, as here, the judgment debtor seeks to avoid liability not by denying liability on the contract or the judgment based upon such contract, but upon a claim that the obligations involved have been discharged, then, in my judgment, the onus is upon him to establish such discharge. This was held to be so in regard to a plea of payment in Pillay's case, supra at p. 958."

With respect I entirely agree.

Finally I attach due weight to clause 18 of the agreement between the parties herein to the following effect:

This Agreement constitutes the entire Agreement between the parties hereto . No Agreement at variance with the terms and conditions of this Agreement shall be of any force or effect unless it is in writing and signed by the parties to this Agreement.

The Buyer declares that this Agreement was fully completed at signature thereof and that the particulars in this Agreement are correct in all respects."

It seems to me therefore that Defendant's reliance on the alleged "further verbal agreement" cannot stand.

In all the circumstances of this case I repeat even at the risk of over-burdening this judgment that there is evidence upon which a reasonable court properly advised might find for plaintiff. The application for absolution from the instance is grossly misconceived and it is hereby accordingly dismissed with costs.

M.M. RAMODIBEDI

J U D G E

For Plaintiff : Mr. Malebanye
For Defendant : Mr. Matooane