CIV/T/659/92

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

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge, on the 14th day of October, 1996.

The litigation between the parties herein commenced by way of a summons filed with the court on 11th December, 1992. On 31st May, 1994 the particulars of claim in the matter were duly amended and the plaintiff prayed for judgment against Defendant for:

"a. payment of the sum of:

(i) R369 806.63

(ii) R223 757.62

(iii) R352 900.45

being damages and being the difference between the value of the goods upon repossession and the balance outstanding on all amounts due to the plaintiff by the defendant.

b. Interest on the aforesaid amount and calculated at the rate of 29% per annum a tempore morae.

c. Costs of suit on the attorney client scale."

The matters which are common cause in terms of the pleadings in this case are as follows:

(a) That on or about the 15th April 1992 the parties herein entered into a written instalment sale Agreement Contract Number 015, Annexture "A" in terms of which the Defendant purchased from the plaintiff a certain Leyland 17/280 bus for the total sum of R781 015.68 leading to claim (a) in the summons.

(b) That on or about the 22nd April 1992 the parties herein entered into another written instalment sale agreement Contract number 016 Annexture "B" in terms of which the Defendant purchased from the plaintiff a certain Leyland 17/280 bus for the total sum of R530 345.88 leading to claim (b) in the summons.

(c) That on or about the 15th April 1992 the parties herein entered into yet another written instalment sale agreement, Contract number 017, Annexture "C" in terms of which the Defendant purchased from the plaintiff a certain Leyland 17/280 bus for the total sum of R778 203.00 leading to claim (c) in the summons.

(d) That the said buses were duly delivered to the Defendant.

(e) That it was an express term and condition of the said sale agreements that:-

(i) Defendant would pay to the plaintiff in respect of the agreements the amounts as specified and in the manner set forth in the aforesaid Annextures "A", "B" and "C";

(ii) that ownership of the goods would not pass to the Defendant until all amounts owing under the Sale Agreements had been paid in full.

(iii) That in the event of the Defendant failing to make any payment in terms of the Sale Agreements after it became payable, or failing to comply with any other provision of the Sale Agreements or any legal provisions applicable in respect of the said transactions, the plaintiff would be entitled to immediately terminate the Sale Agreements in which event the plaintiff would further be entitled to the return and possession of the buses and the plaintiff would be entitled to recover as liquidated damages the difference between the balance outstanding and the value of the buses.

(iv) That should the plaintiff and/or its assigns incur costs as a result of the Defendant's non-fulfilment of any provision of the Sale Agreements, the Defendant would be liable to compensate

such person for any tracing costs, and all legal costs as between attorney and client including collection commission, costs of valuation, dismantling disposal, transport and storage of the buses and costs of locating the goods.

(v) That the Defendant was liable for additional finance charges on all arrear instalments calculated at the maximum permissible rate as laid down in terms of the usury act of the Republic of South Africa from due date to the date of payment of the arrears.

(vi) That if the Defendant failed to comply with any of the provisions of the agreements the plaintiff would have the right, but not the obligation, to effect such compliance on behalf of the Defendant and that all costs and expenses incurred by the plaintiff in effecting such compliance or otherwise in protecting its title to the goods would be paid by the Defendant to the plaintiff on demand.

(vii) That the Defendant notified the plaintiff in writing of his intention to terminate with immediate effect each of the three sale agreements on the 30th July 1992."

The Defendant adds that the said agreements were cancelled by mutual agreement between the parties.

Indeed it is common cause that on the same date of 30th July 1992 the Plaintiff duly accepted Defendant's repudiation of the aforesaid agreements which were duly cancelled as aforesaid.

The Defendant admits that after cancellation of the agreements he duly delivered the vehicles to the Plaintiff who took possession thereof.

Although this is denied by Defendant, it is Plaintiff's case that in terms of clause 16 of the Agreement between the parties a certificate signed by a Director or Manager of the Plaintiff, whose appointment would not be necessary to prove, as to the indebtedness of the Defendant in terms of the Agreements would be prima facie evidence of the Defendant's indebtedness to the Plaintiff for the purpose of provisional sentence or summary judgment or for any other purpose. I understand the latter part to include the determination of the dispute before me.

Section 16 of each of the said three sale agreements provides as follows:-

Certificate of Indebtedness

> "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 am prepared to accept that this clause 16 fairly represents the parties' agreement and is as such binding upon them. It is significant that in his evidence before me the Defendant did not challenge this clause. I find therefore that the Defendant's denial of the terms of this clause in paragraph 5 of his plea was false and designed to

mislead the court.

The Defendant sets out his defence in paragraph 4 of his plea in the following terms:-

> "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."

He concludes in paragraph 5 of his plea by making the averment that "there is no balance outstanding and/or due to Plaintiff as alleged or at all."

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

The Defendant's immediate response was an application for absolution from the instance which, however, I dismissed with costs in my ruling of 30th August 1996 on the ground that there was a prima facie case in that there was evidence upon which a reasonable court properly advised thereto might find for the Plaintiff.

In his evidence PW1 Reymond Marcel Kemp told the court that he is employed by Plaintiff as General Manager having

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. It is his evidence that the accounting and financing functions fall directly under him as well as legal matters affecting plaintiff company. He is the custodian of the records of the company. He duly handed in with the express consent of Mr. Matooane for the Defendant a certificate EX "A" of which PW1 himself is the author. It is his unchallenged evidence that he executed the said certificate in terms of the aforesaid clause 16 of the agreements between the parties.

As I observed in my ruling of 30th August 1996 in the matter, 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.

It is significant that in each of the three sale Agreements concerned namely Annextures "A" "B" and "C" PW1 deals in his affidavit with figures relating to the balance as per each agreement, finance charges, less insurance refund, less valuation, agents costs valuation fees plus interest at the rate of 29% which he says was per agreement of the parties. I attach due weight to the fact that he is unchallenged altogether in this version and that such evidence of 29% interest was led without objection in this matter.

see Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa - Eighth Edition p 20.

It was further PW1's evidence that the Plaintiff company subsequently became aware of a telefax dated 6th May 1992 addressed by one Mrs. Susan Buchling to the Defendant. He duly handed in this telefax as EX "B" in this case. It is the last sentence in that EX "B" on which the Defendant's whole

defence in this case is based. That sentence reads as follows:-

"The 4 ERF buses are fully paid for." More about this later.

PW1 explained that it was precisely because of the confusion that might be created by Ex "B" that Plaintiff decided to amend its summons in order to defer the claim on the said 4 ERF buses to a later date as Plaintiff had a valid claim in respect of those buses which still had outstanding balances despite what the said Mrs. Susan Buchling had stated in Ex "B". Those 4 ERF buses are therefore not part of the Plaintiff's claim before me.

I observe that the whole of Mr. Matooane's cross examination of PW1 was directed at the said Ex "B" in an attempt to show that the said 4 ERF buses were surrendered by the Defendant "to defray the entire debt outstanding" as alleged in paragraph 4 of Defendant's plea. PW1 had no difficulty in denying this suggestion. As far as he was concerned there was no such verbal agreement between the parties. Apart from the fact that PW1 gave evidence in a convincing straight forward manner and impressed me as a truthful witness throughout his evidence I am particularly impressed by his explanation that at that stage when the 4 ERF buses were surrendered on 23rd January 1992 it would have been impossible to say what the value of the buses would be in as much as they were still awaiting the valuation of the assessors regarding such things as depreciation. I find therefore that this explanation is more probable than that of the Defendant and I accordingly accept it and reject the latter as false. Nor does the matter end there.

Clause 18 of the said Sale Agreements provides in part as follows:-

> "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 respect."

In the circumstances therefore I am satisfied that there was no such verbal agreement as alleged by the Defendant or at all. I am satisfied that if there were such agreement it would have been reduced to writing and signed by the parties in terms of Clause 18 of the Agreement as aforesaid.

In any event it is my view that any verbal agreement of the nature suggested by the Defendant in this matter would be at variance with the terms and conditions of Clause 18 of the written Sale Agreements between the parties as aforesaid and would as such be of no force or effect. I find myself in good company in this view regard being had to the remarks of the Learned Chief Justice J.L. Kheola in Dorbyl Vehicle Trading and Finance Company (Pty) Ltd. v Maoela Kuni Sekhoane CIV/APN/84/95 (unreported) wherein the Learned Chief Justice expressed a similar view in a substantially similar matter and I would with respect like to adopt what he said at page 8 of that case:-

> "The agreement allegedly reached by the respondent and the alleged applicant's agent was a breach of the terms of the agreement because it was not in

> writing. Clause 18 provides that 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 agreement which was allegedly reached by the respondent and the alleged applicant's agent was at variance with the terms and conditions of the original agreement under which the respondent was to pay monthly instalments. Under that agreement he was given a grace to pay the instalments at the end of this month."

Indeed PW1 has testified before me and I believe him in the circumstances that if there were any such verbal agreement as suggested by Defendant "it would have been reduced to writing and signed by the parties."

I have also not lost sight of PW1's unchallenged evidence which I believe that Mrs. Susan Buchling had no authority to bind the Plaintiff company and t hat the last sentence in Ex "B", namely "the 4 ERF buses are fully paid for," is wrong. The evidence before me is that Mrs. Susan Buchling was no more than a credit controller. It was PW1's unchallenged evidence that "Susan as credit controller had no authority to commit the company in the manner alleged." Nor was he challenged in his evidence that the said Mrs. Susan Buchling wrote Ex "B" without authority. I observe that even the letter head she used is not of plaintiff company but it is that of Busaf. Significantly PW1 went further to testify that there is a credit manager under whom the said Mrs. Susan Buchling falls. Again this was not denied in cross examination or in the evidence of the Defendant.

The cross examination on this issue as I see it was mainly confined to showing that third parties might be entitled to assume the correctness of Mrs. Susan Buchling's statement in Ex "B". In particular Mr. Matooane's question to PW1 on this point was as follows:

"Q: Would a third party have reason to doubt her (Mrs. Susan Buchling) if she said I have finished?

A: No but I would doubt Ex "B" because the letter head is in the name of Busaf a division of Dorbyl.

Q. Ct: Is it the same company as plaintiff company?

A: No it is not the same company.

Q: Who do you blame, the buyer or the crooked credit controller?

A: We have to look at the facts."

PW1 was adamant that he could see nowhere where it was stated that the debts had been paid. Then true to form came Mr. Matooane's question :-

"Q: Assuming Susan did say that the 4 ERF buses had been paid for, would you blame my client?

A: It depends. You would know that your debts are still there. Surely as a reasonable person he would know that his debt is not extinguished."

I find that ther is merit in this answer and I accept it as a reasonable probability and I shall certainly bear it in mind when dealing with the defence of the Defendant on whether he did pay for the buses in dispute as well as the 4 ERF buses.

There is then the evidence of PW2 Nevil David Smith who testifies that in July 1992 he was employed at Busaf. He is familiar with the case before me and he personally knows the Defendant as he had dealings with him. In 1992 he was instructed by his superiors to take three voluntary surrender documents to the Defendant for his signature. He handed those documents in evidence as Ex "C" collectively.

As I observed in my ruling of the 30th August 1996 in the application for absolution from the instance it is common cause that those voluntary surrender documents related to the aforesaid three written sale agreements between the parties herein. PW2 specifically told the court that those documents related to the three motor vehicles referred to in claims (a) (b) and (c) of the summons in this matter. He identified the signatures at the bottom of each such document as belonging to the Defendant himself. It was his unchallenged evidence that the latter voluntarily surrendered the three motor vehicles in question and even signed thereto.

Significantly it was PW2's evidence that there was no agreement that the surrendering of the motor vehicles in question would extinguish the debts owing by the Defendant.

In the said voluntary surrender documents Ex "C" the Defendant unequivocally acknowledges his indebtedness to the

Plaintiff in the following terms:-

> "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."

I turn then to deal with Defendant's evidence before me. His evidence in chief was surprisingly short and was briefly to the following effect:

In 1992 when the business wasn't so good he contacted one Susan in Durban. He actually went to her physically. He knew her because he used to work together with her. He used to pay his deposit to her at Busaf where he used to get the buses from. Incredibly he claims he did not know anything about Dorbyl as he only knew Busaf. He bought seven buses from Busaf. It was when the business wasn't going well that he consulted Susan as aforesaid and he asked that he should surrender the 4 ERF buses he was not using. Although he forgets the exact date this could have been early in 1992. Well I am prepared to accept PW1's unchallenged evidence that the 4 ERF buses were surrendered on 23rd January 1992.

It is Defendant's evidence that the said "Mrs. Susan" said he should bring those 4 ERF buses for valuation which he did because "I had told her I wanted to settle the Leyland buses forming the subject matter of this dispute." There is no doubt in my mind that the Defendant is not telling the truth in this respect because at that stage the Leyland buses had not yet been bought altogether. They were only bought in April 1992.

According to the Defendant however the said Susan thereafter told him she would send people to go and fetch the remaining 3 buses namely the 3 Leyland buses in dispute in this matter and that this was in fact done. He was then asked by his attorney Mr. Matooane:-

"Q: Did she give you the reason?

A: She said she was taking them for valuation," adding "I didn't know the details, I was just trusting the company." This could have been about July 1992.

He was then given a letter by the said Susan which mentioned that the 4 ERF buses were fully paid for. Presumably this was in reference to the last sentence in Ex "B" which reads as follows:

"TO : MR M.J.MATSABA
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
1992 Leyland 17/280 = R571993-50

Settlements are valid until the 27th of May 1992.

The 4 ERF buses are fully paid for.

Yours faithfully,

.....
Mrs. S. Buchling
CREDIT CONTROLLER"

Thereafter he received the present summons after six months. This was all the evidence of the Defendant in chief and I observe straight away that he did not even attempt to deal with or challenge the evidence of both PW1 and PW2 in the matter other than a reference to the letter Ex "B" in which it is alleged that the 4 ERF buses were fully paid for.

In cross examination by Mr. Malebanye for the Plaintiff the Defendant admitted having signed the instalment Sale Agreements in the matter. He however denied ever telling the Court that he surrendered a total of seven buses. I have no doubt in my mind that the Defendant was not being truthful in his denial on the issue. According to his evidence he first surrendered 4 ERF buses and subsequently the 3 Leyland buses forming the subject matter of this dispute. That clearly makes a total of seven buses in all.

The next question from Mr. Malebanye produced a complete turn about from the Defendant in the following terms:-

"Q: I am putting it to you that these seven buses you did not surrender them at the same time.

A: I didn't surrender the buses."

I have no doubt that the Defendant was not prepared to tell me the truth in this matter and he gave me the impression that he was determined to deny almost anything that was put to him in cross examination. For instance Mr. Malebanye put the following question to him:-

"Q: I further put it to you that the agreement you concluded in respect of the Leyland buses is dated April 1992.

A: It can happen that I did not buy this Leyland in 1992."

It was obvious to me that the Defendant was being deliberately evasive and the court put the following question to him for clarification:-

"Q. Ct: Is the date April 1992 denied?

A: May I explain. I did not buy these vehicles in 1992."

This denial was despite the Defendant's admission in his plea. He was then driven to concede "I agree that I signed this contract in April 1992."

The Defendant was then confronted with the three voluntary surrender documents Ex "C" in the matter. His response was to

pretend not to know English adding that he signed all the seven contracts with plaintiff company without understanding or knowing the contents thereof. He claimed that no one explained the contents of the contracts to him. I saw and observed the Defendant's demeanour in the witness box and he clearly gave me the impression that he was all out to deceive and mislead the court as best as he could. I did not believe him in his allegations as aforesaid particularly as these were never raised in the pleadings or in cross examination of plaintiff's witnesses. Indeed Defendant was finally forced to yield to the pressure of the following question by Mr. Malebanye:-

> "Q: I am putting it to you now that the signatures on Ex "C" are your signatures.
>
> A: Yes the signature is mine. Susan said this was the evidence that I had surrendered the vehicles."

Yet as soon as he was made aware that he signed Ex "C" in July 1992 well after Ex "B" which had been signed on 6/5/92 and that in Ex "C" he still acknowledged his indebtedness to plaintiff despite his claim that the 4 ERF buses had already set off his debt the Defendant made another dramatic somersault to deny his signature in Ex "C". The question was as follows:-

> "Q: I am putting it to you that even subsequent to Ex "B" which was signed on 6/5/92 you still signed Ex "C" in July 1992 indicating that you still acknowledged your indebtedness to plaintiff.
>
> A: That is not my signature."

Well I am satisfied that the signature on Ex "C" is that of the Defendant as he has himself earlier admitted. I observe that this signature is the same as that appearing in the written instalment sale Agreements in the matter which the Defendant admits as his. I am convinced that the Defendant is such an untruthful witness that he does not hesitate to change versions if and when it suits him. The truth obviously means nothing to him as long as he can have it his own way in the matter.

It was then significantly put to the Defendant that if he knew he had fully paid for the 4 ERF buses he wouldn't have surrendered them. After a very long pause his reply was that he had talked over with Susan. This obviously evasive reply provoked a further question from Mr. Malebanye:-

"Q: Are you seriously telling his lordship that just because you talked with Susan you surrendered the vehicles even though you had fully paid for them?

A: I did so because of the Leyland buses."

Nor was that the end of the Defendant's evasive replies to direct questions put to him. He was then asked:-

"Q: When was your last payment that extenguished your debt?

A: Susan is the person to know. I was having dealings with her."

The court then asked him by way of clarification whether he had receipts at all in respect of those 4 ERF buses but his reply

was that he had none as "it happened a long time ago."

It will be recalled as earlier stated that Defendant's case as set out in paragraph 4 of his plea is basically that there was a further verbal agreement between the plaintiff and himself to the effect that the value of the 4 ERF buses "all of which were in very good condition would be used to defray the entire debt outstanding;" As earlier stated, I am satisfied that there was no such verbal agreement and that the Defendant is being plain untruthful in this respect.

Since it is Defendant's case that the said 4 ERF buses were fully paid for and that they were used "to defray the entire debt outstanding", then it is my view that on the principle that he who alleges must prove, it is logical that the Defendant bears the evidential burden of proving his allegations therein and the alleged payments. In fact I made this quite clear in my ruling on the application for absolution from the instance yet the Defendant has dismally failed to discharge such proof.

In Desai v Innan & Co. 1971 (1) S.A. **43** Harcourt J had occasion to deal with a similar situation and I respectfully adopt what he said at page 51 of his judgment:-

> "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 judgement, 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."

There is no evidence that the 4 ERF buses were ever evaluated and if so what their value was. Mr. Matooane himself appears to concede this point in the last sentence of his Heads of Argument where he states:

> "It is submitted with respect that this action should be dismissed and the Plaintiff should be ordered to value the 4 ERF buses to set off the debt."

Consequently, it cannot be said that the 4 ERF buses were used to defray the entire debt outstanding without such valuation. I accordingly reject defendant's claim in this respect as false.

I gained the impression that the defendant had no genuine defence and that he probably thought Ex "B" had suddenly presented him with an unexpected bonus or a piece of luck like the Biblical manna from heaven but the circumstances and the stark realities of the case as aforesaid clearly suggest otherwise.

Mr. Matooane was then forced to embark on a fishing

expedition in his cross examination of PW1 to the following effect :-

> "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."

Well the fact of the matter is that the Defendant failed to produce any receipts for payments be they genuine or bogus. He failed to call a single witness to substantiate his claim. He did not even seek to have the said Mrs. Susan Buchling called as a witness in support of his defence. It is true she was reported to be in gaol but there were several avenues that the Defendant could have availed himself of to obtain the evidence of the said Mrs. Buchling; for instance he could have applied that her evidence be taken on commission or at least applied to file her affidavit.

Nor has it escaped my mind that the unchallenged evidence before me shows that the said Mrs. Buchling was imprisoned for having defrauded the plaintiff company of insurance claims. Her execution of Ex "B" as alleged consequently becomes even more suspect as there may well have been a collusion between herself and the defendant in the matter. Her honesty and integrity are certainly at stake. I observe that Mr. Matooane for the Defendant actually referred to her as the "crooked Credit Controller" in his cross examination of PW1. Yet I am now expected to treat her Ex "B" as genuine.

In any event I am satisfied that even assuming that Ex "B" is correct and that the 4 ERF buses were fully paid for, the Plaintiff's evidence before me which I believe in the circumstances of the case shows that there are balances owing in respect of the three Leyland buses forming the subject matter of the dispute before me. In my view the Defendant would not have surrendered the said Leyland buses if it was true that they had been fully paid for in the sense that the 4 ERF buses had been "used to defray the entire debt outstanding" as alleged.

In all the circumstances of the case I am satisfied on a balance of probabilities that the Defendant owes the Plaintiff as claimed in the summons.

As to costs, Clause 12.3 and 12.3.3. of the instalment sale Agreements provide as follows:-

"12:3 The Seller is further authorised to perform any obligation of the Buyer which the Buyer fails to perform on the Buyer's behalf and to claim the costs thereof from the Buyer on demand including without limitation -

:

:

12:3:3 All legal fees, costs and disbursements incurred by the Seller irrespective of whether action has been instituted or not and irrespective of in which court action is instituted on the scale as between an attorney and his own client;"

There shall accordingly be judgment for Plaintiff as prayed in the amended summons with costs on attorney and client scale and I so order.

M.M. RAMODIBEDI
ACTING JUDGE

For Plaintiff: Mr. Malebanye

For Defendant: Mr. Matooane