CIV/APN/431/96

## IN THE HIGH COURT OF LESOTHO

In the application of:

JULIET LISENYEHO — Applicant

and

MAHLOMOLA TOKI — Respondent

## JUDGEMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 6th Day of February, 1997.

This is the extended return day of a Rule Nisi obtained by the applicant against the respondent and calling upon the latter to show cause, if any, why:-

1.(a) the normal forms and periods of notice provided by the rules of court shall not be dispensed with and this matter treated as one requiring urgent attention.

(b) the respondent shall not be directed forthwith to deliver to the applicant through the Sheriff or his Deputy a TOYOTA HI - ACE 2.2 Super 16 Engine No. 4Y0172940 and Chassis No. YH6389003295 whose current registration numbers are AJ441.

© failing the return thereof to the applicant, the sheriff or his Deputy shall not be authorised and directed to take possession

of the vehicle wherever the same may be found and deliver it forthwith to the applicant.

(d) the respondent shall not pay costs of this application on the scale between attorney and client.

(e) the applicant shall not be granted further and/or alternative relief.

2. pending the return day, the order in terms of 1(a), (b) and © shall not operate as an interim order with immediate effect.

The respondent intimated intention to oppose confirmation of the Rule Nisi. Affidavits were duly filed by the parties.

The facts, disclosed by the founding affidavit, were that in June, 1996 her sister-in-law and the respondent went to the applicant in Johannesburg - the Republic of south Africa. The respondent expressed a wish to purchase a combi for a taxi transport business in Lesotho. The applicant then assisted by taking the respondent and her sister-in-law around the dealers in Johannesburg. Eventually the respondent identified, at the Super Car Sales Dealers, the combi he wanted to purchase. He was required to make a deposit of M10,000 which amount the respondent did not have. He had in his possession only M7,000 which the Super Car Sales Dealers were not prepared to accept as deposit from him.

However, because she was known to, and had an account with, them the Super Car Sales Dealers were prepared to accept the M7,000 as deposit from the applicant if she herself purchased the combi. The applicant then agreed to purchase the combi in her name and under her account. She used the respondent's M7,000 which the Super Car Sales Dealers were quite prepared to accept from her as deposit.

The Applicant then signed a credit Agreement with Bankfin, a financial company, for the purchase of a 16 seater HI -ACE 2.2. super 16 at a total price of M97,374-72. She did so on the understanding that the respondent would, in the future, pay monthly instalments directly to her and, in turn, she would pass the money to the Financial company (Bankfin). As proof of her averments that she had purchased the combi and signed the Credit Agreement applicant attached annexure "JL1", a signed copy of her credit agreement with the Bankfin company.

In his answering affidavit, the respondent averred that in July 1996, he and the applicant entered into a written agreement whereby he purchased, from the latter, the combi, the subject matter of this dispute, at the cost of M15,000. As proof thereof the respondent attached annexure "MT1" (the written agreement).

According to the respondent, at the time they concluded the deed of sale (annexure "MT1") the applicant did not inform him that the combi was under hire purchase agreement and she could not, therefore, pass ownership thereof to him.

On 24th July, 1996, he and the applicant signed an application for change of ownership of the combi. As proof thereof, the respondent attached annexure "MT2" (the completed application form). The combi was cleared by the South African police and the Lesotho police per annexures "MT3" and MT4" dated 15th July, 1996 and 30th July, 1996, respectively.

The respondent denied, therefore, the applicant's averment that she had assisted him to purchase the combi, the subject matter of this dispute, as alleged in her founding affidavit.

In her replying affidavit, the applicant denied that she had sold, per annexure "MT1" which did not even bear her signature, the combi, the subject matter of this dispute, to the respondent. She did not know the chief whose date stamp impression and signature appeared on annexure "MT1". Nor did she affix her signature on annexure "MT2 as suggested by the respondent. Her purported signature on annexures "MT1" and "MT2" was, therefore fraudulent.

It is significant to observe that a list of signatures appear on annexure "MT1" The first one purports to be the signature of the applicant. Likewise the signature purporting to be that of the applicant, as the previous owner of the combi, appears under "18A and B" on the reverse side of annexure "MT2". One does not, however, require to be an expert in hand-writing to realise that the purported signature of the applicant on annexure "MT1" is quite different from her purported signature on the reverse side of annexure "MT2". Indeed, the purported signature of the applicant on annexures "MT1" and "MT2" is clearly different from her undisputed signature at the bottom of annexure "JL1". It is not in dispute that in June, 1996 the applicant bought, under hire purse agreement, the combi, the subject matter of this dispute, from Bankfin company, at the total cost of M97,374-72. However, according to the respondent, in July,1996, the applicant sold to him, per annexure "MT1", the same combi at the price of M15,000.

If it were true that he had purchased this combi from the applicant at the price of M15,000, the respondent would no doubt have annexed an acknowledgement receipt or documentary evidence of some sort as proof thereof. He has not. I am not convinced that the respondent was testifying to the truth on this point. Moreover, I find it incredible that in July,1996 the applicant could have sold to the respondent for M15,000, the combi which she had bought under hire purchase

agreement in June, 1996 at the price of M97,374-72 thus leaving a huge balance which she had to pay to Bankfin Company as the seller.

As regards the purported change of ownership, it is significant to note that there is no indication that the application for change of ownership annexure "MT2", has been presented to the registering authority, pursuant to the provisions of S.11(2) (a) of the Road Traffic Act 1981. Nor is there any indication that the combi, the subject matter of this dispute, has been cleared in accordance with the law relating to customs in terms of the provisions of S.11(2) (a) (v) of the Road Traffic Act, supra.

In the circumstances, I am inclined to accept as the truth the applicant's story that she did not affix her signature on annexures "MT1" and MT2" and reject as false the version of the respondent that she did. That being so, it is reasonable to infer that the applicant neither sold the combi, nor passed the ownership thereof to the respondent as the latter clearly wished the court to believe.

Even if I were wrong and it is held that the applicant did sell the combi to the respondent, it is important to bear in mind that the respondent does not dispute the applicant's averment that she bought the combi by credit and it was under hire-

purchase agreement at the time annexure "MT1" was purportedly concluded. He only contended himself with saying the applicant did not inform him that the combi was under hire purchase agreement and, therefore, not her property.

It is not really in dispute that after she had bought, per annexure "JL1", the combi, the subject matter of this dispute, the applicant took delivery thereof. She then passed the combi to the respondent who, she later found, registered it in his name under Lesotho registration numbers AJ441. According to her, applicant had not authorised the respondent to register the combi in his name. Nor could she do so as the combi was still under hire purchase agreement and, therefore, not her property.

In the averment of the applicant contrary to the understanding that he would, in the future, pay the monthly instalments directly to her, the respondent never paid any such instalments and she herself had to pay, out of her own pocket, M1,500 as part of the instalment for the month of July 1996. She attached annexure "JL2" as proof thereof.

When the respondent failed to pay the first instalment, applicant came to him to inquire about it. His reply was that the combi had broken and he would try to pay

after it had been repaired. According to her, applicant advised respondent to take it back to the Republic of South Africa for repairs as it was still under guarantee. He refused.

After she had made part payment of the first instalment, applicant was unable to pay further monthly instalments and as of September 1996, the amount payable in arrears was M4,490-06. As proof thereof she attached annexure "JL3". The agents of the Bankfin company had already been to her house to repossess the combi but did not find it as it was in Lesotho.

Applicant averred that she had placed, as security for the amount owed to the Bankfin company, her financial investments with financial institutions totalling almost M100,000 being proceeds from her late husband's insurance benefits. The Bankfin company had no option but to either repossess the combi or pay itself from her investments. Indeed, the Bankfin company had already threatened to call for the security on 30th November, 1996 if the combi were not returned or the arrear instalments brought up to-date. If that were to happen, applicant stood to suffer immense financial loss which she would not easily recover , at a later stage, from the respondent, regard being had to his demonstrable unwillingness to pay the arrear instalments. The deterioration of the combi by use or abuse would not be recovered

even by insurance.

It is to be borne in mind that the averment of the applicant that the Bankfin company, as the seller, demands the return or repossession of the combi due to the respondent's refusal/neglect to pay is not really in dispute. Now, assuming the correctness of my findings that it was bought under a hire purchase agreement and the respondent refuses/neglects to pay in terms of the agreement, it must be accepted that the combi remains the property of Bankfin Company as the seller. That being so, there can be no justification in the respondent's retention of the combi against the demand of the Bankfin company for its return or repossession.

In the result, it is obvious that the view that I take is that this application ought to succeed and it is accordingly ordered. The <u>Rule</u> <u>Nisi</u> is confirmed.

**BK MOLAI**

**JUDGE**

6th February, 1997.

For Applicant: Mr. Phoofolo

For Respondent: Mr. Matooane.