CIV\APN\89\96

IN THE HIGH COURT OF LESOTHO

In the Application of :

DORBYL VEHICLE TRADING FINANCE CO (PTY) LTD **Applicant**

vs

DANIEL MOTSEKO MOKHESENG **Respondent**

J U D G M E N T

Delivered by the Hon. Mr Justice M L Lehohla on the 23rd day of June, 1997

On 19th March, 1996 an *ex parte* application was tabled by the applicant before my Learned Brother Mofolo J for an Order in the following terms :

1. Dispensing with the forms and provisions of the Rules of Court and dealing with the matter as one of urgency as contemplated in terms of Rule 8(22) of the Rules of Court.

2. That a *Rule Nisi* do issue calling upon the Respondent to show cause on a date to be determined by the above Honourable Court why an Order in the following terms should not be

issued:-

2.1 Declaring the Instalment Sale Agreement marked "B" to the Applicant's Founding Affidavit, to be cancelled;

2.2 Directing the Respondent to deliver to the Applicant, 1X 1991 Model Mercedes Benz 0811 Speedliner Passenger Bus bearing engine number 30490040 10574947 and chassis number 688177618 49851 ("the Bus");

2.3 Failing the return of the Bus to the Applicant forthwith, the Sheriff or his Deputy be authorised and directed to take possession of the Bus wherever the same may be found and to deliver same to the Applicant;

2.4 That the Respondent pay the costs of this Application on the scale as between attorney and client, alternatively, directing that the costs of this Application be costs of the action or application to be instituted for the determination of the relief set out in 2.1, 2.2 and 2.3;

2.5 Alternatively to 2.2 to 2.4 above, and pending the outcome of this Application, proceedings for the determination of the Applicant's rights to the return of the Bus, the Sheriff or his Deputy attach and remove the Bus wherever the same may be found and to hold the Bus in his possession under attachment;

2.6 Granting the Applicant further or alternative relief.

3. That pending the return day herein the Order in terms of 2.2 and 2.3, alternatively 2.5, operate as an Interim Order with immediate effect.

4. Granting further and\or alternative relief.

The Rule was granted in terms of prayer 2.5 of the Notice of Motion

returnable on 1st April, 1996. The Rule was extended at intervals over a long period of time till the matter was heard by me on 13th June, 1997.

It is important even at this early stage to note that the Order granted in terms of prayer 2.5 in its vital aspect directs that the Bus be attached by the Sheriff or his Deputy and kept in possession of either of the above under attachment. This contrasts sharply with prayer 2.2 which sought to have the bus delivered to the applicant.

The application before me is opposed. Indeed at the hearing *Mr Phafane* for the respondent raised points *in limine* against the above application.

One of such points was that contrary to provisions of Rule 8(11) to the effect that replying affidavits be filed not later than seven days of the filing of opposing affidavits the applicant filed its replying affidavits almost two months outside the time allowed in that while the opposing affidavit was filed on 23-4-96 (see page 28 of the record) the replying affidavit was filed on 4-6-96. The replying affidavit was filed without any prayer for condonation of late filing of such affidavit. *Mr Phafane* prayed that this affidavit should be ignored by this Court therefore.

But Rule 30(1) regarding irregular proceedings much held in question by *Mr Phafane* provides that :

> "Where a party to any cause takes an irregular or improper step any other party to such cause may within fourteen days of taking of such step or proceeding apply to Court to have it set aside :
>
> > Provided that no party who has taken any further step in the cause with knowledge of the irregularity or impropriety shall be entitled to make such application.
>
> Sub(2) provides that an application in terms of sub-rule (1) shall be on notice to all parties in the cause specifying particulars of the irregularity or impropriety involved".

It appears to me therefore that both parties are in equal fault. The rule in such circumstances is that the party who raises a complaint is the one who attracts the court's disfavour on basis of the principle that it is distasteful for pot to call kettle black. ***Bank van die Oranje-Vrystaat BPK vs Cronje*** 1966(4) SA at p.4 is authority for the view that :

> "A notice of intention to defend, which is *ex facie* late but which has been filed with the Registrar cannot be disregarded as it is not necessarily irregular. When a pleading is filed late and a party objects thereto on the ground that it is irregular then he must not proceed with the action as if the pleading does not exist. He must apply to the Court, in terms of Rule of Court 30, for the setting aside thereof".

On the above basis I would reject the point raised *in limine* seeking to persuade me to discard and ignore the applicant's replying affidavit. I would

however hasten to indicate that in making the above ruling in favour of the applicant I am not unmindful of the robust approach adopted by the Lesotho Court of Appeal against irksome laxity and disregard of Rules of Court by legal practitioners in general in C. Of A. (CIV) 17 if 1990 ***Strong Thabo Makenete vs Major-General Justin Metsing Lekhanya and 2 Ors*** (unreported) at p.4 where Ackermann J.A. as he then was said :

> ".....many legal practitioners are displaying a lamentably lax attitude to the Rules of Court bordering on the contemptuous. The attitude evinced seems to be that the Rules are unimportant, can be disregarded at will and that non-compliance will simply be overlooked or condonation granted as a matter of course and right. It is time that practitioners' minds were disabused of this much mistaken impression and the misconceived idea that their disregard of the Rules will be overlooked because of the prejudice their clients might suffer. Clients who suffer loss because of omissions on the part of their legal representatives may, in appropriate circumstances, have remedies against their advisers".

The next point raised *in limine* is concerned with jurisdiction.

Clauses 23.1 and 23.2 of the Instalment Sale Agreement at page 71 of the record provide at .1 :-

> "The Buyer hereby consents to the jurisdiction of the Magistrate's Courts having jurisdiction over its person in respect of all proceedings in connection with this Agreement"

at .2 :-

> "Notwithstanding the aforegoing the Seller shall be entitled to institute all or any proceedings in connection with this Agreement in any division of the Supreme Court of South Africa having jurisdiction".

In the light of the clear meaning of the two clauses mentioned above it seems to me inappropriate that the applicant sought without the respondent's consent to move this application in this Court which is neither a Magistrate's Court having jurisdiction in the matter nor any of the divisions of Supreme Court of South Africa having jurisdiction in the matter. Suffice it to say the respondent in signing this agreement in regard to the jurisdiction may very well have had the question of the scale of costs in mind as indeed the Magistrate's scale is lower than the High Court's. I would in that regard uphold the respondent's point raised *in limine* in this regard.

I may just refer to section 6 of High Court Act 1978 specifically reading :

> "No civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court) shall be instituted in or removed into the High Court, save
>
> (a) by a judge of the High Court acting of his own motion; or
>
> (b) with the leave of a judge upon application made to him in Chambers, and after notice to the other party".

This Court accordingly takes a dim view of the fact that the applicant failed to heed the clear provisions of section 6 of the Act in question above. By their own act and free will the parties to the instalment contract sought to subvert the law as to jurisdiction and opted for the magistrate's court jurisdiction in Lesotho or the Supreme Court in South Africa. It does not lie in any one of them to unilaterally retract from an undertaking solemnly taken between the two of them.

The applicant through its deponent in the replying affidavit has indicated that the R16 000-00 and R9 000 regarding which payments the respondent complained that he has not been credited relate to an agreement concluded before the one in the instant case. This seems to be so.

The applicant has further indicated in bold type in RA1 (onwards) payments which the respondent complains that though he effected he nonetheless was not credited therewith. The first two appear as R8 000 and R9 000 at page 63. Next are reflected

R 9 645 - 99
R16 000-00
R10 000-00
R13 000-00
R 7 000-00
R 3 900-00
R10 000-00
R10 000-00

at page 64 and

R10 000-00	
R10 000-00	at page 65
R30 000-00	
R 8 000-00	at page 66
R 9 354-01	
R 7 000-00	
R10 000-00	
R 3 000-00	
R10 000-00	at page 67

and

R10 000-00	
R10 000-00	at page 68

However this is not the end of the matter.

The transcript of proceedings at page 63 goes as follows :-

Ct. ".....what I want to know(Mr Malebanye) is whether now what you are saying is that all the receipts have been accounted for at this stage?

Mr Malebanye: No your Lordship, I wouldn't say that.

Ct. That's where respondent's case is. He says look I have paid and I have got these receipts but this is not reflected towards reducing the total capital debt.

Mr Malebanye: Yes O.K. I am saying your Lordship grated that the receipts have not all been reflected, yes, but there are receipts which have been reflected and as far as I am aware they could be .....

Ct. But now the ones that you are showing me are they the ones that he said had not been or the ones that you are showing me are the ones you say he said had not been accounted for?

Mr Malebanye: Yes because Annexure A .....are his receipts that I was saying if you look at page thirty something and compare it with page 64 they

are his receipts - Annexure A.

Ct. And then the answers to them were made good by what appears on page 64. It was in response to his queries that page 64 reflects these things.

Mr Malebanye: Yes your Lordship .....His Lordship will realise that he still falls short of .....he still has arrears. Of course it reduces our alleged arrears but he still remains in arrears in my submission your Lordship.

Ct. Yeah! But now if he has certain receipts which are not accounted for it becomes difficult to know by how much - which brings us to his case that this thing should have been gone through by way of a trial, in which case such things would have been ventilated by request for further particulars as to how was a certain sum reached and then it would have been ventilated in the pleadings. Even as we speak or stand now, true enough he as the respondent may have exaggerated or he has in fact exaggerated but the fact remains some of the receipts that he has referred to have not been taken account of.

Mr Malebanye: Yes your Lordship, but I ....."

It was in the course of this interchange that it became somewhat obvious that *Mr Malebanye* saw prudence in being ready to haul down his colours.

Having thus scented blood *Mr Phafane* was quick to indicate that the concession made by *Mr Malebanye* that in fact the applicant has omitted to take into consideration certain receipts, is fatal in view of the fact that it is no longer safe for the Court to decide this matter on papers.

I am of the view that if it is not safe on papers to say the respondent is in arrears then the applicant should have proceeded by way of action and not by way of Motion *ex parte*. As the applicant indeed did so then the applicant was thereby taking a risk which I am afraid the consequences whereof cannot be avoided at this stage. A genuine dispute of fact has arisen which the applicant ought to have foreseen but didn't pay any heed to. Any hitches which naturally would pertain to this dispute of fact would easily have been clarified in any of the stages provided precisely for such eventualities. These are request for further particulars, request for further and better particulars, pre-trial conference and cross-examination in a proper trial.

Moreover there seems to have been remissness of the sort denounced by Munnik J in ***Mangala vs Mangala*** 1967(2) SA page 415 in reference to Rule 6(12)(b) which reads the same as our High Court Rule 8(22)(b) stating that the applicant must in his affidavit or petition

> "set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he could not be afforded redress at a hearing in due course".

On proper reading and understanding of Munnik J's rationale behind this statement it would seem that it is not enough for an applicant in circumstances such

as in the instant case to just proceed *ex parte* on the barest of reasons that "the bus in the possession of the respondent is deteriorating". If it could not suffice in ***Mangala*** above in spoliation proceedings which by nature are urgent, to say "I have not a roof over my head; and I want to get back into the house" it would appear the bare reason given by applicant in motivating the instant application is so much the more inadequate.

With regard to the contempt charge appearing in the applicant's reply against the respondent apart from being not properly motivated, it does not accord with the order granted, namely that it be kept in the sheriff's or his deputy's custody in contrast to applicant's claim that contempt has been committed in that respondent contrary to the court order has not restored the bus to it.

As to urgency my consideration of the rule based on a variety of cases in this respect leads to different conclusions deriving from different facts. However what is basic and deriving from Ackermann J.A's instructive dictum in C. Of A. (CIV) No. 18 of 1991 ***Khaketla vs Malahleha & Ors*** (unreported) is that one cannot sit back for months on end and all of a sudden move *ex parte* on the basis that the matter has become urgent. The fact that it cannot be said with barest clarity by the applicant that the amounts in respect of which the respondent has receipts yet the

balance of the debt corresponding thereto in the applicant's books for an unexplained reason does not seem to be affected in respondent's favour as it should, suffices to illustrate the point.

To buttress the point I referred to about lack of urgency in this application, I deem it significant that when the applicant moved this application on the basis of urgency a stage had been reached in its calculation of arrears in its books. This was the stage which the applicant felt the Court should intervene in its favour against the respondent. But as evidence shows the calculation was based on inadequate information relating to the amount of arrears owed to the applicant by the respondent. In fact the amount of the arrears was at the time less than that reflected in the applicant's books which failed to reflect the actual position which in fact redounded to the respondent's credit. The courts have always taken a dim view of attempts to seek final orders flowing from applications moved *ex parte* and without reference to the other side whose story if heard in an application on notice would have made the court think differently of the applicant's story or outright refuse to grant the order sought *ex parte*. Thus to the extent that the applicant was prompted to move this application urgently on the basis of misinformation regarding the state of the arrears owed, it would seem the applicant was a step or more too quick in moving this application. It would not therefore be proper to say it makes no

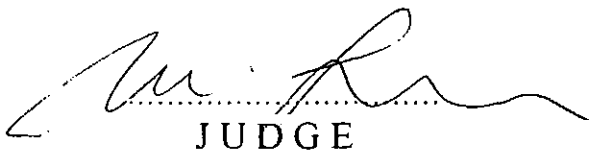
difference what the state of arrears was when the application was moved as long as there were any arrears at all. Assuming the correctness of my exposition in the above text, it would seem therefore that there was no urgency in moving this application at the time it was moved regard also being had to the length of time the applicant sat back without a stir at the end or in the course of which it moved suddenly on erroneous facts.

I would dismiss this application for failure to heed the admonitions by this Court and Court of Appeal regarding proper care necessary to exercise in dealing with serious dispute of facts which are incapable of resolution on papers.

See CIV\APN\174\92 ***Nkhabu vs Minister of the Interior and 2 Ors*** (unreported). Also C. Of A. (CIV) No.1 of 1993 ***Nkhabu vs Minister of the Interior & 2 Ors*** (unreported) by Leon JA at p.7.

With regard to costs I would award the respondent only 85% (per centum) of his costs on account of the applicant's partial success in the points of law raised *in*

limine.



JUDGE
23rd June, 1997

For Applicant : Mr Malebanye
For Respondent : Mr Phafane