

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Division)**

**CIV/APN/37/2010**

In the matter between:-

**MAMOTSELISI T. KHIBA**

**APPLICANT**

and

**LEWIS STORES**

**1<sup>ST</sup> RESPONDENT**

**ALLIANCE INSURANCE COMPANY**

**2<sup>ND</sup> RESPONDENT**

Date of hearing : 30th of March 2010.

**JUDGMENT**

**Delivered by the Honourable Mr. Acting J.D. Lyons**

**On the 7<sup>th</sup> day of April, 2010**

This is an application for a rescission of a judgment in default granted on 16 March 2010.

The judgment in default was granted in terms of prayer (g) of the Notice of Motion.

The judgment declared that the Hire Purchase agreement entered into by the plaintiff and the first defendant be declared null and void in terms of the Hire Purchase regulations of 2002, regulations 4(c) and section 3 (i) of a Hire Purchase Act of 1974.

On hearing I granted the application for rescission and delivered ex-tempore reasons. Those were (as appears from the file note);

*"The judgment in default rendering the Hire Purchase agreement null and void is only one of the remedies available to the plaintiff. It is available only if the contract itself is directly prohibited by the statute (see, **Metro Western Cape Pty. Ltd. V. Ross, 1986 3 SAR p. 181**, especially Boschhoff JA at pages 188 -- 189).*

*Thus, in the circumstances of this case, and whilst the defendant to the main action (Lewis) cannot and does not deny it breached the statute (even if inadvertently), the argument remains available that the rendering of the contract null and void is not necessarily the appropriate remedy for the plaintiff and the judgment in default could well be unjust. On looking at the statute as a whole, and the breach, it may be argued that damages for a lesser amount than the financial loss suffered if the agreement were treated as null and void, is a more probable and just outcome. This is sufficient reason to grant the rescission. However costs of the default judgment and this application flow to the petitioner/plaintiff to be taxed if not agreed."*

In short, whilst perhaps it may not have a defence on liability, the applicant/first defendant has an arguable defence as to the quantum damages. The judgment by default should be set aside to allow this argument explored.

As I stated to counsel at the hearing, this is a matter that should be

settled and settled promptly. An overall remedy for the first defendant's dilemma (and that of similar businesses) may best be sought by adopting a political approach. That seems to me to be the better way to go.

I have set out (above) my ex-tempore decision for reasons of completeness. I thank counsel for their assistance.

**J.D. LYONS**  
**ACTING JUDGE**

**For Applicant** : Mr. Molete  
**For Respondent** : Ms Khiba