CCT/120/2011

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAKOANYANE JOSHUOA LETSIE **Applicant/Defendant**

AND

STANDARD LESOTHO BANK LIMITED **Respondent/Plaintiff**

JUDGMENT

Coram: Hon. Monapathi J

Heard : 16th February 2012

Delivered 9th March 2012

SUMMARY

Complexity of issues in simple rescission of judgment applications should not be created. It is wrong and unfair. When there were two main issues i.e. whether there was wilful default by Defendant and existence of a bona fide defence it was unreasonable to enlarge and raise a panoply of other issues. The Defendant had grossly he neglected and failed to defend and prima facie did not have a bona fide defence. This was more so when virtually, by conceding that there were installments owing, Applicant cannot have "set out averments for which if established at trial would entitle him to relief asked for".

CITED CASES:

Terrance Auto Services Centre (Pty) Ltd and Others v First National Bank of South Africa Ltd 1996 (3) SA 209 (w).

Carolus and Another v Saambou Bank Ltd and **Smith v Saambou Bank Ltd 2002 (6) SA 346 (SE).**

[1] This is an application for recession of a default judgement of the 14th November 2011. The application should not have been complex as it was made to be in a matter in which Defendant had dismally failed show good cause for his failure to plead and failure to explain his default. Mr. Mpaka appeared for the Plaintiff/Respondent and Mr Lephuthing appeared for Applicant/Defendant.

[2] Regrettably most issues raised by the Defendant really fell short of being able to legitimately resolve the matter at hand. For example that the court would be *res judicita* or would be attempting to review the judgement of Molete AJ in CCA 13/2011 and CCA 14/2011 which will be discussed later. A myriad other issues raised in the Plaintiff voluminous heads of arguments were similarly unhelpful.

[3] Plaintiff had claimed for a sum of M138,291.77 plus interest thereon being in respect of the amount due to Plaintiff in terms of a hire purchase agreement entered between the Plaintiff and Defendant. The details were shown in the attached particulars to the summons.

[4] The summons were dated the 9th June 2011 and were filed on the 24th August 2011. It was common cause that there was no entry of appearance

and to date no plea to the claim. It is however true that a lot happened between the date of the service of summons and the date of the application for default judgement. It was negotiations between the parties including an application for re-possession of two vehicles purchased for Defendant by the bank. This resulted in an order by Molete AJ which said the following; that:

1. "The application to strike out the application for rescission fall off.

2. The Respondent pay all arrears as shall be determined by Applicant in terms of the statement of Account.

3. The Respondent shall be liable to pay the Deputy Sherriff fees as determined by the Registrar as appears in the return of service.

4. The Respondent pay the Applicant an amount of M13,378.49 in full, being an account rendered by Maseru Toyota in respect of the service of the Toyota Hilux.

5. Respondent agrees to and shall cede to the applicant, out and out and *rem suam*, all his rights, title and interest in the total rental income of his commercial building in Mokhotlong, which cession shall be countersigned by the undertaking to pay all rentals due as at every month end, to the Mokhotlong branch of the Applicant and the account of Respondent against which the debit orders apply.

6. Should the Respondent default in the payment of the installments in the terms of the High Purchase agreement, the Respondent agrees that he will release both vehicles to the Applicant, within two(2) days of a written demand to be delivered to the Respondent's lawyer's offices, calling upon the Respondent to surrender the vehicles to the Applicant.

7. Should the Respondent fail to surrender the vehicles as envisaged in clause above, he shall be held to be to be in contempt of Court and an application to that effect shall be issued calling upon the Respondent to show cause why he shall not be held to be in contempt and punished accordingly.

8. Against payment of all the amounts referred to above, and upon signature of cession referred to herein, the Respondent shall release to Respondent the Toyota Hilux 4x4, subject to an attachment and such attachment shall not be released until it has been paid in full in terms of the Hire Purchase Agreement.

9. Costs are referred to the 29th September 2011 for argument." (my emphasis)

Only one vehicle was released and the other was repossessed. Thought it was clear that there had been arrears owing and installments owing against the Defendant. The Defendant had not fully discharged any of those. That is why the Plaintiff bank had felt that it was still entitled to proceed on the summons as at the date it

filed the summons for arrears owing balance and breach of agreement which had been occasioned.

[5] As for how the sum claimed in the summons arose I was referred to annexure "A", statement showing two sums of M100,000-00 (outstanding balance) and M37,857.36(arrears). It was demonstrable therefore that without proof of down payments, advances or deposits the amounts owed by Defendant were in that region of sum claimed in the summons.

[6] Mr Mpaka has agreed that as at the time the argument followed by Mr Justice Molete's court order no reference was made to arrears and balance owing in that order because it was contemplated that those had already been sued for in the summons as against installments that would accrue. It was precisely because it was envisaged that the agreed cession would cater for future installments and were owing as after date of court order. Unfortunately at hearing of this application it was not stated that the cessions were signed were operational. That is why Mr Mpaka felt that Plaintiff was entitled to claim for any arrears owing as at any time because they constituted breach of agreement and were contrary to the terms of agreement. The reason is clearly that the Plaintiff would not just abandon its rights under the agreement. I agreed with respect.

[7] Significantly, I thought there was a distinction between arrears and balance on the one hand and installments due and related to the cession agreement on

the one hand. Because of that distinction I thought the Plaintiff was entitled to proceed as contemplated in the summons despite the fact that there was those applications for re-possession before the court. Indeed it was recorded that the application were made "pending issue of summons". It explains why the Plaintiff pressed on with a default judgement. The Defendant's intention to confuse issues is, therefore, apparent when Defendant in response to paragraph 19 of the Plaintiffs answering affidavit says at paragraph 10 of his replying affidavit:

> "….. The amount outstanding at the moment is M80,718.82 and it is the one proposed to be settled with cession alluded to above and that establishes a *bona fide* defence." (my emphasis)

It was in response to paragraph 19 and paragraph 12.1 in which Plaintiff Deponent **(*LANA JEAN KOK*)** said

> "It is interesting that Applicant himself does not say what amount he owes the bank. There is therefore no reason to rescind the Order as Applicant has failed to establish a *bona fide* defence."

Why had Defendant found it difficult to specify dates on which the payments were made. This is significant in that such demonstrated payments would show that Defendant really had a defence, having in mind the *onus* on the party who is alleged to be owing. That is so in that other than showing sufficient cause Defendant has to "make out averments which if established at trial would entitle him to relief asked for" See ***Terrace Auto Services Centre (Pty) Ltd and Others v First National Bank of South Africa Ltd 1996 (3) SA 209*** (w)

[8] It is noteworthy that the payments contemplated in the summons not were future installments. This is so because summons had already been issued for default payments or arrears. If that had been the intention it should have been made clear. Perhaps it will stated it could be that the defence was not:

> "so contrive, far-fetched and improbable that no reasonable court possibly able to find in applicants favour at trial-applications for condonation and rescission dismissed."

See ***Carolus and Another v Saambou Bank Ltd; Smith v Saambou Bank Ltd 2002 (6) SA 346 (SE).***

[9] I found it difficult to accept that the Plaintiff who filed application for repossession of vehicle would be precluded from getting the benefits of a judgement which he filed against the background of the application for repossession.

[10] In the premises I concluded that the application for recession ought to be dismissed with costs.

T. E. Monapathi
Judge

For Applicant : Adv. Lephuting
For Respondent : Adv. Mpaka

Noted by Adv. K.A Mariti