IN THE HIGH COURT OF LESOTHO

(Commercial Division)

CCT/42/2010

In the matter between:-

NEDBANK LESOTHO LIMITED **APPLICANT**

And

TSELISO CLOVIS MANYELI t/a COPY SHOP **RESPONDENT**

JUDGMENT

Coram : Honourable Justice J.D. Lyons (Acg)

Date of Hearing : 5 March ,2012

Date of Judgment : 5 March,2012

Summary

Recission default judgment – basic principles – Hire Purchase Contract – insurance.

ANNOTATIONS

CITED CASES: **Marine and Trade Insurance Co. Ltd vs J. Gerber Finance (Pty) Ltd 1981 (4) SA 958**

LYONS J. (AGT)

[1] This is an application for recission of a default judgment. On the 5th March I dismissed it with costs. Here are my reasons.

[2] On 10 August 2010 the plaintiff respondent (the Bank) issued a summons with an accompanying declaration. The summons sought payment of the sum of M243,876.55 being balance owing by the defendant/applicant (Manyeli) under the provisions of an installment sale agreement entered into between the parties on 16 July 2007.

[3] Manyeli was served. He instructed an attorney to enter an appearance.

[4] The bank filed a notice of summary judgment. This was served and a notice to oppose was filed. This application came before the Court on 20 September, 2011. Manyeli failed to appear. Judgment was granted as prayed.

[5] By notice of motion filed 21 October 2011, Manyeli applied for recission of the judgment.

[6] On an application for recission of a default judgment where no irregularity is pleaded the applicant must show that there existed an acceptable reason for his non-appearance. The applicant must also act without an inordinate delay. Importantly the applicant must demonstrate that he has a bona fide defence.

[7] No issue is taken with the first two requirements. The issue here is whether or not Manyeli has demonstrated that he has a bona fide defence.

[8] In his supporting affidavit, Manyeli covers this point as follows:-

I also aver that, I have bona fide defence in the main and Application of Summary Judgement, wherefore I wish to reiterate the contents of my Affidavit in opposition to the same application. Hence, on the same token I further aver I am not indebted to the plaintiff as alleged regard being had to the following:-

- ***The vehicle the subject matter overturned on the 21st November 200;*** **(sic)**
- ***The said vehicle was declared to be damaged beyond repairs and this was certified by insurance company concerned, I should mention herein that, this was in accordance with the terms and conditions in the agreement at issue; hence, I am advised by my counsel of record and verily believe the same to be true that, in law in terms of clause 11 thereof the agreement was terminated, see original agreement annexed to the summons;***
- ***I am also advised by my counsel of record and verily believe the same to be true that, upon termination of agreement I was absolved from liability, hence, the plaintiff was entitled to claim from the insurance any amount owed;***
- ***I am advised by my Counsel of record and verily believe same to be true that, per the position of the law in Lesotho, as I had***

insured the said vehicle as part of the agreement, plaintiff out to have proceeded against my insurer;

- ***I also aver that, the arrears could not have accumulated to the quantum that is claimed by plaintiff, as I have indicated the contracted was terminated a year back prior to the approaching the Court.***
- ***I further aver that, with foregoing reasons I have in doubt substantiated my averments that I have bona fide defence, as I have shown that I am in no way indebted to plaintiff.***

[9] On the question of termination due to the fatal loss of the goods (a 2004 Mitsubishi Colt), the agreement says at clause II

TERMINATION ON TOTAL LOSS

11.1 This agreement shall determine in respect of such of the goods as are lost or stolen and not recovered within a period of 21 days, or are destroyed or damaged beyond repair. The goods shall be deemed to be damaged beyond repair only if the insurer or such goods elects to treat them as a total loss or if the seller notifies the buyer in writing that in its opinion the goods have been damaged beyond repair.

11.2 On termination of this agreement pursuant to this clause, the buyer shall pay to the seller the balance outstanding at the date of such termination, together with all other amounts payable under this agreement and this seller shall reimburse the buyer as far as possible out of the proceeds (if any) recieved by the seller from any insureance policy in respect of the goods. If the insurer of the goods elects to treat

the same as a total loss and to take over the goods, the buyer shall deliver the goods to the insurer at the buyer's costs and expense.

[10] On a simple reading of this, Manyeli 's claim that his liability under the agreement is absolved is rejected.

[11] The agreement requires that whilst the goods are serviceable, Manyeli was to pay the Bank at the rate of M6,848.82 per month. In the event of a total loss of the goods, clause II comes into effect. That requires that Manyeli (as buyer) then becomes liable for the balance that was oustanding under the agreement less any payment received from an insurer of the goods.

[12] That does not absolve Manyeli from liability at all. This is no defence.

[13] Manyeli then pleads in his affidavit that, as he insured the goods, the Bank, in the circumstances, should have sued the insurer and not him. I pursume he is putting forward as a defence a submission that the Bank sued the wrong party. Thus the judgment against him is invalid and irregular.

[14] This submission is misquided and misleading. In his written submissions the advocate for Manyeli selectively quotes clause 5.4 of the agreement. This, he submits, cedes Manyeli's rights in the contract of insurance on the goods to the Bank. Hence, he argues, the Bank (as principal on the contract of insurance of the goods) should sue the insurer.

[15] Clause 5 in its entirely reads:

5.1 The buyer shall keep the goods registered, licensed and insured against third party claims and against all loss and damage for the full period of this agreement with a registered insurer for such value as may be determined by the seller from time to time. The buyer shall have the seller's interest noted on the insurance policy and shall pay all insurance premiums punctually and comply with all the conditions of the insurance policy.

5.2 If so required the buyer shall cede to the seller a life policy as security in connection with this transaction.

5.3 The buyer shall on request exhibit to the seller proof of payment of the obligations undertaken in terms of the clause and such insurance policies.

5.4 The buyer hereby cedes as security to the seller all the buyer's rights, title and interest in an to the policy taken out in consequence hereof.

[16] Plainly clause 5.1 refers to the insurance of the goods. Thereafter clause 5.2, 5.3 and 5.4 refer to any life insurance policy the Bank may have required Manyeli to take out as security for the agreement. It is cession of this interest (i.e any interest Manyeli had in a life policy) that clause 5.4 refers to. This is obvious. The noting requirement in clause 5.1 secures the Bank's interest (see **Gerber's case** below). Under a life insurance policy the insured (the buyer in terms of the sales agreement herein) acquires a 'right, title and interest' in the policy and any potential payout should the insured event occur. The Bank (buyer in this case) has no interest at law in the policy or its benefits unless the

insured, as security for a loan, transfers (or cedes) that interest to the Bank. (In this case there was no requirement for life insurance.)

[17] The argument in the manner it was put forward was misleading and, as it is properly read and understood, does not afford Manyeli a defence.

[18] Adv. Ntema (for Manyeli) then advances an argument that the decision in **Marine and Trade Insurance Co. Ltd vs J. Gerber Finance (Pty) Ltd 1981 (4) SA 958** applies and is support for the proposition that the Bank should have sued the insurer, not Manyeli.

[19] Unfortunately this is not what the Gerber case says.

[20] In Gerber, the respondent (Gerber) under contract of lease, financed with a lessee the lease of a loader. As a provision of the lease, the leasee had to insure the loader. The lessee insured with Marine & Trade (the applicant). Gerbers' employee through several conversations with a Marine & Trade employee confirmed that the loader was leased. These conversations confirmed Gerber was the owner of the loader. Importantly to that case, the conversations were held to have constituted an agreement that, in the event of a loss of the loader, Marine would protect the interest of Gerber.

[21] Subsequently the loader was lost. On acceptance of a claim, Marine & Trade. ignoring the interest of Gerber and the agreement, paid the lessee the sum insured.

[22] Gerber sued, not on the insurance policy as such, but to confirm the agreement reached between the Gerber and Marine & Trade that Marine & Trade would protect its (Gerber's) interest.

[23] The Court of Appeal (South Africa) held that an agreement to protect the financier's interest had been made between Gerber (the financier) and Marine & Trade. This was an agreement separate and apart from the insurance contract between the leesee and Marine & Trade. The case does not support the argument advanced by Adv Ntema at all. Nor does it provide Manyeli with a defence.

[24] For completeness, clause 12 and 19.2 of the installment sales agreement read:

SELLER INTERVENTION TO PROTECT ITS RIGHTS

Should the buyer fail to comply with any of the provisions of this agreement, more expressly in regard to the payment of amounts in respect of any insurance premiums, licenses, levies, fees, duties and taxes or other amounts of whatever nature, the seller shall be entitled, but is not obliged to pay any such amount on the buyer's behalf and the amount thus paid shall thereupon be payable by the buyer to the seller.

19.2 Renewals of comprehensive insurance will be done on annual basis and shall be paid by the client. Should the client not renew the comprehensive insurance, the Bank shall proceed with the cover under the insurance company of the Bank's choice and consolidate the expense with the existing car loan balance.

[25] Whilst not appearing in the evidence, counsel accept that the interest of the Bank is noted on the policy of insurance that Manyeli had with the unidentified insurance company. Mr. Fraser told the court (and I accept) that there is no dispute between the Bank and the insurer. The insurer is prepared to pay out the insurance once Manyeli signs off on it. The problem both counsel agree, is that Manyeli is unhappy with the amount the insurer is prepared to pay as compensation for the total loss of the goods. That is a matter between Manyeli and his insurer. The Bank has is not required to sue the insurer unless (as in **Gerber's** case) the insurer refuses to protect the Bank's noted interest.

[26] The argument advanced for Manyeli misunderstands the legal position and **Gerber's** case. This fails to provide Manyeli with a defence.

[27] Summing up, Manyeli has failed to persuade me he has a bona fide defence to the Bank's claim.

[28] The application is dismissed with costs. These costs must be on an attorney and client basis (see clause 14.2 of the agreement) and to be as taxed or agreed.

J.D. LYONS
JUDGE (AGT)

For Applicant : Mr. Ntema
For Respondent: Mr. Fraser