

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/462/2002

In the matter between:-

**THE LIQUIDATOR
LESOTHO BANK (LIQUIDATION)**

APPLICANT

AND

MOHAU RALETING

RESPONDENT

RULING

Coram : Hon. Mahase J.
Date of hearing : Various dates
Date of Judgment : 14th November, 2012

Summary

*Civil Procedure – Application Proceedings – Adoption of wrong procedure –
Withdrawal of application – Costs – Institution of trial proceedings*

ANNOTATIONS

CITED CASES: **None**

STATUTES: **None**

BOOKS **None**

[1] This application has been pending before this court since around the year 2002 for reasons not very clear from the various minutes of different Judges before whom the application was prosecuted

- [2] It was subsequently fully argued before this court on the 27th October 2008. On that day, counsel agreed that the application was no longer urgent; probably due to a long lapse of time from date of initial filing to actual date when it was argued. Refer to interim court order dated the 7th October 2002 per my brother Monapathi J.
- [3] The facts as well as the relief herein sort have been clearly set out in the written submissions filed on behalf of the respondent.
- [4] In brief, the applicant approached this Court on an urgent basis, on the 7th October 2002. It was duly granted the interim order on the said date returnable on the 21st October 2002.
- [5] That rule nisi has since lapses and has not been revived even though pleadings have been closed.
- [6] In that interim order of court, the Sheriff of this honourable court or his Deputy has been authorized to attach and take into his possession the motor vehicle; a Mercedes benz sprinter from the respondents premises therein mentioned of the following description:-
Engine No. 602980011025
Chassis No. WDB9034622P907845 and have it retained in its possession pending the final determination of this application.

- [7] In the alternative the sheriff or his deputy were authorized and directed to take that said motor vehicle into their possession wherever the same may be found and hand it over to applicant.
- [8] Of course, applicant has asked for costs to be awarded to it on the scale as between attorney and client.
- [9] On the date of hearing before this Court, i.e. the 27th October 2008, then counsel for the applicant informed court that they have agreed to have the matter withdrawn. The reason for that withdrawal being that the applicant has since then pursued the matter in another case, by way of trial proceedings in CIV/T/16/2007.
- [10] Mr. Mohapi who appeared herein on behalf of the respondent then asked the court to award costs of this application to the respondent since it is the applicant which had sort to have the matter withdrawn after the applicant has realized that it has adopted the wrong procedure in having instituted the instant application.
- [11] The respondent's argument in support of its prayer to be awarded costs following that withdrawal of this matter by applicant is that applicant does so because it has since realized that it has adopted a wrong procedure in that the claim launched against the respondent is and should have been enforceable by action proceedings and not by motion proceedings.
- [12] The applicant has argued that the procedure it has adopted herein is correct, because of the reasons that in filing this application it was avoiding the

deterioration of this motor vehicle while it was being used by the respondent while respondent has defaulted in the payment of its monthly instalments. This, it was argued prejudices the applicant.

- [13] While the applicant may have validly be concerned about the deterioration of the motor vehicle in question for as long as it was being used by a party which had defaulted in the monthly payment of the instalments towards the liquidation of the purchase prize of this motor vehicle, the applicant has not advanced justifiable reasons why it had to enforce its rights by way of application proceedings.
- [14] It is the considered view of this court that the applicant would have achieved the same result by having filed trial proceedings because it has since become clear from the very beginning that among others there is a dispute of fact as to purchase price of the vehicle in question.
- [15] The respondent further denies that he has ever purchased any motor-vehicle from the applicant. Refer to respondent's opposing affidavit.
- [16] Indeed, the applicant has not furnished to this court any justifiable reasons why it had to wait for some five years (5) since 2002, to withdraw this application and institute yet other trial proceedings while the claims in both this instant application and the trial proceedings are substantially the same. The only reason why, in the view of this court it did that, is because it realized that it had adopted the wrong procedure in the first place when it filed this application.

[17] The respondent has at all times been dragged to court by the applicant thereby incurring costs for opposing this application. It is trite law that once applicant withdraws its application, especially where, as in the instant case it has adopted a wrong procedure, it should bear the costs.

[18] In the premises the applicant is ordered to pay costs of this application to the respondent on the scale as between attorney and client.

M. Mahase

Judge

For Applicant	-	Ms. Makhera/Mr. Masupha
For Respondent	-	Mr. Mahlakeng/Mr. Mohapi