

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/478/2004

In the matter between:-

NONTHANDO MATILDA KOTSOKOANE

PLAINTIFF

AND

**BASOTHO ENTERPRISES DEVELOPMENT
CORPORATION**

DEFENDANT

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : Various Dates
Date of Judgment : 15th November, 2013

Summary

Civil Procedure – Attachment and sale of motor vehicle – writ of execution issued against property of plaintiff not against that of the company – Separate legal entity. What is – Damages – Basis of Plaintiff's claim in law.

ANNOTATIONS

CITED CASES:

- **Madrassa Anjuman Islamia v. Johannesburg Municipal Council, 1919 A.D. at 439**
- **Dadoo LTD and Others v. Krugersdorp Municipality Council, 1920 A.D. at 550.**
- **In Salomon v. Salomon & Co (1871) AC 22 (HL)**
- **Masiba v. Constantia Insurance Co LTD, 1982 (4) S.A. 333 (c)**

- **Bester v. Commercial Union Versenkeringsnaats Kappy Van S.A BPK (Bester Case) 1973 (1) S.A. 768 (A)**
- **Cohen Lazar and Co v. Sibbs 1922 TPD 143**
- **Hefer v. Van Grenning 1979(4) S.A. 952(A)**
- **Kali v. Incorporated General Insurance LTD 1976 (2) S.A. 179**
- **Frazers Lesotho LTD v. Hata-Butle (PTY) LTD 1999 – 2000 LLR – LB 65**
- **Ocean Accident and Guarantee Corporation LTD v. Koch 1963 (4) S.A. 147**
- **Peregrine Group (PTY) LTD v. Peregrine Holdings LTD 2001 (3) S.A. 1268**

STATUTES:

- **High Court Rules No. 9 of 1980 (Rule 46(7))**
- **Subordinate Court Rules No. 132 of 1996 (Rule 39 (4) and (5))**

BOOKS:

- **African Mercantile and Company law 5th Edition page 309 (Juda) per Gibson Smith.**
- **The Law of Delict – per Neethling, Partgieter and Visser.**
- **The Law of Delict – per Makerron**
- **The Law of Delict – per Boberg (Volum 1 page 170)**
- **Principles of Evidence, 2nd Edition, page 544 – per Hoffman and Zeffert.**

[1] In this action, the plaintiff is claiming against the defendant the total sum of M176,000.00 (one hundred and seventy six thousand maloti) as being damages she allegedly suffered for wrongful attachment and sale of her motor vehicle of registration numbers BCC 535 F.S.

The damages are broken down as follows:

- a) Fourty one thousand Maloti (M41,000.00) for market value of the motor vehicle;
- b) Fourty thousand Maloti (M40,000.00) for emotional shock;
- c) Fourty five thousand Maloti (M45,000.00)for inconvenience;
- d) Fifty thousand Maloti (M50,000) for impairment of dignity. She also asked for costs of suit and interest at the rate of 18% per annum a tempo morae. Further and or alternative relief.

[2] Plaintiff and one Nkabi Kotsokoane are married by civil rights in community of property. I note however that she has sued the defendant unassisted by her husband.

[3] The plaintiff's husband is the Director of a company called N.N. Medics Lesotho (PTY) LTD. It was indebted to the defendant in the sum of M19,848.48 (nineteen thousand eight hundred and forty eight Maloti, forty eight lisente). He failed to repay the said debt.

[4] Consequently the defendant brought proceedings against N.N. Medics (PTY) LTD; this being the registered company of Nkabi Kotsokoane. A default judgment was eventually granted against the said N.N. Medies (PTY) LTD. The defendant then had a writ of execution issued against the property of N.N. Medies (PTY) LTD.

[5] However, according to the plaintiff her property, and not that of N.N. Medics (PTY) LTD was executed against the judgment debt. She was consequently forced to approach court on an urgent basis sometime on the

8th September 2003 to claim cancellation of the writ in question, and that the attachment and execution of her, property be set aside. This she did successfully although according to her the defendant/respondent ignored the order of Court. As a result her vehicle was then sold by public auction to one Mr. Frete Makhakhe for an amount of fourteen thousand Maloti (M14,000.00) some three months since September 2003. I note however, that the order of court referred to above by the plaintiff has not been handed into Court as proof of its existence.

[6] The plaintiff has not disclosed to this Court what became of the contempt of court proceedings she allegedly instituted against the defendant after the defendant had ignored an order of the Magistrates' Court to the effect that her vehicle be restored to her.

[7] Further on, she does not say what steps she took after a notice of sale; exhibit "D" was issued and publicized, in respect of which the messengers of court informed the public at large about the sale of her car by public auction so as to have the judgment debt in question liquidated.

[8] The plaintiff issued out summons against the defendant some eleven months after the public auction of the said motor vehicle was carried out. Even then, she elected not to join the messenger(s) of court nor the buyer of that vehicle who were known to her.

[9] The plaintiff has further withheld from this court the fact that she had issued a notice in terms of the provisions of Rule 39 (4) of the Subordinate Court Rules but had same withdrawn at a later stage. This is a notice or claim

through which the Clerk of Court in the Magistrates' Court was informed that in fact, the said vehicle belongs to her and is her property and not that of N.N. Medics (PTY) LTD nor of her husband, Nkabi Kotsokoane.

- [10] In an attempt to prove her case the plaintiff lead evidence of three witnesses; namely herself, her husband Mr. Nkabi Kotsokoane and Mr. Lehlohonolo Mpobole.
- [11] A brief summary of the totality of her evidence with regard to the actual market value of this motor vehicle, is that the plaintiff gave conflicting, contradictory evidence.
- [12] At first she testified that the market value of her said motor vehicle was fourty one thousand Maloti (M41,000.00), but two years later, she said it was fourty –seven thousand Maloti (M47,000.00). Refer to exhibits E, F, G and I. Not only that, she also elected not to call the author of exhibit “F” for them to assist the court with regard to the market value of that motor vehicle.
- [13] She instead called PW3, a motor mechanic who is not an expert in valuation of motor vehicles. PW3 conceded, under cross examination that he did not evaluate the motor vehicle in question and that what he told the Court was based on the information he had gleaned from the motor dealers' guide of 2003, while contents in exhibits “F” are based on the motor dealers' guide of 2005.
- [14] In short, the plaintiff could not say with certainty, relying on the said conflicting figures, what the actual market value of her vehicle was when

she issued the summons claiming damages in the sum of one hundred and seventy six thousand Maloti, inclusive of the market value in the sum of fourty one thousand Maloti.

[15] The plaintiff could also not support her claim for transport costs which she says she incurred as a result of the seizure and auction of her car by and or on behalf of the defendant. In the same vein, she gave two conflicting figures as being the sums of money she had to pay per day as a result of her having to hire a private taxi from Maseru to Ladybrand.

[16] A total sum of fourty thousand Maloti is claimed against the defendant allegedly as being transport costs she incurred while travelling on a private hired taxi between Maseru and Ladybrand. Aside from the fact that this is a general claim, no attempt has been made firstly to explain why she had to hire a private taxi while there are daily public transport taxis operating between Maseru and Ladybrand and vice versa. This Court takes judicial notice of the fact that there are taxis (public transport) which operate between Maseru and Ladybrand and vice versa.

[17] Secondly, the plaintiff has failed to call as her witness the owner(s) of the private taxis she allegedly so hired to transport her. Thirdly, she has failed to say or to state the period for which she had to use privately hired taxis for transportation; neither has she explained nor disclosed to this court why she felt compelled to travel between Maseru and Ladybrand while according to her summons and declaration, she is presently employed at Maseru City Travel, Kingsway, Maseru. The plaintiff has, in other words failed to provide the basis for her claim because she has not adduced any other form

of evidence to proof on a balance of probabilities how she has calculated the sum of fourty thousand Maloti which she claims from the defendant in respect of transportation costs.

[18] The plaintiff has further claimed certain various sums of money as damages she has suffered as a result of the alleged wrongful attachment of her vehicle at the instance of the defendant. These are:

- The amount of M40,000.00 for suffering and emotional shock;
- The amount of M45,000.00 for inconvenience to her; and
- The amount of M50,000.00 for impairment of her dignity.

[19] As has been the case with other claims, the plaintiff has not supported the above claims by production of any kind of evidence, viva voce nor by documentary proof. Hers are just bare allegations which have not been substantiated by evidence. The plaintiff should not only have alleged that she suffered damages in the above amounts; she should, as a matter of pleadings in cases of this nature, also proved that such were occasioned in the way alleged as a direct result or as a necessary consequence of the defendant's acts or negligence and or at least that the defendant contemplated and intended such consequences.

[20] The plaintiff's above claims lack certainty, particularly and proof. This is particularly so because nowhere does the plaintiff allege that the said damages she claims are caused by and or that they are as a direct or necessary consequence of the defendant's act she complains about. She has in fact misrepresented to court that her application to have this motor

vehicle, subject-matter herein restored to her, was granted, whilst that in fact was dismissed with costs by the Magistrate's Court.

[21] Further more, she also failed to disclose to court that even an application which she launched against the defendants in terms of the provisions of Rule 39 (4) of the subordinate Court Rules was withdrawn at her instance, thereby denying herself the right to intervene in the case in which the subordinate court would have made an appropriate decision as to her rights in that motor vehicle.

[22] Instead of having issued the summons in this Court as she did, the plaintiff should have invoked the provisions of the above Rule 39(4) in which she could also have joined N.N Medics Lesotho (PTY) Ltd, the present defendant as well as the concerned messenger of court, since all of the above parties have or had an interest in that matter, and or were involved somehow by having attached, removed and sold that car.

[23] Alternatively, the plaintiff could have applied, before the subordinate court for either stay of execution of the judgment and or for rescission and also for stay of the public auction pending her application for joinder and determination of an application of her rights over that motor vehicle. She did neither of the above and elected to sue the defendant alone for damages; almost one year after the sale of that motor vehicle.

[24] This she failed to do even though she was well aware as early as on the 5th September 2003 that the motor vehicle in question had been attached, and removed pursuant to a lawfully issued writ of execution. She does not even

argue nor challenge the legality of this writ of execution. She contents herself with saying that, that writ was issued mala fide without demonstrating how and why she so alleges.

[25] Failure by the plaintiff to join other interested parties as alluded to above has dealt a severe blow to her case. The argument that her property and not that of the N.N. Medics Lesotho (PTY) LTD. has been unlawfully executed against does not advance her case in any way. This is because according to contents of exhibits “J” and “K”, her husband, to whom she is married by civil rights and in community of property clearly show that it is her husband, Nkabi Motsokoane (PW2) who is indebted to the defendant. Nowhere is it therein indicated that it is the N.N Medics Lesotho (PTY) LTD which is so indebted to the defendant.

[26] While it is indeed trite law that a duly registered company is a legal entity distinct from its members who compose it, and that as such it can sue and be sued on its own; in the above shown exhibits, there is nowhere where the said company or its director(s) have acknowledged its indebtedness to the defendant. The only name which appears in the two documents is that of the plaintiff’s husband; Nkabi Kotsokoane.

[27] The said two documents bear the dates the 14th December 2000 and the 22nd April 2002 respectively. The plaintiff only approached the Court suing the defendant some four years since her husband had acknowledged and signed that acknowledgment of debt. Not only that, having decided not to invoke the provisions of Rule 39 (4) of the subordinate courts Rules, she issued summons in this Court against the defendant, one year after the sale of the

motor vehicle in question and without having joined among others, the buyer of the car in question, whilst she has also not taken any steps to have the execution of that judgment stayed and or rescinded and also without having applied for the stay of the sale which she has had prior knowledge of before it was carried out.

[28] The fact that the plaintiff and the said Nkabi Kotsokoane are married in community of property places the vehicle in question which was bought by the plaintiff during the subsistence of their marriage, under the joint estate of the plaintiff and her husband (PW2), who then is the administrator of same

[29] Accordingly, as per contents of the two documents referred to above, she cannot now be heard to argue that the said motor vehicle did not form part of their joint estate and or that it was unlawfully or wrongfully attached and sold by public auction so as to liquidate the debt which her husband has acknowledged to be owing as an individual to the defendant.

[30] In effect, the evidence of PW1 and PW2 is mutually inconsistent and destructive in many respects; amongst which to the effect that PW2, the plaintiff's husband lost a case in the Magistrate's Court wherein he had sort to have that motor vehicle restored to him. Contrary to what PW1 said, PW2 told this Court that he lost that case and was ordered to pay costs.

[31] On the other hand, it has been argued on behalf of the plaintiff that the court had ordered that the said attachment and removal was irregular and that defendant was to restore that vehicle to the plaintiff but such an order of court was disregarded by the defendant as a result of which contempt of

court proceedings against it were invoked. What has not been disclosed to court is what ultimately became of the said proceedings.

[32] The order of Court to such proceedings, if any is in existence should have formed part of her evidence as proof that indeed there was such an order or a finding to the effect that the defendant was convicted of having been contemptuous. This is not only a bare allegation, but as it has been pointed out above, this evidence of plaintiff is inconsistent with that of her husband in this regard.

[33] Lastly while in exhibit “H” the N.N. Medics (Lesotho) (PTY) LTD, has been lawfully registered in terms of the provisions of the relevant laws of this country, there is nothing in exhibits “J” and “K” indicating that the loan in question was obtained by and or on behalf of the N.N. Medics (Lesotho) (PTY) LTD, or through its authority by any of its Directors. On the contrary, PW2, the plaintiff’s husband testified that in the year 2002, he obtained funds from the defendant and had made the plaintiff (PW1) (his wife) to sign as a Director to enable him to get those funds. This is yet a clear demonstration of the inconsistent evidence adduced by both PW1 and PW2 on this issue. Further still and of poignant relevance, as regards subject - matter herein, PW2 conceded that the motor vehicle in question belongs to their joint estate and that as such it is his own property too.

[34] It is therefore a considered view of this Court that for the reasons herein stated, this action ought to fail and so the entire claims are accordingly dismissed with costs to the defendant.

M. Mahase

Judge

For Plaintiff - Adv. Rafoneke
(V.V.M. Kotelo & Co)

For Respondent - Adv. Shale
(S. Phafane Chambers)