CIV/T/191/2010

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

MAKHAKHE BARETHOME SEKONYANA **PLAINTIFF**

And

STANDARD LESOTHO BANK LIMITED **DEFENDANT**

JUDGMENT

Coram : Hon. N. Majara J

Date of hearing : 5th May 2011 – 22nd November 2013

Date of judgment : 1st August 2014

Summary

Hire-purchase contract – whether defendant in breach by repossessing goods – whether defendant's evidence was a shift from his facts as stated in his defence – effect of contradictory stories of plaintiff per assertions in his application papers and those in his pleadings and

evidence – conflicting and mutually destructive versions of the parties – version of the plaintiff highly improbable and rejected as false – whether voluntary surrender a term of the contract – though not an express term, voluntary surrender an implied term of the agreement – no need for defendant to take legal action – action dismissed with costs.

ANNOTATIONS

BOOKS

1. Isaacs; Beck's Theory and Principles of Pleading in Civil Actions; Butterworths, 5th Edition

STATUTES

1. Hire Purchase Act No. of 1974

CASES

1. Johnston v Leal 1980 (1) SA 927
2. Mercantile Credit Co. Limited v Cross [1965] 2 QB 205
3. National Employers' General Insurance v Jagers 1984 (4) SA 437 at 440 D – G
4. Robinson v Randfontein Estates G M Co. Ltd 1924 AD
5. Durbach v Fairway Hotel 1949 (3) SA 1081
6. Samuel Aro v Joe Allen & Co. Limited [1979] 2 FNR 292

[1] The plaintiff in this action seeks a remedy from this Court *to wit*, judicial cancellation of a hire-purchase contract entered between him

and the defendant on the 27th July 2006; damages in the sum of two million, six hundred and fifty thousand Maloti (M2, 650, 000.00) being the total purchase price of a bus he bought in terms of the said contract as well as costs of suit.

[2] It was a term of the contract that the transfer of the bus would be made to the plaintiff but ownership thereof would remain with the defendant and would pass on to the plaintiff after he had paid the total price of the bus which payment was to be made in monthly instalments. It is common cause that during the contract, the plaintiff defaulted in respect of his monthly payments as a result of which the defendant repossessed the bus hence the present action.

[3] It is the evidence of the plaintiff that he did not voluntarily surrender the bus to the defendant but rather, the latter unlawfully repossessed it after it had requested him through a telephonic conversation with DW1 one Mr. Lichaba S'khozana, an employee of the defendant to avail it to it for purposes of ferrying its employees on some trip sometime in October 2007. Pursuant thereof the plaintiff ordered his driver to take the bus to the bank on the 19th October for the said trip. His driver later called him to report that he had been asked to park the bus in the defendant's yard and to tell the plaintiff that it had been seized.

[4] When the plaintiff came back from his trip in Cape Town he went to see Mr. S'khozana and the latter told him that he had seized the bus because the plaintiff was in arrears. The latter then told him to bring the amount of M180, 000.00 before the bus could be released to him which he was agreeable to. When he later went to pay the said amount he was told that the bus had since been sold.

[5] The second witness for the plaintiff was his driver whose evidence confirmed that of the plaintiff that he did take the bus to the defendant bank per his employer's instructions and that when he arrived thereat, he was told to park it in the yard of the defendant after which he was informed that the bus was seized.

[6] The defendant disputes these facts and its case is that the plaintiff voluntarily surrendered the bus after he had had various meetings with DW1, Mr. S'khozana whose testimony was that after the plaintiff had defaulted in his payments, the defendant made several attempts to rehabilitate him *to wit,* to assist him to settle his arrears.

[7] When all efforts came to naught, he called the plaintiff informed him that the situation was beyond rehabilitation and advised him to surrender the bus. The plaintiff replied that since he was away, he would request his wife to bring the bus to the bank. The bus was then surrendered as agreed and was driven by PW2 in the company of the plaintiff's wife and she handed the keys over to him. Further that it is

post that voluntary surrender that the defendant advertised the bus after which they got some offers, the best being from one Peter Lekhooa who bought it.

[8] On the evidence before the Court, the only disputed material fact between the parties is whether or not at the time the defendant took possession of the bus, the subject matter herein it had been voluntarily surrendered by the plaintiff through his wife and P.W 2, who was the bus driver.

[9] In this connection, it was argued on behalf of the plaintiff by **Adv. K. Mosito KC** that on the evidence led before the Court, the version of the defendant has shifted from that contained in the pleadings namely, that it is the plaintiff that surrendered the bus, to the one that it was surrendered by his wife. It was his contention that the plaintiff's wife was not a party to the hire-purchase contract and that for the defendant to succeed in its defence, it must prove that the plaintiff had authorized his wife to surrender the vehicle to it. Further that the defendant did not discharge this onus in that it did not lead evidence on the fact of the authorization.

[10] It was his submission that the law relating to pleadings and evidence is such that having pleaded voluntary surrender, the defendant cannot turn around and lead evidence that any person other than the plaintiff surrendered the vehicle. To this end the plaintiff's Counsel

referred the Court to a number of decided cases which will be dealt with later on in this judgment.

[11] Insofar as the actual terms of the hire-purchase contract are concerned, it was **Adv. Mosito**'s submission that same was never novated or amended in any manner whatsoever as any amendment would offend the parol evidence rule. To this end he quoted the remarks of Corbett JA in the case of **Johnston v Leal** [1] *to wit*:-

> *"it is clear to me that the aim and effect of this rule is to prevent a party to a single contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or remove the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract."*

[12] It was **Adv. Mosito**'s further contention that there is no provision in the contract that the plaintiff's wife is also a party to it yet the defendant sought to lead evidence showing that she was a party. It was his submission that if the object of leading such extrinsic evidence is to incorporate it into the agreement and to enforce the said condition, then such evidence would be inadmissible.

[13] With respect to voluntary surrender, it was **Adv. Mosito**'s submission that there is no provision for it in the agreement between the parties herein and that same should have been embodied in the contract

[1] 1980 (3) SA 927 (A) at 943 B-E

as an express term thereof. Further that no variation, novation or cancellation of the contract shall be of any force or effect unless reduced to writing and signed by the parties or their duly authorized agents. In support of this submission, Counsel for the plaintiff referred to the comments in the English case of **Mercantile Credit Co. Limited v Cross** [2] in which the Court of Appeal per Wilmer LJ stated as follows:-

> *"I find it quite impossible to accept the contention that acceptance of a voluntary surrender of goods the subject matter of a hire-purchase amounts to an 'enforcement' within the meaning of section 11(1) of the Act. The words to be construed are 'enforce any right to recover possession.' Those words appear to me to imply active step being taken. They are not, in my judgment, apt to describe the passive conduct of one who merely accepts the delivery of goods surrendered by consent."*

[14] To this end, it was Counsel's submission that what is contemplated in clause 9 of the agreement in the present case is impliedly that active step be taken, and is not apt to describe the passive conduct of one who merely accepts the delivery of goods surrendered by consent in case of breach of the agreement. Further that the concept of voluntary surrender of goods finds no accommodation in the agreement. He however correctly added that one of the remedies available to the owner in the case of a breach of a hire-purchase agreement is re-possession of the goods.

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[2] [1965] 2 QB 205

[15] On the other side, **Adv. T. Mpaka** who represented the defendant made the contention that on the facts, at the material time, the plaintiff breached the agreement by failure to pay installments and fell in arrears. He added that in order for the plaintiff herein to succeed in his claim, he has to prove the following facts on a balance of probabilities.

[16] These are, breach of contract and that the defendant was placed *in mora* or the defendant repudiated the contract; the right to cancellation has accrued in favour of the plaintiff because the breach was material or that the contract has a cancellation clause and the provisions for termination have been complied with; the plaintiff has suffered damages; the damages flowed naturally and generally from the kind of breach of contract in question or were within the contemplation of the parties when the contract was concluded; the contract was entered into on the basis of that knowledge, as well as a causal link between the alleged breach and the damages.

[17] In this connection, **Adv. Mpaka** made the submission that the plaintiff has failed to prove the breach in as much as his testimony was improbable and thus cannot be believed and that he has failed to discharge the onus on him that the defendant was *in mora*, had breached a specific clause of the contract entitling him to cancel with the resultant damage, and that he suffered damages and/or the extent thereof as the alleged damages were never quantified.

[18] Further that on the evidence placed before the Court, there are clearly two conflicting versions and when the Court is faced with such a situation, it must evaluate the evidence of the party that bears the onus. Further that when there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and the defendant's version is false or mistaken and falls to be rejected.

[19] Further that the estimate of the credibility of a witness will be inextricably bound up with a consideration of the probabilities of the case and if the probabilities favour the plaintiff, then the Court will accept his version. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do that of the defendant, the plaintiff can only succeed if the court nonetheless believes him and is satisfied that his evidence is true and the defendant's version is false.[3]

[20] In connection with the issue of the probabilities, it was **Adv. Mpaka**'s submission that the plaintiff's version is inherently improbable in that though he testified that the bus was sought for a trip, he failed to mention the nature, destination, duration thereof and the fare charged as would be expected of him as its owner in the ordinary course of business.

[3] National Employers' General Insurance v Jagers 1984 (4) SA 437 at 440 D - G

[21] Secondly that it is inconceivable that P.W.2 would leave an open space suitable for picking up passengers and then agree to drive through a small gate into the bank yard where there wasn't enough space. Further that it cannot be sheer coincidence that the bank was given possession of the bus at the same time the plaintiff was in arrears and already thinking of selling it and had suggested surrender, according to the defendant's version, especially since it is not clear that this is the only bus that the plaintiff had.

[22] Thirdly that it is highly improbable that two witnesses would testify to the fact of the wife of the plaintiff being the one that surrendered the bus and be wrong on the point because if indeed she had not, the plaintiff could have called her to testify more so when there is evidence that she signed the surrender form.

[23] Fourthly that it is highly improbable for the plaintiff not to have taken immediate action if according to him the bus was "seized" and only belatedly did so almost a year down the line in his unsuccessful application for a spoliation order whose contents totally destroys his credibility. This because, therein, his evidence is that the bus was seized at the Maseru bus stop where it had been parked and in respect of which his witness in this trial disowned the supporting affidavit thereof that he *ex facie*, deposed to and signed.

[24] Lastly that it cannot be sheer coincidence that the bus was sold for the price that the plaintiff had already suggested in his letter to the bank marked **"Id A"** in these proceedings.

[25] On the question of breach, **Adv. Mpaka** made the contention that for the plaintiff to succeed, he has to prove that the defendant failed to perform its part with regard to the terms of the agreement and the damages and quantum thereof. He stated that the plaintiff's case is misguided in alleging that the defendant is guilty of repudiation in that per his case, the defendant breached clauses 9 and 10 of the agreement. It was his submission that both clauses do no give rise to such a right because clause 9.1 provides that all action to be taken by the defendant in the case of breach by the plaintiff is at the defendant's election.

[26] He added that there is no evidence that the defendant has terminated the agreement. That on the other hand, clause 10 of the agreement can only kick in if the plaintiff concedes that he was called upon by the defendant to place the bus into the latter's possession which fact is vehemently denied by the plaintiff in terms of the evidence.

[27] Counsel for the defendant made the further contention that in terms of the pleadings, the plaintiff cancelled the agreement verbally and for that reason there was no cancellation in terms of clause 13.2 of the contract. It was his submission that in the absence of an agreement to the contrary, a party to a contract who exercises his right to cancel must

convey his decision to the mind of the other party; and cancellation does not take place until that happens. He added that the evidence led does not prove that fact as such the defendant was not placed in *mora*. He added that in the alternative even if the Court finds that the plaintiff has proved breach that does not automatically translate into a successful claim for damages.

[28] It is against this scenario that I now proceed to deal with the question whether there was a breach of the contract or not and if so which of the parties was in breach and since it is common cause that the plaintiff fell in arrears, the it is my view the answer will be dependant on how the defendant took possession of the bus in question.

[29] In this respect, the evidence of the defendant is that the plaintiff voluntarily surrendered the bus and ordered his wife and driver to drive it to the premises of the defendant whereas the plaintiff testified that he was hoodwinked into taking the bus there on the pretext that it was going to ferry the defendant's employees on a trip.

[29] It is thus not debatable that these two versions are indeed conflicting and mutually destructive. In this regard, it is a well established principle of law that when the Court is faced with such a situation it must evaluate the evidence of the party that bears the onus against the general probabilities and the plaintiff can only succeed if he

satisfies the Court on a preponderance of probabilities that his is the true version.

[30] To this end, I am cognizant that the record of the Court also contains the spoliation application that the plaintiff launched in 2008, as well as the pleadings in this action. In the application, his assertion is that the bus was seized by the defendant's employees while it was parked at the Maseru bus stop and they drove it to where they impounded it. He is supported in this regard by his driver, PW2 sin his signed affidavit albeit he disavowed knowledge thereof under cross-examination in this trial.

[31] However, per the contents of his pleadings and evidence, it is the case of the plaintiff that the bus was driven to the defendant's premised by his driver to ferry the employees of the defendant only for the latter to seize it unlawfully. It is noteworthy that his own story with regard to how he alleges the bus was repossessed is contradictory.

[32] It is an unassailable fact that the alleged seizure forms the very crux of the plaintiff's version with regard to his claim that the bus was seized unlawfully. It is thus my view that the contradiction is so material that it renders his version highly improbable especially when considered against the fact that the alleged unlawful seizure is vehemently disputed by the defendant.

[33] In addition, it is noteworthy that the alleged seizure happened at the time that the plaintiff had already discussed the issue of his being arrears with his instalments with the defendant through DW1. This is in terms of a letter he wrote to the defendant wherein he acknowledged his debt a fact he admitted in cross-examination.

[34] Further, while it was correctly suggested by **Adv. Mosito KC** that it was not put to the plaintiff in cross-examination that his version is also improbable because he never gave the Court the details regarding the alleged trip, such as the destination, the fare charged, the duration thereof, etc, it is my view that due to the fact that the onus was on him, his evidence in this respect was indeed very wanting yet it lied at the very centre of his case, i.e. that the bus had been taken to the defendant to ferry the latter's employees on a trip.

[35] With regard to the suggestion that it was up to the defendant to call the plaintiff's wife to testify to the fact of the voluntary surrender, it is my view that while it might have been necessary otherwise, for the very fact that I have found that that the plaintiff's version is highly improbable, it would not take his case any where. For these reasons I accordingly find that his version is so improbable that it is ought to be rejected as false as I hereby do. See the case of **National Employers General Insurance v Jagers (supra).**

[36] However, it was also submitted on behalf of the plaintiff that his wife was not a party to the contract so that having pleaded voluntary surrender the defendant cannot turn around and lead evidence that someone other than the plaintiff surrendered the vehicle. In this connection, **Adv. Mosito K**C made reference to several cases in which the legal position has been lucidly stated that the object of pleadings being to define the issues, the parties will be kept strictly to their pleas where any departure from it would cause prejudice to the other party or would prevent a full enquiry. [4]

[37] In this connection the defendant stated as follows at paragraph 8 of its plea:-

> *"The Defendant pleads that the Plaintiff made a voluntary surrender of the vehicle to the Defendant without the necessity of legal action. Defendant pleads that it was entitled to take the vehicle into its possession and denies that there was any misrepresentation made to Plaintiff and Plaintiff is put to proof of the contrary."*

[38] I respectfully agree with the stated position of the law because indeed the purpose of pleadings is to bring to the notice of the Court and the parties to an action the issues upon which reliance is to be placed and this was aptly stated by Tredgold J in the case of **Durbach v Fairway Hotel** [5] among others albeit the Court in that case was specifically

[4] Robinson v Randfontein Estates G.M. Co. Ltd 1924 AD 173 at 193
[5] 1949 (3) SA 1081 (SR) at 1082

dealing with the issue of discovery of documents. However, it is also trite that while pleadings must set out the facts with sufficient particularity, evidence must not be pleaded. [6] Thus as the learned Isaacs states:-

> *"There is a distinction between giving evidence of a fact and stating that fact … Stating that a thing was done is stating a fact; giving details of how it was done would be giving evidence of it."*

[39] It is therefore important to consider whether the fact that the defendant did not state in his plea that the voluntary surrender was done by the wife of the plaintiff, is a fact or evidence of how it was done. In my opinion, it was sufficient for the defendant to have stated that the bus was voluntarily surrendered by the plaintiff without stating that it was by his wife and or driver as that would be stating the how.

[40] In addition, the very fact that the plaintiff does not raise the same argument with respect to the fact that it is the defendant's evidence that it was PW2 i.e. the plaintiff's driver that drove the bus to the defendant's premises and not the plaintiff himself also proves that the issue of who actually drove it there is not material as long it is shown that it was done pursuant to the instructions of the plaintiff because it is common cause that he was out of the country on that particular day.

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[6] Isaacs; Beck's Theory and Principles of Pleadings in Civil Actions, Butterworths ,5th Edition p 37

[41] Thus, I am not persuaded by the submission that by giving testimony that it was the wife of the plaintiff in the company of his driver PW2 who drove the bus to the defendant in voluntary surrender, the defendant shifted from his case as it is stated in his plea. It further does not suggest that his wife was now being made a third party to the contract in as much as same was not suggested about his driver who undisputedly drove the bus to the defendant's premises.

[42] I am saying this cognizant of the fact that the plaintiff's evidence is that the reason his driver drove the bus there per his instructions was to ferry the employers of the defendant on a trip. It must be remembered that I have already found that this evidence contradicts materially with what the plaintiff averred in his founding affidavit to the spoliation application which is part of the Court's record.

[43] This in turn brings me to the issue whether having accepted the defendant's version as the more probable and the plaintiff's as false, the said voluntary surrender was either a term of the contract between the parties and/or the defendant was placed in *mora*. The issue of breach is dealt with in clause 9 of the contract and it reads as follows in relevant parts:-

"9.1 should the purchaser

9.1.1 default in the punctual payment of any instalment or any other amount falling due in terms thereof or fail to observe and perform any other of the terms, conditions and/or obligation of this Agreement, or

... upon the happening of any of these events the Seller, shall, subject to the provisions of the Hire Purchase Act No. of 1974 or any amendment or substitution thereof ("the Act"), in so far as the Act may be applicable to this Agreement, be entitled in its election and without prejudice to any other rights to

9.1.10.1 claim immediate payment of all amounts payable in terms hereof, irrespective of whether or not such amounts are due at that stage, or

9.1.10.2 immediately terminate this Agreement and take whatever legal steps are available to it to obtain repossession of the goods, retain all amounts already paid in terms hereof by the Purchaser and claim liquidated damages calculated in accordance with the following provisions…."

[44] The term voluntary surrender is not mentioned anywhere in the terms of the agreement. However, it is my view that once it happened, it was not necessary for the defendant to take any legal action as envisaged in clause 9 of the agreement because it was an implied term that can be deduced from clause 9.1.10.2 above.

[45] The clause provides for the defendant to take whatever **legal steps available to claim repossession of the goods** which in my view became unnecessary due to the voluntary surrender by the plaintiff. In terms of the **Hire Purchase Act**[7] the buyer is given the right to terminate the contract and to communicate such termination to the seller in writing. *In casu*, there is evidence that the plaintiff wrote a letter **Exhibit "A"** to the bank in which he was acknowledging that he was in arrears and in which he proposed that the bus be sold for M1, 500 000.00 which in my opinion was termination of the hire purchase agreement.

[46] Thus, it is also my view that the decision in the **Cross' case (supra)** is distinguishable from the present one in my view because therein, the defendant had surrendered possession of a motor cycle he had bought on hire purchase consequent to a notice of termination of the contract from the plaintiffs. *In casu,* I have already accepted the evidence that the plaintiff surrendered the bus voluntarily not because of any notice requiring him to do so but independently.

[47] In addition, I wish to respectfully align myself with the comments of the Court in **Samuel Aro v Joe Allen & Co. Limited**[8] quoted by the plaintiff's Counsel in which Okagbue J.C.A. defined a hire-purchase transaction in the following terms:-

[7] Act No. 27 of 1974
[8] [1979] 2 FNR 292

> *"... essentially, a hire-purchase system is a system whereby the owner of the goods lets them on hire for periodic payments by the hirer upon an agreement that when a certain number of payments have been completed, the absolute property in the goods will pass to the hirer, but so however, that the hirer may return the goods at any time without any obligation to pay further balance or rent accounting after return; until the condition have been fulfilled the property remain in the owner's possession."*

[46] Thus, in the light of the position stated above, voluntary surrender in a hire-purchase system does not constitute variation or amendment of the terms of the contract in which case, the parol evidence rule would have to apply.

[46] It is on the basis of the foregoing reasons that I find that the plaintiff has failed to make out his case that the defendant is in breach of the contract on the basis of which he should be awarded damages. I accordingly dismiss his claim with costs.

N. MAJARA
JUDGE

For the plaintiff : Adv. K. Mosito KC

For the defendant : Adv. T. Mpaka