IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/511/2018**

In the matter between:

'MATIKOE LETSIE **PLAINTIFF**

VS

KAMOHELO MONYAU **DEFENDANT**

Neutral Citation: 'Matikoe Letsie v Kamohelo Monyau (CIV/T/511/2018) [2021] LSHC 21 (25TH MARCH 2021)

JUDGMENT

CORAM: **MOKHESI J**

DATE OF HEARING: **10TH FEBRUARY 2021**

DATE OF JUDGMENT: **25TH MARCH 2021**

SUMMARY

CIVIL PRACTICE: *Defendant raising a special plea that the plaintiff does not have locus standi in judicio to sue on account of the fact that the plaintiff's vehicle was a subject of a hire purchase agreement at the time of the collision-* ***Smit v Saipem*** *considered and applied, and special plea dismissed.*

ANNOTATIONS

CASES:

Raqa v Hofman (A38/2009) [2009] ZAWCHC 90; 2010 (1) SA 302 (WCC) (29 May 2009)

Smit v Saipem 1974 (4) SA 918 (A)

[1] The genesis of the plaintiff's claim against the defendant is the motor vehicle collision which involved vehicles driven by the defendant and the plaintiff's vehicle (Registration numbers and letters A 0215) which at the material time was driven by one Taelo Mochebelele. The plaintiff had instituted an action claiming an amount of M27,830.36 against the defendant. It is common cause that the vehicle A 0215 was registered in the names of the plaintiff. Even though the said vehicle was registered in the names of the plaintiff it was bought under hire purchase agreement which was still alive. At that time, the vehicle was insured, and to all intends and purposes, the plaintiff was the vehicle's lawful possessor.

[2] In his plea, the defendant had raised a special plea of *locus standi in judicio* couched in this manner:

> ***"SPECIAL PLEA:***
> ***LOCUS STANDI IN JUDICIO:***
>
> *The plaintiff's vehicle was still under hire purchase agreement at the time of the alleged accident. Over and above that, the vehicle as insured. The plaintiff does not have the locus standi in judicio to institute these proceedings against the Defendant as she is/was just a possessor at the time of the accident. It is the insurer and/or the bank who could sue the Defendant and, on this point alone this action deserves to be dismissed with costs."*

[3] The essence of the defendant's special plea is clear: Because the plaintiff had not as yet become the owner of the vehicle, which was bought on hire purchase, he therefore could not sue in his name. According to the

defendant, it is the bank which has the *locus standi* to sue. The defendant had advanced this argument and went on about explaining how ownership in hire purchase agreement passes to the purchaser. He cited the Hire Purchase Act 1974 to bolster his argument. In my judgment, the issue of the passing of ownership is not determinative of this case. It is now trite, following the decision in **Smit v Saipem 1974 (4) SA 918 (A)** that our law recognises, in certain circumstances the right of a person who is not the owner of the property to claim compensation under Aquilian action for damage to such a property. **Smit v Saipem** (ibid) recognised that a debtor under hire-purchase agreement can bring an action under *Lex Aquilia* in his own name for diminution in the value of property in his possession for damage caused to it.

[4] Because the **Smit v Saipem** decision was authored in Afrikaans, I had a pleasure of relying on the extrapolation of its conceptual and legal bases provided by Binns-ward AJ in **Raqa v Hofman (A38/2009) [2009] ZAWCHC 90; 2010 (1) SA 302 (WCC) (29 May 2009)** wherein the learned judge said:

> *"[16] Jansen JA found it convenient, notwithstanding the peculiar facts of the case before the court, to address the question with regard to the analogous position of a purchaser under a hire-purchase contract. In this regard (excluding what might otherwise be the position were any of the parties involved), the learned Judge observed that having regard to the purchaser's financial obligation to the seller in respect of payment of the purchase price, which remained unaffected by the fate of the res vendita after delivery, the seller's economic interest in the true sense was not in the goods, despite its ownership thereof, but rather in the payment of the purchase price by the buye. Seen in that way the claim for the purchase price, and not the res vendita itself, was*

the hire-purchase seller's 'real asset' (Afr. 'werklike bate'). Referring to Professor Boberg's contribution on Delict in the 1972 Annual Survey, Jansen JA remarked that it was considered desirable that hire-purchaser should be afforded a right to claim compensation, based on the diminution of value of the goods, from a person who wrongfully damaged the res vendita. The question, the Judge said, was whether our law was sufficiently 'supple' to provide the hire-purchase with the remedy in delict that was, in the context of the (then) recently manifested phenomenon of the large scale conclusion of hire-purchase contracts (nowadays, technically labelled 'instalment agreement'), regarded by commentators like Boberg as desirable.

[17] It is unnecessary for present purposes to rehearse the historical analysis undertaken by Jansen JA to arrive at the affirmative answer he gave to the questions identified in the passages of the judgment mentioned above. It is sufficient to state that the learned Judge concluded that although our law had adhered to the principle that a purchaser had no right to a claim under the Actio Legis Aquiliae before it had taken delivery of the res vendita, there were nevertheless examples in our jurisprudence which established recognition of the possessor, who was not the owner, to a remedy premised on the possessor's negative interest in the property in this regard, the judgments in ***Melville v Hooper 3 SC 261*** *(a claim by a caretaker of livestock, who was responsible to the owner for their good condition), and* ***Spolander v Ward 1940 CPD 24 (****a claim by a borrower of goods for use, who was responsible to the hire-purchase thereof for their safe return), were cited. Significantly, the learned Judge of appeal considered it appropriate to expressly distinguish the position of claimants in the cited cases from that of an insurer. The distinction was explained on two bases; firstly, the discrete character and effect of the contract of insurance, and secondly and of particular importance to the current case – on the ground that an insurer is not the possessor (Afr. 'houer') of the insured good.*

> *[18] The subsequent judgment of the Appellate Division in* ***Refrigerated Transport (EDMS) Bpk v Mainline Carriers (EDMS) Bpk 1983 (3) SA 121 (A)*** *also proceeded on the basis of an acceptance by the court that the extension of the Aquilian remedy to a claimant who was not the owner of the property in question was premised on the presence of the dual attributes of possession of, and risk-bearing responsibility by, the claimant in respect of the property in question."*

In the light of this legal background the special plea raised in this case is ill-conceived and should be dismissed.

[5] **Costs**

Although as a matter of general principle, costs should follow the event, however in this matter, that should not be the case: Ms Taka for the plaintiff did not file the plaintiff's heads of argument at all, and therefore, this judgment was written without having the benefit of her submissions. A problem engendered by this behaviour was more pronounced as I had informed both counsel that the heads of argument should suffice for writing this judgment, without the need for oral arguments. In the exercise of my discretion to show my utter displeasure at this conduct, the plaintiff should be deprived of her costs in this matter.

[6] In the result:

(a) The special plea is dismissed with no order as to costs.

MOKHESI J

For the Plaintiff:	**Ms. Taka** **From Webber Newdigate Attorneys**
For the Defendant:	**Adv. Mariti**