IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.47в OF 2013

CCT/206/2008

In the matter between

TUMO TLELAI t/a LESOTHO MINERAL EXPLORATION **APPELLANT**

And

THE LIQUIDATOR, LESOTHO BANK (IN LIQUIDATION) **RESPONDENT**

CORAM: K. E. MOSITO P
P.T.DAMASEB AJA
M.C. CHINHENGO AJA

HEARD: 23 JULY 2015

DELIVERED: 7 AUGUST 2015

SUMMARY

Appeal from the High Court – High Court having dismissed an application for rescission on the basis that it was time-barred – Hire purchase Act 1974 requires that the goods be transferred (delivered) - there being no proof that the caterpillar allegedly sold to the appellant was as a fact delivered – Court of Appeal exercising its discretion to decide the appeal on the ground other than the ones set forth in the grounds of appeal and relied upon by the parties in the interest of justice.

Appeal succeeding with no order as to costs – matter remitted to the High Court to enable the appellant to file his plea and defend the action.

JUDGMENT

MOSITO P

[1] This is an appeal against an order, with costs, by the Commercial Division of the High Court (**Molete J**).The facts giving rise to this appeal are that, on 7 October 1993 and at Maseru, the respondent as "the seller" and the appellant as "the purchaser" entered into a hire purchase agreement. In terms of the said agreement, the respondent was to sell to the appellant a motor vehicle described as a "caterpillar 910 front-end, chassis/serial number 8OU08409." The full purchase price agreed on was the sum of M104, 310.37 (One hundred and four thousand, three hundred and ten Maloti and thirty seven Lisente) including finance changes.

[2] A deposit of M28, 366, 67 (twenty eight thousand three hundred and sixty six Maloti and sixty seven Lisente) was

payable on or before signature of the agreement. The amount of M104, 310.37 (One hundred and four thousand, three hundred and ten Maloti and thirty seven Lisente) was payable in monthly instalments of M2, 109.55(Two thousand one hundred and nine Maloti and fifty five Lisente) and a final instalment of M2, 109.45 (Two thousand one hundred and nine Maloti and forty five Lisente) over thirty five months. The first instalment was payable on 28 November 1993 and subsequent instalments on the 28th day of each succeeding month thereafter until the whole purchase price would have been paid.

[3] It was a material term of the agreement that, should the appellant default in the punctual payment of any instalment or any other amount falling due in terms thereof, or fail to observe or perform any other of the terms, conditions and/or obligations of the agreement, the respondent would, subject to the ***Hire Purchase Act No. 27 of 1974*** or any amendment thereto, in its election and without prejudice to any other rights, to take certain specified steps.

[4] The respondent alleges in its declaration that it performed its obligations in terms of the agreement and that the caterpillar was delivered to the appellant on behalf of the respondent. The respondent further alleges that in breach of his obligations in terms of the agreement, the appellant failed to make payment of certain instalments and as at the

10th day of August, 2008 the appellant was in arrears in an amount of M72,689.73 (seventy two thousand six hundred and eighty nine Maloti and seventy three Lisente). In the circumstances the respondent instituted an action in the Commercial Division of the High Court for judgment in the following terms:

> *"(a) Payment of the amount of M72, 689.73 (Seventy two thousand six hundred and eighty nine Maloti and seventy three Lisente).*
>
> *(b) Interest on the said amount of M72, 689.73 (Seventy two thousand six hundred and eighty nine Maloti and seventy three Lisente) at the rate of 18.25% per annum a tempore morae to date of payment.*
>
> *(c) Cost of this suit on the scale as between Attorney and own Client.*
>
> *(d) Further and alternative relief."*

[5] On 19 February 2009, the respondent obtained judgment by default from the Court a quo for the sum claimed in the summons. A writ of execution was subsequently issued against the appellant on 23 March 2009. The appellant filed an application for rescission and stay of execution by way of Notice of Motion. In the affidavit supporting the application, he (Tumo Tlelai) denied that he ever received a summons to appear in Court. He attempted to dispute that he and "2nd applicant" were two separate entities. However a reading of the papers filed of record did not reveal that there was a "2nd

applicant". He also attempted to dispute that he entered into an agreement for a loan in his personal capacity. He also deposed that no caterpillar was ever bought for him by the respondent.

[6] Appellant further averred that if ever the respondent bought a caterpillar for him, it ought to have proven that as a fact such agreement was concluded and attached the registration certificates as well as ownership papers on to papers because in agreement of hire purchase, ownership passes to the buyer upon completion of payment of the debt. He therefore charged that he ought to have been shown such papers as they should be in the possession of the respondent.

[7] In proof of its claim and in reaction to the application for rescission, the respondent annexed an invoice addressed to Barlows, Box 1088, Bloemfontein 9300. The invoice is on the letterhead of J & G Transport and is dated 14 September 1993. It indicates that on 9 September 1993, there was transported D910 from Ladybrand to Kao junction. It also reflects a waybill number, an amount and a truck number.

[8] The appellant however denies that the said invoice proves that payment was made on his behalf or on behalf of Lesotho Mineral Exploration (Pty) Ltd. He avers that there is

no way J & G transport could deliver the property to him before an agreement was entered into. This he says because the invoice is dated 14 September 1993 while the Hire Purchase Agreement is dated 6 October 1993. He also avers that the delivery invoice does not expressly show that it was made to his place of business and it does not even show as to who received the property on his behalf. He avers that the respondent should have shown as to who amongst appellant's employees received the property.

[9] On 26 September 2003, **Molete J** dismissed the application for rescission and ordered that, "the application is time-barred to the extreme and the applicant has failed to discharge the onus on him to dispute the service by the Sheriff." He consequently dismissed the application with costs.

[10] The appellant noted an appeal to this Court. His grounds of appeal are reproduced below:

> *"1. The learned judge erred and/or misdirected himself by holding that the appellant's rescission application is time-barred basing himself on the return of service for service of summons not on the date of knowledge of default judgment.*
>
> *2. The learned judge erred and/or misdirected himself by holding that rescission application is time-barred basing himself on the date the writ of execution was issued notwithstanding the fact that there is no proof that writ of execution was ever served upon the appellant until in August, 2011.*

> 3. *The learned judge erred and/or misdirected himself by holding that appellant's rescission application is time-barred basing himself on the notice of appearance to defend saying appellant knew of the matter and failed to defend it.*
>
> 4. *The learned judge erred and/or misdirected himself by holding that rescission application is time-barred basing himself on the merits of the matter, whether appellant's explanation for not defending the matter was sufficient or not in limine."*

[11] Quite clearly therefore, the appellant took issue with the decision for the reason that the judge a quo arrived at the decision that the application was hopelessly out of time having had regard to the date of service of the summons, the date on which the writ of execution was issued, the date on which an entry of appearance to defend was purportedly filed on appellant's behalf and the explanation proffered by the appellant for not defending the matter. These were the specific grounds of attack by the appellant of the decision of the court below. In terms of Rule 4 of the Rules of this Court, the appellant must stand or fall by his grounds of appeal, although the Court has the discretion to consider other matters as it may consider relevant in the circumstances. The question here is partly whether there are any circumstances that should constrain this Court to consider other factors outside the stated grounds of appeal. I will revert to this issue later below.

[12] In this case the Deputy Sheriff delivered the summons on the appellant personally on 9 December 2008. In the return of service at page 22 of the record of proceedings the Deputy Sheriff

makes it abundantly clear that "I served summons upon the defendant personally at Thaba-Khupa and he signed to acknowledge the service." A return by Deputy Sheriff is *prima facie* proof of what is stated therein. This is so because the Deputy Sheriff is an officer of the court and his return, unless shown to be false must be accepted as reflecting the truth of what it says. Persuasive authority for the proposition that the return is prima facie proof of what is stated therein is the various judgments of the High Court.

[13] On 18 February 2009 the respondent applied for default judgment purportedly in terms of Rule 27 (11) of the High Court Rules and judgment was entered on 19 February 2009. It seems to me that the relevant Rule is Rule 27(3) because there is no sub-rule (11) in that Rule. I may also observe that the application for default judgment was not made on notice to the appellant because as at the date of the application and the date it was granted, an appearance to defend had not been entered.

[14] An appearance to defend was however entered for the appellant by EH Phoofolo & Co, c/o Mahase Chambers, Legal Practitioners, on 27 March 2009. This was just over a month after the default judgment was granted. One wonders it was that the legal practitioners entered the appearance some four months after service of the summons and a month after the grant of the default judgment? Only them can explain. The appellant denied that he was served with the summons or that an appearance to

defend was entered on his behalf by Phoofolo & Co. This denial and an

explanation as to how it was that the appearance was entered are contained in paragraph 3 of the answering affidavit where it is stated-

> *"…I have indicated that I only came to know the judgment when a writ of execution was served upon my wife on the 26th day of August 2011. …I must indicate that I never instructed M MAHASE CHAMBERS in this matter, it is possible that he find (sic) the matter in other places and knowing that he represented me in all my matters then he issued appearance to defend but it is not through my instructions and knowledge."*

[15] Phoofolo & Co. could only have entered the appearance because they had been given the summons by the appellant and had become aware that a default judgment had been entered. At that point in time Phoofolo & Co could have acted only on the basis that they had been given the summons or it had come to their attention that a judgment had been entered against the appellant. Either way they would have advised the appellant of the action that they had taken. It would therefore not be with a sound basis to hold that at the very latest the appellant became aware of the default judgment on or about the time that Phoofolo & Co. entered an appearance for him.

[16] The Deputy Sheriff and the legal practitioners in Phoofolo & Co. are officers of the court. The former alleged that he delivered

the summons to the appellant personally and the latter entered an appearance for the appellant. No reason is advanced as to why the Deputy Sheriff would have filed a false return. Phoofolo & Co. filed no affidavit in support of the appellant's assertion that they entered appearance without his instructions. By his own admission they represented him in all his matters. He could have easily obtained a supporting affidavit from them. In my view the appellant's bare denial that he did not receive the summons and his failure to get a supporting affidavit from Phoofolo & Co. that they entered an appearance without his authority are a sufficient indication that the appellant is untruthful and therefore evidence against him. I am satisfied that the summons was personally delivered to him and that he signed for it as stated in the return of service. I am also satisfied that Phoofolo & Co. entered appearance for him on his instructions.

[17] This Court should be loath to doubt the professional integrity of its officers. **Mr Mots'oari** was also unable to explain why the said attorney who had allegedly filed a Notice of Appearance to Defend without a mandate was not asked to file an affidavit explaining why he had done so. It is highly improbable that an officer of this Court would have done what the appellant would like this Court to believe he did in this connection. One would have expected that the appellant would ask the attorney to file such an affidavit failing which, the appellant himself would file an affidavit indicating that the attorney has refused. None of these were presented before this Court. In the same way the

appellant's failure to provide a tangible reason for not defending the action was not convincingly explained before us. Thus, if the above grounds of appeal were anything to go by, this appeal would ordinarily be dismissed.

[18] The court order was not attached to the papers, but the writ of execution bearing the stamp of the Assistant Registrar of the High Court is proof enough that the default judgment was entered on 19 February 2009.

[19] The appellant lodged the application for the rescission of the default judgment on or about 24 August 2011. He averred that he became aware of the default judgment on 19 August 2011 after a writ of execution was served on his wife on 18 August and so applied for rescission immediately. This is the application that was dismissed by his Lordship Molete J on 26 September 2013, the decision now appealed. The notice of appeal was filed on 30 October 2013 and the appeal heard this July 2015 session of the Court.

[20] The default judgment was entered against the appellant only because he did not defend the claim after he was personally served with the summons. He did not advance good and sufficient cause for the rescission of the default judgment. To succeed in such an application one has to show good and sufficient cause i.e. give a reasonable explanation for the default;

show that the application is made *bona fide* and show a bona fide defence to plaintiff's claim (see ***GD Haulage (Pvt) Ltd v Mumugwi Bus Service (Pvt) Ltd 1980 (1) SA 729 (ZRA) and Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765 A-G)***. The appellant's application was dismissed because he failed to show good and sufficient cause. Even though the judge a quo did not give detailed reasons for dismissing the application he at least stated that the application was "time barred to the extreme."

[21] One of the essentials for establishing good and sufficient cause is that the application must be bona fide. On this score the applicant failed dismally. At the hearing he conceded that he applied for the loan in his personal capacity. Indeed he went on to sign the agreement in his personal capacity. The price of the caterpillar was some M104 000.00. The appellant paid a deposit of some M28 000.00 hence he was sued for the balance of about M72 000.00. That deposit was to be paid on signing the agreement. That explains why the invoice is dated 14 September 1993 and the agreement was only signed about three weeks later on 6 or 7 October 1993. The respondent averred that it delivered the caterpillar vehicle to the appellant. There is some evidence, though not the best evidence, that the caterpillar vehicle was purchased for the appellant and transported from South Africa into Lesotho. The appellant was sued for the balance of the purchase price 10 years later from the time that he signed the agreement and paid the deposit. One would have thought that, if for ten years the vehicle had not been delivered to him, he would

have long instituted action either for the return of his money or for the delivery of the vehicle. It was only in 2009, after he was personally served with the summons, failed to enter an appearance to defend, and served with a writ of execution that he applied for rescission of the judgment and alleged among other things that the caterpillar vehicle was not delivered to him.

[22] The appellant's grounds of appeal did not raise the issue that the caterpillar vehicle was not delivered. They only dealt with the objection to the judgment of the court a quo that the application was irredeemably out of time. In my view, the grounds of appeal carry no merit at all.

[23] However this aspect of the case has exercised our minds quite heavily against just dismissing this appeal. It happened that, at the hearing of this appeal, this Court enquired from **Advocate S. Malebanye KC** who appeared for the respondent as to whether the Court a quo did apply its mind to the averment by the appellant that the caterpillar which the respondent had allegedly purchased and was delivered by J& G Transport was as a fact, ever delivered to the appellant or his business place. The learned counsel was not able to point to an affirmative answer on the record. There was indeed no documentary support that it was ever delivered to the appellant and there was no evidence filed of record by whoever might have delivered it either at the appellant's place of business or to the appellant himself or left it with the appellant's employees.

[24] In all fairness to **Advocate S. Malebanye KC,** he conceded this point and he drew the attention of this Court in the interest of justice, to the terms of Rule 4 (5) of the Rules of this Court that it was permissible to resolve this appeal on any ground other than those relied upon by the parties. We were very grateful to the learned counsel for his mature guidance of this Court in this regard. **Advocate Malebanye** also urged us that, it would not be in the interest of justice to dismiss the appeal if we were of the view that it is highly probable, regard being had to the record before us, that the caterpillar may have not been delivered at the appellant's place of business or to the appellant. This concession was clearly well made for this is an issue on which a Court of justice would not just let pass while at the same time aware that it raises some eyebrows.

[25] It is true that this Court has to ordinarily decide an appeal on the basis of the grounds filed on appeal and, no party is permitted to argue an issue which has not been raised in the grounds of appeal. Rule 4 (5) of the ***Court of Appeal Rules 2006*** provides as follows:

> *"The appellant shall not argue or rely on grounds not set forth in the notice of appeal unless the court grants him leave to do so. The court, in deciding the appeal, may do so on any grounds whether or not set forth in the notice of appeal and whether or not relied upon by any party."(Underlining added for emphasis)*

[26] In my opinion, it is clear that the appellant has all along been disputing that he did receive the caterpillar as it was not delivered to him. In my opinion, the Court a quo erred in not addressing this issue. This failure culminated in an injustice on the appellant.

[27] Section 3 of the ***Hire Purchase Act No. 27 of 1974*** provides for the transfer of the possession of the goods sold, while the purchase price is to be paid in instalments. This clearly indicates that there must be delivery of the goods to the purchaser. A hire purchase agreement is a species of the contract of sale. The essentials of a contract of sale are agreement upon the *merx*, the price and the obligation of the seller to deliver the *merx* to the purchaser (See: ***Commissioner for Inland Revenue v Wandrag Asbestos (Pty) Ltd 1995 (2) SA 197 (A) p214***). A hire purchase agreement is a form of credit sale. A credit sale is one in which the time for payment has been postponed for a substantial, i.e., non-eligible, period after delivery (***Laing v SA Milling Co. Ltd., 1921 AD 387 at pp. 394 - 5, 400 - ; R. v Salaam, 1933 A. D. 318 at p. 320***).

[28] According to our law, ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods (see ***Crockett v Lezard, 1903 T.S. 50 at pp. 592-3; Commissioner of Customs and Excise v Randles Bros. and Hudson Ltd., 1941 AD 369 at p. 398; Ambassador Factors Corporation v***

K. Koppe & Co.; K. Koppe & Co. v Accreylon Co. Inc., 1949 (1) SA 312 (T) at p. 318; American Cotton Products Corporation v Felt and Tweeds Ltd., 1953 (2) SA 753 (N) at pp. 756 - 7). Whether delivery alone will suffice depends in general upon the intention of the parties (See: ***Weeks and Another v Amalgamated Agencies Ltd. 1920 AD 218 at p. 230; Eriksen Motors (Welkom) Ltd. v Protea Motors, Warrenton and Another, 1973 (3) SA 685 (AD) at p. 694***).

[29] The issue whether a property that is said to have been sold and delivered to a purchaser was as a fact so delivered, is one that cannot be lightly ignored. A seller who claims for his purchase price must prove that the property subject of the sale was as a fact delivered to the purchaser. Otherwise to allow a claim short of proving this aspect is a recipe for injustice.

[30] It is for the foregoing reasons that this Court should be inclined to allow this appeal as the Court a quo did not investigate this issue despite the fact that it was raised (albeit belatedly). Even if it had not been raised at all, the Court is still obliged to do justice. The courts of law do not grant orders simply because they have been asked for. The courts have an obligation to ensure that even where causes are not opposed or defended, there is proof on a balance of probabilities that the basis of such a cause does exist. In the present case the High Court did not investigate this crucial aspect.

[31] In the result, my view is that this issue ought to have been investigated. There must have been evidence to prove delivery of the caterpillar to the appellant. I say this because it appears this was one of the appellant's defences to the claim and the appellant ought to have been allowed to defend himself in this regard.

[32] The order of this Court is therefore that:

(a) The appeal succeeds and the judgment of the court a quo is set aside.

(b) The matter is remitted to the Court a quo to enable the appellant to file his plea and prove his defence.

(c) Since this appeal has been allowed on a ground other than the one relied upon by the parties herein, it would be in the interests of justice that there be no order as to costs. There will therefore be no order as to costs.

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DR K.E.MOSITO

President of the Court of Appeal

I agree

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P.T. DAMASEB

Acting Justice of Appeal

I agree

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M.C CHINHENGO

Acting Justice of Appeal

For Appellant : **Advocate M. Mots'oari**

For Respondent: **Advocate S. Malebanye KC**