IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 2818/95

In the matter between

DORBYL VEHICLE TRADING & FINANCE COMPANY (PTY) LTD Applicant

And

ANDREW LUIGI SCIOLLA Respondent

CORAM : DUNN J.

FOR APPLICANT : MR. FLYNN

FOR THE RESPONDENT : MR A LUKHELE

JUDGMENT

22ND MARCH 1996

The parties to this application entered into two Instalment Sale Agreements in respect of two passenger buses. The first agreement (annexure 'C to the founding affidavit) was entered into on the 30th August 1990 in respect of a Mercedes Benz 1622/60 bus bearing engine no. 496900002021485T. The purchase price of the bus was R597 893,40. The second agreement (annexure 'F' to the founding affidavit) was entered into on the 23rd December 1991, in respect of a Mercedes Benz bus bearing engine no, SB 01078SA023141 V. The purchase price of the bus being R731 400,22.

It is set out in the founding affidavit that ownership of the two buses vests in the applicant until the purchase price

has been paid in full. It is alleged in paragraph 12 of the affidavit that the respondent has defaulted in the payment of the instalments provided for in the agreements and that as at the 16th November 1995 the arrears in respect of the first and second buses were R91 392,55 and R93 192,04 respectively.

The failure to pay the instalments as provided for in the agreements is stated to be a breach of the agreements. The clauses in the agreements, dealing with the applicant's rights in the event of a breach by the respondent are referred to in the affidavit. In so far as the first agreement is concerned, clause 15 thereof provides that the respondent shall be called upon to remedy any breach within 7 days of receipt of written notice of such breach. Failure to remedy such breach entitles the applicant to inter alia, claim payment of all amounts then outstanding under the agreement or to cancel the agreement and claim damages. Similar rights are, in effect, accorded to the applicant under clause 12 of the second agreement.

It is set out under paragraph 15 of the founding affidavit that on the 12th October 1995, the applicant sent letters to the respondent per registered post to the respondent's chosen domicilium citandi et executandi calling upon the respondent to remedy its breach of the agreements within thirty days of receipt of such letters. It is stated that notwithstanding the lapse of the thirty days, the respondent has failed to remedy the breach and remains indebted to the applicant in the amounts earlier set out. It is

for that reason that the applicant states that it has cancelled the two agreements and seeks the return of the two buses.

3

The present application was filed on the 23rd November 1995. The respondent filed a notice of intention to oppose the application on the 27th November, The application was set down for the 1st December. On that date, it was post-poned to the 8th December when the following order was issued*.

2. That a rule nisi do issue calling upon the Respondent to show cause on Friday the 19th day of January 1996 why an Order should not be made in the following terms:-

2.1 declaring the instalment Sale Master Agreement and the Instalment Sale Agreement marked annexures "C" and "F" respectively to the Applicant's Founding Affidavit to be cancelled;

2.2 directing that the Respondent deliver to the Applicant the following vehicles:-

2.2.1 1 x Mercedes Benz 1622/60 Passenger Bus, bearing Engine Number 496900002021485T and Chassis Number 39704726013243; and

2.2.2 1 x 1991 Model Mercedes Benz OF 1624/60 Passenger Bus, bearing Engine Number SB 01078SA023141V and Chassis Number 39704726016743

4

(hereinafter collectively referred to as "the Buses").

2.3 That failing the return of the Buses to the Applicant forthwith, the Sheriff or his Deputy be authorised and directed to take possession of the Buses, wherever the same may be found, and to deliver same to the Applicant;

2.4 Directing the Respondent to make payment to the Applicant in the amount of R184,584.59 (one hundred and eighty four thousand, five hundred and eighty four Rand and fifty nine cents), together with interest thereon at the rate of 15.5% per annum calculated from the 16th day of November 1995 to date of payment;

2.5 That the Respondent pay the costs of this Application on the scale as between attorney and client, alternatively, directing that the costs of this application be costs in the application or action to be instituted for the determination of the relief set out in 2.1, 2.2, 2.3 and 2.4 above.

3. Pending the return day herein, the buses are to be returned to the Applicant, providing that the buses are not to be removed from the jurisdiction of the above Honourable Court.

The interim relief, by way of the return of the buses to the applicant, pending the return date was sought on the

5

grounds of specific allegations by the applicant of the deterioration of the buses due to their daily use by the respondent and the likelihood of the buses being attached by another Creditor of the respondent, believing that the buses belong to the respondent. It is averred at paragraph 2.3 of the founding affidavit that " with each passing day the risk of loss and/or damage to the buses persists

and the applicant has no alternative other than to take immediate steps in order to protect its interests."

The respondent filed an answering affidavit to which the applicant replied and the matter was called before on the 15th March 1996, in the contested motion court. The applicant seeks confirmation of the rule nisi issued on the 8th December. The respondent's opposition to confirmation of the rule is based primarily on the averment that he is not in breach of the agreements or that if he is found to be in breach, that the applicant failed to give notice to him to remedy whatever breach the applicant complained of, as provided for in the agreements. The applicant's calculations of the amounts by which the respondent is stated to be in arrears are stated to be inaccurate. The respondent does not, however, indicate or suggest in what way the calculations are incorrect. Mr Lukhele for the respondent, conceded that the respondent ought to have made such an indication but argued that this was an oversight and that the respondent should not be penalised to the extent of not being allowed to address the issue fully, particularly in view of the amount of the claim. The question of the allegation of the failure to give notice as required in terms of the agreements raises the question of the domicilium citandi et executandi chosen by the parties and the proper interpretation of the clauses in the agreement relevant to service of notices under the agreement at such domicilium citandi

The two agreements require as a domicillum citandi et executandi, a business or residential address.

To that end the applicant chose the " 14th Floor First National House. 11 Diagonal Street, Johannesburg" as its domicilium citandi in respect of the first agreement and "55 Fox Street, Johannesburg" in respect of the second agreement. The respondent chose "Park House, Bend Inn Big Bend. Swaziland" as its domicilium citandi in respect of both agreements.

Clause 24 of the first agreement provides-

The parties hereby respectively choose domicilium citandi et executandi for all notices and processes to be given and served in pursuance hereof, at their respective addresses given on page one of this Agreement; the Buyer warranting that such address and any other address selected by it hereunder shall be on address at which it is ordinarily resident or employed or shall be its business address.

The clause further provides.

All notices, demands or communications intended for either party, shall be made or given at such party's domicilium for the time being, and if forwarded by the Seller by prepaid registered post, shall be deemed to have been made or given 3 days after the date of posting. The provisions of this clause shall not be construed as constituting the Post Office the agent of the Seller for any purpose and

all risk of theft, loss or destruction in the post of any payment made by or on behalf of the Buyer shall at all times remain with the Buyer.

Clause 24 of the second agreement provides-

24.1 The parties hereby respectively choose domicilium citandi et executandi for all notices and processes to be given and served in pursuance hereof at their addresses given on page 1 of this agreement. The Buyer warrants that such address and any other address selected by it in terms hereof shall be an adddress at which it is ordinarily resident or employed or ordinarily carries on its business, trade or calling.

24.2 Any notice in terms of this Agreement shall be in writing and shall-

24.2.1 if delivered by hand be deemed to have been duly received by the addressee on the date of delivery;

24.2.2 if posted by prepaid registered post be deemed to have been received by the addressee on the fourth day following the date of such posting.

24.2.3 if given by telegram, be deemed to have been

received by the addressee one day after despatch;

24.2.4 if successfully transmitted by telex or facsimile be deemed to have been received by the addressee one day after despatch.

24.3 Each party shall be entitled to change his domicilium citandi et executandi to another physical address situated within the Republic of South Africa by giving the other party notice to that effect;

24.4 Notwithstanding anything to the contrary contained in this Agreement, a written notice or communication actually received by a party from the other including by way of telegram, telex or facsimile shall be adequate written notice of such party.

The applicant's case is that notice of the breach under each agreement was sent by prepaid registered post on the 12th October 1995. Copies of the notices and certificates of posting are attached to the founding affidavit as I1; I2; J1 and J2. It was submitted that service of the notices through the post was specifically provided for under the two agreements.

The respondent argued that the relevant notices had not been received. The respondent maintained that it had been the understanding between the parties at the time of the agreements that service of any notice or process would be by delivery at the

chosen domicilium citandi et executandi. It was argued that that was the reason for the express requirement that the chosen domicilium be a business or residential address. It was pointed out that the postal services in Swaziland do not extend to the delivery of mail at residential addresses. Post office boxes are allocated and mail is deposited into such boxes for collection by clients.

A domicilium citandi is a place chosen by a person where process in judicial proceedings may be served upon him. Normally, where a person chooses a domicilium citandi et executandi, the domicilium so chosen must be taken to be his place of abode within the meaning of the rules of court which deal with the service of summons. The whole purpose of requiring a choice of domicilium in respect of process is to be relieved of the burden of having to prove actual receipt of any such proccess.. See MULLER V. MULBAHTON GARDENS (PTY) LTD 1972 (1) SA 328, LORYAN (Pty) LTD v. SOLARSH TEA AND COFFEE (PTY) LTD 1984 (3) SA 834 and Erasmus, SUPERIOR COURT PRACTICE BI-23.

There are agreements, such as the two in the present application, where provision is made for a domicilium for notices under the agreement as well as the service of process. There is in such agreements a so-called double provision. See GERBER v STOLZE and OTHERS 1951 (29 SA 166

and the MULBARTON case supra at 333. Whether a clause in an agreement contains this double provision is a matter of construction.

As earlier stated, the respondent argues that service of the notices should have been at the domicilium citandi and not

10

through the post office for which no post box number was given in the agreements. The question of delivery of mail at residential addresses in Swaziland will have to be considered in interpreting and applying the clauses of the agreement's dealing with the service of notices. This is a matter which will no doubt call for some evidence. It was submitted on behalf of the applicant that it was the duty of the respondent to inform the applicant that service at the domicilium citandi through the postal services was not possible in Swaziland. These are issues that cannot be fully dealt with in an application such as the present. I have already referred to the issue of the respondent's contention that the applicant's calculation of the respondent's indebtedness in incorrect. An opportunity should be granted to the respondent to present his case fully in this regard. These are matters that can best be dealt with in a trial.

The applicant presently has possession of the two buses and cannot complain of being prejudiced by any depreciation in value of the buses, that would be brought about by their continued use by the respondent. An order for the retention by the applicant of the buses, pending the outcome of an action by the applicant to secure its rights under the two agreements is in my view the appropriate order to make in this case. Such an order would in fact be in line with what was envisaged under Order no. 2.5 of the order of the 8th December 1995.

It is in the circumstances ordered-

1. That paragraph 3 of the order of the 8th December 1995 be confirmed pending the outcome of

11

proceedings to be instituted by the applicant against the respondent for the enforcement of the applicant's rights under the agreements, annexures "C" and "F" to the founding affidavit.

2. That the costs of this application be costs in the cause.

3. That the proceedings under order no.1 hereof be instituted within a period of 14 days from to-day's date .

B. DUNN

JUDGE