IN THE HIGH COURT OF SWAZILAND

DORBYL VEHICLE TRADING & FINANCE COMPANY (PTY) LIMITED

V

INHLE TRANSPORT (PTY) LIMITED

JUDGMENT

19/6/98

The applicant has come to court to seek relief consequent on alleged breaches by the respondent of three agreements in terms of which the respondent acquired commercial vehicles from the Applicant.

In terms of the Agreements ownership in the vehicles remains vested in the Applicant, which, in the event of termination of the agreement by the applicant on the

respondent's default is also entitled to return of the vehicles together with the payment of all rarer and unpaid installments

The applicant has alleged such breaches and has demonstrated respondent's default with detailed schedules showing all transactions in respect of each agreement and the amount of arrears at the date of termination. Applicant seeks return of the vehicles, judgment in the aggregate amount of the unpaid arrears so demonstrated and costs

The respondent's opening salvo in answer to this claim was to demand security for costs. Such security was furnished at or after the first hearing. Little remains to be said about this aspect of the case and in view of the conclusion to which I have come and the manner in which the Respondent caused the postponement for this aspect to be dealt with it is the Respondent which will have to bear the costs occasioned thereby

After this initial timewasting skirmish the Respondent raised and argued several so called points in limine. I took time to consider these and later reconvened the hearing when I informed the parties that they should proceed to argue the matter on the merits and that I would deal with the points raised in my judgment on the application as a whole.

In his answering affidavit the respondent first challenged the jurisdiction of the court and promised that legal argument would be addressed in support of this submission. This was not forthcoming and I did not understand the Respondent to persist in this objection.

The next point raised was argued at some length and with more vigour. Nonetheless this point was also devoid of substance. The Respondent maintained that the Applicant's papers were fatally defective in that they contained no evidence of what the South African law, which in terms of the agreements governed the transactions, was. This argument could not be maintained, as the common law of Swaziland is the same as the Roman Dutch law of the Republic. In making its claim the Applicant did not rely on the provisions of any statute. If the Respondent relied on any provision of a South African Statute to afford him a defence to this claim it was for him to have proved the statute. No such defence was raised and accordingly the provisions of the various South African Statutes to which the Respondent stated the Applicant had not referred were irrelevant

A further weak argument was advanced as presaged in the answering affidavit that "Applicant's papers do not disclose a cause of action in as much as annexes E1 to F2 do not evidence compliance with with clause 24 read with clause 12.2 of the agreements". The annexes in question are copies of letters of demand and copies of documents proving the posting thereof. As in terms of the agreements the applicant is not required to give notice requiring the remedying of any default before exercising its rights of forfeiture on the Respondent's default, the argument has no force at all

The respondent next argued that one of the agreements was a second sale of the same vehicle by the Applicant to the Respondent. The conclusion urged upon me was that as in law one cannot purchase one's own property the second agreement relied on by the applicant was void. This was not a point in limine in any sense of the word and was answered in the Applicant's replying affidavit. The answer given by the Applicant in a replying affidavit that the second agreement replaced the first, was uncontroverted, met and disposed of this point raised by the Respondent.

The respondent also maintained there was no evidence that the Respondent had breached the agreements and was in arrear in the payment of installments. This despite the detailed accounts, verified on oath of all the business transacted in respect of the agreements, which were attached as annexures to the founding affidavit. There was no merit in this argument especially as the Respondent did not traverse any of the allegations in the accounts. It was argued that the accounts demonstrate that the interest already paid by the Respondent exceeds the capital amounts and no further amounts are accordingly owing or claimable. The accounts do not support the argument.

On the merits the Respondent alleged that there had been an agreement to reschedule the payment of installments. The Applicant denied this. The Respondent's counsel was not able to point to any written agreement to support this contention and the terms of the agreements themselves provide that no alteration of their provisions may be altered or varied otherwise than in writing signed by the parties. This defense too was of no substance.

The respondent further claimed that as the demands had not been received by him and were incorrectly addressed the Applicant was not in these proceedings entitled to enforce

the forfeiture provisions of the agreement. The terms of the agreements however do not prescribe the giving of any notice or the necessity of any demand before such action may be taken on Respondent's default. The applicability of provisions the provisions of a South African statute has not been alleged or proved which could make the giving of notice necessary

Lastly it was argued that it would be unconscionable for Applicant to be granted relief involving not only retention of the amounts paid, the payment installments in arrear at the time of cancellation, and the return of the vehicles. There is nothing unconscionable in this at all. The relief claimed by the Applicant is that provided in most if not all agreements of those with which we are here concerned. Applicant is not claiming payment of the full purchase price and simultaneous cancellation. All amounts claimed by Applicant were due before termination of the agreement and do not constitute a penalty or damages.

Reference was made to a Swaziland Statute, the Conventional Penalties Act the provisions of which were said to afford the Respondent a defense to the Applicant's claim, or which would at least require some adjustment thereof by the court. The agreements however provide that it is South African Law, which is to govern, The provisions of a Swaziland statute are inapplicable. Furthermore the relief claimed does not fall within the provisions of the Act referred to. Again, the point was completely devoid of merit.

In the result the application succeeds and it is ordered as follows

The agreements, copies of which are attached to the founding affidavit marked "B" "C" and "D" are declared to have been validly terminated

The vehicles, being the subject matter of the agreements are to be returned by the Respondent to the Applicant forthwith. Failing such return the Sheriff or his lawful deputy is authorized and directed to take possession thereof and deliver the same to the Applicant

3. The respondent is to pay to the Applicant E194,716.08 together with interest from 17th April 1998 to date of payment, calculated at 15% per annum

4. The Respondent is to pay all Applicant's costs incurred in this application which costs are to be taxed on the scale appropriate to an attorney and client bill