

THE HIGH COURT OF SWAZILAND

Unitrans Motors (Pty) Ltd

Applicant

Vs

Swaziland Treated Poles (Pty) Ltd

Respondent

Civ. Case No. 2388/99

Coram Sapiro, CJ

For Applicant P. FLYNN

For Respondent P. M. SHILUBANE

JUDGMENT

04/02/00

The applicant in this matter is Unitrans Motors (Pty) Ltd. The respondent is Swaziland Treated Poles (Pty) Ltd. It is appropriate at this point having indicated who the parties are to dispose of the question as to the identification of the plaintiff. The respondent has in its replying affidavit suggested that the plaintiff is not the same person as referred to in the documents in support of the plaintiffs claim. There is in the file of record a certificate of changing of name which clarifies the position beyond

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any doubt whatsoever and there is no substance in the objection raised by the respondent on this account.

The founding affidavit sets forth that the affidavit is attested by the credit manager of the applicant who has access to all the records of the applicant relating to financial agreements concluded by the applicant. It is specifically stated that the applicant changed its name from Unitrans Motors (Pty) Ltd to Unitrans Motor Enterprises (Pty) Ltd in April 1998. The copy of the certificate of change of name is attached marked "JG1".

The authority of the deponent in so far as that is required is proved by resolutions which are attached to the affidavit.

The application was in the first instance brought, for interim relief. The applicant sought by recovery of the vehicle concerned to protect his rights pending the outcome of the application for further relief relating to the Respondent's default in payment of the purchase price of a vehicle. The form of the prayer was for a rule nisi part of which was to operate with immediate effect. This if granted would have required the Respondent to surrender possession of the vehicle pending the outcome of the application. Relief in this form was not granted and the application was argued eventually for final relief in terms of the prayers.

The facts recited are that on or about the 29th March, 1996 and at Illovo in the Republic of south Africa, the applicant and the Respondent entered into a written instalment sale agreement in terms whereof the applicant sold and delivered to the respondent a vehicle described as "One MAN used 1989 Truck Tractor bearing registration No. SYG 237 T and Chassis No. 71710301030". A copy of the agreement is attached. The terms of the agreement appear from the schedule of the instalment sale agreement.

The deponent alleges that the vehicle was delivered to the respondent and that the applicant has complied with its obligations in terms of the instalment sale agreement.

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Reference is then made to a number of provisions of the agreement, in particular to the fact that the ownership of the vehicle remains vested in the applicant, and the forfeiture provisions, which are contained in other clauses of the agreement.

The applicant alleges that the respondent failed to comply with its obligations in terms of the agreement and falling to the rules of the instalment. This is a bald statement but supported by details of the respondent's account.

The applicant states that on the 18th March, 1999 a letter was hand-delivered to the respondent at its domicilium citandi et executandi calling upon respondent to remedy the breach and to comply with its obligations in terms of the instalment sale agreement. A copy of the letter is attached for reference marked "JG4".

The period of the agreement expired on the 14th April, 1999 but the respondent has remained indebted to the applicant in the sum of E63 079.69 in respect of the arrear instalments and penalty interest.

On the 18th August 1999 a further letter was sent by the Applicant's attorneys to the Respondent calling upon it to remedy the breach. A copy of the letter is annexed hereto marked "JG5". The respondent did not respond to the letters and has not made payment of the amount claimed. The applicant has attached a copy of the ledger account reflecting the outstanding balance. The applicant has elected to cancel the agreement and to reclaim return of the vehicle forming the subject matter thereof.

The matter was brought as a matter of urgency but it was dealt with on the normal basis. Essentially therefore the applicant seeks an order for the return of the vehicle and payment of the arrear instalments together with interest thereon. The respondent has filed a replying affidavit to which I will refer later. Before doing so I wish to deal with certain points of law raised by the respondent in terms of a notice dated 18th October, 1999. The first of these points is that the relief sought by the applicant is contrary to the provisions of Section 17 of the Credit Agreements Act number 75 of 1980. The Court cannot take cognisance of the provisions of the act and foreign law in so far as it is applicable to this agreement has to be proved by

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expert evidence. This has not been done in this case and the point on this ground must fail.

The point is further defective in that the applicant has not set forth the grounds upon which it is said that the relief is contrary to the provisions of the legislation referred to.

The second point raised is that there is dispute of fact which the applicant should have foreseen would arise at the time the application was launched and which cannot be resolved without oral evidence. This is not strictly speaking a point of law and in so far as the conflicting allegations are concerned these will be examined in relation to the merits of the matter.

The respondent has filed an affidavit attested to by one Robert Crabtree who claims to be the director of the respondent and alleges that he is duly authorised to make the affidavit. Apart from observing again that nobody needs to be authorised to make an affidavit I am satisfied that the respondent is properly before the court through its attorney Mr. Shilubane. In paragraph 4 of his affidavit, Robert Crabtree, before dealing with the contents of the applicant's affidavit seeks to place on record that the application is not bona fide but is prima facie intentionally misleading and clear abuse of the Honourable High Court. This is meaningless. The bona fides of the applicant is clear. It has delivered an expensive vehicle to the

respondent for which the respondent has not paid and the applicant seeks to enforce the provisions of the agreement in terms of which the vehicle was delivered. I fail to see any lack of bona fides in this and the intention to mislead the court is entirely absent.

Paragraph 1.2 is an example of the irrelevant obfuscation. resorted to by the respondent through the mouth of the deponent to the affidavit. He seeks to make some point out of a misspelling of one word and he seeks in this way to discredit the deponent to the applicant's papers. This itself is niggling irrelevant pettiness.

The second point raised in the succeeding paragraphs is that the applicant no longer exists. This is completely devoid of any merit as the applicant is clearly registered in the name under which it has come to court.

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After wading through all the irrelevancies raised by the respondent in its affidavit the basic question to be decided in this case is whether or not it was the respondent which bought the vehicle or it was Robert Crabtree himself. The real answer to the applicant's claim against the respondent is that it was not the respondent which purchased the vehicle but Robert Crabtree in his personal capacity.

The agreement itself shows that it was signed by the applicant on the 29th March 1996 whereas the respondent's signature was later added. There is no doubt however, that it was common cause that it was Robert Crabtree who signed the agreement above the words which describe the signatory as warranting his authority. The buyer is described in the agreement as Swaziland Treated Poles (Pty) Ltd and there is a company registration number inserted in writing thereafter.

Prima facie of the agreement was drawn up with specific details as to the identity of the purchaser. It is difficult to understand why the applicant should not have had the correct name of the intended purchaser inserted. It seems that this defence raised by Robert Crabtree is of late date as.

(a) The agreement was foreshadowed by an application for credit dated 18th January, 1996. The purchaser there was indicated as Tonkwane Estates Limited of which the respondent is a subsidiary.

(b) JG8 announces the full registration name of the business to be Swaziland Treated Poles (Pty) Ltd and the name Tonkwane Estates appears closely thereafter.

(c) In paragraph 13 of the application it is indicated that the names and addresses of the directors, members, partners or proprietors are Robert Crabtree and one Soveig Crabtree.

(d) Furthermore there is a warrantee given by the same Robert Crabtree that all the information given in this application is true and correct and up-to-date.

(e) There is also a document dated 6 February 1996 being a letter addressed by Unitrans Motors to the respondent for the attention of Mr. Crabtree. The letter refers to an application for finance for the purchase of a used 1989 MAN 30,365 tractor and trailer and clearly refers to the present

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agreement. This indicates quite clearly as to who was intended as the purchaser.

(f) It is also interesting to note that a cheque for E5 000.00 drawn on the bank account of the respondent was delivered in payment of the amount then due. I am fully satisfied that when this agreement was signed it was intended that the respondent should be the purchaser.

Obviously the respondent being a company had to act through some individual and it was Mr. Robert Crabtree who was that individual. I am satisfied that he at all times was not acting in his personal capacity

but for and on behalf of the respondent. It is not necessary to review all the document which have been referred to by the applicant in further substantiation of this proposition and I cannot find otherwise than that the respondent's defence is without foundation.

It is equally clear that the respondent has breached the agreement and has remained in breach thereof despite repeated calls upon to make good the default. In the circumstances the applicant must succeed in the application and it is ordered that:-

1. the instalment sale agreement which is annexure JG 1 to the applicant's founding affidavit is declared to have been cancelled.
2. the respondent is directed to deliver to the applicant forthwith the vehicle described as one MAN used 1989 truck tractor bearing registration number SYG 237 T and Chassis No. 71710301030.
3. the respondent is ordered to pay the sum of E63 079.69 together with interest calculated at the rate of 24.5 % per annum in respect of arrears instalment as from the 18th March, 1999.

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4. The respondent is further to pay the costs for this application which costs may be taxed on the scale as between attorney and client.

S.W. SAPIRE, CJ