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SWAZILAND HIGH COURT

KIRK Thomas
Applicant

vs

DUNN Farrel
Respondent

Civ. Case No. 1180/2002

Coram	SAPIRE, CJ
For Applicant	Mr Flynn
For Respondent	Mr. Rodrigues

JUDGMENT

18th June 2002

The applicant applied for an order directing the respondent to deliver to the applicant a 1998 Toyota HINO Truck SD 927 GS.

The Applicant in his founding affidavit alleges that the respondent sold the vehicle to the applicant in terms of a written agreement entered into between the parties on the 6th April 2002. A copy of the agreement is annexed to the papers and it reads as follows: -

"6th April 2002-05-22

FULL AND FINAL DEED OF SALE

BETWEEN

FARREL DUNN Representing D & O MARKETING

AND

THOMAS KIRK

One 1988 Toyota HINO Truck SD 927 GS

Full purchase price = E30, 000.00 (thirty thousand Emalangeni)

Paid in full cheque Number 0139.

Conditions of Sales

*This sale is subject to an expressed **14 days buy back** period agreement between both parties. Payment to be effected in full on signature of this agreement. This truck must be insured:*

As excess or uncovered damages.

Farrel Dunn pledges his NISSAN LDV SD 785 PM for all full costs.

_____	_____
Purchaser's Signature	***Seller's Signature***
Witnesses	*Witnesses*
*1.*_____	*1.*_____
*2.*_____	*2.*_____

"

The terms of the agreement are repeated on page 6 of the founding affidavit.

The applicant claims to have performed his obligations in terms of the agreement by payment in full to the Respondent of the purchase price namely the sum of E30 000.00. This is not in dispute.

The applicant thereafter alleges that the respondent has failed to exercise the "purchase back" option within the stipulated time period and the applicant is accordingly entitled to delivery of the truck in question. The question of the "purchase back " stipulation and whether it was exercised is a disputed issue. The applicant has demanded delivery but the respondent has not complied therewith.

The application is brought by way of urgency. It is difficult, if not impossible to justify this procedure in the instant case.

The respondent has filed an affidavit in which the circumstances in which the agreement was entered into are described in greater detail. There is much to support his contention that the "sale" was really a loan of money, which was to have been paid back within 14 days. No sinister implication is alleged to arise from the disguise of the transaction, but what is of importance is that if the circumstances are as alleged by the respondent, the court might well not be disposed to exercise its discretion to decree specific performance. Specific performance remains a discretionary matter and in the present case there are a number of factors that militate the granting of this relief.

Before however the granting of relief can be considered the agreement upon which the applicant relies requires further examination. The document, "TK1" is clearly a do-it-yourself effort. By that I mean it was obviously not professionally drafted. The heading "Full and Final Deed of Sale" is in itself not the way in which agreements of this nature are normally described. What the meaning of the word "Full and Final" is, in this connection is not at all clear.

The agreement also records that it is between Farrel Dunn representing D & O Marketing and Thomas Kirk. Farrel Dunn is the respondent and Thomas Kirk is the applicant. The word "representing" when applying to Farrel Dunn is somewhat misleading and has given rise to the first point that was raised by the respondent. The respondent has claimed that D & O Marketing is in fact a company and that he, Farrel Dunn, is not a party to the agreement. The use of the word "representing" might strongly suggests that the Respondent may not have been acting in personally on his

own behalf. If D&O Marketing is an entity apart and distinct from the respondent himself this point may have some weight but it is not necessary to decide the case on this issue.

The document goes on to state what the *merx*, or subject matter is. It is the Toyota Truck to which reference has been previously made.

The full purchase price is said to be E30 000.00 and it is recorded that cheque number 0139 pays it in full.

The fact that the vehicle was not delivered to the applicant at that time suggests that the respondent's explanation of the agreement may well be correct.

This version receives further support in what is referred to as a condition of the sale. The agreement states: -

> *"This sale is subject to an expressed 14 days buy back period agreement between both parties".*

The words

> *"Payment to be effected in full on signature of this agreement."*

then appear.

If this refers to the original sale it seems redundant as the agreement already reveals that payment had been made. It is meaningless in relation to the "buy back" agreement

The agreement further records that the truck must be insured. The obligation to effect insurance is not cast on either of the parties.

A further term is expressed in these words: -

> *"As excess or uncovered damages Farrel Dunn pledges his NISSAN LDV SD 785 pm for all full costs."*

The meaning of these words is again unclear. It is not necessary for the purpose of this case to try and discover what is intended. I may however observe that the pledge of movable requires delivery, to be effective and in the absence of delivery the pledge confers no security.

The real problem however is the meaning of the provision relating to the 14-day buy back agreement. One wonders why the applicant would have bought the vehicle and paid cash for it if there was the possibility that the transaction would be reversed within 14 days. This consideration could militate against the court exercising its discretion to grant an order of specific performance in this case.

The contention however is, that

a) The "retro purchase" is unenforceable, because no price is stated at which the it may take place.

b) The period of 14 days is moreover meaningless unless a commencement day is stipulated.

This seems to be a sound argument, but Mr Flynn, who appeared for the applicant argued that a meaning can be given to the retro sale provision, namely that the vehicle could be bought back at any price that the applicant was willing to accept.. This is contrary to principle, and does not find support in the authority or persuasiveness of decided cases either in this jurisdiction or in South Africa. Contracts, which leave the determination of the consideration in the discretion of one of the parties, are not binding agreements. The Supreme Court of South Africa has not yet accepted that there can be a valid sale at an implied "reasonable price" One of the essential terms is and remains undecided and indeterminable. In this case there is no agreement as to price and I find that the condition is in fact incapable of being enforced.

Mr Flynn relied on *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* [1] to bolster his argument. The judgment of Nicholas AJA, especially at page 576 make it clear that there are distinguishing features of that case which are not to be found in the present instance. The judgment quotes with approval the general principle that,

> *"contractual obligations must be defined or ascertainable not vague and uncertain. More specifically, there can be no valid contract of sale unless the parties have agreed, expressly or by implication upon a purchase price" and citing the words of the judgment in Westinghouse Brake & Equipment (Pty) Ltd. V Bilger Engineering (Pty) Ltd. 1986(2) SA 555 A , "There can be no valid contract of sale if the parties have agreed that the price is to b fixed in the future by one of them"*

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[1] *1992(1) SA 566(A) at576*

Nicholas J further observed that it has been held[2] that a contract to sell for a reasonable price is invalid. There is he concedes no unanimity on the point which remains undecided in the Appellate Division, (now the Supreme Court of Appeal). I am persuaded that the full bench decision in the Transvaal, with which I am in agreement, should be followed.

The next question that arises is whether if this condition is unenforceable, the remaining provisions of the agreement are binding. I bear in mind that part performance of the sale has by payment of the purchase price, taken place. That does not mean that the agreement is to be enforced.

The question to be asked is would the parties, and the seller in particular have entered into the agreement if there had not been provision for the retro purchase. In the circumstances as stated in the affidavit the answer to this question must be clearly no. The purpose of the transaction was clearly to afford the respondent temporary finance and that the transaction would or could be reversed once the finance furnished by the applicant had been repaid. It follows that the agreement as a whole because of the uncertainty of its terms cannot be enforced and the applicant cannot succeed in the application.

The Respondent has tendered return of the purchase price.

The application is dismissed with costs.

SAPIRE, CJ

[2] full bench TPD Erasmus v Arcade Electric 1962 (3) SA 418 (T)