THE HIGH COURT OF SWAZILAND

SELBY DLAMINI	Plaintiff
And	
FRED OSTERGETEL	1st Defendant
MBABANE MOTORS (PTY) t/a AUTOSTAN	2nd Defendant
Civil Case.No.	2087/2001
Coram	S.B. MAPHALALA – J
For the Plaintiff	MR. J.S. MAGAGULA

For the Defendant Advocate P. Flynn (Instructed by Robinson Bertram)

JUDGEMENT

(05/03/2004)

The relief sought

The Plaintiff seeks an order cancelling a contract of sale entered into between himself and the 1st Defendant during January 2000; repayment of the purchase price of E36,

000-00; interest on the said sum of E36, 000-00 at the rate of 9% per annum calculated from the 26th January 2000, to final date of payment; damages in the sum of El, 449-99 together with interest thereon at the rate of 9% per annum calculated from the date of judgment to final date of payment; and costs of suit on attorney and own client scale.

The Plaintiff alleges in his Particulars of Claim as follows:

4. Upon or about the 19th January 2000, Plaintiff and 1st Defendant entered into a verbal agreement of sale in terms of which Plaintiff bought from 1st Defendant a motor vehicle, to wit, a Volkswagen Microbus registered SD 616 YM, for an amount of E36, 000-00 which Plaintiff paid in full on the 26th January 2000.

5. At all material times Plaintiff was represented by his wife Cordelia Dzeliwe Dlamini (nee Hleta) and the 1st Defendant was represented by the 2nd Defendant which he had appointed as his agents and were actually in possession of the motor vehicle. The 2nd Defendant was itself represented by its salesman Nqaba Dlamini when the sale was concluded.

6. Although the motor vehicle was sold as a second hand, the 2nd Defendant specifically represented that the motor vehicle had been fitted with a new engine, which had done only 21000 kilometres having been fitted during 1999. It was on the strength of this representation that the Plaintiff bought the motor vehicle and was agreeable to the purchase price of E36, 000-00.

7. Plaintiff however later established after the engine totally failed to perform well that it actually had been fitted into the motor vehicle about five years earlier, a fact which was not denied by 2nd Defendant when confronted by the Plaintiff.

8. There was therefore fraudulent misrepresentation on the part of the Defendants and which misrepresentation was material and entitles the Plaintiff to cancellation of the agreement and a return of the purchase price as well as damages suffered as a result of the fraudulent sale.

9. That the engine totally failed is common cause as this fact was later specifically admitted by the 2nd Defendant. The Plaintiff promptly returned the motor vehicle to the 2nd Defendant, which is still keeping it to date hereof, demanding that it be fitted with a new engine as per 2nd Defendant's representation failing which he should be refunded the purchase price. The Defendants have not done either.

10. As a result of the fraudulent sale the Plaintiff has suffered damages in the form of repairs to the motor vehicle to the tune of El449-99.

11. The Defendants are accordingly indebted to the Plaintiff as follows:
11.1 Return of the purchase price E36,000-00
11.2 Damages E 1,449-99
12. Despite due and lawful demand having been made the Defendants fail refuse and/or neglect payment thereof.

The defence

The Plaintiff applied for summary judgment which was refused by the court on the 16th November 2001, with costs. The matter was referred to trial. The Defendants affidavit resisting summary judgment was converted to a plea. The defence advanced therein is found at paragraphs 6 to 13; thus: ad the merits

6. It is clear from the afore-going that the Plaintiff has insurmountable difficulties in limine and the application for summary judgment application should be dismissed with costs. In so far as it is necessary to set out the merits of the plaintiff's defence; I set out same hereunder,

7. I deny that there was any misrepresentation, fraudulent or otherwise, made by either myself or the second Defendant to the Plaintiff and I put the Plaintiff to the proof thereof.

8. The Plaintiff purchased the motor vehicle voetstoots with any and all defects from the second Defendant acting on behalf of first Defendant on the 26th January 2001.

9. It was fully explained to the Plaintiff and/or his agent Cordelia on the day in question and subsequently as more fully appears from annexure "FO1" hereto that the vehicle was purchased on any "as is" basis and that no warranty of whatsoever nature was given to the Plaintiff and/or his agent by any of the Defendants, The communication was in accordance with the mandate given to the second Defendant by myself as more fully appears from annexure "FO2" hereto.

10. The Defendant and his wife and agent Cordelia inspected the motor vehicle and further test-drove it prior to delivery and they fully were satisfied with the condition in which the vehicle was. In fact, the second Defendant then subsequently arranged a meeting between myself and the Plaintiff in order for me to explain the functions, mileage, engine and the history of the vehicle to him and his agent. This was all done and the Plaintiff subsequently took delivery of the motor vehicle.

11. I re-iterate that the vehicle was sold to the Plaintiff on an "as is" basis, it being a second hand vehicle and further that at no stage whatsoever did I ever give a warranty that the vehicle would not give any trouble. Sometime after delivery, the Plaintiff returned the motor vehicle to the Defendant requesting that the second Defendant investigate an oil leak. The second Defendant duly checked the vehicle, attended to fault and returned the vehicle to the Plaintiff duly repaired.

12. After a considerable period of time, the Plaintiff acting through his agent brought the vehicle to the second Defendant indicating that the vehicle had an engine noise. The second Defendant, although it was not obliged to do so, investigated the cause of the engine noise and at its own cost repaired the engine by replacing the crankshaft at a cost of approximately E5, 000-00 (five hundred emalangeni).

13. The Defendants avers that despite the fact that the vehicle was sold by the Plaintiff voetstoots both the Defendants have more than discharged their obligations to the Plaintiff and as such tender the vehicle to the Plaintiff which vehicle is available for collection at the second Defendant's premises by the Plaintiff.

The chronicle of the evidence

When the matter came for trial the Plaintiff led the evidence of only one witness. The witness called is plaintiff's wife one Cordelia Dzeliwe Dlamini. She presented a lengthy account of what she knew pertaining to this case. She was in turn cross-examined at length by counsel for the Defendant.

The Defendant led two witnesses. The first witness was one Fred Ostergetel who is the 1st Defendant in this case. The second witness for the Defendant was one Nqaba Dlamini who was a Salesman of the 2nd Defendant at the material time.

Reverting to the evidence of PW1 Cordelia Dlamini, she told the court that she was involved in the purchasing of this motor vehicle which is the subject-matter of this case. She told the court that her husband called her to come to the 2nd Defendant premises. She proceeded as requested where she found her husband and one Swazi male who represented the seller. They then went to inspect the motor vehicle. The seller told them that the motor vehicle had a new engine. She enquired from the seller as to how he can tell that the motor vehicle had a new engine. The seller showed them the mileage, which was 21,000kilometres at that time. She and her husband

then agreed to buy the motor vehicle on the s strength that it had a new engine. She then proceeded to her place of work where she obtained a bank cheque for the sum of E36, 000-00 and paid Autostan (the 2nd Defendant). The following day they had the motor vehicle but it was not long when they had trouble with it. The engine started leaking oil. For this they took it to Cooper Motors where they had to buy certain parts for it. The parts were fitted but after some time it started leaking oil from the engine.

She told the court that at this juncture they took it back to Autostan. They were advised to take the motor vehicle for service. They took it back to Cooper Motors where a certain mechanic effected repairs on it. However, the oil did not stop leaking from the engine. At some point the motor vehicle stopped and it had to be towed to Cooper Motors. The mechanic worked on the motor vehicle and then told them that the engine was too old and that it cannot be repaired. With this information they then went back to Autostan. Autostan did not agree with the fact that they had returned the motor vehicle back to them. They then asked for their money back as they had only had the motor vehicle for a month. The Defendants refused to refund them the purchase price. Thereafter, followed a tit for tat between the parties culminating to the present suit.

Under cross-examination it emerged that her husband who is the Plaintiff in this matter was out of the country in Hong Kong when this matter was heard. It was put to her that her husband prior to the sale was told that the motor vehicle had been fitted with a reconditioned engine. She told the court that she is not aware of this.

It was further put to her that the motor vehicle was sold "voetstoots" in which she said she did not know this aspect of the matter. She maintained though that what she knew is that the motor vehicle had a new engine.

She also told the court under cross-examination that she was not aware of a meeting between her husband and the 1st Defendant.

The evidence of the Defendants came from the 1st Defendant. He told the court that when the vehicle was sold it had a reconditioned engine which was fitted in 1990. He

told the court that he had meetings with the Plaintiff where he advised him that the motor vehicle had a reconditioned engine.

The witness was quizzed as regards the endorsement in exhibit "B" being the receipts given to the Plaintiff when he purchased the motor vehicle that "microbus 2.1 with new engine". He told the court that he never told the Salesman one Austin that the motor vehicle had a new engine.

The Defendants then called DW2 Nqaba Dlamini who is a salesman at Autostan. He told the court that Plaintiff came to the shop and liked the motor vehicle which is the subject matter of this case. The Plaintiff asked to test-drive the motor vehicle. They then went to 1st Defendant who was the owner of the motor vehicle. The 1st Defendant told him all the particulars of the motor vehicle. More importantly that he was selling the motor vehicle "voetstoots ". After Plaintiff had test driven the motor vehicle he expressed an interest to buy the motor vehicle. The following day he paid for the motor vehicle using a Swazi Bank cheque.

This witness was the author of exhibit "B" and testified what he meant by "new engine" in which he replied that he meant the motor vehicle had a "reconditioned < engine ". He told the court that the Plaintiff was told before he purchased the motor vehicle that it was fitted with a "reconditioned engine ".
The witness was cross-examined searchingly by Mr. Magagula for the Plaintiff when he testified that he made a mistake by not writing, "reconditioned engine". He further testified that he was present when the 1st Defendant explained to the Plaintiff about the motor vehicle. He also told the court that the reason they repaired the motor vehicle is because they were merely assisting a "customer". They were not obliged to do so.

Plaintiffs arguments.

Mr. Magagula for the Plaintiff filed very comprehensive Heads of Argument in this matter. It is contended for the Plaintiff that the Defendants represented that the motor vehicle, which is the merx, was fitted with a new engine. This was stated both

verbally and in writing on the receipt acknowledging payment of the purchase price. Defendants actually admit making this representation save that they now prefer the term "reconditioned engine " than the term "new engine " (per paragraph 6.2 of plea and paragraph 3 of exhibit "A"). The Plaintiff argues that this representation was actually false as the engine totally failed to perform and the Plaintiff, after being advised by a mechanic from a reputable garage that the engine was too old, returned the motor vehicle to the Defendants and demanded a return of the purchase price.

It is contended for the Plaintiff that the Defendants admitted that the engine was actually fitted into the motor vehicle some years ago and it was not true that it had been fitted with a new or reconditioned engine for that matter. Therefore, the Defendants admitted that there was a misrepresentation on a material term of the contract. This entitles the Plaintiff to rescission of the contract and a return of the purchase price plus damages.

On the defence that the Plaintiff bought the said motor vehicle "voetstoots" that this is denied by the Plaintiff and this is corroborated by the fact that Defendants subsequently repaired the motor vehicle at a cost of E5, 000-00. Had the sale been "voetstoots" Defendant would not have accepted and repaired it after delivery to the Plaintiff. Even assuming that such "voetstoots" condition was in existence, it is trite law that where there is misrepresentation, a "voetstoots" condition cannot be of any assistance to the Defendant. In regard to this proposition the court was referred to the legal

authority of G. T.A. Gibson, S.A. Merchantile & Company Law (4th ED) page 78.

The Defendant's submissions.

Mr. Flynn for the Defendants argued au contraire that it was imperative that the Plaintiff gives evidence in this case because the discussions between him, Mr. Ostergetel (the Principal) and Mr, Dlamini (the Salesman) were crucial to what later transpired. Essentially, what is contended in this regard, is that what happened before Mrs. Dlamini came with the cheque to pay is highly relevant because it indicates what the knowledge of the Plaintiff was at the time the purchase was made.

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Mr, Flynn argued that the contract was not concluded when plaintiff's wife made the payment by cheque but the representation which were made to the Plaintiff. "The essential element that must be alleged and must be proved is that the representation induced the Plaintiff to enter into the agreement. If, indeed the Plaintiff had knowledge of something which calls into question any representation that would have been made by the salesman at the time Mrs. Dlamini paid the cheque. In this regard the court was referred to the case of Harvey's Investment Trust vs Oranjegezicht Estates 1958 (1) S.A. at page 479 at 485 to the proposition that the onus of proof rest throughout on the Plaintiff.

As regards to the 2nd Defendant it was contended by Mr. Flyrnn for the Defendants that there are technical difficulties in regard thereto Autostan took the 1st Defendant to the Plaintiff and disclosed every aspect of the matter. The Plaintiff has failed to rebut the evidence before court. Firstly, in this regard it is contended that Mr. Ostergetel said that he assisted in giving the history of the motor vehicle to the Plaintiff. Secondly, when Mr. Dlamini (the salesman) was asked about exhibit "B" he said in cross-examination that the buyer (Mr. Dlamini) has been told that the motor vehicle has been fitted with a reconditioned engine. These two points have not been rebutted by the evidence of the Plaintiff.

On the issue of "voetstoots " it is contended for the Defendant that Mr. Ostergetel told Mr. Dlamini (the Plaintiff) that the motor vehicle was sold "as is" and this has not been rebutted.
The court's analysis and conclusions thereon.

The following matters are common cause; that Plaintiff and 1st Defendant entered into a contract for the sale of the motor vehicle in question; that the purchase price was the sum of E36, 000-00; that the Plaintiff paid the purchase price to the 1st Defendant in full through the 2nd Defendant, that the Plaintiff returned the vehicle to the Defendants and that the vehicle is currently in the custody of the Defendants, and that the Defendants are presently keeping both the motor vehicle and plaintiff's money.

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The facts that are disputed are firstly, that the vehicle had latent defects and that its engine totally failed and secondly, that Defendants represented that the vehicle had been fitted with a new engine. The only defence advanced by the Defendants is that ' the sale was "voetstoots". The other issue that there was any misrepresentation, fraudulent or otherwise, made by 1st Defendant or the 2nd Defendant to the Plaintiff is denied by the Plaintiff.

It would appear to me that at the onset that is common cause that the 2nd Defendant acted as agent on behalf of the 1st Defendant as gleaned from paragraph 5 of the plaintiff's Particulars of Claim. As such, the 2nd Defendant incurred no personal liability and should not have been cited in these proceedings, (see Jourbert et A1 The Law of South Africa Vol. 1 paragraph 138 at page 130).

In respect of the 1st Defendant's liability in this matter there is clear and unrebutted evidence of the 1st Defendant that the Plaintiff purchased the motor vehicle "as is" with any and all defects from the 2nd Defendant acting on behalf of 1st Defendant on the 26th January 2001. The 1st Defendant told the court and this has not been rebutted by the Plaintiff who did not give evidence in this court that 1st

Defendant explained to the Plaintiff on the day in question that the vehicle was purchased on an "as is " basis and that no warranty of whatsoever nature was given to the Plaintiff in a meeting prior to his wife coming with the cheque to pay for the motor vehicle. This crucial aspect of the matter has not been dislodged in evidence by the Plaintiff.

There is also undisputed evidence, that the 2nd Defendant arranged a meeting between the 1st Defendant and the Plaintiff in order for the 1st Defendant to explain the functions, mileage, engine and the history of the vehicle to him and his agent. This was all done and the Plaintiff subsequently took delivery of the motor vehicle. In this regard I agree in toto with the submissions made by Mr. Flynn that the representations made by either the 1st or the 2nd Defendant to the Plaintiff prior to the cheque paid by

plaintiff's wife are crucial to determine whether any misrepresentation, either fraudulent or otherwise was made. In the absence of rebutting evidence from the Plaintiff himself on this aspect of the matter the court with the evidence at its disposal cannot say that there was any misrepresentation, fraudulently or otherwise, made by either the 1st or the 2nd Defendant to the Plaintiff and it would appear to me that the

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Plaintiff has not discharged his onus in this regard. Malan J in Harvey's Investment Trust (supra) held inter alia that the onus rests throughout upon the Plaintiff to prove all the ingredients essential to the success of his case including proof of a causal connection between the misrepresentations and the damages claimed.

Further, the Plaintiff in his Particulars of Claim has not averred that the alleged misrepresentation was to the knowledge of the Defendant/s false, and as such has failed to establish a cause of action, (see Antler's Precedents of Pleadings at page 155).

In the totality of the evidence before me, I find that the Plaintiff has failed to prove his case for the relief sought and therefore the action is accordingly dismissed with costs to include costs of counsel in terms of Rule 68 of the High Court Rules.

S.B.MAPHALALA

JUDGE