

# IN THE HIGH COURT OF SWAZILAND

**HELD AT MBABANE**

Civil Case No. 3030/2004

In the matter between

**Obadiah Nhlengetfwa**

Applicant

and

**Royal Swaziland Sugar Corporation**

Respondent

Coram: Annandale, AC J

For the Applicant: Mr. P.R. Dunseith of Dunseith Attorneys, Mbabane

For the Respondent: Mr. Magagula of Millin, Magagula Hlophe  
Attorneys, Mbabane

## **JUDGMENT**

8 December 2005

[1] The subject matter of this application is a certain Massey Ferguson tractor, which was bought by the applicant from the respondent and which the applicant seeks to be delivered to him, while the respondent wishes to deliver a different tractor. The purchase was by way of a sealed bid in reaction to an advertisement wherein a number of vehicles were offered for sale.

[2] The advertisement contains a list of twenty vehicles, listed as twenty lots, each detailing the fleet number, description and remarks or reason for sale. Lot number 10 reflects the fleet number as 11286, being a MF (Massey Ferguson) Tractor 390, 1998 MODEL, with old age being the remarks/reason for sale. No registration number of any vehicle appears in the advertisement. Lot 10 is one of four Massey Ferguson 390 tractors, all four lots said to be of 1989 vintage and three sold due to old age, the fourth described as a non-runner.

[3] The advert further states a day and time for viewing the first ten lots at the seller's security yard (at Simunye) with the closing date for bids being some two weeks thereafter. Interested parties are advised where terms and conditions and bid submission forms can be obtained, though a newspaper advert filed by the respondent also contains the terms and conditions.

These mainly advise of the manner in which bids must be tendered and excludes an obligation by the seller to accept the highest or any offer, directs the method of payment, removal within a limited time after notification of acceptance of successful bids and a refusal to enter into any negotiations.

[4] The essence of the dispute is that the applicant has it that he bought a specific tractor while the respondent has it that it was a different one.

[5] In his affidavits the applicant states that he delivered an offer to purchase the advertised lot number 10, described in the respondent's advert as fleet number 11286 for E40 000, whereafter he was notified that his bid was successful. He then obtained a bank cheque payable to the respondent which he took to their offices, obtained a form on which the stores controller "*...had completed the details of the tractor I had purchased, namely Lot No. 10, MF Tractor SD 497 JL...*" whereafter he went to the paying office, tendering both his cheque and the form he had just obtained. He then was issued with a receipt which he attached to his papers, indicating as description of what he paid for to be a MF 390 tractor, registration number SD 497 JL, lot number 10, with a further number which is neither the fleet number nor an engine or chassis number. He was then taken to the transport office to collect the blue registration book for the tractor.

[6] There, and perhaps significantly telling, he heard the respondent's transport officer, one Dlamini, saying that had he known this tractor being for sale, he would have bought it himself. He says that this transport officer said so after asking Mr. Auto Dlamini, the Stores Controller who issued him with the form on his arrival and who took him to the paying office and then to the transport office, to confirm to him the particulars of the tractor he had been instructed to sell. He then received the blue registration book of the tractor, of which he attached a copy to his application.

[7] He goes on to state that on his return some days later to collect the tractor, he was cautious due to the interest in the tractor expressed by the transport officer. With no number plate on the tractor, he scrutinised the licence disk and found it to be a different tractor than the one he purchased, as described in his papers, this one being SD 486 JL instead of SD 487 JL, though marked as "Lot 10".

[8] Complaining about this new state of affairs to the stores controller, Auto Dlamini, and demanding delivery of the correct one as reflected in his documents, he was taken to the transport officer who wanted him to exchange his blue registration book for the one of SD 486 JL, which he rejected.

[9] He left disgruntled and sought legal advice, which resulted in this litigation.

[10] He amplifies his position in his replying affidavit, explaining that when he inspected the tractors for sale, no keys were available and he thus enquired from the stores controller about them, being told that all four were in running condition but that fleet number 11286 was the best of them all as it was mainly used to convey *maheuru* workers to the field, which tallied with his own information. None of the four tractors displayed fleet or registration numbers, but he knew the fleet numbers from the advertisements. He then made bids for all four tractors, his highest bid of E40 000 for fleet number 11286 designated as lot number 10.

[11] He vigorously denies that he made his highest and successful bid on any other tractor than the one advertised as lot 10 with fleet number 11286 as his enquiries at the time all pointed to it being the best of the four. As a mechanically challenged layman, he did not bid on the basis of his physical inspection of the tractor but based it on the information he obtained and the corresponding information in the advert.

[12] In response to these contentions, the respondent wishes to raise as a ruse that it made a mistake in its advertisement, ascribing fleet number 11286 erroneously to lot 10. What it effectively seeks to do is to create a factual dispute, ostensibly incapable of being decided on the papers and have the matter referred for trial. I fail to see how it should be so and what purpose the hearing of oral evidence would serve, save than causing a delay in the outcome of the matter. Also, the sudden interest shown by the transport officer on the tractor when he came to know of the sale, with him saying that he would have bought it for himself if he knew about it, ties in with the line of defence taken by the respondent. No denial of this incident is pleaded in any affidavit of the respondent.

[13] In its opposing papers, the respondent's group company secretary, Maziya, states that the tractor seen by the applicant was not the one he now seeks to be given to him, but a different one of the same model and age but registered as SD 486 JL. He does not state that he personally viewed the tractors on display. Their case is that the

respondent mistakenly inserted a wrong fleet number in the advertisement, relative to lot ten. This in turn would have resulted in Auto Dlamini, the stores controller, on retrieving information from their computer to receipt the payment by the applicant, to indicate that the tractor, lot 10, was registered as SD 497 JL.

[14] From this presupposition, he then goes on to say that since the receipt reflects the registration number, due to the wrong fleet number allocated to lot 10 in the advert, it caused a similar error being made by the applicant to assume that he was shown tractor SD 497 JL, not SD 496 JL.

[15] From this he submits that "*...the mistake in describing the tractor that was being sold resulted in both the applicant and the respondent making the assumption that the tractor, which was the subject of the sale (i.e. lot 10) was the one with registration number SD 497 JL instead of SD 486 JL*" and that the mistake in the advert perpetuated the original mistake.

[16] He then unequivocally states, without having asserted anywhere that he in fact personally also saw the tractor on display as lot 10, that "*(t)he tractor SD 497 JL was not a subject of the sale and was never displayed as lot number 10 or any other lot during the auction (sic) sale*" and that the one shown to the applicant during the inspection was in fact SD 486 JL. As said, this is based on his assumption and not his personal observation of the tractors on display.

[17] In unison, the respondent's stores controller, Auto Dlamini, who was said to have accompanied the applicant at the inspection and provided information *in situ*, also later in time processing his payment, filed his confirmatory affidavit for the respondent. He confirms this version, and states that:-

*"I later discovered that the fleet number on the advertisement, which we had used to trace the tractor lot 10, was wrong and did not relate to the tractor that had been advertised and stood as lot 10, which was the tractor that had been inspected by the applicant" (My underlining).*

[18] Thus, the version of the respondent is that they had a different tractor in mind than the one they offered for sale. Their version is that the tractor was not specifically marked with the registration number designated by Government but by their own internal allocation of a fleet number. As lot 10, they offered for sale a tractor identified by its fleet number, 11286, whereas what they actually wanted to sell was another tractor, also to be demarcated as lot 10, also a Massey Ferguson 390, but with a different fleet number.

[19] For some unknown reason the respondents do not state which fleet number, allocated to a different tractor, they actually wanted to sell by tender. All they say is that they did not want to sell SD 497 JL but rather SD 486 JL. However, what was contained in their advertisement was not a reference to the registration number but a

reference to their fleet number. The respondent does not even attempt to show how its alleged error would have occurred. It does not say which of its officers made the error, supported by an affidavit of that person. It remains a mystery as to how this averred error originated. Should the respondent corporation have wanted to rely on its error being *Justus*, it did not deem it necessary to show it to be so, or at minimum attempt to do so. For the respondent to escape the consequence of its alleged error, at minimum that error should be a reasonable error, *Justus* under the circumstances.

[20] The applicant argues, with reliance on **George v Fairmead (Pty) Ltd** 1958(2) SA 465 AD at 471 and **HNR Properties CC & Another v Standard Bank of South Africa Limited** 2004(4) SA 471 SCA, that an error cannot be said to be *Justus* where it arises from the negligence of the party seeking to avoid the contract and such party is itself to blame in the sense that by his own conduct he has led the other party, as a reasonable and blameless man, to innocently believe that he was binding himself. To its detriment, the respondent now wishes to put up its own mistake to avoid the contract.

[21] In **National & Overseas Distributors Corporation (Pty) Ltd v Potato Board** 1958(1) SA 473 AD it was held that:-

*"Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and he has not appreciated at the time of*



*acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake would have to be reasonable (Justus)..."*

I respectfully agree with this position which equally applies to our local law.

[22] When the applicant went to inspect the tractors on offer, he made his offer, which was accepted, based on the information he obtained relative to the fleet number of lot 10, as advertised and as held out to him. At that time, he had no idea what the tractor's registration number was. He says that due to his limited mechanical knowledge, compounded by the absence of keys for the tractors, he did not base his tender on a physical inspection of the tractor, but on the information he obtained in respect of the allocated fleet number, as advertised.

[23] The affidavits of Auto Dlamini and Maziya both state that the tractor which was on view was not SD 497 JL, fleet number 11286, but SD 486 JL, with a different but undisclosed fleet number. They say that both parties were *ad idem* about the *merx* physically on display as lot 10, but also say that the applicant was under a misapprehension that it was fleet number 11286, which information was incorrect, due to the respondent's error, but which he used in order to determine his offer.

[24] The respondent thus avers that the minds of the parties did in fact meet for all purposes and intent, save for the aspect of the wrong fleet number and that the applicant could only litigate by way of action for rectification. It does tender a return of the purchase price should this court not convert the application into action proceedings and have the sale rescinded. The applicant's case is that there was no mutual error but that it was unilateral.

From the papers before me, it is common cause that the respondent advertised as lot 10, the tractor designated with fleet number 11286. It is also common cause that the tractor allocated with that fleet number is registered as SD 487 JL. With reliance on **Worman v Hugh and Others** 1948(3) SA 495 AD, the applicant wants this *merx* delivered to him, not a different tractor. At page 505 of *Worman* it was held that:

*"It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means i.e. what their intention was as expressed in the contract...". (My emphasis).*

The language used in this contract, where a tractor was offered for sale, an offer was tendered and acceptance of the written offer, is clear and unequivocal; until it came to the moment of delivery, the *merx* was clearly described as is set out in the advertisement.

Seemingly, it was only at the time when the respondent transport officer clearly indicated to the applicant that he himself would rather

have purchased the tractor for himself that events took a turn for the worse.

[27] In **South African Railways & Harbours v National Bank of South Africa Limited** 1924 AD 704 it was held that:-

*"The law does not concern itself with the working of the minds of the parties to a contract, but with the external manifestation of their minds. Even therefore if the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as record of their agreement."*

[28] Accordingly, in this matter, where the applicant cannot be said to have acted in any other manner than the best faith, the respondent likewise until it developed a change of heart when it seemingly discovered its mistake well after the time when the contract was concluded, it seems to me that the parties indeed contracted in respect of fleet number 11286 and not something else.

[29] In **Steyn v LSA Motors Limited** 1994(1) SA 49 AD at 53, the appellate division referred to the dictum of Davis J in **Irvin & Johnson v Kaplan** 1940 CPD 647 at 651:-

*"If it were not so, it is difficult to see how commerce could proceed at all. All kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like, would become relevant and*

*no party to any contract would be safe; the door would be open to uncertainty and to fraud. For this reason, in the case of contracts, in the absence of fraud of the other party, we are only concerned with the intention of the party as shown by his conduct, by the words which he has used or to which he appears to have assented."*

[30] It is because of the state of affairs in this application, where the respondent has advertised what it had for sale, the acceptance of the offer made by the applicant and the facts established on the papers, that it is firstly not necessary to have the matter referred for hearing of oral evidence as proposed by the respondent. Nothing new will emerge that could not have been ventilated on affidavit, and on the affidavits, no need arises to hear *viva voce* evidence. Secondly, as also proposed by the respondent, rectification of the contract would be an incorrect remedy which is sought solely to absolve the respondent from performing under the contract. Thirdly, as proposed as a further alternative, it is inappropriate to order it to return the money paid over to it by the applicant, which would also only serve to absolve the respondent from its contractual obligation.

[31] I cannot but agree with the *dicta* referred to above from the extracts of legal precedents in our neighbouring jurisdiction. The principles contained therein apply with equal persuasion in the Swazi jurisdiction regarding the law of contract.

[32] For the reasons above, it is held that the application must succeed, and it is ordered that the tractor bought by the applicant from the respondent be forthwith delivered to him. From the registration

document (blue book) and the papers before me, it is described as a Massey Ferguson 390 tractor, registration number SD 497 JL, with chassis number 07632 JJ and engine number LH 82100SA027195.

[33] Costs are ordered to follow the event.

JACOBUS P. ANNAN DALE

ACTING CHIEF JUSTICE