

# **IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO . 899/07**

**In the matter between:**

**HERBERT NDZABUKELWAKO**

**APPLICANT**

**VS**

**SINKHWA SEMASWATI t/a**

**MISTER BREAD BAKERY**

**RESPONDENT**

**CORAM**

**MAMBA J**

**FOR APPLICANT**

**MR FAKUDZE**

**FOR RESPONDENT**

**MR MOTSA**

## **JUDGEMENT**

**9<sup>th</sup> NOVEMBER, 2007**

[1] The plaintiffs claim is that on the 13<sup>th</sup> September 2006 the parties entered into a Deed of Sale of a Motor Vehicle for a sum of E15000.00. The plaintiff avers further that "upon payment of the balance by the plaintiff, the defendant failed to hand over to the plaintiff the blue book of the above mentioned

vehicle. As a result transfer of ownership could not be effected."

[2] The Deed of sale is annexed to the summons and the terms thereof are as follows:

1. That the defendant sold a vehicle to the plaintiff for a sum of E15 000.00,
2. The vehicle was an Isuzu 2.8TD, 1997 model with no engine and that
3. The vehicle was being "sold as it is."

[3] The plaintiff avers further that as a result of the defendant's failure to furnish him with the blue card for the motor vehicle, plaintiff has been unable to transfer the motor vehicle into his name or to use it and has consequently suffered damages in the sum of E50, 000.00 which he now claims from the defendant.

[4] The defendant filed an exception to the plaintiffs particulars of claim and argues that such particulars of claim "cannot sustain a cause of action as;

2.1.1 in terms of annexure "A" there is no express stipulation that the excipient should handover or provide a blue-book to the respondent; and

2.1.2 such term i.e to handover a blue-book cannot be implied into the contract as it was not necessary in the business sense to give efficiency to the contract."

[5] It is perhaps not insignificant that the Deed of sale refers to the subject matter of the sale as an Isuzu vehicle and not a motor vehicle. The agreement of sale specifically states that the vehicle has no engine. An engine is a motor. A vehicle is any carriage or conveyance that may be used on land. The parties were alive to these facts about the merx and did not refer to it as a motor vehicle.

[6] The agreement of sale does not refer to the plaintiff being given the vehicle's blue book by the defendant. The defendant argues that the handing over of the blue book "cannot be implied into the contract as it was not necessary in the business sense to give efficiency [efficacy] to the contract."

[7] Counsel for the defendant largely based his argument on the fact that the vehicle was sold voetstoots - as is-and that it was not necessary for the defendant to handover the blue book for the vehicle to the plaintiff to give full effect or efficacy to the agreement of sale. He argued that his submissions found support in the case of **PEMA v RASMUSSEN, 1959 (1) SA 196 (TPD)** where the court held that "a term could not be implied in the contract that the seller had to hand over a

roadworthy certificate [for a motor vehicle] before he could claim any payments due to him in terms of the contract."

[8] I would not, with due respect, disagree with that proposition. For instance, where the motor vehicle is sold "as is" and is un-roadworthy, it simply means that the purchaser buys and takes it in that state of un-roadworthiness and the seller is not obliged to handover to the purchaser a roadworthy certificate.

[9] A certificate of roadworthiness relates to the mechanical and or electrical condition of the motor vehicle. It relates to the suitability of the Motor Vehicle to be on the road. On the other hand, a blue book or document of Registration of the motor vehicle relates to the identification of the motor vehicle. On this basis, I would therefore not treat the failure to handover a certificate of roadworthiness on a similar footing or terms as a failure to supply a blue book.

[ 10] Counsel for the plaintiff submitted before me that section 21 (2) (c) of the Road Traffic Act No. 6 of 1965 imposes a duty on a seller of a Motor Vehicle if he disposes it; that "he shall, not later than 7 days after the disposal ...at the same time, surrender to the new owner of the motor vehicle the registration book and the motor vehicle licence and clearance certificate of roadworthiness in respect of the vehicle."

This Act defines a motor vehicle as;

- " (a) Self-propelled vehicle; or
- (b) Trailer; or
- (c) Vehicle having pedals and an engine as an integral part of the vehicle, or attached to it, and which is designed or adapted to be propelled either by means of those pedals or that engine or both..."

This clearly not applicable in this case where a mere vehicle or component part of a motor vehicle was sold. This much was conceded by counsel for the plaintiff.

[11] In casu, the agreement of sale between the parties was that the vehicle was sold voetstoots and it had no motor. It was not roadworthy. The plaintiff does not aver in his particulars of claim that the defendant was obliged to handover the blue book for the vehicle to him or that the blue book was a *sine quo non* to the effective passing of ownership or transfer of the vehicle to him. In the absence of these averments in the plaintiffs particulars of claim, the summons does not establish a link or legal nexus between the failure to supply the blue book and the damages suffered by the plaintiff. That being the case, the summons fails to disclose a cause of action and is excipiable (exceptionable).

The exception is upheld with costs.

[12] As was agreed between the parties herein, this judgement also applies to case No. 746/07. The objection in that case is also upheld with costs.