IN THE HIGH COURT OF SWAZILAND

NDUMISO NKOMONDE

Plaintiff

And

O.K. BAZAARS (1929) (PTY) LTD

Defendant

Civil Case No. 112/2004

Coram: S.B. MAPHALALA - J

For the Plaintiff: MR M. SIMELANE

For the Defendant: MRZ. SHABANGU

JUDGMENT

20th July 2007

[1] Plaintiff claims cancellation of the contract and restitution of the total amount (E2, 050-00) paid by the Plaintiff to the Defendant in terms of the agreement, payment of the sum of El 5, 000-00 for damages incurred as a consequence of the breach of contract and costs

[2] The above-cited claims arose as follows: On the 6 July 2000 at O.K. Bazaars (1929) (Pty) Ltd Plaintiff concluded a written agreement of sale in terms of which Defendant sold to Plaintiff a refrigerator. A copy of the agreement is annexed marked "A" and Defendant was represented by a salesman known as Mr. Makhathini.

[3] The material terms of the Hire Purchase Agreement are the following:

(a) Payment of a deposit of El, 200-00 and monthly instalment of El93-00 for 23 months;

(b) Reservation of ownership by the Defendant until final payment;

(c) Breach cause entitling cancellation, repossession for failure and damages;

(d) Substitution of original goods;

(e) Customer protection insurance certificate and extended guarantee contract.

[4] According to the Plaintiff he has performed his obligations in terms of the agreement and paid the initial deposit and further certain instalments. Thereafter Defendant has delivered the refrigerator, but it developed technical problems. Subsequently the refrigerator was taken back on the 9th January 2003 for repairs by the Defendant who had failed to return it to Plaintiff or furnish the Plaintiff with a replacement.

[5] The Plaintiff decided to discontinue paying his monthly instalments upon realizing

that the Defendant was unnecessarily delaying in delivering a new refrigerator as the agreement provided. In fact, the Defendant failed to give the Plaintiff a guarantee that he would receive the refrigerator or an alternative refrigerator. In the premise:

(a) Plaintiff is entitled to cancel the contract for breach;
(b) Plaintiff is entitled to recover from the Defendant damages suffered as a consequence of the breach of the agreement.

[6] The Defendant has filed a Notice of Intention to Defend dated 29th January 2004 and thereafter on the 12th February 2004 filed its plea. The defence averred therein is that Plaintiff has breached the aforesaid agreement by failure to pay his instlaments and is currently in arrears of over five months instalments. Defendant further avers that after repairs Plaintiff unjustifiably refused to accept the refrigerator alleging he had already bought a new one elsewhere. In breach of the agreement, Plaintiff failed to pay instalments under the said agreement. Defendant avers further that Plaintiff has breached the agreement and cannot rely on such breach as a cause of action. Furthermore, Defendant avers that there are no grounds for the Plaintiff to cancel the agreement, as he is the one who violated it. That the damages claimed by the Plaintiff are not explained.

[7] In evidence in the trial of the matter I heard the evidence of the Plaintiff who deposed at great length the sequence of events leading to the alleged breach by the Defendant to the time the matter was brought to court for trial.

[8] In evidence Plaintiff testified that the refrigerator which is the subject-matter of this case was delivered by the Defendant on the 12 July 2002 and that it had dents and he reported it to the Defendant. The Defendant returned to pick up the refrigerator and after a while came to deliver another one. At that time he was at Big Bend. He started using the refrigerator and in September the top of the refrigerator ceased working. Towards the end of the month the freezer stopped working. He then reported the problem each time he

had gone to make payments on the Hire Purchase Agreement. Thereafter he had to ask his friends to put things in their refrigerators until the 9th January 2003 when someone came from the Defendant's shop to pick up the refrigerator. He paid E250-00 to this person and the refrigerator was taken to Bhunu Mall. He asked one salesman by the name of Makhathini to assist him. Throughout that time he was paying the monthly instalments. He paid even after the refrigerator had been taken by the Defendant.

[9] The Plaintiff showed the court the receipts in respect of his payments to the Defendants and these were entered collectively as exhibit "B". He deposed further that the refrigerator was never returned to him. He told the court that he would report this state of affairs to the cashiers whenever he had gone to make payments. He did not pay the whole amount. The defendant never asked for payments thereafter. He was not told that the agreement was terminated. He stayed without a refrigerator until December 2003. All in all, he had paid a sum of E2, 050-00 and has applied to the court that the money be returned to him and that the agreement be cancelled.

[10] The Plaintiff was cross-examined searchingly by ***Mr. Shabangu*** for the Defendant regarding the terms of the agreement and I shall revert to his replies in due course.

[11] Plaintiff then closed his case and did not call any other witness. Defendant then moved an application from the instance citing the legal authority in ***Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition*** at pages ***682 - 683.*** The argument advanced in this regard is that a person who is in breach of contract cannot rely on the breach of contract as a "cause of action". The court was further referred to what is stated by the learned author ***R.H Christie, The Law of Contract, 4th Edition*** at page ***576.***

[12] On the other hand ***Mr. Simelane*** who appeared for the Plaintiff took the view that this application is misconceived and cited the provisions of the Hire Purchase Act.

[13] The issue before court is governed by the ***dictum*** in the South African leading case in the matter of ***Gascoyne vs Paul and Hunter 1917 T.P.D. 170*** which contains the following formulation:

"At the close of the case for the Plaintiff, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the Plaintiff … the question therefore is, at the close of the case for the Plaintiff was there a *prima facie* case against the Defendant Hunter; in other words, was there such evidence before the court upon which a reasonable might, not stand, give judgment against Hunter".

[14] The learned authors ***Herbstein et al*** continue to state at page ***681*** that it follows from this that the court is enjoined to bring to bear the judgment of a reasonable man and:

"is bound to speculate on the conclusion at which the reasonable man of [the court's] conception not should, but might, or could arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer", (see also the judgment of PittrnanJ in *Myburg vs Kelly 1942 E.D.L. 202* at *206).*

[15] In my assessment of the evidence of the Plaintiff against the general principle enunciated in the above-cited case of ***Gascoyne vs Paul's Hunter*** I cannot say that Plaintiff has not advanced a ***prima facie*** case against the Defendant. I have also come to the considered view as I was addressed by Counsel for the Plaintiff that the provisions of the Hire Purchase Act of 1969 have not been followed by the Defendants.

[16] In the result, for the afore-going reasons the application for absolution from the instance is refused and costs to be costs in the trial.

S.B. MAPHALALA

JUDGE