IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 558/2005

NOMSA MKHOMBE T/A DREAM DRESS Plaintiff

And

MOTJANE HIGH SCHOOL Defendant

Coram: S.B. MAPHALALA-J

For the Plaintiff: MR. Z. JELE

For the Defendant: MR. J. MAVUSO

JUDGMENT

25th July 2008

[1] The Plaintiff commenced action proceedings in February 2005 in which she claimed from the Defendant payment of the sum of El03, 250-00 being in respect of goods sold and delivered by the Plaintiff to the Defendant in its special instance and request, interest on the aforesaid amount at the rate of 9% per annum calculated from the date of summons to date of final payment and costs of suit.

[2] The Defendant duly filed its Notice of Intention to Defend and the Plaintiff filed its declaration. On the 15th April 2005 summary judgment was granted for the amount of E68, 250-00. The Defendant then filed an application to rescind the summary judgment and tendered payment of the sum of E68, 250-00 which amount it acknowledged it owed the Plaintiff, which is duly paid in respect of 250 tracksuits which were acknowledged by the Defendant to have been delivered by the Plaintiff at the school.

[3] The parties then drew up a Statement of Agreed Facts which was duly handed into court. The crisp issue for determination through oral evidence was whether the Plaintiff did deliver to the Defendant the 100 tracksuits over and above the 250 tracksuits that were delivered on the 1st February 2004. Should the answer be in the affirmative then the Plaintiff would be entitled to its judgment.

[4] It is common cause between the parties that the Plaintiff and the Defendant entered into a written contract in terms of a letter, wherein the Plaintiff was contracted to supply 250 tracksuits by the 1st February 2004 for Form 1 and Form 4 students at the value of E350-00 per tracksuit. The Plaintiff was also contracted to avail further 250 tracksuits for sale at the school business for the Form 2, Form 3 and Form 5 to buy. A copy of the letter is filed as annexure "A".

[5] The evidence of the Plaintiff is that she did deliver to the school the first 250 tracksuits for Form l's and Form 4's. This fact is acknowledged by the Defendant. It is also the evidence of the Plaintiff that she then by verbal agreement with the Headmaster of the school delivered 100 tracksuits to the Secretary of the school in the presence of the Deputy Headmaster (Basil Howe)

on the 1st March 2004. This fact is denied by the Defendant and alleges that the tracksuits were merely "dumped" at the school and they were not actually delivered to the school and/or the schools' authorities.

[6] In support of the Plaintiffs claim (2) two witnesses were led, these are the Plaintiff herself being PW1 and PW2 3401 Detective Constable Themba Paul Dlamini. The defence in support of its case called three witnesses. The witnesses who were called were DW1 (the Headmaster Mr. Julius Dlamini), DW2 Basil Howe, the Deputy Headmaster and DW3 the school Secretary, Mrs. Nomsa Shongwe.

[7] PW1 Nomsa Mkhombe testified that she effected the delivery of the 98 tracksuits in March 2005 by dropping them at the school and leaving them with the school Secretary and that she was unable to sign for the tracksuits delivered because the book designated for such was no where to be found. She stated further that she requested Nomsa Shongwe (DW3) to write on a piece of paper the number of tracksuits she counted, which was 98. She alleges that she sent a teacher by the name of Sibusiso

Vilakati to furnish the school with a delivery note. Lastly, PW1 alleges that when she delivered the tracksuits DW3 Mr. Basil Howe was present in the office and that no communication took place between them.

[8] PW1 was cross-examined by Counsel for the Defendant.

[9] The second witness for the Plaintiff was PW2 3401 Detective Constable Themba Paul Dlamini. The essence of his testimony was to buttress PW1 's evidence to the effect that she had left the tracksuits with the Defendant.

[10] The Plaintiff then closed her case and the Defendant then led its evidence in rebuttal.

[11] The evidence of the Defendant is commenced by that of the Headmaster of the school one

Mr. Julius Dlamini who gave evidence that he never received the tracksuits and that he was not present (to receive them) when they were left with the school Secretary and that he had issued an instruction to DW3, the school Secretary Nomsa Shongwe not to receive anything from the Plaintiff as she had taken the issue of tracksuits to court.

[12] DW1 was cross-examined by the Plaintiffs Counsel.

[13] The second witness for the Defendant was one DW2 Basil Howe who is the Deputy Headmaster of the school. He testified that when the Plaintiff left the tracksuits boxes with the school Secretary, he was working on a computer at the time and noticed the event. He testified that the Headmaster was locked up in a meeting and that he was responsible then for the general administration of the school. He testified that there was no communication between himself and the Plaintiff because of differences occasioned by the award of the tracksuits tender to the Plaintiff, who was then a teacher at the school, something which he viewed as unprofessional. Also because as Chairperson of the School Uniform Committee, tasked with finding affordable tracksuits he felt bypassed by DW1 when he awarded the Plaintiff the tender without involving him. He also testified that at some point the Plaintiff raised her displeasure at his attitude towards her. Mr. Howe also informed the court that responsible for receiving goods was DW1 and himself.

[14] In cross examination of this witness it emerged that there was an obvious feeling of contempt between the Plaintiff and Basil Howe, evidenced by the lack of communication between the parties who could not even exchange a greeting.

[15] The third and last witness for the Defendant was DW3 Nomsa Shongwe who was the Secretary when the Plaintiff came to deliver the tracksuits and that one of the cartoons carrying the tracksuits had been placed in her office and after the Plaintiff had counted them, as instructed by the Plaintiff she recorded on a piece of paper that they were 98. She further testified that she was temporarily out of her office when the Plaintiff entered same and thought that she had discussed with DW2, the delivery of same.

[16] She was also cross-examined by Counsel for the Plaintiff.

[17] The court then heard submissions from both Counsel and I must say Counsel filed very useful Heads of Arguments for which I am grateful.

[18] The crisp issue for determination by the court is whether the events as having been testified to by the parties constituted delivery both in terms of the practice established between the parties and the law.

[19] Counsel for the Plaintiff referred to these following salient facts being firstly that both the Headmaster and the Deputy Headmaster acknowledged that the Secretary may receive goods on behalf of the school if she had been so mandated. Secondly, that the Deputy headmaster was present when the delivery was made. Whether he was unhappy about the contract award is not material, he was the person in charge of the premises at the material time. He witnessed the delivery. Thirdly, the tracksuits were physically counted, sizes recorded and left at the school. The tracksuits remained in the school to date and no tender to return or restitution has been sought or made by the school notwithstanding the institution of these proceedings. Fourthly, that the tracksuits were specifically made for the school and can not be sold elsewhere except to the students of the school. Lastly, that it is remarkable that the Secretary would not enquire from Mr. Howe as to the identity of the person who effected the delivery, and the Headmaster himself would not raise the issue with Mr. Howe. i.e. **"that there was a mysterious delivery at the time when you were in charge of the premises, do you know who made the delivery?**

[20] Counsel for the Plaintiff cited a textbook by the learned author *AJ Kerr, "The Law of Sale and Lease "* at page *161* where he states:

"Delivery refers to the placing of goods at the disposal of the buyer so that he may take them away".

[21] The court was further referred to the textbook by *Silberberg and Schoeman, The Law of Property 4th Edition* at page *171* who state the following:

"Physical delivery takes place when the thing or item is physically delivered to the purchaser".

[22] Furthermore, it was contended for the Plaintiff that in the event that the purchaser is not willing to accept delivery of the items then he has specific remedies being firstly, cancellation of the contract. If he alleges there was a breach, then there must be cancellation of the contract. This did not take place. Secondly, if the goods that have been supplied are not of the correct description or are not what was required, then the buyer may cancel and claim restitution. This means he must tender the goods.

[23] According to the arguments for the Defendant there are various forms of delivery recognized by the Roman-Dutch law, but the relevant one for the purposes of these proceedings is *("tradition vera ")* actual delivery. In this type of delivery, the transferor gives the thing from his hand of the transferee *("datio manu in manum")* with the intention of transferring ownership. In this regard the court was referred to the case of *Groenewald vs Van Der Merve 1917 A.D. 233* at *238 - 239* where Innes CJ observed that:

> **"In the majority of cases the physical factor takes the form of handling the movable in question bodily to the transferee, who accepts it with requisite intention and thereby becomes owner. That is actual deliver".**

[24] The nub of this case is whether anyone of the defence witnesses received the tracksuits and even more importantly and in accordance with the *Groenewald* case that, such if ever accepted its acceptance was with the **"requisite intention".** This is the crux of the whole matter.

[25] It appears to me that the arguments of the Respondent accords with what is stated in *Groenewald case.* I say so because the purported delivery was not in accordance with the agreement being annexure "A" which was entered into between the parties. In that in terms of the agreement the tracksuits were to be supplied during the year 2004. Part of the consignment was to avail for sale at the Schools Business Centre and this did not happen.

[26] The 98 tracksuits were left at the school after the proceedings herein were instituted. In this

regard the Respondent contends the following facts:

(a) **Respondents submit that, in the belief that such would sustain her case, the Applicant then took it upon herself to, in one way or another have the tracksuits dropped at the school even if it meant not adhering to the legal requirements of delivery.**

(b) **Respondent further submits that after leaving the consignment with the School Secretary, under normal circumstances the Applicant would have had no problem returning to had been over the invoice and have everything properly done with the School's headteacher.**

(c) **Clearly and from the above, it cannot be said that the Applicant left the tracksuits with the intention of having the school receive ownership thereof.**

(d) **It also cannot be said that anyone of the defence witnesses received the tracksuits and even more importantly and in accordance with the *Groenewald* case that, such if ever accepted its acceptance was with the "requisite intention".**

[27] Having considered the *ratio* in the *Groenewald* case *(supra)* I have come to the considered view that the requisite intention has not been proved *in casu.* In the result, I have come to the decision that the Applicant failed and/or neglected to properly and legally deliver the tracksuits to it and as such its claim for the 98 tracksuits is dismissed with costs.

S.B. MAPHALALA
PRINCIPAL JUDGE