



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO.3020/06

In the matter between:

MAXWELL MAGAGULA
VS
RATTA MAZIBUKO

CORAM

BANDA, CHIEF JUSTICE

FOR THE PLAINTIFF
FOR THE DEFENDANT

MS. X. HLATSHWAYO
MR. S.C. SIMELANE

JUDGMENT

10 March 2009

[1] It is common cause that the two parties had entered into an oral agreement in terms of which the defendant was to act as the plaintiff's agent to secure a serviceable tractor that was in good working condition.

[2] It is the contention of the plaintiff that on or about the

28th July 2005 and at Matsapa he and the defendant entered into an oral agreement in which the defendant was to act as the plaintiff's agent to secure for the plaintiff a serviceable tractor in good working condition.

- [3] It is the evidence of the plaintiff that he and the defendant had earlier seen a tractor at Swazi Trac in which the plaintiff had expressed interest to acquire it. The defendant was working at Swazi Trac as a driver/mechanic. He had been with that company for over twenty years. It is the further contention of the plaintiff that he had told the defendant to buy him the tractor which they had seen together. However, defendant said that he had informed the plaintiff that the tractor which they had seen together was no longer available to him to buy but that there was another tractor, at Nhlangano, which a Mr. Roberts would sell after he had bought a new one. The plaintiff stated that he had told the defendant that he could buy a different tractor provided it was in the same condition as the tractor they had both seen. The defendant agreed that he had told the plaintiff that Mr. Robert's tractor was in a good working condition as it was already engaged in hauling timber at Nhlangano.

- [4] The plaintiff decided to buy that tractor and duly went to Swazi Trac on 28th July 2005 and paid E30 000.00 for it. Swazi Trac issued a receipt to the plaintiff which indicated that the money was being received on behalf of a Mr. Roberts the owner of the tractor that was being sold. It is significant to note that it was the plaintiff himself who went to Swazi Trac to pay for the tractor.
- [5] It is important to disclose the relationship which exists between the plaintiff and the defendant. The latter is the maternal uncle to the plaintiff. The plaintiff wanted to take the advantage of his uncle's connection with Swazi Trac where he was working as driver/mechanic. Because of this connection the defendant said that he informed the sales manager that the plaintiff was his nephew and requested him if he would consider reducing the price of E38,000.00 which was being demanded. It is clear on the evidence that because of the intervention by the defendant, on behalf of the plaintiff, the price of the tractor was reduced to E30,000.00.
- [6] After the plaintiff had paid for the tractor the defendant offered to deliver it to the plaintiff's home. The tractor was duly delivered by the defendant who was

helped in the delivery of the tractor by the plaintiff's father who drove the delivery truck. It is to be noted, and this was clear from the evidence of the defendant, that the plaintiff's father is a man who is familiar with tractors having himself owned one before. The defendant duly informed the plaintiff that the tractor had been delivered to his home. Six days after the delivery of the tractor the plaintiff visited his home when, for the first time, and according to him, he saw the tractor he had bought. He was not satisfied with its condition and decided to return it and told the defendant to collect it. The plaintiff's description of the tractor was that it was a scrap; it emitted a lot of smoke and that it had oil leakages and that the steering wheel could not turn the wheels. He, therefore, demanded the refund of the E30,000.00 which he had paid.

- [7] The defendant said that the tractor was a second hand one and that although the external appearance looked old its engine was strong and that it was a better tractor than the one that he and the plaintiff had seen together. The defendant said that he told the plaintiff about the problems the tractor had and had informed the plaintiff that they were minor problems which could

be rectified while the tractor continued to work. He said the tractor did not have a cover for the battery, it did not have the oil cap and dip stick. He said that he told the plaintiff that he would be going to South Africa where he could obtain spare parts for the tractor. The defendant emphasized the point that the particular tractor which he had found for the plaintiff was better than the one they had both seen because it had manhem engine which was stronger and more durable than other engines used in some tractors. As far as the defendant was concerned the tractor which he is keeping at his home is still the plaintiff's property which can be collected at any time. He informed the court that he had attempted to sell it so that he could refund the money to the plaintiff. He was later advised by counsel not to sell it during the current court proceedings. He was surprised that he was being sued for the refund of the money and for damages. He told the court that he was not told that the plaintiff needed the tractor in order for him to fulfil tender obligations. The defendant stated that the only time he had heard about a contract of tender was after the tractor was returned and that the tender was in relation to a contract to haul timbers at Tyros where the plaintiff's friend had secured the tender.

- [8] Ms. Hlatshwayo, for the plaintiff, has submitted that the defendant was the agent of the plaintiff and that in that capacity the defendant had assumed the mandate to get for the plaintiff a serviceable tractor. She contended that the tractor which the defendant obtained for the plaintiff was not in the same condition as the tractor which they had both seen. She further submitted that the defendant undertook to obtain the tractor they had both seen and that as an agent the defendant had undertaken to work in the best interests of the plaintiff. She further contended that the defendant had failed to perform his part of the contract in that he failed to act in good faith and with prudence. She has submitted that the plaintiff paid the sum E30 000 00 as a result of misrepresentation made by the defendant and that such misrepresentation had occasioned loss to the plaintiff.
- [9] Mr. Simelane for the defendant first dealt with the seeming contradictions between the defendant's pleadings and the evidence given by him. Mr. Simelane submitted that the only difference relates to whether the plaintiff had spoken to Mr. Roberts and that was the only point where there was some difference

between the pleadings and the evidence. Mr. Simelane submitted that there was also some difference between what is asserted in the pleadings by the plaintiffs and the evidence he had given. The plaintiff's pleadings had alleged that the agreement had been made on 28th July 2005 when in fact that is the date when the plaintiff made the payment to Swazi Trac. Mr. Simelane referred to the blood relationship that exists between the plaintiff and the defendant. He contended that the plaintiff was not a credible witness in that he knew that he was buying the tractor from Swazi Trac and the receipt which was issued and discovered was never produced as evidence in court.

[10] Mr. Simelane has contended that the defendant was a credible witness who stuck to his story throughout his evidence. He said that the defendant admitted facts that needed to be admitted like the parts which were missing from the tractor. He submitted that the plaintiff had never used the tractor to test if it could work. The defendant had contended that the tractor had been working at Nhlngano where it had been hauling timber and that the plaintiff did not call any witness to testify about the defects which the plaintiff said the tractor had which prevented it from working.

Mr. Simelane further contended that the sale agreement was between the plaintiff and Mr. Roberts only that the latter was not aware that he was dealing with the plaintiff and that, therefore, there could be no cancellation of the agreement because Mr. Roberts had made no misrepresentation to the plaintiff. It is Mr. Simelane's submission that what the plaintiff should have been praying for was that he had paid more for what he got and that is the only claim that the plaintiff could make against the defendant and not the prayer for cancellation of the agreement.

[11] Mr. Simelane has submitted that the defendant substantially performed what he was mandated to do and that the plaintiff had not proved that the defendant had been dishonest in discharging that mandate.

[12] Mr. Simelane has also submitted that the plaintiff did not adduce evidence about the alleged tender to show how much was the value of the tender; what expenses would be incurred and what profit would have been made. There is no proof by the plaintiff to show that it was the alleged misrepresentation by the defendant which caused the plaintiff to lose his alleged tender. The plaintiff's own evidence shows that the tender

works were supposed to start on 27th July 2005 but the plaintiff only paid for the tractor on 28th July and the tractor was not delivered until five days later. The plaintiff took more days before he inspected the tractor. Mr. Simelane has, therefore, submitted that it cannot be said that the tender was lost because of the conduct of the defendant. There was no evidence called from the Farmers Association to substantiate the plaintiff's claim that he had been given a tender to haul sugar cane for the Association.

[13] The defendant gave evidence. He stated that the plaintiff who is his nephew approached him in July 2005 and told him that he was looking for a tractor to haul Timbers at Tyros where the plaintiff had a friend. The defendant said that he told the plaintiff that a tractor was available but was expensive, as the owner was demanding E48,000.00 for it. He said he told the plaintiff that the tractor they had seen was not good because of its age but he told the plaintiff that there was a tractor which was coming from Nhlanguano and would be towed. He told the plaintiff that the tractor was a John Deere model and that the plaintiff's father would not like it as the defendant had bought a similar

tractor for the plaintiff's father who experienced difficulties with it. The defendant said that he also told the plaintiff that a Massey Ferguson engine would give the plaintiff problems if he intended to use it at Tyros Timber because of the mountainous terrain which existed there. The plaintiff told the defendant that the tractor would be his and not his father's and that he would take it directly to Tyros Timbers. The defendant advised the plaintiff to wait for another tractor. The defendant said that after a short time he phoned the plaintiff to inform him that he had seen a tractor at Nhlangano belonging to a Mr. Roberts and that the tractor was in the fields working. The defendant told the plaintiff that the tractor had a few defects which could be rectified while it was being used.

[14] The defendant stated that he heard about the plaintiff wanting to use the tractor in hauling sugar cane only after the plaintiff had refused to accept the tractor.

[15] The agent is obliged to discharge his obligation which he has expressly or impliedly undertaken to fulfil. The agent is obliged to discharge the following obligation:

- (1) To discharge what he has been instructed to do.
- (2) To exercise care and diligence.

- (3) To impart information.
- (4) To advise.
- (5) To act in good faith.
- (6) To account.

[16] The mandate which the defendant had assumed to discharge was to find, for the plaintiff, a serviceable tractor for a sum of E30,000.00.

[17] In the Law of Agency 4th Edition by A.J. Kerr at page 136 the learned author describes the duty of an agent as follows:

“A mandatory is bound to prosecute the mandate which he has undertaken with diligence and in good faith.

So also Pothier ‘the mandant has the right to demand of the mandatory... not only his good faith, but also all the care required in the execution of the mandate’.

[18] And in the case of DAVID TRUST & OTHERS V AEGIS INSURANCE COMPANY LTD AND OTHERS 2003 SA 289 the court held:

“The contract is one of mandate. The mandate given by each plaintiff to Katz Salbu was to invest and administer funds entrusted to it by the plaintiff concerned and collected by it from the plaintiff’s debtors. These funds were to be invested in a bank, in this case Investec and Trust Bank respectively. It is one of the naturalia of each such contract, as it is of contracts of mandate in general, that the mandatory is obliged, first, to perform his functions faithfully, honestly, and with care and diligence and, secondly, to account to his principal for his actions”.

[19] I have carefully reviewed the evidence which both parties gave in support of their respective cases. I

carefully watched their demeanour as they gave evidence. I was particularly impressed with the manner in which the defendant gave his evidence. I was at pains to discover why the defendant would want to misrepresent the condition of the tractor. He had nothing to gain by making any misrepresentation. Throughout his evidence the defendant said that he did what he did because the plaintiff was his nephew. In his own words, he said, "I was doing it for my nephew". He was very honest in his evidence. He did not misrepresent the condition of the tractor. He told the plaintiff that the tractor had defects which could be rectified with spare parts which he could bring from South Africa. He identified the defects as that the battery cover was missing and that wires had been used to tie it up; that the oil cap and dip stick were not available. The defendant stated, in his evidence in chief, that the plaintiff's father had helped him to off load the tractor and that the father was present when the defendant drove the tractor to the plaintiff's homestead. And yet the plaintiff did not call his father to testify as to the condition of the tractor especially on the state of the steering wheel. The tractor was a second hand and the defendant did not present it as a new tractor. There was no evidence called to show

what kind of a tractor that could have been bought for E30,000.00. There was no evidence given on the value of the tractor which was bought which would have shown that the E30,000.00 which was paid was an over valued price. The onus was on the plaintiff. The defendant told the plaintiff that he would obtain spare parts from Johannesburg where he was due to visit.

[20] I find it difficult to believe that the plaintiff who was anxious to acquire a tractor for a tender job would go to Swazi Trac and pay for the tractor without inspecting the condition of the tractor he was buying. Contrary to what Ms. Hlatshwayo said, it is the plaintiff, in my view, who made up his story as he gave his evidence. He did not give the impression that he was a credible witness. I find that the defendant was telling the truth when he gave his evidence and throughout his evidence I got the distinct impression that he was narrating the facts as best as he could remember them. There was no hint that he was making up the story. He said that he did what he did for his nephew.

[21] I am satisfied and find that the defendant diligently discharged his mandate as plaintiff's agent honestly and in good faith. There was no failure on his part to

discharge the duty which he had assumed as mandatory. He stood to gain nothing in making any misrepresentation. He tried his best to find a reasonable tractor for his nephew for the amount of money which the plaintiff said he had. I am satisfied that the plaintiff has not proved his case, on balance of probabilities, against the defendant. I will therefore dismiss this action with costs.

R.A. BANDA
CHIEF JUSTICE