IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 90/2012

In the matter between:-

DANDI INVESTMENTS (PTY) LTD **Applicant**

and

FREDERICK J. HAWLEY T/A **Respondent**

Neutral citation: *Dandi Investments (PTY) Ltd v Frederick J. Hawley T/A* (90/12) [2012] SZHC 118 (6th June 2012)

Coram: HLOPHE J

Heard:

Delivered: 6th June 2012

For the Applicant: Mr. S. Simelane

For the Respondent: Mr. B. Magagula

Summary

Civil Procedure – Application for attachment of certain motor vehicle allegedly handed over to Respondent as security for a loan – Respondent disputing it was handed over to Applicant as security for loan concerned – Respondent alleges it was a subject of a sale between the parties and the handing over of it was delivery following a written agreement of sale – Deed of sale allegedly subject to a right of cancellation of same upon repayment of the purchase price – Agreement of sale seems to be a simulated transaction – What constitutes one – effect of such an agreement.

JUDGMENT

[1] The dispute between the parties involves the determination of the true nature of an agreement concluded by the parties resulting in a motor vehicle forming the subject matter of these proceedings, being handed over to the Respondent.

[2] According to the Applicant, the transaction concluded between the parties was a loan agreement in terms of which he was meant to be loaned and advanced a sum of E40 000.00 by the Respondent with the motor vehicle concerned being pledged as security and thus handed over to the Respondent to keep in safe custody until the outstanding amount was paid. Furthermore according to the Applicant the motor vehicle concerned was not meant to be used by the Respondent other than to keep it safely as security for the debt. I say Applicant was meant to be loaned a sum of E40 000.00 because according to it, it was eventually loaned E32 000.00 for the reasons set out herein below.

[3] The Applicant contends further that in actual fact the transaction resulting in the current dispute was not the first one as in January 2011, a similar transaction had been concluded between the parties as a result of which the same motor vehicle had been handed over to the Respondent to hold over as security until repayment of the loan advanced together with the agreed interest thereon. The Applicant contends that this loan was repaid in March 2011. This led to the release of his said motor vehicle back to him.

[4] The Applicant once again approached the Respondent for a loan of the same amount as before – E40 000.00 – during the month of

July 2011. Applicant claims to have once again pledged his motor vehicle as security for the same loan.

[5] There was an anomaly though, this time around as the Respondent did not advance Applicant the E40 000.00 as agreed but only advanced it a sum of E32 000.00 and claimed that the E8 000.00 balance represented the first interest to the said loan which had to be deducted from the loan amount itself. This interest, the Applicant contends, exceeded the lawful interest chargeable it in law as it exceeded 20% per month. I can only mention in passing that in terms of the Money Lending And Credit Financing Act no interest above 8% of the prime rate of interest fixed by the Central Bank at a given time is chargeable.

[6] The Applicant does not however deny that at all relevant times when he sought a loan from the Respondent, the latter would cause him to sign an agreement called a Deed of Sale, which provided that the amount of E40 000.00 advanced him was a purchase price for the car he says he was pledging as security

[7] Together with signing the Deed of Sale aforesaid, he was also caused to sign documents purporting to transfer ownership of the motor vehicle to the Respondent.

[8] On the other hand the Respondent denies that the agreement concluded between the parties was a loan but claims it was one of sale, in terms of which he purchased the Applicant's motor vehicle for a sum of E40 000.00 from the Applicant. As proof this was the nature of the transaction between the two of them, he refers to the Deed of Sale annexed to the application and referred to above together with the documents purporting to transfer ownership of the motor vehicle from Applicant to him. The agreement of sale

referred to bears the words – Deed of Sale – as a heading and goes on to describe the parties as Purchaser and Seller respectively. The item being sold is described as a 1998 Model, Toyota Landcruiser, White 100 VX, V8 Petrol Engine, Registration number SD 857 JS. The purchase price is provided as E40 000.00. It also provided at paragraph 8 thereof, that the purchaser granted the seller an option to cancel this agreement within 30 days of the date of sale. This would be facilitated through the alleged Seller reimbursing the purchaser the full purchase price. It was provided further in this regard, and this term was now handwritten, that a further 30 days option could be negotiated under the same conditions. I have observed that the agreement in question makes no mention of either interest being payable nor of any charges payable by the Applicant.

[9] Of course this written agreement and the documents purporting to transfer the ownership of the vehicle were signed on or about the 21st January 2011. It is common course this agreement was allegedly cancelled on the 15th March 2011 when the E40 000.00 together with a sum of E8 000.00 as interest was paid to the Respondent as agreed. The motor vehicle was consequently released to the Applicant. Applicant claims to have been told verbally that there was to be charged an interest on their loan agreement fixed at 20% per month, which is what the E8 000.00 he paid Respondent together with the E40 000.00 represented.

[10] The Applicant once again needed some money in or around July 2011, as a result of which another loan agreement was concluded between the parties on or around the 26th July 2011. No new Deed of Sale documents were written and signed this time around, but a simple, “document written addendum to the Deed of Sale signed

on the 21st January 2011" was signed by the Applicant and the Respondent as, respectively represented by Mduduzi Cyprian Maziya and Frederick J. Hawley. This document was couched in the following terms:-

> "*Subject to clause 8 of the Agreement of Sale signed on the said day, it is agreed that the Purchaser extends the option of cancellation to the 26th day of August 2011 by reimbursement of E40 000.00 over and above the purchase price as quoted in the Deed of Sale.*"

[11] This document was then signed by the same Representatives of the Parties mentioned above in front of certain witnesses.

[12] The Applicant, as the alleged seller, failed to repay the E40 000.00 to the Respondent by the date fixed so as to obtain cancellation of the alleged sale agreement. Applicant claims to have only managed to pay towards "cancellation" of the said agreement, a sum of E3000.00 in August followed by E8 000.00 in September 2011. This in my understanding is besides the E8 000.00 deducted from the E40 000.00 advanced on 26th July 2011 to the Applicant by the Respondent.

[13] On or about the 26th August 2011; the date to which the initial "cancellation" option was to be exercised, and upon the Applicant failing to repay the E40 000.00, so as to achieve cancellation of the agreement as agreed; the cancellation option was extended to the 26th October 2011, and the cancellation amount fixed at E47 000.00 irrespective of the amounts mentioned above which he claims to have already paid to the Respondent. At the end of the agreed period in October 2011, Applicant claims to have approached the Respondent and requested a statement of the

loan. This he says was not forthcoming as instead he claims to have been given a small piece of paper written on it that the cancellation option was then being extended to the 26th November 2011 with the amount for the cancellation now being a sum of E58 750.00.

[14] The Applicant contends that from this episode he realized that he was being cheated and he says he then informed the Respondent that his actions were, unlawful. There then ensued negotiations between the two which resulted in the Applicant claiming to have been told for the first time that his motor vehicle was now going to be sold by the Respondent after having transferred same to his name. In January 2012, Applicant was told that the sum of money to pay in order to salvage his motor vehicle was a sum of E91 800.00 which he says was verbally explained to be interest. At this stage he had gathered that the Respondent was now using his motor vehicle as his. In this regard Applicant was sent a short message service – SMS – which read:-

> *"That is fine. My obligation to you was to store the car for 30 days which has long surpassed. I've been FORCED to settle debt on the car and take it out of storage for resale to lower my costs. Its to heavy on fuel to use but I try keep it going to minimize deterioration. Glad you have the funds to purchase the motor vehicle. When its made available Monday I will furnish you with an invoice on the current offer of E91 800.00. should you after payment immediately not be satisfied with its condition, you will be refunded in full and I will do necessary repairs / service and sell it on the open market at an adjusted price."*

[15] It was as a result of this short message service – SMS – that the Applicant decided to approach this court for a remedy where he sought *inter alia* the following orders on an urgent basis:-

1. Dispensing with the normal requirements and usual requirements (sic) prescribed by the Rules of Court relating to time limits, manner of service, procedure and form and enrolling this matter as one of urgency.

2. Condoning any non compliance with the Rules of Court.

3. That a rule nisi do hereby issue operating with immediate effect calling upon the Respondent to show cause on a date to be fixed by the Honourable Court why prayers 3.1, 3.1.1, 3.2 and 3.3 herein below must not be confirmed into a final Order of Court.

   3.1 Directing the Deputy Sheriff for the district of Hhohho to forthwith attach and remove from the Respondent or from wherever it can be found, the motor vehicle described, to his safe storage pending finalization of this application and the vehicle is;

   (the full description of the motor vehicle as made in paragraph 8, hereinabove is then made)

   3.2 Declaring the purported Deed of Sale of the Motor Vehicle described above dated 21st January 2011 and the addendum thereto as null and void *ab initio* and of no legal force and effect.

   3.3 Declaring the interest rates charged by the Respondent on the loan of E32 000.00 advanced to the Applicant on the 26th July 2011 and in particular

the interest rate exceeding the lawful money lending rate in Swaziland as unlawful and legally invalid.

4. Costs of this application.

5. Further and or alternative relief.

[16] As indicated above, the Respondent's response to the application was to deny that the transaction between the parties was a loan agreement as contended by the Applicant. He contended that the agreement was one of sale as evidenced by the various signed documents. The amounts he had levied to effect the option to cancel, he denied was interest but referred to it as the "costs of extending the option to cancel."

[17] As regards the allegations that the Respondent prepared and sent Applicant's director, the Short Message Service – SMS – referred to above, the Respondent does not deny same but only contends that the Applicant is contending oral agreements over and above the written one. He therefore does not really dispute the SMS attributed to him. I observe that the Deed of Sale itself does not exclude verbal agreements concluded between the parties.

[18] After considering both parties' versions as well as listening to their submissions made of record, I am convinced that the parties did sign the Deed of Sale which according to Respondent indicated the nature of the transaction concluded by the parties. I am however, not convinced that the parties ever doubted at the initial stages of their agreement that same was a loan agreement couched as a Deed of Sale for whatever other designs particularly on the part of the Respondent. Of course I have no doubt at the time of signing

the Deed of Sale, the Applicant considered chances of his failure to repay the debt to be extremely remote.

[19] The following facts are the ones that make me conclude that in actual fact both parties were of the view that the true nature of their transaction was a loan, with the motor vehicle being surrendered as a pledge to secure the loan.

1. After handover of the motor vehicle to the Respondent, it was not to be used. This is unthinkable in the case of a normal sale. It is only in a pledge where the item pledged would not be used because it would only be securing a debt. Otherwise, it is difficult to envisage sold items not to be used after the purchase price would have been paid and the item having been delivered.

2. Whilst on the face of it there was a Deed of Sale of the motor vehicle, it is however obvious that the purported purchaser had no intention of becoming an owner of the motor vehicle, concerned than to hold it as a form of security for the loan advanced. To this end the purported Deed of Sale was a “simulated transaction”.

3. It is not disputed that after concluding the agreement, the Applicant did not receive, the E40 000.00 which according to him he asked to be loaned (yet according to the Respondent was a purchase price), but was advanced or given a sum of E32 000.00. There is no sound reason why the Respondent would have subtracted E8 000.00 from the purchase price of the motor vehicle if the agreement was a sale, particularly in so far as no other costs were mentioned in the agreement nor are there any

allegations there was ever a verbal agreement to that effect. In fact he has not explained this. On the other hand the explanation by the Applicant on why the E8 000.00 was deducted makes sense and his version is therefore more probable – that is, it was deducted therefrom as the interest that had to be paid on the amount which he avers had been agreed verbally. By way of analogy, a similar approach was followed by the Respondent on a similar situation in ***Phillip Fanelo Dlamini V Frederick Hawley t/a Penrose High Court case no. 1494/2011***. This confirms and or supports my view the E8 000.00 deducted was shown to be interest. Otherwise Respondent should not be heard to be saying he purchased the motor vehicle for E40 000.00 if he only paid E32 000.00.

4. The monthly escalation of the amounts required to be paid after the lapse of the initial period of repaying the debt. No such amounts would be added in that manner in an agreement of sale which goes to confirm that the true transaction was a loan and the motor vehicle was merely used as a form of security. That the Deed of Sale made no provision for the escalation or the levying of any extra amounts can only make the Respondents' case more believable whilst making that of the Applicant even stronger that over and above the Deed of sale there was the loan agreement and the motor vehicle was meant to secure same.

5. The SMS sent Applicant by Respondent, does confirm upon a closer reading, that the true nature of the agreement between the parties was a loan of which the motor vehicle was only a form of security which was not

meant to be used. The SMS shows that the emphasis on the agreement being regarded as one of sale was an afterthought.

6. Furthermore, it is not disputed that the motor vehicle was worth more than E200 000.00 which makes it unreal that the Respondent would have been willing to sell it at E40 000.00 which is far less than its true value.

[20] The foregoing reasons cumulatively make me conclude that the true nature of the agreement between the parties was a loan agreement to which the motor vehicle given over to the Respondent was a pledge or a form of security and not a subject matter of a sale.

[21] The Deed of the Sale concluded between the parties was therefore not a genuine sale agreement but a simulated transaction. I am of the view that where a transaction is found to be a simulated one the court should enforce the true agreement and not the simulated one.

[22] I am supported in this approach by such cases as ***Vasco Dry Cleaners v Twycross1979 (1) SA 603 (A)*** and ***Skje lbreds Rederi A/s and others v Hartless (PTY) Ltd 1982 (2) SA 710 (A),*** where agreements meant to hide their real meanings were not enforced but instead their real meanings where uncovered and they were then treated as the latter agreements.

[23] In keeping with this approach, I have no doubt that the agreement in the matter at hand was a loan secured through a pledge in the form of the motor vehicle in question.

[24] Having found that the applicable transaction was a loan secured through the motor vehicle forming the subject matter of these proceedings, this court cannot enforce the sale agreement and it declares same to be of no force or effect as it was a simulated transaction and instead enforces the loan agreement which in terms of the Money Lending And Credit Financing Act of 1991 is referred to as a Money – Lending transaction, which is defined as follows:-

> *"Money –Lending transaction" means any transaction which, whatever its form may be and whether or not it forms part of another transaction is substantially one of money – lending."*

In my view this definition fits fully the transaction at hand in this matter.

[25] Having concluded that the agreement between the parties was a loan agreement, such an agreement has to be in line with the relevant laws. This is as regards the applicable interest rates. It was argued that according to section 3 (1) (b) of the Money Lending And Credit Financing Act of 1991, no interest exceeding 8% per annum of the rate for discounts, rediscounts and advances announced from time to time by the Central Bank of Swaziland Order of 1974, shall be chargeable on a money lending transaction.

[26] On the other hand section 6 of the same Act provides as follows:-

> "6 (1) *Any agreement in connection with any money – lending or credit transaction that is not in conformity with the provisions of this Act shall be null and void,*

and shall not be enforceable against the borrower or the credit receiver by the lender.

(2) *No lender shall in connection with any money – lending or credit transaction obtain judgment for or recover from a borrower or credit receiver an amount exceeding the sum of –*

(a) *the principal debt owed by the borrower or credit receiver;*

(b) *the interest charged on the principal debt.*

(c) *the additional finance charges calculated in the manner prescribed by section 7.*

(d) *In the case where judgment is obtained for recovery of the principal debt or finance charges due from the borrower or credit receiver, legal costs awarded in terms of such judgment.*

[27] Although the Applicant contended that the loan agreement concluded between it and the Respondent was null and void, it indicated its preparedness at paragraph 9 of the Founding Affidavit to repay the Respondent the lawful and correct loan balance calculated on the correct and lawful interest rate.

[28] This tender seems to be reasonable and is in my view not only logical but is also in line with the provisions of section 6 (2) of the applicable Act cited above.

[29] For this judgment to have effect, and in view of the conclusion I have reached that the agreement between the parties is a loan agreement secured by means of the motor vehicle in question, I must determine what the capital debt was as well as what interest

or charges is payable as well as determine what happens to the motor vehicle forming the pledge.

[30] Whereas it is common course that the intended capital borrowed was a sum of E40 000.00, it is not in dispute that only a sum of E32 000.00 was advanced after a sum of E8 000.00 was deducted as interest. I have no hesitation that such an interest looks exorbitant even though I do not know what the prime rate, beyond which interest could not lawfully exceed 8% was. Being that as it may and in order to avoid complications, I shall direct that the capital loan be taken to have been E32 000.00 and then ignore this E8 000.00 which was never advanced. Any amounts acknowledged to have been paid by the Applicant since its receipt of the E32 000.00 have to be taken into account as reducing the capital debt.

[31] To avoid speculation on the appropriate interest I will direct that the interest payable be and is to be mora interest fixed at 9% per annum because the parties never spelt out any agreed lawful interest and this court may not be equipped to fix any other rate of interest than mora interest. I for instance cannot assume that the intended interest was meant to be prime or even prime plus or prime less whatever.

[32] I am not in a position to know whether or not there were any financial charges agreed upon between the parties in the absence of evidence on what the appropriate charges are if any. Consequently, I will direct that there were no agreed charges nor are there any payable.

[33] I am therefore of the view that the outstanding amount of the loan due to the Respondent is E32 000.00 less whatever amounts

can be shown to have been paid by the Applicant towards repaying the loan.

[34] I have deliberately avoided granting Applicant the reliefs sought in the manner they are sought because in my view such would not lead to finalization of the matter just as it could mean that one of the parties ends up being treated unfairly which is what the Applicant was himself complaining of.

[35] As concerns who keeps the motor vehicle concerned pending finalization of the matter, I am of the view that since same was meant to secure a debt, it cannot be released to Applicant, before it pays off the outstanding debt together with the interest fixed at 9% per annum. I am of the view that the current condition of the motor vehicle be inspected by both parties after which it should be kept by the Respondent pending payment of the outstanding debt together with its interest by the Applicant. I need not add that the Respondent is required to keep the said vehicle in the condition it was in pending payment of the debt. Of course the Applicant will have to pay the outstanding balance plus 9% interest within 30 court days from date of this Judgment, failing which the Respondent shall then be entitled to deal with it as it would deal with a pledged item at the end of the period for repaying the debt.

[36] Given that notwithstanding the tender by the Applicant to pay to the Respondent what was lawfully due, the latter insisted on a dismissal of the application, I am of the view the Respondent cannot avoid the costs of these proceedings.

[37] Having come to the conclusion I have and for the removal of doubt, I now make the following orders:-

1. The Deed of Sale purportedly signed between the parties is declared null and void and of no force or effect.

2. The motor vehicle forming the subject of these proceedings is to be held by the Respondent as a pledged item pending payment of the outstanding loan balance and interest thereon at 9% per annum from the 26th August 2011 which payment should be done within 30 court days from date hereof.

3. In holding the said vehicle as such pledged item, the Respondent is to keep it intact and is ordered not to interfere with it in anyway, except with the leave of court.

4. Upon payment of the said outstanding balance the Applicant shall be entitled to the release of the motor vehicle forming the subject matter of these proceedings to itself.

5. Should Applicant fail to pay the outstanding amount comprising the capital debt and the outstanding interest, within the period stated above, the Respondent shall be entitled to deal with the matter in the same way one deals with pledged items where the secured debt is not paid.

6. The Respondent is to pay the costs of these proceedings.

Delivered in open Court on this the ……day of June 2012.

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N. J. HLOPHE

JUDGE