



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 2880/09

In the matter between:

FRANCIS SIBONISO DLAMINI

Applicant

and

TOKYO CARS (PTY) LTD

Respondent

Neutral citation: *Francis Siboniso Dlamini vs Tokyo Cars (Pty) Ltd 2880/09*
[2012] SZHC 37 (8 March 2012)

Coram: MAPHALALA PJ

Heard: 21 APRIL 2011

Delivered: 8 MARCH 2012

Summary: Plaintiff filed a combined summons against Defendant for the sum of E60.000.00 in respect of the purchase price and costs of repairs and improvement. Defendant contended that it was a wrong party brought to court. However, the court has found in favour of the Plaintiff with costs.

The Plaintiff's action

[1] The Plaintiff Francis Siboniso Dlamini has filed a combined summons against the Defendant Tokyo Cars (Pty) Ltd for payment of the sum of E60,000 in respect of a refund of the purchase price and costs of repairs and improvement.

[2] In the Particulars of Claim filed before this court on 13 August, 2009 the Plaintiff avers the follows:

“1. Payment of the sum of E60 000 (sixty thousand Emalangeni) in respect refund of the purchase price and the costs of repairs and improvements;

2. Interest on the aforesaid amount at the rate of 9% per annum calculated from the date of issue of summons to date of final payment;

3. That and failing immediate compliance by the Defendant with Order 1 above, that the Deputy Sheriff for Manzini be duly authorized to effect such Order and with the assistance of Members of the Royal Swaziland Police Force of Whichever Region upon whom the order is presented, if need be.

4. Costs of suit.”

[3] The cause of action between the parties arose this way. On or about the 13 November, 2008 and at Matsapha at the Defendant's place of business and

or business premises, the parties entered into an agreement of sale of a motor vehicle described as:

Make : Toyota Rosa Bus
Model : 1998
Engine No. : 1165898
Chassis No. : AB 30 000 6377
Registration : SD 641 CF

[4] The material terms of the sale agreement were that the Defendant sold to the Plaintiff the motor vehicle described above and the purchase price was agreed at E35, 000.00 payable as follows:

- 4.1 A deposit of E30,000 was payable on the date of agreement;
- 4.2 The balance of E5,000 would be payable in two equal monthly instalments of E2,500 payable on the 6 February and 27 March 2009 respectively;

[5] Plaintiff represented himself personally and the Defendant was represented by its Director, one Nadeem Mushtaq.

[6] Possession of the motor vehicle was to pass to the Plaintiff immediately upon payment of the deposit of the said E30,000. During the said sale agreement the Defendant expressly and/or alternatively, and in law, impliedly gave Plaintiff a warranty against eviction.

[7] Further terms of the agreement are outlined at paragraph 8 to 8.4 of the Particulars of Claim.

The defence

[8] The Defendant has filed a plea against the above cited claims. The gravamen of the Defendant's case is found in paragraph 7 of the plea that Defendant denies receiving payment for its own account from Plaintiff in respect of the sale agreement. Defendant states that any payment received by it in respect of the sale agreement was received for the account of Global MK Motors. Defendant denies that the said Nadeem Mushtaq represented it on conclusion of the sale agreement.

The evidence of the parties

(i) Plaintiff's evidence

[9] The Plaintiff gave *viva voce* evidence under oath that on about the 13 November 2008 and at the Defendant's premises at Matsapa in Manzini District, it entered into an oral agreement with the Defendant for purchase of motor vehicle described as:

Make	:	Toyota Rosa Bus
Model	:	1998
Engine No.	:	1165898
Chassis No.	:	HB 300006 377

Registration : SD 641 CF

[10] The Plaintiff testified that the material terms of the Sale Agreement were that the Defendant sold to the Plaintiff the motor vehicle described above and the purchase price was agreed at E35,000.00.

[11] The Plaintiff further testified that a deposit of E30,000.00 was payable on the date of agreement. The balance of E5,000.00 would be payable in two equal monthly instalments of E2,500.00 payable on the 6 February and 27 March 2009 respectively. The Plaintiff represented himself personally and the Defendant was represented by its Director one Nadeem Mushtaq.

[12] The Plaintiff testified that possession of the motor vehicle was to pass to the Plaintiff immediately upon payment of the deposit of the said E30,000.00.

[13] Plaintiff further more testified on what is contained in paragraph 8 to 10 of his Particulars of Claim.

[14] The Plaintiff stated that upon taking possession of the motor vehicle, in order to restore the motor vehicle to a running and roadworthy condition, he further conducted the following reasonable and necessary repairs and improvements on the said motor vehicle:

14.1 The Plaintiff replaced the floor of the said motor vehicle which was in a dilapidated state;

14.2 The Plaintiff further re-installed the wall panels of the said motor vehicle.

14.3 Plaintiff also repaired the interior of the said motor vehicle.

14.4 Furthermore the Plaintiff caused the motor vehicle engine to be overhauled and further changed all the tyres to be replaced with new one.

14.5 The Plaintiff further underwent clearing, testing and registration costs in relation to the said motor vehicles.

[15] To the above the Plaintiff spent an amount of E23,000.00 in effecting the said reasonable and necessary repairs and improvements.

[16] Plaintiff furthermore testified that on or about the 24 July 2009, and at the Manzini Bus Rank, the motor vehicle was attached in execution of an order of court by a Deputy Sheriff of the court on behalf of a party, who in light of the court order, had incontestable title to the said motor vehicle.

[17] Upon the lawful attachment, the Plaintiff duly called upon the Defendant to protect him. However Defendant failed to come to his defence and as such to date, the motor vehicle was attached and removed from the

Plaintiff's possession and control, thereby causing Plaintiff to suffer damages in the amount of E60,000.00.

[18] The Plaintiff was cross-examined searchingly by the attorney for the Defendant but he was not wavered from his evidence in chief.

(ii) The Defendant's evidence

[19] The Plaintiff closed his case and the Defendant led the evidence of two (2) witnesses namely, Nadeem Mustaq and Simangele Nxumalo who gave evidence as follows:

19.1 Defence witness (s) testified that he is a Director of the Defendant's company, that his company leased a portion of its property to Global MK Motors.

19.2 That at the conclusion of the agreement he duly advised the Plaintiff that the vehicle belonged to the said Global MK Motors.

19.3 That a written sale agreement was conducted which clearly depicted the seller as being Global MK Motors.

19.4 That upon being deprived of the possession of the motor vehicle the Plaintiff made demand for compensation to Global MK Motors and not it. That there is evidence led by the letter written by Plaintiff's attorney dated 2nd August 2009.

[20] The second defence witness Simangele Nxumalo testified that she was present when the Plaintiff concluded the sale agreement and at all times the Plaintiff was aware that the party it was contracted with was Global MK Motors and not the Defendant.

[21] This witness was also cross-examined by Plaintiff's attorney where some of her answers did not make any sense.

The arguments of the parties

(i) The plaintiff's arguments

[22] The attorney for the Plaintiff filed very comprehensive arguments on the point for decision and I am indebted to him for his usual scholarship. I wish to apologise profusely for the tardiness in the issuing this judgment on account that I ordered the parties to furnish me with detailed Heads of Arguments.

[23] The attorney for the Plaintiff contended that the material terms of the agreement were that the purchase price was fixed at E35,000.00 payable by deposit of E30,000.00 on date of signature and the balance thereof being paid in two instalments of E2,500.00 each on the 6th February and 27th March 2009 respectively. Plaintiff paid this amount in full as was his uncontroverted evidence before the court.

[24] The attorney for the Plaintiff contends that all in all the Defendant is liable to pay back to it the purchase price, costs of improvement and costs of suit in the matter. On the other hand, it was the evidence of the Defendant's Director that in executing the said agreement, it was not doing so on behalf of the present case company but on behalf of a different company. This company is not registered to do business in Swaziland. That this defence raised by the Defendant also fall short of logic and legal reasons for the following reasons:

“g) The sale occurred on the defendants business premises at Matsapha;

h) The director of the defendant one Nadeem Mushtaq represented the defendant as seller;

i) Delivery took place in the Defendant's premises. Payments were also tendered and accepted at such defendants business premises;

j) The defendant issued receipts of payment under its own name and gave these to the plaintiff; and

k) In the entire transaction, and in terms of the evidence led by the plaintiff there was nothing to even remotely suggest that the Defendant was acting in a representative capacity or otherwise. This has merely been an afterthought by the defendant faced with the threat of a legal suit;

l) The suggestion too that a written deed of sale, indicating a different seller, was signed by the plaintiff has been denied by the plaintiff who insists his sale was an oral one between him and the defendant and no one else.”

[25] The attorney for the Plaintiff cited a number of legal authorities at paragraphs [7] to [13] of the Heads of Arguments which are pertinent to the Plaintiff’s case.

[26] The attorney for the Plaintiff further contends that it was a requirement under such warranty that the buyer faced with a threat of such eviction must give notice to the seller so as to allow the seller to come to the buyer’s defence. In this regard cited the case of *Westul Engineering vs Sydney Crow 1968(3) SA 458*.

[27] The attorney for the Plaintiff furthermore advanced various arguments from paragraph [14] to [21] of the Heads of Arguments citing pertinent cases on the subject. The final submission being that the defence of agency created by the Defendant cannot in the circumstances hold water since, as clearly established in evidence, this alleged unknown principal was not disclosed to the Plaintiff.

[28] In this regard the attorney for the Plaintiff cited a plethora of decided cases including that of *Goolam Hoosen Desai vs Kenneth Dlamini High Court Case No.1869/1999, Cullinan vs Noordkaaplanase*

Aartappellkernmoerkwekers Kooprasie 1972(1) SA761 (A), Natal Trading and Milling Company Ltd vs Inglis 1925 TPD 724 and that of Talachi and Another vs The Master and Others 1997 (1) SA 702 (7).

[29] All in all the attorney for the Plaintiff contended that the court ought to grant the orders as sought in the Particulars of Claim.

(ii) Defendant's arguments

[30] The attorney of the Defendant also filed useful Heads of Arguments for which I am grateful. That Defendant opposes the Plaintiff's claim in relation to the claim of E60,000.00 upon the following grounds:

- (a) The sale of the motor vehicle was between Plaintiff and Global MK Motors, the Defendant merely acted as an agent.
- (b) The Plaintiff concluded a written sale agreement with the said Global MK Motors.
- (c) The Defendant never held itself liable personally, in respect of the Agreement concluded.

[31] That in support of its defence the Defendant relied on the evidence of two (2) witnesses, namely Nadeem Mustaq and Simangele Nxumalo. The attorney has outlined the evidence of these witnesses at paragraph [2] of his Heads of Arguments.

[32] The attorney for the Defendant proceeded to cite a plethora of legal authorities to the legal proposition that an empowered agent is not a party to the contract, and if he has entered into any supplementary agreement and has cited within the scope of his authority. He is not liable to the third party. See *A.J. Kerr, The Law of Agency, 3rd Edition* at page 29, in textbook by *Gideon, South African Mercantile's Company Law 8th Edition* at page 233 on the last legal authority the following was stated:

“When an agent contracts on behalf of his principal with a third person, no contractual liability or right in respect of the agreement can attach to the agent if he had cited within his authority.”

[33] That *in casu* during the conclusion of the sale agreement the Defendant duly disclosed the capacity he was acting in the principal was named. That the issue of the undisclosed principal does not arise in the present case. The principal was disclosed from inception. The attorney for the Defendant contends that the cases cited by the Plaintiff are distinguishable from the facts of this case and have no application in the present case because of the following:

- (a) The evidence reveals that the Plaintiff was from inception/conclusion of the written sale agreement aware that Defendant acted as agent;
- (b) The Plaintiff by letter dated 2nd August, 2009 instructed his attorney to demand consideration from Global MK Motors.

(c) The Principal was clearly disclosed from beginning.

[34] The final proposition advanced by the attorney from the Defendant is that the liability of an agent arises only where the agent contracts with a third party and does not disclose that he is acting for a principal where he personally hold himself liable.

[35] All in all the attorney for the Defendant contends that this action ought to be dismissed with costs.

(iii) The court analysis and conclusions thereon

[36] Having considered the evidence and the arguments of the parties I have come to the view that the Plaintiff's arguments are correct on all counts. In my assessment of the facts of the case, it has clearly been established that, and during the said sale, the Defendant clearly presented himself as "principal" and not an agent. I agree with Plaintiff's arguments that if indeed in fact Defendant was acting on behalf of a third party, the Defendant would still be liable by operation of the "undisclosed principal."

[37] The learned authors *Hosten Edward Nathan and Bosman, Introduction to South African Law and Legal Theory* cited at page 9 of Plaintiff's Heads of Arguments state the following:

“The effect of representation is,...,that the agent is the one who enters into juristic act but the resulting obligations exist, directly, between the other contracting party and the principal; the agent is in no way a party to the contract.... An exception to this rule is the so-called doctrine of the undisclosed principal. According to this doctrine, where the agent acts for a principal but without disclosing this fact to the other contracting party, the principal may afterwards reveal himself and claim under the contract. Where the other party gets to know of the existence of the undisclosed principal, he may choose whether to hold the agent or the principal liable under the contract.”

[38] Further I find the *dictum* in the following cases to be persuasive on the facts of this case. These cases being *Goolam Hoosen Desai vs Kenneth Dlamini, High Court Case No.1869/1999, Cullinan vs Noordkaapslande (supra)*, that of *Natal Trading and Milling Company Ltd vs Inglis (supra)* and that of *Talachi and Another vs The Master and Others (supra)*.

[39] Furthermore, the defence of agency put forth by the Defendant cannot in the circumstances hold any water; as it has clearly been established in evidence, that the alleged unknown principal was not disclosed to the Plaintiff.

[40] In my assessment of the *viva voce* evidence of the parties I have come to the considered view that the probabilities favour the Plaintiff’s argument. The evidence of the Defendant was contradictory on a number of respects. In cross-examination the Director of the Defendant could not answer

straight forward questions. This gave the impression that the defence was manufactured. I did not believe the evidence of the Defendant and therefore on a balance of probabilities I prefer the Plaintiff's version.

[41] I agree *in toto* with the submissions of the Plaintiff's Heads of Arguments in paragraph [16] to [18].

[42] In the result, for the foregoing reasons the order is granted in terms of the Particulars of Claim in paragraphs 1, 2, 3 and 4 thereof.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

For the Applicant: Mr. M. Ndlovu

For the Respondent: Mr. S. Nyoni