IN THE HIGH COURT OF SWAZILAND

Civil case No: 2496/11

In the matter between:

LINDIWE PERTUNIA DLAMINI	**Applicant**
AND	
MXOLISI MATSEBULA	**Respondent**
Coram:	**MAPHALALA M.C.B., J**
For Applicant	Attorney Sabela. Dlamini
For Respondent	Attorney Muzi Simelane

Summary

Civil procedure – application for Summary Judgment – essential requirements of the remedy discussed - Application granted.

JUDGMENT
28.03.2012

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[1] The plaintiff instituted proceedings against the defendant claiming an amount of E54, 292.70 (Fifty four thousand two hundred and ninety two emalangeni seventy cents) in respect of the balance of the purchase price for the sale of a motor vehicle.

[2] The plaintiff alleges that on the 7th June 2010 and at Mbabane the parties concluded an agreement in terms of which the plaintiff leased to the Defendant a motor vehicle, being an Isuzu bus a 2003 model with registration numbers SD 808 JN; the purchase price was E90, 000.00 (Ninety thousand emalangeni) which constituted the full purchase price of the motor vehicle.

[3] The defendant was obliged to pay a deposit of E10, 000.00 (Ten thousand emalangeni) and thereafter monthly instalments of E5, 000.00 (Five thousand emalangeni) payable on the 6th day of each month; and, the total purchase price was to be paid on the 6th October 2011. The parties agreed that if the defendant defaulted in the payment of any monthly instalment, the overdue amount would carry interest at the rate of 2% per month from the date on which payment was due.

[4] Furthermore, it was expressly agreed between the parties that in the event of breach of the Agreement, the balance outstanding would become due and

payable, and the plaintiff would be entitled to institute legal proceedings to recover the debt together with costs at attorney and client scale.

[5] The plaintiff duly delivered the motor vehicle to the defendant pursuant to the Agreement. The plaintiff alleges that the defendant breached the Agreement by paying only E37, 500.00 (Thirty seven thousand five hundred emalangeni) leaving an outstanding balance of E52, 000.00 (Fifty two thousand emalangeni) which is now due and payable; and, that the interests accrued on the balance is E1, 792.70 (One thousand seven hundred and ninety two emalangeni seventy cents) as at 28th November 2011 bringing the amount outstanding to E53, 792. 70 (Fifty three thousand seven hundred and ninety two emalangeni seventy cents).

[6] The defendant filed a notice to defend the proceedings; and, the plaintiff inturn filed an application for Summary Judgment alleging that the defendant has no bona fide defence to his claim, and, that the Notice of Intention to Defend has been entered solely for the purpose of delaying the Action.

[7] The defendant subsequently filed a Notice Resisting Summary Judgment denying that he has no *bona fide* defence to plaintiff's claim; and further denying that he has filed the Notice to defend solely to delay the matter. As

part of his defence, he argued that Summary Judgment is incompetent where the cause of action cannot be discerned from the particulars of claim; he argued that it was not clear from the pleadings whether the plaintiff's claim is one based on a lease or sale.

[8] He argued that paragraph 5.2 of the particulars of claim refers to the Lease of Agreement yet Clause 5.4 refers to the total purchase price. He argued that there are different legal consequences that flow from each species of the Agreements.

[9] He argued that if the Agreement was a Lease, the plaintiff would take back the subject-matter of the Lease on the expiry of the lease and not seek to recover the balance. He further argued that if the Agreement was a sale, the plaintiff should repossess the vehicle, sell it and thereafter deduct what is owing; and, that if there was still a balance outstanding after the sale of the motor vehicle, she could recover the balance from him.

[10] He denied that he paid only E37, 500.00 (Thirty seven thousand five hundred emalangeni); and argued that on two occasions, he gave the plaintiff E2, 500.00 (Two thousand five hundred emalangeni) on each occasion. He argued that the sum of E5, 000.00 (Five thousand emalangeni) does not appear in the pleadings as having been received by

the plaintiff. However, paragraph 8 of the Particulars of Claim indicate three payments of E5, 000.00 (Five thousand emalangeni) each, one payment of E2, 500.00 (Two thousand five hundred emalangeni) and two payments of E10 000.00 (Ten thousand emalangeni) each; the total amount paid is E37, 500.00 (Thirty seven thousand five hundred emalangeni). Worse still, the defendant does not indicate when the two omitted payments of E2, 500.00 (Two thousand five hundred emalangeni) each were made. Since he denied that he only paid E37, 500.00 (Thirty seven thousand five hundred emalangeni), he should have disclosed the correct amount which he paid to the plaintiff pursuant to the agreement. The plaintiff denies receiving payment above E37, 500.00 (Thirty seven thousand five hundred emalangeni) from the defendant.

[11] The plaintiff has filed a Replying Affidavit arguing that the distinction sought to be drawn by the defendant between a sale and a lease is fictitious because a lease is a type of sale; and that the difference is that even though there is a delivery of the goods sold to the purchaser or lessee, ownership still vests in the seller or lessor, and that ownership is transferred on payments of the last instalment, and if the full purchase price is not paid, the sums paid towards the purchaser are regarded as rentals.

[12] The plaintiff further argued that article 11 of the Agreement allows him to recover any outstanding balance as well as the balance of the unexpired term.

[13] The Agreement concluded by the parties is annexed to the Particulars of Claim as annexure "LM1", and, the defendant does not deny the transaction including his signature on the document or that he took delivery of the motor vehicle or that it is in his possession.

[14] The document is headed "Lease Agreement", and, it states that "the Lessor hereby sells to the Lessee who purchases the goods described hereunder upon the terms and conditions of this Agreement comprising the schedule below and terms and conditions attached". The goods sold are described as Isuzu 2003 Model; the registration, engine and chassis numbers are reflected. Next to the description of the goods is the "total selling price of E90 000.00 (Ninety thousand emalangeni), cash deposit E10 000.00 (Ten thousand emalangeni)". The Agreement further provides that the defendant would pay E5, 000.00 (Five thousand emalangeni) instalment per month towards the balance; and, Article 5 provides that an interest of 2% per month shall be charged on an overdue instalment.

[15] Article 11 of the Agreement provides that should the Lessee commit a breach of the Agreement, the Lessor shall have the right without prejudice to any other rights which might avail him to claim immediate payment due together with the balance of the instalments for the unexpired term of the Agreement. The Lessor may in the alternative cancel the Agreement, repossess the goods and then claim any balance still outstanding; in addition, the Lessor may claim as liquidated damages for the breach of contract the balance of instalments for the unexpired term of the Agreement. The Agreement further allowed the Lessor to retain all monies paid by the Lessee as well as to recover from the Lessee all expenses incurred in taking possession of the goods inclusive of all legal expenses and Attorney and client costs.

[16] The essence of Article II is that it gives the Lessor an election to choose one of the remedies provided; it is evident from the pleadings that the Lessor has chosen to claim payment of the amount due to it under the Agreement together with the balance of the instalments for the unexpired term, which is October 2011.

[17] The defendant argued that it is not clear from the pleadings whether the contract is one of Lease or Sale, and, that Summary Judgement was therefore inappropriate in the circumstances. The learned author J.T.R.

Gibson in his book entitled the South African Mercantile and Company Law, fourth edition, published by Juta & Company Ltd in 1977 stated the following at page 123:

> **"A contract of Sale… does not have the effect of a *translatio dominii* (transfer of ownership); it is simply an obligation to give *vacua possessio* coupled with the further legal consequence of a guarantee against eviction (*Kleynhams Bros v. Wessels Trustee* 1927 AD at 282)**
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> **In the very similar contract of letting and hiring, the one party also undertakes to give the other possession of the property concerned. The distinguishing feature between such a contract and one of sale is that in the former case permanent transfer of possession is not envisaged as in the latter. Moreover, in the case of a lease a continuing relationship is usually created between landlord and tenant which is not so in the case of a normal sale."**

[18] Similarly at page 121 the learned author defines the contract of sale as follows:

"**A sale is a contract in which one person (the seller or vendor) promises to deliver a thing to another (the buyer or emptor), the latter agreeing to pay a certain price…. It is the agreement alone which constitutes the sale, neither the delivery nor the payment being necessary before the sale is concluded. And legal rights and duties flow immediately upon agreement."**

- **See also *J.T.R. Gibson, South African Mercantile & Co Ltd Law, 8th edition, Juta & Co*. 2003 paged 110-113.**

[19] The learned author, then, quoted the case of *Nimmo v. Klikenberg Estates Co. Ltd* 1904 TH at 314 where the court said the following:

"…the word 'Sale' is used with various meanings. To lawyers discussing it from an academic point of view it means the time when the parties have arrived at a valid and binding agreement, apart from any question whether the purchase price has been paid or whether there has been delivery of the article sold…."

[20] The agreement provides that the amount of the Lease would ultimately constitute the full purchase price once paid in its entirety; the price is payable in instalments and ownership of the goods passes to the buyer on payment of the last instalment. Accordingly, it is a credit sale agreement

subject to a suspensive condition reserving ownership. In addition to the suspensive condition, it also contains a clause, a "*Lex Commissoria*" entitling the Seller to cancel the contract on non-payment of any instalment on due date; it also contains a penalty clause entitling the seller on cancellation, to retain instalments already paid, and, to claim instalments in arrear at the time of cancellation. In addition, the Seller has a right as owner to recover the goods.

- **J.T.R. Gibson, the South African Mercantile Law, eighth edition at pages 159-161.**

[21] *Phillip Millin* and *George Wille* in their book *Wille and Millin's Mercantile Law of South Africa* published by Hortons Stationery in 1984 states the following at pages 177:

> **"…the essentials of a contract of sale are three in number: an intention by the parties to buy and to sell respectively, an agreed thing or commodity (known as the *merx* or the *res vendita*), and an agreed price (known as the *pretium*)…. Neither the delivery of the commodity nor the payment of the purchase price is necessary to complete the contract. Delivery and payment are rights which flow from the contracts not requirements of the contract itself. Nor in our law, differing in this respect from the**

English law does the making of a contract of sale pass the ownership in the thing sold."

[22] At page 285 the learned Authors distinguish a contract of Sale from a contract of Lease:

"Lease is the most important branch of letting and hiring, a contract which is so closely allied to purchase and sale that it is governed, as far as possible, by the same rules of law. In both contracts the performance consists in one party transferring the possession of a thing to the other in return for remuneration; but while in sale the use and enjoyment of the property is to be transferred for all time, in letting and hiring the use and enjoyment is to be conferred for a fixed or determinable period of time only. The remuneration corresponding to the price in sale is known in letting and hiring as rent or wages; it is fixed in respect of the length of time for which the use of the thing in question is to be handed over, and as a rule is payable periodically."

[23] The court has a duty to consider the real nature of the transaction in dispute whether it is one of Sale or Lease. It is apparent from the Agreement that there is an intention by the parties to buy and sell the motor vehicle at a purchase price of E90 000.00 (Ninety thousand emalangeni); a deposit of E10, 000.00 (ten thousand emalangeni) was paid and the balance payable in monthly instalments of E5 000.00 (Five thousand emalangeni) each. It is

further evident from the contract that on payment of the full purchase price, ownership would pass to the defendant. In the circumstances, it is irrelevant whether the parties call themselves Lessors and Lessees. I agree wholeheartedly with the observation of *GRT Hackwill* in his book entitled *Mackeurtan's* Sale of Goods in South Africa published in 1984 by Juta & Co. Ltd; 5th edition; he states the following at page 262:

> **"…before considering its provisions it is first necessary to examine the common-law nature of the contract, that is to say, whether it is a sale and therefore governed … by the law of purchase and sale, or whether it is a contract of another kind.**
>
> **The answer will… depend upon whether there is an obligation to sell and purchase contained in the agreement. If there is, the contract will be regarded as a sale, notwithstanding that the parties describe themselves as Lessor and lessee, and the instalments of the purchase price are designate in the contract as rent. If there is not, the contract will be one of letting and hiring, or some other contract than sale."**

[24] I will now deal with the Application for Summary Judgment. This remedy is available to a party who can satisfy the requirements set out in Rule 32; it enables a party to obtain judgment without the necessity of going to trial as long as he can show that the defendant has no bona fide defence to the claim. Admittedly, this remedy is extra-ordinary, stringent and very drastic

because it denies the defendant the opportunity to present his defence during the trial; it is for this reason that courts have declared that it must be granted only on those cases where the plaintiff has a clear and unanswerable case:

- ***Maharaj v. Barclays National Bank Ltd*** **1976 (1) SA 418 (A)**
- ***Breitenback v. Fiat (PTY) Ltd*** **1976 (2) SA 226 (T)**

[25] Rule 32 provides that the plaintiff should lodge his claim after the defendant has delivered a notice of intention to defend the claim; the remedy is available on claims based on a liquid document, for a liquidated amount in money, for delivery of specified movable property, or for ejectment together with any claim for interest and costs. The notice of application for Summary Judgment delivered by the plaintiff must be accompanied by an affidavit deposed by him or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed, and stating that in his opinion there is no bona fide defence to the action and that the notice of intention to defend has been delivered solely for the purpose of delay:

- **See also** ***Maharaf v. Barclays National Bank*** **(supra) at 422E-423A**

[26] The plaintiff has annexed a liquid document in the form of the Agreement signed by the parties in which the defendant acknowledges his indebtedness in a fixed and certain sum of money; he admits that he concluded a contract of sale in respect of the purchase of a motor vehicle at a purchase price of E90 000.00 (Ninety thousand emalangeni), and a deposit of E10, 000.00 (ten thousand emalangeni) was paid leaving a balance of E80 000.00 (Eighty thousand emalangeni) payable in monthly instalments of E5 000.00 (Five thousand emalangeni). It is settled law that a liquid document is one in which the debtor acknowledges in writing over his signature or that of his authorized agent, his indebtedness in a fixed and certain sum of money:

- ***Herbstein & Van Winsen; the Civil Practice of the Supreme Court of South Africa fourth edition, van Winsen et al, Juta & Co. Ltd,*** **1997 at page 435**
- ***WM Mantz & Sons (PTY) Ltd v. Katzake*** **1969 (3) SA 306 (T)**

[27] Rule 32 (5) provides clearly that in order for the defendant to resist Summary Judgment, he may either give security to the plaintiff to the satisfaction of the court for any judgment including costs that may be given; the defendant may satisfy the court by affidavit that he has a bona fide defence to the claim.

[28] The defendant in this matter has filed an affidavit resisting summary judgment; he argues that he has a bona fide defence to the claim on two grounds: first, that summary judgment is incompetent where the cause of action cannot be discerned from the Particulars of Claim; and, that it is not clear whether the plaintiff's claim is one based on a lease or sale. I have already dealt with this issue in the preceding paragraphs.

[29] Secondly, the defendant makes a bare denial disputing that he paid only E37 500.00 (Thirty seven thousand five hundred emalangeni); he argued that on two occasions he gave the plaintiff E2 500.00 (Two thousand five hundred emalangeni) each but this is not reflected in the Particulars of Claim. However, this does not amount to a *bona fide* defence to the claim. The defendant acknowledged his indebtedness of E80 000.00 (Eighty thousand emalangeni) to the plaintiff in the Agreement annexed to the summons which he undertook to liquidate in monthly instalments of E5 000.00 (Five thousand emalangeni). The defendant does not state the amount still owing to the plaintiff. On the other hand, the plaintiff states that from the E80 000.00 (Eighty thousand emalangeni) owed, the defendant merely paid E37 500.00 (Thirty seven thousand five hundred emalangeni) leaving an outstanding balance of E52 000.00 (Fifty two thousand emalangeni).

[30] *Corbett JA* who delivered the majority judgment in the case of *Maharaj v. Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425 G – 426 dealt with Rule 32 which is similar to our own Rule as follows:

> **"Under Rule 32 (3), upon the hearing of an application for summary judgment, the defendant may either give security to the plaintiff for any judgment which may be given, or satisfy the court by affidavit or, with the leave of the court by giving oral evidence of himself or any other person who can swear positively to the fact that he has a bona fide defence to the action. Such affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon therefore. If the defendant finds security or satisfies the court in this way, then in terms of Rule 32 (7), the court is bound to give leave to defend and the action proceeds in the ordinary way. If the defendant fails either to find security or to satisfy the court in this way, then, in terms of Rule 32 (5), the court has a discretion as to whether to grant summary judgment or not…. If on the hearing of the application it appears that the defendant is entitled to defend as to part of the claim, then, in terms of Rule 32 (6), the court is bound to give him leave to defend as to that part and to enter judgment against him for the balance of the claim, unless he has paid such balance into court."**

[32] The defendant does not state in his affidavit the amount which he has paid to the plaintiff and how much balance is still outstanding; he merely denies that he has paid only E37 500.00 (Thirty seven thousand five hundred

emalangeni); and further denies that he is indebted to the plaintiff in the amount claimed in the summons. However, the defendant does not furnish proof of payment of the full purchase price. This cannot amount to a bona fide defence. *Corbett JA* in *Maharaf v. Barclays National Bank* (supra) at page 426 states the following:

> **"Accordingly, one of the ways in which a defendant may successfully oppose a claim for Summary Judgment is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts in the sense that material facts alleged by the plaintiff in his Summons, or Combined Summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into is: (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters, the court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully"…. connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the**

court to decide whether the affidavit discloses a *bona fide* defence…. At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the court examine it by the standards of pleading."

[32] The Affidavit Resisting Summary Judgment in the context of the claim set forth in Plaintiff's Summons does not establish a *bona fide* defence to the claim. The application for Summary judgment is granted with costs on the ordinary scale.

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M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT