IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 1293/11

In the matter between

SWAZILAND DEVELOPMENT & SAVINGS BANK **APPLICANT**

And

DR BONGANI MEFIKA SHABANGU **RESPONDENT**

Neutral citation	***Swaziland Development & Savings Bank vs Dr Bongani Mefika Shabangu (1293/11)*** **19 September [2013] SZHC 202**
Coram:	**Ota J.**
Heard:	**9 September 2013**
Delivered:	**19 September 2013**
Summary:	**Civil procedure; breach of agreement by lessee; affidavit in opposition lacking in sufficient averments to defeat the application; remedies available to the lessor in the face of the breach considered; application granted.**

OTA J.

[1] By way of *exparte* application, the Applicant commenced proceedings against the Respondent on the premise of urgency, claiming the following reliefs:-

> **"1. That dispensing with the usual forms and procedures relating to the institution of these proceedings and allowing the matter to be heard and enrolled as one of urgency.**
>
> **2. Condoning Applicant's non-compliance with the Rules of Court.**
>
> **3. That a Rule *nisi* do hereby issue returnable on a date to be determined by the above Honourable Court calling upon the Respondent to show cause why prayers 1, 2, 3, 4, and 5 should not be made final.**
>
> **3.1 That the sheriff or his lawful Deputy for the District of Hhohho should not be authorized and empowered to seize and attach from the Respondent or whosoever is in possession of the under mentioned BMW 320i and wherever it may be found.**
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> | | | |
> |---|---|---|
> | **3.1.1** | **Model:** | **2006** |
> | | **Make:** | **BMW 320i** |
> | | **Registration Number:** | **SD 655 SS** |
> | | **Colour:** | **white** |
> | | **Chassis No:** | **10BAVA76000NKO4204** |
> | | **Engine No:** | **A372H591** |

3.2. That the 2006 BMW 320i set in above should not be kept under the custody of the Deputy sheriff for the District of Hhohho pending the finalization of this matter.

3.3 That the agreement between the parties should not be cancelled and the possession of the 2006 BMW 320i be restored to the Applicant in terms of the Agreement.

3.4 That the Court should not declare that the Applicant is entitled to retain all amounts already paid by the Respondent as part of the hire.

3.5 That the Applicant be and is hereby entitled to dispose of the said 2006 BMW 320i either by public auction or by private treaty.

3.6 Costs of the application on the attorney and own client scale should not be granted against the Respondent, including collection commission.

4. Directing that paragraph 3.1 of the Rule *nisi* operate with immediate and interim effect pending the return date of this application.

5. Granting the Applicant any further and / or alternative relief."

[2] The application is premised on the founding affidavit of one Robinson G. Hlophe, described in that process as an adult male employed by the Applicant (Mbabane Branch) as the motor vehicle finance Manager. It is on record that the Applicant also filed a replying affidavit sworn to by one

Mbongeni K. Gwebu, described in that process as the Senior Manager Asset Finance of the Applicant.

[3] The Respondent for his part opposed this application via an answering affidavit sworn by the Respondent himself.

[4] It is on record that a *Rule nisi* was issued by this Court per **MCB Maphalala J** on the 8th of April 2011.

[5] Before considering the merits or demerits of this application, it is imperative for me to interpolate and observe here, that on the 15th of August 2013, I set this matter down for argument on the 23rd of August 2013. Notice of set down was duly served on Respondent's attorneys of record, Messrs Lloyd Mzizi attorneys and received by them on the 19th of August 2013.

[6] When the matter served before me for argument at the appointed time on the 23rd of August 2013, Mr Mabuza who appeared for the Applicant, indicated to the Court that he was in receipt of a notice of withdrawal as attorneys of

record filed by Respondent's attorneys on the 22nd August 2013, going by the Registrar's stamp appearing in that process.

[7] Inspite of Mr Mabuza's insistence on the matter being proceeded with, on the grounds that a notice of withdrawal of attorneys filed a day prior to the date of set down is tantamount to litigation by ambush which the Court should not condescend to, except prior leave is sought for same, I deemed it more prudent in the interest of substantial justice to accommodate the tenets of Rule 16 (4) (a) and (b) of the Rules of this Court on withdrawal of attorneys, which state as follows:-

> **"(4) (a) Where an attorney acting in any proceedings for a party ceases so to act, he shall forthwith deliver notice thereof to such party, the Registrar and all other parties: provided that notice to the party for whom be acted may be given by registered post.**
>
> **(b) After such notice, unless the party formerly requested within ten days after the notice, himself notifies all other parties of a new address for service as required under sub-rule (2), it shall not be necessary to serve any documents upon such party unless the Court otherwise orders:**
>
> **Provided that any of the other parties may before receipt of the notice of his new address for service of documents, serve any documents upon such party who was formerly represented"**

[8] It appears that in compliance with the dictates of the Rules, the notice of withdrawal was duly sent by registered post to the Respondent at P.O. Box 5205 Mbabane, on the 22nd of August 2013 as evidence by the certificate of posting NO 139780 of the Manzini Post Office, which forms a part and parcel of these proceedings.

[9] In the face of these developments, I postponed the matter to the 9th of September 2013 to accommodate the 10 days *dies* upon which such appointment of new attorneys was to be done as prescribed by the Rules.

[10] On the 9th of September 2013, learned counsel for the Applicant Mr Mabuza appeared, but the Respondent who was absent and unrepresented had not complied with the requirement of the Rules, which is within 10 days of the notice to appoint and notify in writing the Applicant's Attorneys and the Registrar of the Court an address at which he will accept service of process in these proceedings.

[11] It was against a backdrop of the aforegoing facts, that I proceeded with the matter without the necessity of any further notice to the Respondent.

[12] I have very carefully considered the totality of the papers filed of record, and I find that a summary of the case for the Applicant, is that Applicant loaned and advanced the sum of E216,199.00 (Two Hundred and Sixteen Thousand One Hundred and Ninety Nine Emalangeni) to the Respondent, Dr Bongani Mefika Shabangu. The loan and purpose of the loan was to finance a BMW 320i Sedan that the Respondent was purchasing. The terms and conditions of the said loan agreement are as correctly captured by Mr Mabuza in pages 2 to 4 of the Applicant's heads of argument, in the following terms:-

"APPLICANT'S CASE

2.1 The Applicant and Bongani entered into a valid agreement the terms of which are as follows:-

a) Applicant lends him the said money.

b) He repays in timely instalments of E4,777.00 (Four Thousand Seven Hundred and Seventy Seven Emalangeni). It is imperative that I indicate here that the instalments were to be paid at the end of each month.

c) Interest on the sum is at prime – 1.25% per annum.

d) That Bongani shall keep possession of the vehicle and take care of its use and maintain it in proper working order.

e) That in the event the vehicle being involved in an accident, Bongani shall notify the Applicant.

f) That the vehicle shall belong to Applicant until fully paid up by Bongani.

g) That it shall be a breach to fail to pay any instalments.

h) That it shall be a breach to prejudice Applicant's right in the vehicle.

i) That it shall be a breach to dispose of the vehicle without the Applicant's prior approval.

j) That in the event there is a breach the Applicant shall, without prejudice to any of its rights, be entitled to approach the Honourable Court, cancel the contract, repossess the vehicle and to retain all instalments already paid.

In this respect the Honourable Court is referred to pages 17, 18, 19 20 and 21 of the Book of pleadings.

2.2 That Bongani Shabangu breached the agreement and defaulted in making payment as agreed.

2.3 That Bongani Shanagu further disposed of the vehicle and sold it to one Sonto Zemavasco.

2.4 That the said Sonto Zemavasco damaged the vehicle and hid it without fixing it.

2.5 That the alleged Sonto Zemavasco further lied to his insurers . and held himself out to be the rightful owner of the vehicle.

2.6 That Sonto Zemavasco had committed a litany of criminal offences including forgery, uttering and perjury by holding himself out as Bongani Shabangu and deposing to affidavits filed before Court"

[13] In an obvious effort to buttress the allegations contained in paragraph 2.6 above, Mr Mabuza contended, that the signature appearing in the answering affidavit allegedly deposed to by the Respondent, when juxtaposed with other relevant documents that form a part of these proceedings, will reveal that the signature on the affidavit belongs to Sonto Zemavasco (Sonto) and not the Respondent. Therefore, it is in essence the said Sonto who is opposing the application aided and abetted by Respondent's attorneys of record who allowed him to engage in such a disingenuous enterprise.

[14] Counsel contend that Sonto is before the Court with dirty hands and his activities orchestrated in complicity with Respondent's attorneys of record, ought to be strongly deprecated in the circumstances.

[15] Now, the nature of the enterprise which Mr Mabuza calls upon the Court to undertake, which is comparing the signature on the answering affidavit which the Applicant disputes as belonging to the Respondent, with signatures in other papers filed of record i.e. the agreement between the parties (annexure A) which bears the authentic signature of Respondent, to ascertain the veracity of the signature on the answering affidavit, is not unkown to law.

[16] Commenting on this principle in my decision in **Nedbank (Swaziland) Limited vs Baslam Investments (Pty) Ltd and Another Civil Case No. 2016/11,** wherein the signature appearing on the Deed of surteyship allegedly signed by the 2nd Defendant in a summary judgment application was disputed by him, I observed as follows:-

> **"[33] What Mr Mabuza is saying by his posture, is that there is enough material to try and reconcile the issue of the signature of the 2nd Defendant on the papers, without the necessity of further evidence.**
>
> **[34] In my opinion, I agree with Mr Mabuza, since the 2nd Defendant's signature appears on another document which I can compare with the signature on the surteyship.**
>
> **[35] This is because it is trite, that where the signature on a document is in issue in the sense that the person who is alleged to have made it is denying making it, the Court can compare that signature with his signature on another document which he has admitted making to resolve the dispute"**

[17] In line with the aforegoing principle, I have compared the signature of the Respondent contained in annexure A, the agreement entered between the parties (See pages 21 and 23 of the record), with the signature of the deponent of the answering affidavit appearing on page 37 of the record, and I must say that I do not see any substantial disparity in these signatures, as

to reach the conclusion that the Respondent is not the deponent of the answering affidavit or that it was Sonto that deposed to the said affidavit. Rather, Sonto's signature appearing on page 3 in one of the annexures to the letter written to the Applicant by Sonto's insurers, LIDWALA Insurance Company, on 3rd August 2011, which letter Mr Mabuza urged from the bar during argument, bears out my views. I say that because the signature appearing on the LIDWALA document which Mr Mabuza accepts belongs to Sonto, is significantly different from those appearing on pages 21, 23 and 37 of the book, which are said to be the Respondent's. The signatures appearing on pages 21, 23 and 37 of the book to my mind bear a striking similarity, leaving me with the only reasonable deduction in the circumstances, which is that they were all made by the Respondent. I will in the premises dismiss Mr Mabuza's objection to the answering affidavit.

[18] Now, the relevant portions of the Respondent's affidavit are paragraphs 5 to 13 wherein he averred as follows:-

> **"5. <u>AD PARAGRAPHS 4</u>**
>
> **I wish to confirm that I approached the Applicant for purposes of obtaining a loan for the purchase of the motor vehicle which is more fully described by Applicant in its affidavit.**

5.1 The Applicant caused me to sign the documents being annexure "A" of the founding Affidavit. It was either I signed them or I did not get the loan hence I signed them.

6. <u>AD PARAGRAPH 5.1</u>

The content of this paragraph are denied and Applicant is put to strict proof thereof. I submit that the nature of the agreement I had with the Applicant is the following:-

6.1 I was caused to sign two documents as appears in annexure "A" of the Founding Affidavit. These were a document titled Lease Agreement and another titled Letter of Offer and Acceptance. All these documents pertain to the motor vehicle in question and none of the agreements have been cancelled. In my understanding, they operate side by side.

6.2 In the Lease Agreement (as more fully appears in annexure "A" of the founding Affidavit) the Applicant leased to me the motor vehicle. The Lease was for a period of 60 months commencing from the 30th May 2009 and ending on the 30th April, 2014.

6.3 The Lease amount was agreed to be a sum of E195.000.00. May I pause out that this amount is the purchase price of the motor vehicle.

6.4 In addition to the Lease amount are certain charges. These were:-

(a) A sum of E1,750.00 being what Applicant termed Additional charges. This then brought the total Lease amount to E196,750.00;

(b) I was then supposed to pay a cash deposit of E19,429.00 which Applicant termed insurance. I am not certain if the insurance was for the loan I was obtaining from it or for the motor vehicle. In any event I paid this amount;

(c) Payment of the E19,429.00 then changes the Lease Agreement and lease amount. I must say that this is where it confuses me. The transaction then changes from being a Lease into a loan hence I then become liable to what Applicant terms a principal debt;

(d) In any event upon payment of the E19,429.00 which I accordingly did, my 'principal debt' then becomes E216,199.00.

(e) Applicant then added to the 'principal debt' certain finance charges amounting to E67,456.00. According to Applicant this then brought a total collectable amount of E283,635.00.

6.5 I submit that I honestly do not understand how I have been made liable to an amount of E283,635.00 for a Lease Agreement. My simple understanding is that in a Lease Agreement you only become liable to rentals. I therefore submit that the agreement titled Lease Agreement is not really a Lease Agreement but a loan agreement disguised as a Lease Agreement.

6.6 **I am advised and further submit that in the circumstances I entered a hire purchase agreement with the Applicant instead of the Lease Agreement. However, I submit that since this is a document that was prepared by the Applicant it is the one that can best describe it as well as motivate its legality.**

6.7 **In the Letter of Offer and Acceptance (as more fully appears in annexure "A" of the Founding Affidavit) the Applicant offered and I accepted by appending my signature thereto a loan of E216,176.00 for the purchase of the motor vehicle.**

6.8 **It was agreed that ownership of the motor vehicle would vest upon the Applicant until I had paid the last instalment of the loan. I would pay the instaments for a period of sixty months.**

6.9 **In paragraph 6 of the Letter of Offer and Acceptance I offered as security for the loan the motor vehicle as well as its insurance. I must pause and highlight the following confusion in this document.**

If I was allowed by the Applicant to pledge the motor vehicle as security for the loan then surely this would contradict clause 1.1 and 1.2.1 of the said agreement as well as the Lease Agreement. This is because this would mean that I am the owner of the motor vehicle since I am pledging it as security,

6.10 **In any event I submit that it is the Applicant that can best enlighten me and the Court about the agreements since they were prepared by it. My submission is that my understanding is that I entered into a loan agreement with the Applicant for purchase of the motor vehicle which forms the subject matter**

of these proceedings. Such loan agreement has never been cancelled by the Applicant and Applicant continues to receive my instalments in liquidation of same. I do not fathom why I have been made to incur legal expenses unnecessarily.

7. <u>AD PARAGRAPH 5.2 To 5.3</u>

The contents of these paragraphs are admitted.

8. <u>AD PARAGRAPH 5.4</u>

The contents of this paragraph are put to issue. I submit that the Applicant may do one of two things in the event I am (sic) breach of the Lease Agreement.

8.1 The Applicant may claim immediate payment of all amounts due under the agreement together with the balance of instalments for the unexpired term of the agreement; or

8.2 It may cancel the agreement and repossess the asset.

9. <u>AD PARAGRAPH 6</u>

The contents of this paragraph are not in issue.

10. <u>AD PARAGRAPH 7</u>

The contents of this paragraph are put to issue.

10.1 I submit that as at the 23rd March, 2011 it is incorrect to allege that I was in breach of the agreement. This is because I was

entitled to make payments of my installment at the end of the month.

10.1.1 I therefore submit that it is premature and misleading for the Applicant to then allege cancellation on the basis of my non-payment by the 23rd March, 2011.

10.2 I further submit that the certificate of balance would be relevant to the present proceedings if Applicant was invoking its first option in terms of the agreement i.e claiming immediate payment of all amounts due.

10.2.1 Furthermore, Applicant would first have to claim such amount from me and not rush to Court. Presently, there is no claim that has ever been made to me. It is my first time to have sight of the Certificate of Balance through the Court papers.

10.3 I further submit that I am not indebted to the Applicant for the installment of March, 2011. I paid the said installment and it was received by the Applicant on the 10th day of May, 2011. It comes as a surprise to me to be informed that the Deputy Sheriff then repossessed the motor vehicle on the 12th May, 2011. There was never any demand that was made to me and I submit that this is clear litigation by ambush and an abuse of the Court's process.

10.3.1 I annex and mark "A" a copy of proof of payment.

10.3.2 I therefore submit that I cannot understand why Applicant has dispossessed me (sic) the motor

vehicle. Such conduct is unfair and an abuse of the Court's process.

11. <u>AD PARAGRAPH 8</u>

The contents of this paragraph are denied and the Applicant is put to strict proof thereof. I submit that the Applicant is not entitled to the relief it seeks due to the following:-

11.1 I submit that the Applicant never cancelled the agreement prior to approaching the Court. I therefore submit that Applicant has no right to repossess the motor vehicle if it has not cancelled the agreement.

11.2 This is further compounded by the fact that I am not indebted to it for any installment of the motor vehicle. If indeed Applicant had cancelled the agreement it would not have accepted payments of the instalments. I submit that Applicant is misleading the Court when it alleges that it cancelled the agreement.

11.3 The issue of cancellation of the agreement is further compounded by the relief Applicant is seeking. The Applicant in prayer 3.3 seeks "That the agreement between the parties should not be cancelled..." (my emphasis). I submit that this presupposes that the agreement has not been cancelled.

11.4 In essence I submit that the Applicant has not cancelled the agreement prior to approaching the Court.

11.5 I further submit that cancellation of the agreement cannot therefore be done *ex post facto.*

12. **<u>AD PARAGRAPH 9 TO 10</u>**

I am advised that the contents of these paragraph have been overtaken by events. Therefore it would be futile to respond to them.

13. **<u>AD PARAGRAPH 11</u>**

The contents of this paragraph are denied and the Applicant is put to strict proof thereof. I submit that as pointed out above there is no merit in the present application. The application is essentially an abuse of the Court's process and I apply that the Deputy Sheriff be ordered to return the motor vehicle to me."

[19] A careful perusal of the aforegoing averrals confirms Mr Mabuza's view that the Respondent whilst admitting that he entered into the agreement with the Applicant, however, appears to be disputing the terms of the agreement between the parties, by the introduction of new facts. Implicit from the averment that he was caused to sign the two documents appearing in annexure A, is that he was forced to sign those documents.

[20] Mr Mabuza argued that the Respondent is a sophisticated and elitist man belonging to the upper echelons of the society. A highly educated man being a medical practitioner by profession. His argument that he was caused to sign the agreement therefore flies in the face of these facts. I agree with him.

[21] I also agree with Mr Mabuza that the Respondent's contention that the terms of the contract are unkown to him and they, notwithstanding are confusing to him, and he was caused to sign the agreement, is clearly mischievous!. I say this because in paragraph 24.2 of the agreement under the heading DECLARATION AND ACKNOWLEDGMENT, the parties covenanted as follows:-

> **"The lessee declares that prior to signing this agreement no benefits not recorded herein were offered, given or promised by lessor, either directly or indirectly as an inducement to enter this agreement and further warrants that the initiative in connection with this transaction and the signing of this agreement emanates from him.**
>
> **I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THE TERMS AND CONDITIONS OF THE AGREEMENT"**

[22] It was after the aforegoing acknowledgement that the lessee (Respondent) appended his signature to the agreement contained in annexure A (See page 21 of the record).

[23] It appears to me that the facts now being advanced by the Respondent constitute nothing more than lame attempts by him to resile from the terms and conditions of the agreement. These facts cannot be countenanced by the

Court to controvert the terms of the written agreement entered by the parties, as evidenced by annexure A.

[24] This is the law as I succinctly acknowledged in my decision in **MTN Limited vs ZBK Services and Another Civil Case No. 3279/11** in the following terms:-

> **"It is a trite principle of the law, one of hallowed and universal antiquity respected and honoured in all jurisdictions that, *inter alia,* when any contract has been reduced to the form of a document no evidence may be given of such contract."**

[25] In the **MTN Limited vs ZBK Services and Another Case (Supra**), I relied on the decision of **Masuku J,** in **Busaf (Pty) Limited vs Vusi Emmanuel Khumalo t/a Zimeleni Transport Civil case No. 2839/08, paragraph [15] to [17],** where His Lordship postulated as follows:-

> **"[15] In their work entitled The south African Law of Evidence. (formerly Hoffman & Zeffert). Lexis Nexis, 2003, the learned authors Zeffert *et al* say the following at page 322, regarding the proper position relating to agreement reduced to writing:-**
>
> > **'If, however, the parties, decide to embody their final agreement in written form, the execution of the document**

deprives all previous statements of their legal effect. The document becomes conclusive as to the terms of the transaction which it was intended to record. As the parties' previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them is therefore inadmissible.'

This principle enunciated above is referred to by the learned authors as the integration rule.

[16] Speaking about it in National Board (Pretoria) (Pty) Ltd v Estate Swanepoel 1975 (3) S.A 16 (A) at 26, Botha J.A., quoting from the learned author Wigmore stated as follows:-

'This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act i.e. its formation from scattered parts into an integral documentary unity. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of hat (sic) are the (sic) determining what are the terms of their act.'

[17] The import of the foregoing on the case is that because the parties to the agreement, namely, the Plaintiff and the Defendant decided to embody all the terms of the agreement in a single memorial, the Defendant may not seek to lead evidence tending to prove anything contrary to the express terms of the agreement. To the extent that he seeks to do so, he is totally out of order. The net result is that the

purported defences raised by the Defendant serve to undermine the memorial of their agreement, which it is common cause, was reduced to writing and signed by both parties, signifying that they bound themselves to the terms thereof".

[26] It appears to me therefore that inasmuch as the Respondent seeks to rely on other facts outside the express terms of the agreement between the parties, he is **"totally out of order".**

[27] Similarly, Respondents contention that he is not in breach of the agreement is unsustainable. To substantiate his claims in this respect Respondent averred in paragraph 10.3 of his affidavit recited above, that he paid the instalment meant for March 2011, and it was received by the Applicant on 10th day of May, 2011. I hold the firm view that the Respondent shot himself squarely in the foot by this averment. I say this because by his own showing, his averment defeats any contention that he was not in breach. This is due to the fact that the parties covenanted that the monthly instalmental payments will be made at the end of each month. It is clear therefore that by admitting that the Applicant received the instalment for March 2011 on the 12th of May 2011, the Respondent is clearly admitting that he defaulted in payment of that instalment by the end of March 2011, as covenanted by the parties. This clearly constitutes a breach of the terms of

the agreement between the parties. To compound the Respondent's already precarious position, he failed to urge any documentary evidence in proof of this payment. This is notwithstanding that he had proposed to urge such as annexure A in the said paragraph 10.3 of his affidavit. The absence of documentary proof in these circumstances, robs these averrals of any potency, they, in that event, being bare allegations of fact.

[28] Furthermore, the fact that the Respondent breached the terms of the agreement by failing to pay instalments timeously, is clearly borne out by annexure B, the statement and certificate of balance showing that the Respondent was in arrears in the sum of E4,369.02 as at 23rd March, 2011.

[29] More to the above is the fact of the breach occasioned by the Respondent when he sold the vehicle to one Sonto Zemavasco who is also known as Solomon Sonto. It is on record that the BMW was recovered by the Deputy Sheriff from the said Sonto in the wake of the interim order. This fact was raised as a point *in li*mine by the Applicant in paragraph 2.1.2 of it's replying affidavit. Though such an issue should be raised in the founding affidavit, I however see no prejudice suffered by the Respondent by the fact that it was raised in reply. This is because Respondent, as I demonstrated at

the outset of this judgment, was given ample opportunity to attend Court and challenge same if he so desires, but he failed to do so. In any event, the fact of the sale of the vehicle to Sonto is established via indisputable documentary evidence as I hereby proceed to demonstrate, which is very relevant to the issues *in casu*. In this regard, I place reliance on the letter written by LIDWALA Insurance Company addressed to the Applicant (Mbongeni Gwebu) the *ipsissima verba* of which is as follows :-

> **" RE 2006 BMW 320i – SD 456 YL**
>
> **We refer to your communication via email to our Mrs Octavia Kunene, dated 18 July 2011, wherein you requested that we furnish you with facts on how we insured and eventually paid Mr Solomon Sonto for damages to the abovementioned vehicle.**
>
> **On the 27th of January 2011, we received a motor policy from one Mr Solomon S. Sonto, in which he held himself out to be the owner of a BMW 320i registered SD 655 SS, chassis no. WBAVA7600NK04204, engine no. A372H591. A copy of the proposal form is attached hereto and marked annexure 1.**
>
> **In terms of the blue book submitted (also attached hereto and marked annexure 2) we confirmed that he was indeed the owner of the abovementioned vehicle. Having fully established his insurable interest in the vehicle, we accepted his proposal and issued out a policy.**
>
> **In terms of the policy, no financier's interest was noted as per the insured's disclosures when filling up his proposal form.**

On the 2nd of March 2011, we were informed by his broker Impilo Yami Insurance Brokers that he was involved in an accident. The usual claim process was followed and throughout Mr Sonto maintained his interest in the vehicle as the owner and never gave us any reason to believe otherwise. Since the car was a write-off, we requested that he furnishes us with a cancellation certificate from the Central Motor Registry, which he duly did as seen from the attached copy of the cancellation certificate marked annexure 3.

We only got to know that there was a problem when a female Swazi bank employee called our offices, enquiring about the whereabouts of the vehicle concern (sic). She informed us that the bank had an interest in the vehicle and to her dismay the person who had insured the vehicle with us was unkown to her. At that time we had also been relentlessly trying to get Mr Sonto to surrender the vehicle to our depot, because we had already paid him the replacement value of the vehicle.

So the actual gist of the problem, it appears, is that your client (whose name was not communicated to us) sold and transferred the vehicle to Mr Solomon Sonto, then upon receipt of payment he omitted to settle his debt.

In all honesty, we see no fault on our part. We actually believe that it was your client who acted in bad faith by not disclosing to you that he had disposed of the vehicle to our client (Mr Solomon S. Sonto).

On the abovementioned grounds we believe the onus is on you to pursue your client for the outstanding debt".

[30] As is obvious and apparent from the aforegoing letter, it's subject matter is the BMW 320i in issue in these proceedings. Annexed to this letter is a

photocopy of the blue book annexure 2, which names Sonto Solomon S as the owner of the BMW.

[31] The aforegoing documents are axiomatic, they put it beyond any peradventure, that the Respondent not only sold the vehicle to a third party, Sonto Solomon S, without the prior notice or consent of the Applicant as agreed by the parties, but the vehicle was also involved in an accident and was declared a write off, and this fact was not communicated to the Applicant. These facts constitute clear breaches of the terms and conditions of the agreement between the parties, as I captured in paragraph [12] above.

[32] In the circumstances, I reach the inexorable conclusion that the Respondent breached the terms of the agreement between the parties and thus prejudiced the rights of the Applicant in the vehicle. It is by reason of this fact that Mr Mabuza contended that the Applicant, without prejudice to any of its rights, is entitled to cancel the contract, repossess the vehicle and to retain all instalments already paid, pursuant to the terms of the agreement as contained in paragraph 13.2 thereof, wherein the parties covenanted and agreed as follows:-

> **"In the event of breach as described above, the lessor shall have the right without prejudice to any other rights which may thereupon be available to it,**

> **to claim immediate payment of all amounts then due to it under this Agreement together with the balance of instalments for the unexpired term of this Agreement, all of which shall be deemed to be due and payable forthwith, or to cancel this Agreement and repossess the asset which cancellation shall be without prejudice to the Lessor's right to claim payment of all amounts then due under this Agreement and to claim as liquidated damages for breach of contract the balance of instalments for the unexpired term of this Agreement all of which shall be deemed to be immediately due and payable and to retain all monies paid by the lessee whether by way of instalments, deposit or allowances, and to recover from the lessee all expenses incurred in taking possession of the goods, including all legal expenses, attorney and client costs, collection commission ----"** (emphasis added)

[33] The sort of reliefs agreed upon by the parties above is recognized by our local jurisprudence as elucidated in the case of **Polypack (Pty) Ltd v the Swaziland Government and Another Appeal Case No. 44/20011, para [40]** where the Supreme Court per **MCB Maphalala JA (AM Ebrahim and AE Agim JJA Concurring)**, stated as follows:-

> **"It is trite law that where a party acts in breach of contract, the innocent party is entitled to cancel the contract and claim damages in lieu thereof; he may also elect to maintain the contract and demand specific performance ...."**

[34] Furthermore, in **Mine Worker's Union vs Prinsloo 1948 (3) SA 831 A,** the Court held that the lex commissoria or the cancellation clause (with the

injured party retaining all monies paid over and selling the merx) is valid and enforceable. This decision was in approval of an earlier decision by the Transvaal Provincial Division in **Cloete vs Union Corporation (1929) TPD 508.**

[35] Then, there is **Louw vs Trust Administrateurs BPK 1971 (1) SA 896 (W) at page 903,** where the Court held that where time for performance was stipulated in the contract then failure to perform timeously entitled the injured party to cancellation.

[36] It is pertinent for me to note that I had occasion to adumbrate on this selfsame issue with respect to the right of specific performance, in the case of **Sibongiseni Fundzile Xaba vs Lindiwe Bridget Dlamini NO and Others Civil Case Nos 1080/2009 and 844/2010, pages 15 – 16,** where I made the following apposite remarks:-

> **"------- In general an aggrieved part has a right to an order of specific performance. The classic statement of this rule is by Innes JA in Farmer's Cooperative Society vs Berry (1912) A1) 343 350, where he declared "prima facie every party to a binding agreement who is ready to carry out his own obligation under it, has a right to demand from the other party, as far as possible, performance ----- the requisites of an order for specific performance on the part of the applicant as follows:-**

"6.3.1 Allege and prove the terms of the contract.

6.3.2 Allege and prove that he has complied with his antecedent or reciprocal obligation.

6.3.3 Allege non performance by the defendant on his obligation.

6.3.4 Claim specific performance".

[37] It is overwhelmingly evident from the exposition by the totality of case law authority paraded above, that the reliefs sought the Applicant are approved by law.

[38] Since the Applicant has proved compliance with his own side of the obligation, proved material breached of the terms and conditions of the agreement by the Respondent, he is entitled to the reliefs sought.

[39] The inescapable conclusion is that this application has merits. It succeeds.

[40] The *Rule nisi* granted is hereby confirmed in the following terms.

1. That the Sheriff or his lawful Deputy for the District of Hhohho be and is hereby authorized and empowered to seize and attach from the

Respondent or whosoever is in possession of the BMW 320i, more particularly described in paragraph [1] above.

2. That the agreement between the parties be and is hereby cancelled and the possession of the said BMW be restored to the Applicant.
3. That the Applicant be and is hereby declared to be entitled to retain all amounts already paid by the Respondent as part of the hire.
4. That the Applicant be and is hereby entitled to dispose of the said BMW either by public auction or private treaty.
5. Costs on the attorney and client scale against the Respondent, including collection commission.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE .....DAY OF 2013

OTA J.

JUDGE OF THE HIGH COURT

For the Applicant: **N.V. Mabuza**

The Respondent absent and unrepresented