



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 1876/10

In the matter between:

WEBSTER LUKHELE

Applicant

vs

KHANYISILE JUDITH DLAMINI

Respondent

Neutral citation: *Webster Lukhele vs Khanyisile Judith Dlamini (1876/2014)*
[2014] [SZHC 136] (4th July 2014)

Coram: **MAPHALALA PJ**

Heard: 5th June 2014

Delivered: 4th July 2014

For Applicant: Mr. M. Mzizi

For Respondent: Mr. Z. Magagula

Summary: (i) *At the close of the Plaintiff's case the Defendant applied for absolution from the instance.*

- (ii) *That it was the duty of the Plaintiff to prove the existence of an agreement of sale as opposed to an agreement as pleaded by the Defendant.*
- (iii) *In my assessment of the facts and the arguments of the parties I have come to the considered view that Plaintiff has proved the agreement of sale as opposed to the agency agreement contended for by the Defendant.*

Legal authorities referred to

1. **Gibson, South African Mercantile and Company Law, 7th Edition at page 116.**
2. **Richtown Development (Pty) Ltd vs Dustenwald 1981(3) SA 691.**
3. **Hoffmann and Zeffert, The South African Law of Evidence, 4th Edition at page 508.**

JUDGMENT

(on the Application for absolution from the instance)

- [1] The issue for decision by this court for present purposes is an Application for absolution from the instance after Plaintiff had closed her case in an action before this court.
- [2] The cause of action between the parties arises from a combined summons filed by the Plaintiff for orders in the following terms:

- “1. Payment of the sum of E55 000.00 (fifty thousand Emalangeni);**
- 2. Interest on the sum of E55 000.00 (fifty thousand Emalangeni) at 9% per annum from date of summons to date of final payment.”**

[3] In paragraphs 8 to 9 the following is averred in support of the above cause of action:

“8.

- 8.1 On about January 2010 at Manzini plaintiff demanded delivery of the motor vehicle from defendant. Defendant failed to deliver the motor vehicle.**
- 8.2 As a result of the defendants breach of parties agreement plaintiff has cancelled the verbal contract with defendant and has demanded a refund of the sum of E55 000.00 (fifty five thousand Emalangeni) being monies paid to the defendant as the purchase price of the motor vehicle. Defendant has accepted this cancellation and as such is liable to plaintiff in the said sum of E55 000.00 (fifty thousand Emalangeni).”**

[4] The Defendant oppose the action and has filed a Notice of Intention to Defend dated 13th June 2010 in answer to the averments of the Plaintiff in Particulars of Claim.

[5] The Plaintiff has given **viva voce** evidence be led by her attorney and was searchingly cross-examined by the attorney for the Defendant Mr. Z. Magagula.

[6] The Plaintiff did not call witnesses and therefore closed her case whereupon the attorney for the Defendant applied for absolution from the instance in accordance with the Rules of this court.

The law

[7] According to the learned authors **Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4th Edition** at page 681:

“After the plaintiff has closed his case the defendant, before commencing his own case, may apply for the dismissal of the plaintiff’s claim. Should the court accede to this, the judgment will be one of absolution from the instance. The lines along which the court should address itself to the question whether it will at that stage grant a judgment of absolution have been laid down in the leading case of Gascoyne v Paul & Hunter, which contains the following formulation:

‘At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? ...The question therefore is, at the close of the case for the plaintiff was there a **prima facie** case against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?’

It follows from this that the court is enjoined to bring to bear the judgment of a reasonable man, and

‘is bound to speculate on the conclusion at which the reasonable man of [the court’s] conception not should, but might, or could, arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer.’

- [8] The above therefore is the legal framework in which the dispute between the parties ought to be decided for the time being. In this regard this court will outline the salient features of the Plaintiff’s evidence for a better understanding of the arguments of the Defendant advanced in respect to the Application for absolution from the instance.

The evidence of the Plaintiff

- [9] It is only the Plaintiff, Khanyisile Judith Dlamini who gave evidence in support of the action and she did not call any witness to support her evidence. She was thereafter cross-examined by the attorney for the Defendant Mr. Magagula.

- [10] The essence of her evidence under oath was that she was referred to the Defendant by a Third Party whom she had told that she wanted to buy a motor vehicle. She testified before court that the Third Party gave her Defendant’s number and further told her that a Defendant was in the

business of selling motor vehicles. She was told that Defendant was in the business of selling motor vehicles that the Defendant sold beautiful motor vehicles. She stated that upon calling Defendant she discovers that she knew him as he lived in her home area.

[11] She testified that she approached the Defendant about her quest and Defendant confirmed to her that he sold motor vehicles. She testified under oath that Defendant told her that he was in the business of buying and selling motor vehicles and that he would stock them from Durban.

[12] It was Plaintiff's evidence that Defendant advised her to contact him when she had sufficient funds to buy a motor vehicle. That on or about December, 2007 Plaintiff had raised funds and she approached Defendant. Upon discussions Defendant stated that he was going to Durban to buy the motor vehicle which would preferably be a Mazda 6 and that the purchase price was fixed at E55 000.00.

[13] The Plaintiff testified that Defendant requested a deposit of E8 000.00 before he left for Durban. That when he reached Durban the Defendant informed Plaintiff that the Mazda 6 model vehicle was available and

instructed her to deposit money to a South African First National Bank account.

[14] She testified that on the night she was informed by Defendant that the motor vehicle had broken down. She was requested by the Defendant to arrange a breakdown to fetch the motor vehicle at Lavumisa Border Post. She further testified that she received a message from Defendant threatening that was contemplating suicide because the motor vehicle had been detained since it was travelling with false registration numbers. Defendant further requested Plaintiff to bail him out of the situation and she duly complied and paid the sum of E6 000.00 for the release of the motor vehicle. She testified that the payment of the breakdown and fine at the Border Post would form part of the balance of the purchase price.

[15] Plaintiff further gave evidence that the motor vehicle was taken to a motor mechanic known to the Defendant and further payments were demanded from her for the repair of the motor vehicle and upon seeing that the payments demanded from her were now exceeding the agreed purchase price for the vehicle she then cancelled the contract. She testified that she later saw Defendant driving the motor vehicle and further saw his wife the same motor vehicle. She stated that as far as she

knew the motor vehicle is in the possession of the Defendant and he has been using it for his own benefit.

[16] This is about the extent of the Plaintiff's evidence in-chief. She was cross-examined searchingly by the attorney for the Defendant that there was no contract of sale but a contract of agency. She testified that there was no agency between them but a contract of sale. Further it was put to her that the motor vehicle belonged to her.

[17] It was at this stage the attorney for the Defendant applied for absolution from the instance after the Plaintiff closed her case.

The arguments of the parties

(i) Defendant's arguments

[18] The attorney for the Defendant Mr. Z. Magagula advanced arguments of the Defendant in this regard and filed comprehensive Heads of Arguments for which I am grateful.

[19] The first argument advanced for the Defendant is that it is trite law in this jurisdiction that he who alleges must prove. The burden to prove the

existence of a contract of sale and all its elements therefore rests on the Plaintiff. If the Plaintiff falls to prove the elements of a valid contract of sale then the Defendant is entitled to be absolved (absolution from the instance). In this regard the attorney for the Defendant cited what is stated by the learned authors **Hoffman and Zeffert, The South African of Evidence, 5th Edition** at page 508. That if at the end of the Plaintiff's case there is no sufficient evidence upon which a reasonable man could find for him, the Defendant is entitled to absolution.

[20] The nub of the argument of the Defendant in this regard is that it was the duty of the Plaintiff to prove the existence of an agreement of sale as opposed to an agency agreement as pleaded by the Defendant. In support of this argument the court was referred to the legal authority of **Gibson, South African Mercantile and Company Law, 6th Edition** at page 10 to the following legal principle:

“A contract is lawful agreement, made by two or more persons within the limits of their continual capacity, with the serious intention of creating a legal obligation communication of such intention without vagueness, each to the other and being of the same mind as to the subject matter, to perform positive a negative arts which are possible of performance.”

[21] It is contended for the Defendant that from the above definition of a contract or agreement it is clear that the parties in this matter were not of same mind that is **ad idem**.

[22] Various arguments are advanced in this regard at pages 4 to 5 of the Defendant's Heads of Arguments and I shall revert to pertinent arguments later on in the course of this judgment. The final salvo of the Defendant is citing the words **Harms JA in Gordon Cloyed and Appointers vs Revert and Another, 2001 SA 88 (SCA)** at page 93 quoted with approval by **Mamba J in Cethula Dvokolwako Farmers Association vs AJ Nyman Swaziland (Pty) Ltd (unreported) High Court Case No.555/2005** to the following:

“This implies that a Plaintiff has to make out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court could find for Plaintiff...”

(ii) Plaintiff's arguments

[23] The attorney for the Plaintiff Mr. Mzizi advanced arguments of the Plaintiff and also filed Heads of Arguments for which I am grateful.

[24] The gravamen of the Plaintiff's argument is found in paragraphs 3.3, 3.4, 3.5, 3.7 of the Heads of Arguments of Mr. Mzizi.

[25] It is contended for the Plaintiff that Defendant confirmed to the Plaintiff that he was in the business of selling motor vehicles and Plaintiff agreed to buy a motor vehicle preferably a Mazda 6 motor vehicle at the sum of E55 000.00. That in essence the agreement was the sale of a motor vehicle to be delivered to the Plaintiff at the sum of E55 000.00. That there was no further agreement on how the motor vehicle would be secured and delivered to Plaintiff. That Plaintiff did not know the wholesalers or dealers where Defendant would stock his motor vehicles as she did not know what kind of contract Defendant had with his fellow wholesalers /dealers of the motor vehicles.

[26] Plaintiff contends that according to the evidence the contract was perfected when Defendant informed Plaintiff that the Mazda 6 motor vehicle was available and when he further demanded payment of the deposit. That the elements of a contract of sale are present in this case and that this sale falls under the category of **res sperata**. In this regard the attorney of the Plaintiff cited the legal authority in **Gibson, South African Mercantile and Company Law** at page 119 on the **res sperata** as follows:

“The sale of a non-existent thing which may come into existence is however, as we have seen, perfectly valid. Such a sale is known as the sale of a “*spes*” or “*res sperata*”. The distinction between the two is of little practical importance. A *spes* is a mere hope that something will be available for delivery by the seller, depending purely upon chance. A *res sperata* on the other hand, is something which, although not yet in existence, can confidently be expected to come into existence in the normal course of things.”

[27] The court was further referred to the South African case of **Richtown Development (Pty) Ltd vs Dustewald 1981(3) SA 691** where he **Merx J** stated the following:

“The sale of an expected thing under an *emptio rei spate...* as I understand the principles relating thereto, only comes into existence when the object which has been stipulated actually comes into existence and is also a sale subject to a suspensive condition up to the stage that the merx actually comes into existence. No contract to pay a purchase price would therefore be enforceable until that stage has been reached...”

[28] The attorney for the Plaintiff then dealt at great length with the aspect of urgency as contended for by the Defendant in paragraphs 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7 and 4.9 and cited the legal authority in **Gibson, South African Mercantile and Company Law (supra)** to the following legal formulation:

“Agency is a contract whereby one person (the agent) is authorized and usually required by another (the principal) to contract or to negotiate a contract on the latter’s behalf with a third person. The authority given by the principal to the agent to represent him is the essence of the commercial agency.”

[29] The final argument for the Plaintiff is that the simple facts of this matter are that the Plaintiff entered into a contract of sale of a **res sperata** being a Mazda 6 motor vehicle with Defendant. Plaintiff cancelled the sale and Defendant accepted the cancellation. That upon cancellation Defendant who was in possession of the motor vehicle confirmed full ownership of the motor vehicle. That he did that by registering the motor vehicle in his name and to date Plaintiff does not know of the whereabouts of the motor vehicle. That Plaintiff is claiming a refund of the purchase price paid to the Defendant. That the facts speak for themselves in the present case in that the defence of agency is merely an afterthought by the Defendant forced with a threat of a legal suit and the court is urged to dismiss the Defendant’s Application with costs.

The Court’s analysis and conclusion thereon

[30] Having considered the able arguments of the attorneys of the parties it appears to me that the arguments of the attorney of the Plaintiff are correct for the following reasons.

[31] Firstly, in the present matter it is the Plaintiff's case that Defendant informed Plaintiff that he was in the business of selling motor vehicles and Plaintiff agreed to buy a motor vehicle preferably a Mazda 6 motor vehicle at the sum of E55 000.00. From the evidence in chief and the cross examination by Defendant's attorney it appears to me that the essence of the agreement was the sale of a motor vehicle (the article to be delivered to Plaintiff at the sum of E55 000.00). There was no further agreement on how the motor vehicle would be received and delivered to the Plaintiff. Plaintiff did not know what kind of contract the Defendant had with his fellow wholesalers/dealers of vehicles in Durban.

[32] Secondly, according to the evidence of the Plaintiff the contract was perfected where Defendant informed Plaintiff that the Mazda 6 motor vehicle was available when he further demanded payment of a deposit. I agree **in toto** with the arguments of the Plaintiff to the legal proposition that the elements of a contract of sale were present in this case and the sale fell under the category of "**res sperata**". In this regard the

definitions cited by the Plaintiff at paragraph [26] and [27] above are apposite on the facts of the present case.

[33] Thirdly, I proceed to consider whether the relationship between the parties was that of an agency.

[34] It is common cause that Plaintiff cancelled the contract of sale, Defendant accepted the cancellation and Defendant registered the motor vehicle in his own name. This is contended by the Defendant in his own plea in the present matter at page 33 of the Book of Pleadings at paragraph 10.3 where he states on oath that:

“the motor vehicle was finally repaired and I registered it in my name and paid the sum of E12 000 inclusive of import duties, testing and all the requirements.”

[35] I agree **in toto** with the submissions of the Plaintiff that the act of registering the motor vehicle in his name clearly indicates to this court that this was not an agency agreement.

[36] According to the learned authors **Gibson South African Mercantile and Company Law (supra)** agency is defined as follows:

“Agency is a contract whereby one person (the agent) is authorized and usually required by another (the principal) to contract or to negotiate a contract on the latter’s behalf with a third person. The authority given by the principal to the agent to represent him is the essence of the commercial agency.”

[37] It is trite law that all acts done by the agent should be authorized by the principal. In the evidence of the Plaintiff she testified that she did not authorize the Defendant to negotiate any price for the motor vehicle on her behalf while in Durban. It is also common cause between the parties that the transaction that occurred in Durban was not done in Plaintiff’s name.

[38] I further agree **in toto** with the submissions of the Plaintiff in paragraphs 4.4, 4.5, 4.6 and 4.7 of the Heads of Arguments of Mr. Mzizi. In paragraph 4.8 thereof it is contended for the Plaintiff that the motor vehicle registration document (Blue book) bears the name of the Defendant. That if it as Defendant contends that he entered into an agency agreement with Plaintiff and that he had fulfilled his mandate there are several questions that arise from his actions being:

(a) Why did he register the vehicle as his own?

- (b) **Why did he proceed to use the motor vehicle for his own benefit after cancellation of the agreement?**
- (c) **Was he acting on his principal mandate when he performed the above?**

[39] I agree with the Plaintiff's argument that the answer to the above question is to the negative. If an agreement of an agent and principal existed between the parties, upon repair the Defendant should have delivered the motor vehicle by his alleged principal being the Plaintiff. Further, he should not have registered it in his name and assume full ownership of it.

[40] Finally, the simple facts of this matter are that Plaintiff entered into a contract of sale of **res sperata** being a Mazda 6 motor vehicle with Defendant. Plaintiff cancelled the sale and Defendant accepted the cancellation. Defendant who was in possession assumed full ownership of the motor vehicle by registering the motor vehicle in his name and to date Plaintiff does not know of the whereabouts of the motor vehicle.

[41] In the result, for the foregoing reasons the Application for absolution from the instance is accordingly dismissed and Defendant is put to his defence. Costs to be costs in the main action.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE