IN THE HIGH COURT OF SWAZILAND

Case No: 1494/2011

In the matter between:

PHILIP FANELO DLAMINI **APPLICANT**

AND

FREDERICK HAWLEY **RESPONDENT**

t/a Penrose

Neutral citation: *Philip Fanelo Dlamini v. Frederick Hawley t/a Penrose (1494/2011) [2014] SZHC54 (3 April 2014)*

Coram: M.C.B. MAPHALALA, J

Summary

Civil Procedure – declaratory order – plaintiff instituted action for a declaratory order that the agreement between the parties is one of a Loan and not one of sale –requirements of a declaratory order considered – held that the alleged sale is a simulated transaction – held further that the contract between the parties is one of a Loan based on the Money-Lending and Credit Financing Act – held further that the contract was null and void as being in contravention to the said Act – further held that the motor vehicle was used

as security for the Loan and was not sold to the defendant – the action granted with costs.

JUDGMENT
3 APRIL 2014

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[1] The plaintiff instituted action proceedings against the defendant for an order declaring the agreement between the parties as one of Loan and not one of sale. He further sought an order declaring the interest of E29 000.00 (twenty-nine thousand emalangeni) charged upon the loan of E16 000.00 (sixteen thousand emalangeni) as unlawful. He also sought an order for payment by defendant of the sum of E28 680.00 (twenty-eight thousand six hundred and eighty emalangeni) in respect of the said unlawful interest as well as interest thereon at the rate of 9 % per annum calculated from the date of issue together with costs of suit. The defendant operates a money-lending business.

[2] The plaintiff alleges that he concluded an oral contract with the defendant on the 3rd December 2010 for a loan of E20 000.00 (twenty thousand emalangeni) payable on the 3rd January 2011 at E24 000.00 (twenty-four thousand emalangeni). The interest of E4 000.00 (four thousand emalangeni) was payable in advance before the amount of the loan was paid to the plaintiff. The plaintiff further alleges that on attainment of the loan, he had to hand over as security his motor vehicle to the defendant, and, the motor vehicle was returnable to the plaintiff upon payment of the loan.

[3] According to the plaintiff his motor vehicle was handed to the defendant as security on the 3rd December 2010, and, the defendant paid to the plaintiff an amount of E16 000.00 (sixteen thousand emalangeni) and withheld an amount of E4 000.00 (four thousand emalangeni) which was the interest required to be paid in up-front, which amount the plaintiff did not possess.

[4] The plaintiff alleges that on the same day, the defendant presented a document to him and demanded him to sign. The document was a Deed of Sale of the plaintiff's motor vehicle to the defendant for a purchase price of E20 000.00 (twenty thousand emalangeni). According to the plaintiff, the defendant in so doing fraudulently and maliciously misrepresented to him that the document was in fact not a sale agreement but was one of pledge used generally for the money-lending business.

[5] The plaintiff alleges that when the defendant made the representation, he knew it to be false, and, that plaintiff was induced by the representation to sign the Deed of Sale when he only required a loan. The plaintiff insists that the representations were material and were made with the object of inducing him to sign the Deed of Sale, and, that the representations were to the knowledge of the defendant false. The plaintiff further alleged that

upon his return to the defendant in February 2011 to pay the loan of E20 000.00 (twenty thousand emalangeni), the defendant demanded that he paid E45 000.00 (forty five thousand emalangeni) before he could release the motor vehicle. The plaintiff paid the amount demanded by the defendant for fear of losing his motor vehicle.

[6] The defendant is defending the action, and, he has filed the Defendant's Plea in which he denied concluding an oral agreement of a loan with the plaintiff. He avers that the only agreement concluded between the parties was the written Deed of Sale. To that extent he denied the allegations of fraud levelled against him by the plaintiff. The defendant further alleges that the parties agreed that in the event the plaintiff wished to resile from the contract, he would pay an amount of E4 000.00 (four thousand emalangeni) within thirty days of signature which would be for storage and insurance costs, and, further reimburse the defendant the purchase price paid of E20 000.00 (twenty thousand emalangeni). The defendant contends that the plaintiff only became interested in the motor vehicle after the thirty days period when he had refurbished the motor vehicle and was selling it.

[7] The plaintiff filed a Replication in which he reiterated the factual allegations made in the Particulars of Claim. He emphasized that the

contract between the parties was one of loan and that the interest of E28 680.00 (twenty eight thousand six hundred and eighty emalangeni) charged on the loan by the defendant offends against the Money-Lending and Credit Financing Act of 1991 as well as the in-Duplum rule. He argued that the defendant is liable to refund the plaintiff the sum of E28 680.00 (twenty eight thousand six hundred and eighty emalangeni).

[8] It is common cause between the parties that in June 2011, the defendant filed a Notice of Exception in which he excepted to the Plaintiff's Summons and Particulars of Claim on the basis that same lacks averments necessary to sustain a cause of action. The basis of the Exception was that the Agreement is one of sale and not a Loan, that there is no allegation that the defendant has breached the contract, and, that the plaintiff has failed to place the defendant in *mora*. The defendant further sought an order upholding the Exception with costs as well as dismissing the plaintiff's action with costs.

[9] Since this was an action proceedings the plaintiff gave evidence which was in accordance with the allegations made in the Particulars of Claim. He emphasised that if he had known that the document he was made to sign constituted a sale of his motor vehicle, he would not have signed it. He

contends that his motor vehicle was relatively new at the time of conclusion of the contract being a Toyota four-wheel drive bought eight years ago, and, that it was worth far more than the E16 000.00 (sixteen thousand emalangeni) which he was given by the defendant.

[10] Under cross-examination the plaintiff maintained his evidence and reiterated that the contract between the parties was one of Loan and not Sale, and, that the defendant had assured him that the document was merely a formality consistent with money-lending transactions and that it would not prejudice their oral agreement. He further denied signing any document transferring ownership of his motor vehicle to the defendant; he clarified that the document at page 39 of the Book of Pleadings was merely a Police Clearance Certificate which was intended for the introduction of the new number plates which government had introduced; he gave it to the defendant as proof of his ownership. Similarly, the defendant gave evidence along the averments made in the Defendant's Plea. He denied the oral contract and insisted that the parties had concluded a sale agreement. He further argued that he refurbished the motor vehicle because it was not roadworthy in order to resell it.

[11] Under cross-examination the defendant told the Court that he didn't drive the motor vehicle because of possible risks such as theft and accidents; he conceded that the motor vehicle was always parked, and, it was put to him that the reason he could not use the motor vehicle was because it was pledged, and not sold to him. The defendant could not explain why the plaintiff had to pay storage charges inclusive of insurance if this was a contract of sale. The defendant was evasive in his answers and did not convince me as an honest witness as opposed to the plaintiff who answered all questions asked forthrightly, honestly and without any difficulty. Similarly, the defendant contends that he paid the purchase price for the motor vehicle in full; however, he failed to produce proof of payment. This leads to the conclusion that the agreement between the parties was a Loan. It is apparent from the evidence that the sale agreement was merely a simulated transaction, and, I am bound to enforce the true agreement between the parties, being a loan agreement in terms of the Money Lending and Credit Financing Act of 1991. The simulated agreement is null and void.

[12] The defendant does not deny that the motor vehicle was relatively new having been bought eight years ago. Similarly, he could not deny that the motor vehicle was worth more than E20 000.00 (twenty thousand

emalangeni) or that the plaintiff was able to sell the motor vehicle above E45 000.00 (forty-five thousand emalangeni) demanded by the defendant. Exhibit 1 shows the transfer of E45 000.00 (forty-five thousand emalangeni) from Phineas Sigudla to the defendant.

[13] During cross-examination the defendant could not dispute the evidence of the plaintiff that the transaction between them was a loan agreement and not a sale agreement. Similarly, he could not dispute the plaintiff's evidence that the oral Loan agreement had already been concluded when he was given the alleged document to sign. The plaintiff reiterated and stood firm that the defendant had informed him that the document meant nothing but a mere formality in money-lending transactions. The defendant could not dispute the evidence of the plaintiff that the defendant gave him E16 000.00 (sixteen thousand emalangeni) as the Loan, and, that E4 000.00 (four thousand emalangeni) was withheld by the defendant since the plaintiff in lieu of the E4 000.00 (four thousand emalangeni) interest demanded by the defendant as a precedent to releasing the loan.

[14] It is also interesting to note that the plaintiff was required to pay for storage and insurance costs in a contract of sale. It is further interesting to note that the alleged contract of sale had an option for the plaintiff to buy back the

motor vehicle at an increased purchase price; this is contrary to the principles of sale. Why should the defendant buy property with an option for the seller to buy it back. As stated in the preceding paragraphs, the transaction between the parties has all the attributes of a pledge as opposed to a sale agreement.

[15] Simulated transactions form part of the Common law principle encapsulated in the maxim "*plus valet quod agitur quam quod simulate concipitur*", meaning that "what is actually done is more important than that which seems to have been done". In applying this principle, Courts have sought to advance the legal substance of a transaction over the form in which it is presented if the nature of such a transaction is in dispute. In doing so the Courts ascertains the intention of the parties and determines whether the parties truly intended to give effect to the agreement in accordance with its terms. If they did, then substance follows the form and the agreement will stand. If they did not, then substance contradicts form and the agreement will be disregarded.

See *Vasco Dry Cleaners v. Twycross* 1979 (1) SA 603 AD at 611-612.

[16] In the Vasco Dry Cleaners case (supra) at p. 611, H*oexter AJA* quoted with approval the decision of *Innes J* in *Zandberg v. Van Zyl* 1910 AD 302 at

309 on the issue of a simulated transaction. *Hoexter AJA* stated the following:

> **"The defendant, in short, seeks to invoke the following maxim of our law: plus *valet quod agitur quam quid simulate concipitur*. The scope and limitations of the principle enshrined in the maxim just cited appear from an oft-quoted passage in the judgment of *Innes J* in *Zandberg v. Van Zly* 1910 AD 302 at 309:**
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> > **"Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however, (either to secure some advantage which otherwise the law would impose) the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what it in form purports to be. The maxim then applies "*plus valet quid agitur quam quod simulate concipitur*". But the words of the rule indicate its limitations. The court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For, if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry,**

therefore, is in each case one of fact, for the right solution of which no general rule can be laid down. Perezius Ad Cod 4.22.2 remarks that these simulations may be detected by considering the facts leading up to the contract, and by taking account of any unusual provision embodied in it."

[17] His Lordship continues and deal with a pledge at pp. 611 – 612 as follows:

"The only effective methods of constituting a pledge is by agreement accompanied by delivery of possession of the article to the pledgee. Without such delivery of possession, while the pledge may be good as between the parties, the pledgee will lose his preference if a third party *bona fide* obtains real rights in the article pledged, or if a judgment creditor of the pledgor attaches the article pledged, or should the pledgor be sequestrated, in a *concursus creditorum*. Essential not only to the valid constitution of a pledge but also to its effective retention by the pledgee is a natural possession of the article pledged by the pledgee. From this it follows that although constructive delivery in the form of *traditio brevi manu* may suffice, subject to clear evidence that the transaction is bona fide, to constitute a valid pledge... there is no room for the application of the process of *constitutum possessorium* in the creation of a valid pledge in a situation in which the pledged article is to remain with the pledgor, to be used by the pledgor for his own benefit."

[18] I have come to the conclusion that the parties intended to conclude a money-lending transaction, and, that the motor vehicle was merely pledged as security for the loan. In the circumstanding, the Money Lending and

Credit Financing Act, 1991, is applicable to the present proceedings. A money-lending transaction is defined in section 2 of the Act as any transaction which, whatever its form may be and whether or not it forms part of another transaction, is substantially one of money-lending.

[19] Section 3 of the Act provides that where the principal debt in respect of a money-lending transaction or credit transaction, exceeds E500.00 (five hundred emalangeni) no lender shall charge an annual interest rate of more than 8 percentage points, or such amount as may be prescribed from time to time, above the rate for discounts, rediscounts and advances announced from time to time, by the Central Bank under section 38 of the Central Bank of Swaziland Order, 1974. Section 6 of the Money-Lending and Credit Financing Act 1991, provides the following:

> **"6. (1) Any agreement in connection with any money-lending or credit transaction that is not in conformity with the provisions of this Act shall be null and void, and shall not be enforceable against the borrower or the credit receiver by the lender.**
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> **(2) No lender shall in connection with any money-lending or credit transaction obtain judgment for or recover from a borrower or credit receiver an amount exceeding the sum of –**
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> **(a) the principal debt owed by the borrower or credit receiver;**

(b) the interest charges on the principal debt;

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

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

(3) No lender shall in any proceedings against a borrower or credit receiver in respect of any loss, damage or expense alleged to have been incurred by him in connection with a money-lending or credit transaction, obtain judgment for any sum not recoverable under subsection (1) of this section."

[20] It is apparent from the evidence that the amount advanced to the plaintiff as a loan was E16 000.00 (sixteen thousand emalangeni), and the interest of E4 000.00 (four thousand emalangeni) was payable in advance to the defendant before the loan was released. However, it is not in dispute that the plaintiff did not pay the E4 000.00 (four thousand emalangeni) interest required. Subsequently, when the plaintiff sought to settle the loan amount together with the E4 000.00 (four thousand emalangeni) interest, the defendant demanded E45 000.00 (forty-five thousand emalangeni) as a resale price of the motor vehicle pledged as security, this being interest of E29 000.00 (twenty nine thousand emalangeni). Clearly such an interest contravenes the Money-Lending Act.

[21] As stated in the precedent paragraphs, in my judgment delivered on the 5th December 2011, when I dealt with the interlocutory application in respect of the Notice of Exception, I stated clearly in paragraphs 12 - 15 of the judgment that the plaintiff was entitled to the declaratory order that the contract was one of Loan and not one of Sale. I stated the following:

> **"12. There are generally two requirements for the grant of a declaratory order: First, the applicant must have an interest, not merely abstract or of an intellectual nature, in an existing, future or contingent right or obligation, and on whom the declaratory order will be binding; and, Secondly, there must exist suitable circumstances for the exercise of the discretion of the court. It was stated in the case of *Adbro Investment Co. (Pty) Ltd v. Minister of the Interior & Others* 1961 (3) SA 283 (T) at 285D that "the plaintiff must not have a mere academic interest in the decision, but that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought. Furthermore, the decision on the application for a declaratory order must be as binding as if the dispute has been one involving an existing right on the basis of which relief might have been granted at the time of institution of the proceedings:**

- **Herbstein & Van Winsen, 4th Edition, Van Winsen et al, Juta & Co., 1997 at pages 1053-1055**
- **Ex Parte Nell 1963 (1) 754 (A) at 759H-760C**
- **Ex Parte Chief Immigration Officer, Zimbabwe 1994 (1) SA 370 ZS at 374 H – 375 I**

13. **The applicant for a declaratory order must have a direct and substantial interest in the subject-matter of the litigation. He must establish a legal interest which requires him to have a legally enforceable right:**

    - **Herbstein & Van Winsen (Supra) at page 1056**
    - ***Milani & Another v. SA Medical & Dental Council & Another* 1990 (1) SA 899 (T) at 902 D - 903 H**

14. **The applicant for a declaratory order must also show that he has a legally enforceable right in an existing, future or contingent right or obligation:**

    - **Herbstein & Van Winsen (Supra) at page 1056 – 1057**
    - ***Asmal v. Asmal & Others* 1991 (4) SA 262 (N) at 265 H.**

15. **The Plaintiff has established material facts which if proved would entitle him to succeed in his claim. The summons and particulars of claim do not lack averments which are necessary to sustain the plaintiff's cause of action."**

[22] Having said that the money-lending contract between the parties contravenes sections 3 and 4 of the Money Lending and Credit Financing

Act, 1991. It is therefore null and void to the extent that the interest of E29 000.00 (twenty nine thousand emalangeni) far exceeds the rate of interest legally permitted by the Act.

[23] Accordingly I make the following orders

(a) The agreement between the parties is hereby declared as one of Loan and not a Sale.

(b) The contract between the parties is null and *void ab initio* to the extent that it contravenes the Money-lending and Credit Financing Act No. 3. of 1991.

(c) The defendant is directed to reimburse the plaintiff the amount of E29 000.00 (twenty nine thousand emalangeni).

(d) The defendant is directed to pay costs of suit.

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

For Applicant — Attorney N. Ndlovu
For Respondents — Attorney N. Mabuza