



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 1876/2010

In the matter between:

KHANYISILE JUDITH DLAMINI

Plaintiff

And

WEBSTER LUKHELE

Defendant

Neutral citation: *Khanyisile Judith Dlamini vs Webster Lukhele (1876/2010)*
[SZHC] 189 (21st September, 2016)

Coram: **MAPHALALA PJ**

Heard: **14th July, 2016**

Delivered: **21st September, 2016**

For Plaintiff: **Mr. M Mzizi**
(of Masina, Ndlovu, Mzizi Attorneys)

For Defendant: **Mr. Z. Magagula**
(of Zonke Magagula And Co.

Summary: *Civil Procedure – after the dismissal of an Application from the instance – Defendant gave viva voce evidence contending that Plaintiff conceded in cross-examination that she was not aware whether or not Defendant sold motor vehicles – in view of this concession it doubtful whether Plaintiff has proved an agreement stated as (a) in the legal authority of **Gibson, South African Mercantile and Company Law, 7th Edition at page 116** – this court finds in favour of the Defendant on the above cited legal authority.*

JUDGMENT

The Introduction

- [1] On the 4th July, 2015 this Court issued a judgment on the Application by the Defendant for absolution for the instance dismissing said Application and that costs to be costs in the main action.
- [2] The said judgment is incorporated into the present judgment for insofar as it is relevant.
- [3] The Defendant then opened his case and led evidence on oath and was searchably cross-examined by the attorney for the Plaintiff Mr Mzizi.

The claim

- [4] By Combined Summons, the Plaintiff approached this court claiming payment of the sum of E55,000.00 (Fifty Five Thousand Emalangeni) interest thereon at the rate of 9% per annum and costs of suit from the Defendant.

- [5] Plaintiff's claim, according to the Particulars of Claim arises out of an oral contract entered into by the parties on or about 21st December, 2009.
- [6] According to Plaintiff, the agreement of sale of the motor vehicle described as a Mazda 6.
- [7] The parties agreed that a deposit in the sum of E 5000.00 (Five Thousand Emalangeni) was to be paid on the 21 December, 2009, that a further E39,000.00 (Thirty Nine Emalangeni) was to be paid on the 22nd December, 2009 and that the balance in the sum of E11,000.00 (Eleven Thousand Emalangeni) was to be paid on delivery of the motor vehicle. The delivery of the motor vehicle was to be on or before January, 2010.
- [8] Plaintiff alleged that she paid the sum of E5000.00 (Five Thousand Emalangeni) on the 21st December, 2009, the sum of E39 000.00 (Thirty Nine Thousand Emalangeni) on the 22nd December, 2009, the sum of E6500.00 (Six Thousand Five Hundred Emalangeni) on the 23rd December, 2009, the sum of E900.00 ((Nine Hundred Emalangeni) of the 24th December 2009, the sum of E2000.00 (Two Thousand Emalangeni) on the 24 December, 2009, the sum of E2000.00 (Two Thousand Emalangeni) on the 28th December, 2009, the sum of E600.00 (Six Hundred Emalangeni) on about January, 2010 and the further payments of E6000.00 (Six Hundred Emalangeni and E500.00 (five Hundred Emalangeni) respectively during the months of January, 2010.

The Defence

- [9] The Defendant defends the action and has filed a Notice of intention to Defend dated the 13th June, 2010 and also filed a Plea canvassing the defence thereto.
- [10] At paragraph 2.3 of the said Plea the Defendant plead that there was no agreement that the purchase price would be fixed at E55 000.00 (Fifty Five Thousand Emalangeni).
- [11] Further at paragraph 3.1 of the said Plea the Defendant pleads that he denies that there was an agreement between the parties to the effect that a deposit of E5000.00 (Five Thousand Emalangeni) would be paid on the 21st December. In the main the Defendant denies liability of the claim by Plaintiff.

The Chronicles of the evidence of the parties

- [12] As I have stated above that Plaintiff had given evidence and closed her case when the attorney for Defendant applied for absolution from the instance. The said Application was dismissed by the court and as a result the Defendant gave evidence under oath and was cross-examined by the attorney for the Plaintiff. For the sake of clarity I shall outline **in extenso** the evidence of both Plaintiff and the Defendant in the following paragraphs of this judgment.

(i) Plaintiff's evidence

- [13] The evidence of the Plaintiff is outlined in the Heads of Arguments of the attorney for the Plaintiff Mr Mzizi and I shall outline the said evidence in **extenso** from paragraphs 2.1 to 2.8 of the said arguments:

2.1 It was Plaintiff's evidence that she was referred to the Defendant by a third party whom she had told that she wanted to buy a

motor vehicle. She told the court that the third party gave her defendant's mobile number and further told her that defendant was in the business of selling motor vehicles. She was also told that defendant sold beautiful motor vehicles. She stated that upon calling defendant on his mobile phone she discovered that she knew him as he lived at her home area.

2.2 She approached defendant about her quest and defendant confirmed to her that she sold motor vehicles. It was plaintiff's evidence that defendant told her that he was in the business of buying and selling motor vehicles and that he would stock them from Durban.

2.3 It is plaintiff's evidence that defendant advised her to contact him when she had sufficient funds to buy a motor vehicle. On about December 2009 plaintiff had raised funds and she approached defendant. Upon discussing defendant stated that he was going to Durban to buy the motor vehicle which would preferably be a Mazda 6 and the purchase price was fixed at E55 000.00 (Fifty Five Thousand Emalangeni).

2.4 It was plaintiff's evidence that defendant requested a deposit of E5000.00 (Five Thousand Emalangeni) before he left for Durban. When in Durban defendant told plaintiff that the Mazda 6 model vehicle was available and instructed her to deposit in a South African F.N.B account. It is common cause that defendant demanded a deposit in the sum of E50 000.00 (Fifty Thousand Emalangeni) but plaintiff refused to deposit the whole amount since she had not seen that motor vehicle. Plaintiff deposited the sum of E39 000.00 (Thirty Nine Thousand Emalangeni). She testified further that later on the night she was informed by defendant that the motor vehicle had broken down. She was requested by defendant to arrange for a breakdown to fetch the motor vehicle at the Border post. She further testified that she got a message from defendant through her mobile phone wherein

defendant was threatening suicide because the motor vehicle had been detained by the police in South African because it had false registration numbers. Defendant further requested plaintiff to bail him out of the situation and she duly complied and paid a fine of E6000.00 (Six Thousand Emalangen) for the release of the motor vehicle. It was plaintiff's evidence that it was agreed that payments of the breakdown and fine at the border post would form part of the balance of the purchase price.

- 2.5 It is her evidence that motor vehicle was taken to a mechanic known to the defendant and further payments were demanded from her for the repair of the motor vehicle and upon seeing that the amounts demanded from her were now exceeding the agreed purchase price for the vehicle she cancelled the contract.**
- 2.6 She further testified that she later saw the defendant driving the motor vehicle and further saw his wife driving the 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.**
- 2.7 The essence of defendant's cross-examination and evidence in defence was that there was no contract of sale but a contract of agency. Defendant alleged that the motor vehicle belongs to plaintiff.**
- 2.8 It is common cause that the motor vehicle was repaired and registered in the name of the defendant.**

[14] I shall in like manner reproduce **in extenso** the evidence of the Defendant extracted from the Heads of Arguments of the attorney for the Defendant from paragraphs 7 to 13.1 to the following:

7. **The Defendant pleaded that he did enter into an agreement of sale of motor vehicle with Plaintiff, that he knew Plaintiff long before they has a commercial agreement.**
8. **He pleaded and stated in evidence that he was introduced to Plaintiff by his sister who used to be her colleague at the Standard Bank in Matsapha; they were actually neighbours and Defendant was aware of Plaintiff's brother, Sammy Dlamini.**
9. **Early in the year 2009, the Defendant had assisted Plaintiff with her motor vehicle which has an engine overheating problem. Plaintiff had planned to make a claim against her insurer for the engine problem and dissuaded by Defendant who advised her that an insurance claim could only be made if the motor vehicle was accident damaged.**
10. **A relationship then developed between the two parties resulting in an agreement being reached that they would, once finances on Plaintiff's part, allowed, go to Durban to look for a suitable motor vehicle that Plaintiff would purchase.**
11. **In about December 2009, plaintiff did come into some money and unfortunately could not travel to Durban on the agreed day so the parties agreed as follows;**
 - 11.1 **That Defendant would travel to Durban and find a suitable motor vehicle for Plaintiff. Defendant had earlier suggested a Mazda 6.**
 - 11.2 **That once a suitable motor vehicle was found, Plaintiff would then pay for it to the dealers and Defendant would drive the motor vehicle back.**
 - 11.3 **That Defendant would be paid the sum of E4,000.00 (Four Thousand Emalangen) as commission but Plaintiff would also be liable for Defendants costs of travel, accommodation and subsistence while in Durban.**

12. Defendant testified that he was paid the sum of E6,000.00 (Six Thousand Emalangeni) by Plaintiff on the day he set out for Durban which was his commission of expenses.

12.1 In Durban he was able to find a Mazda 6 motor vehicle, communicated this to Plaintiff who was approved, he negotiated with the dealer and they settle on the sum of E39,000.00 (Thirty Nine Thousand Emalangeni) communicated this to Plaintiff who approved and she then transferred purchase price into the dealer's account.

12.2 On proof of payment being furnished to the dealer, Plaintiff transferred the sum of E39,000.00 (Thirty Nine Thousand Emalangeni) into the motor vehicle dealer's account and Defendant was able to drive the motor vehicle away.

13. The motor vehicle developed problems along the way and had to be towed to the border gate and because it was not registered a fine of E6,500.00 (Six thousand Five Hundred Emalangeni) was levied on it which was paid by Plaintiff, a tow truck was secured by Plaintiff and he paid for it.

13.1 The motor vehicle was towed to a garage in Manzini and the parts for repairing it were paid by the Plaintiff.

The Arguments

[15] On the 14th July, 2016 the attorneys of the parties advanced their arguments filing comprehensive Heads of Arguments on both sides for which I am grateful. I shall in brief outline the parties arguments for one to understand the issues for decision by this Court in the following paragraphs.

(a) Plaintiff's arguments

[16] The attorney for the Plaintiff filed Heads of Arguments as stated above in paragraph [13] of this judgment.

[17] The arguments on the law are canvassed by the attorney for the Plaintiff at paragraphs 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 and 3.7 of the Heads of Arguments. A number of decided cases are cited in support of those arguments.

[18] At paragraphs 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8 and 4.9 dealt with the issue of agreements. In this regard advanced the following arguments:

4.1 It is further 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 conceded by the defendant in his on plea in the present matter at page 33 of the book of pleadings paragraph 10.3 where he states that;

“Defendant pleads that the plaintiff lost interest in the motor vehicle thus defendant registered it in his name and paid the sum of E12000.00 (Twelve Thousand Emalangeni) inclusive of import duties and other expenses.”

This fact was also admitted under oath in the defendant's founding affidavit in his Rescission Application at page 18 of the book of pleading at paragraph 20 where he states on oath that;

“The motor vehicle was finally repaired and I registered it in my name and paid the sum of E12000.00 Twelve Thousand Emalangeni) inclusive of import duties testing and all the requirements.”

4.2 It is our humble submission that the defendants act of registering the motor vehicle in his name clearly indicates to this honourable court that the above was not an agency agreement.

GIBSON-SOUTH AFRICAN MERCENTILE AND COMPANY LAW at page 207 defines Agency 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 in the essence of the commercial agency.”

4.3 It is submitted that all acts done by the agent should be authorised by the principal. In her evidence plaintiff stated in Court that she did not authorise defendant to negotiate any price for the motor vehicle on her behalf while in Durban. It also common cause that the transaction that occurred in Durban was not done in plaintiff’s name. Defendant has not discovered any proof whatsoever that the motor vehicle was bought in plaintiff’s name to the knowledge of the dealer in Durban as he alleges.

[19] Finally it is contended for the Plaintiff that the facts speaks for themselves in the present case and therefore the Court ought to grant an order in terms of the Summons.

(b) The Defendant’s arguments

[20] The attorney for the Defendant also filed comprehensive Heads of Arguments. I have reproduced in part at paragraph [14] of this judgment. In paragraph 14, 15, 16, 17, 18 and 19 dealt with the law and cited pertinent cases and legal

authorities and prefaced his arguments by citing the legal authority of **Gibson South African Mercantile and Company Law 6th Edition** at page 16 to the following:

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

[21] That it is an essential requirements of a contract that the parties be of the same mind. That in the present matter at least according to the evidence of the parties is such that Plaintiff is suggesting that this was an agreement of sale of a motor vehicle. The Defendant on the other hand suggests that the agreement was one of agency. That he was hired as an agent of the Plaintiff to find a motor vehicle for which she would and did indeed pay him and was to drive the motor vehicle to Swaziland which he did. That in evidence before court this was an agreement of agency. In this regard the attorney for the Defendant cited the South African case of **Joel Melamed and Hurwitz vs Vorer Investments 1984 (3) SA 155 (A) at 166 C-D Corbett J.A.** stated as follows:

“In cases concerning tacit contract which have hitherto come before our courts, there have always been two people involved; and in order to decide whether a tacit contract arose the, the court has regard to the conduct of both parties and the circumstances of the case generally. The agreement approach is an objective one. The subjective views of one or other of the persons involved as to the effect of his actions would not normally be relevant.”

[22] Further, the attorney for the Defendant cited the South African case of **Standard Bank of S.A. Limited vs Ocean Commodities INC. 1983 (1) SA 276 at 292** where **Corbett J.A.** stated:

“In order to establish a tacit contract on the terms it is necessary to show by a preponderance of probabilities unequivocal conduct which is capable of no other reasonable interpretation than that the parties intend to, and did in fact contract on the terms alleged.” (emphasis added)

[23] Furthermore, the attorney for the Defendant cited a judgment of the Supreme Court of Swaziland in the case of **Inter Agencies (Pty) Ltd vs Eugene Dlamini Civil Appeal Case No. 57/15** where the South African cases in paragraphs [21] and [22] were cited.

[24] Finally, it is contended for the Defendant by Mr. Magagula at paragraph 19 of his arguments that his client version is supported by the conduct of the parties. That is not conceivable that the Defendant would have known of all the mishaps that were later to befall the motor vehicle before hand. What is real is that Plaintiff simply cancelled what she thought her loses were and then claimed that to be purchase price of the motor vehicle.

[25] Therefore, on the facts Defendant prays that Plaintiff’s claim be dismissed with costs.

The Court’s analysis and conclusions thereon

[26] Having considered the papers before Court and the arguments of the parties it is agreed by both attorneys of the parties that the law that is pertinent in the resolution of the present dispute is found in the legal textbook by **Gibson**

“South African Mercantile and Company Law” 6th Edition at page 10 to the following legal principles:

“The sale of non-existent is however, as 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] According to the above legal authority it is an essential requirement of a contract that the parties be of the same mind.

[28] The Plaintiff contends on the facts of the present case the contract of in the present case fall in the category of “**res sperata**”. In this regard the attorney for the Plaintiff has cited the legal textbook by **Gibson “South African Mercantile and Company Law“ 6th Edition at paragraph 10** to the following legal principle:

“The sale of non-existent is however, as 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.”

[29] The Plaintiff further cited the case of **Richtown Development (Pty) Ltd vs Dusterwald 1981 (3) SA 691 (W LE Roux J)** to the following dictum:

“The sale of an expected thing under and *emptio rei speratae* 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 enforceable until that stage has been reached”

[30] The Plaintiff contends in the present case that the Mazda 6 vehicle was not in existence when the agreement of sale was entered into but it was confidently expected to come into existence once the Defendant got to his wholesalers/dealers in Durban. That the contract of sale existed between the parties before the Defendant went to Durban.

[31] The Defendant on the other hand is of the view that there was no contract of sale between the parties but an agreement of agency. That the circumstances of this case do not support Plaintiff’s version that it needs be mentioned that Defendant denied selling motor vehicle and Plaintiff conceded as much in cross-examination that she was not aware whether or not Defendant sold motor vehicles other than what she was told by an unknown person whose names were not ever given to the court.

[32] The Defendant further contends that his version is supported by the conduct of the parties. That it is not conceivable that the Defendant would have known of all the mishaps that were later befall the motor vehicle before hand.

[33] In my assessment of the two competing arguments of the attorneys of the parties it appears to me that the position adopted by the Plaintiff on the framing of the case for decision is correct. I find the **dictum** in the legal authority of

Gibson – “**South African Mercantile and Company Law**” 7th Edition at **page 116** to the following legal principle apposite:

“The word sale is used with various meaning. 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 the question whether the purchase price has been paid or whether delivery of the article sold.”

[34] According to the above legal authority there must then be:

- (a) An agreement
- (b) To deliver
- (c) A particular article
- (d) At a particular price

[35] However, the Plaintiff cannot succeed on the first requirement (a) above in that the Defendant did not confirm to Plaintiff that he was in the business of selling motor vehicles and Plaintiff agreed to buy the motor vehicle. On this point Defendant denied that he was selling motor vehicles and Plaintiff conceded as much in cross-examination that she was not aware whether or not Defendant sold motor vehicles other than what she was told by an unknown person whose names were not given to the court. In view of this confusion by the Plaintiff I cannot say that there was an agreement between the parties

[36] My finding on (a) above makes it pointless to deal with the further requirements of (b), (c) and (d) in the legal authority of **Gibson (supra)**.

[37] On the issue raised by the Defendant that the relationship between the parties was that of agency the court can only surmise so before this court on the evidence addressed by the parties.

[38] It would also appear to me that motor vehicle whatever it may be belongs to the Plaintiff and should be returned to her.

[39] In the result, for the foregoing reasons the action by the Plaintiff is dismissed with costs. Further the motor vehicle which is the subject matter of this action should be returned to the Plaintiff.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE