



IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 1113/2014

HELD AT MBABANE

In the matter between:

MBONGISENI SIHLONGONYANE

APPLICANT

And

THE COMMISSIONER OF POLICE

1st RESPONDENT

NJABULO MAMBA

2nd RESPONDENT

ATTORNEY GENERAL

3rd RESPONDENT

Neutral Citation *Mbongiseni Sihlongonyane vs The Commissioner of Police and
2 Others [1113/2014] [2019] SZHC 86 (30 April 2019)*

Coram: **M. LANGWENYA J**

Heard: **6 February 2018; 19 February, 2018; 18 July 2018; 18
September, 2018 and 1 October 2018**

Delivered: 30 April 2019

Summary: *Law of Contract-Contract of sale of motor vehicle and TLB heavy plant equipment-Motor vehicle was delivered to the applicant-TLB was delivered to the second respondent- Properties exchanged voetstoots- Second respondent avers he cancelled oral agreement when TLB was delivered-Second respondent kept the TLB from February 2014 and purported to return it to the applicant in August 2014- Currently the TLB is at Timothy Myeni's place and not with the applicant-General principles of cancellation of contract-return everything received thereunder-cancellation gives rise to restitution-Purchaser seeking restitution of performance may claim ex contractu under action empti-If unable to claim under action empti-purchaser can invoke aedilician remedies.*

JUDGMENT

Introduction

[1] The matter first came before the High Court on a certificate of urgency on 15 August 2014 where the applicant sought an order in the following terms:

1.1 Dispensing with the normal rules of Court as relates to service and time limits and hearing the matter as an urgent matter.

- 1.2 Condoning the applicant's non-compliance with the Rules of Court.
- 1.3 That the first Respondent be and is hereby ordered to forthwith release to the applicant his motor vehicle to wit: a Toyota, manufactured in the year 2007; engine number 2KD7296307; Chassis number AHTCS12G307512269, white in colour.
- 1.4 That the *rule nisi* do hereby issue calling upon the respondents to show cause on a date and time as shall be determined by the Court why an order in terms of prayer 1.3 should not be made final.
- 1.5 That the respondents be and are hereby ordered to pay the costs of suit.
- 1.6 Granting applicant further and/or alternative relief

[2] The second Respondent opposed the application and raised a *point in limine* that the matter ought not to be heard as application proceedings because it raises disputes of fact. On 2 February 2018 the matter was argued and the Court determined that indeed there were disputes of fact concerning the ownership of the motor vehicle in issue. The Court held that the matter be referred to oral evidence in terms of Rule 6(18) of the High Court Rules.

Brief Background

[3] In February 2014 the applicant and the second respondent entered into an oral agreement of sale where the applicant gave the second respondent a TLB heavy plant equipment and the second respondent gave the applicant a Toyota motor vehicle whose details are fully stated in prayer 1.3 above. In terms of the said agreement, the parties had to satisfy themselves with the

condition of the properties that were the subject of the exchange prior to delivery. Both the TLB heavy plant equipment and the motor vehicle were exchanged *voetstoots*.

[4] It is the applicant's version that he inspected the second respondent's motor vehicle and was satisfied with its condition. The second respondent delivered the motor vehicle to the applicant at Mpaka. The TLB heavy plant equipment was delivered to the second respondent at Simunye. On delivery of the motor vehicle to the applicant, the second respondent did not transmit the motor vehicle's registration papers (blue book) to the applicant. The reason for not giving the applicant the blue book of the motor vehicle was that the second respondent had not received the registration papers of the TLB from the applicant. The applicant is said to have stated that he had still not received the TLB registration papers from the previous owner of the TLB heavy plant equipment.

[5] Following the exchange, the applicant was in possession of the motor vehicle from February 2014 until August 2014 when the motor vehicle was detained by the police after it was found to be using a falsified licence disc and falsified registration number plate. The falsification of the licence disc and registration number plate was as a result of the second respondent's failure to transmit the blue book to the applicant so he could pay for the licence fee of the motor vehicle.

[6] The applicant contends further that he was happy with the motor vehicle and had made improvements on it. The applicant assumed that the second

respondent was happy with the transaction as he had not communicated to the applicant cancellation of the oral agreement nor had he demanded that the motor vehicle be returned to him. In response to the applicant's contention, the second respondent submitted that nothing could be further from the truth. It is second respondent's version that he cancelled the oral agreement on the day the TLB was delivered to him when he discovered that the applicant had misrepresented to him that the TLB was in good condition when it was not. The second respondent alleged that he cancelled the oral agreement when he discovered that 'the applicant had made serious misrepresentations regarding the condition of the machine¹.'

The Case for the Applicant

[7] Three witnesses gave evidence in support of the case of the applicant. AW1 is the applicant. He told the Court that sometime in February 2014 he and the second respondent entered into an oral agreement where he gave his TLB to the second respondent and the latter gave the applicant the motor vehicle described in prayer 1.3 above. Each of the parties inspected the properties that were the subject of the exchange prior to taking possession and ownership of same. It was part of the terms of the oral agreement between the parties that the motor vehicle and the TLB was being exchanged *voetstoots*. Accordingly, the applicant inspected the motor vehicle when it was brought to him by the second respondent and was satisfied with its condition. The second respondent sent Lucky Dlamini to deliver the motor vehicle to the applicant on a later date. The applicant was not present when the motor vehicle was delivered to him.

¹ See Second Respondent's Answering Affidavit, paragraph 10 at page 25 of the Reconstructed Book of Pleadings.

[8] Regarding the inspection of the TLB, the applicant assigned his second-in-charge employee Manqoba Ndzabandzaba-a mechanic- to attend to the TLB and help the second respondent inspect it prior to the exchange taking place. In the company of second respondent's mechanic and Manqoba Ndzabandzaba the second respondent went to Nyakeni where the TLB was stationed and inspected it. The applicant was not present when the second respondent inspected the TLB.

[9] The TLB was subsequently transported from Nyakeni and delivered to the second respondent at Simunye using the applicant's truck. The registration papers of the TLB were not delivered when the TLB was taken to the second respondent at Simunye. According to the evidence of the applicant in chief, he did not deliver the TLB's registration papers because the applicant had also not given him the blue book for the motor vehicle. When the TLB was delivered at Simunye the applicant was informed by Ndzabandzaba that there were parts of the TLB that the latter had undertaken to deliver to the second respondent on a later date. The said parts were a proper shaft for the front wheels and a front cover. The proper shaft and the front cover were collected later by the second respondent after the TLB was delivered.

[10] The applicant told the Court that the licence disc of the motor vehicle expired after the motor vehicle was delivered to him. The applicant gave money to Ndzabandzaba to give to the second respondent so he could renew the licence for the motor vehicle because he still kept the blue book of the motor

vehicle. The second respondent took the money and undertook to renew the licence disc. It was at this point that through Ndzabandzaba the second respondent made the applicant aware that he was also waiting for the TLB blue book to be furnished him. Ndzabandzaba informed the second respondent that the TLB blue book was not in the applicant's possession because it had not been furnished to the applicant by the previous owner of the TLB. The second respondent took the cash and renewed the licence disc but refused to hand over the licence disc to the applicant. The second respondent is said to have stated that he was reluctant to hand over the renewed licence disc because the TLB was not in good working condition. The applicant says he told Ndzabandzaba that the second respondent should call the applicant. The second respondent never called the applicant concerning the alleged bad condition the TLB was in.

[11] The applicant informed the Court that his driver was later arrested for using the motor vehicle while it bore a false licence disc and a falsified registration number. He paid a fine for his driver at the Magistrate Court in Manzini. The motor vehicle was detained by the police for the falsified registration plate and disc in August 2014. The exchange of the motor vehicle and the TLB had happened sometime in February 2014.

[12] It is the evidence of the applicant that the second respondent never cancelled the oral agreement on the date the TLB was delivered or at any other date. It is the evidence of the applicant that the agreement of exchanging the motor vehicle and the TLB was never cancelled because the applicant later saw the

TLB on a truck belonging to Timothy Myeni. The TLB was loaded on Myeni's truck on the instruction of the second respondent. After only a day or two the motor vehicle was detained by the police that the second respondent purported to deliver the TLB at applicant's place of business at Mpaka using Myeni's truck. The second respondent never informed the applicant why the TLB was being returned to Mpaka after the detention of the motor vehicle by the police.

[13] The applicant stated that he had spent about E25,000 on repairs of the motor vehicle. The applicant is of the view that he acquired ownership of the motor vehicle when the exchange of the motor vehicle and the TLB was delivered to the applicant and the second respondent respectively. The applicant applied to the Court that the second respondent de-registers the motor vehicle from his name or that of a third party and register it in the name of the applicant. The applicant also prayed that the motor vehicle be released to him.

[14] The applicant was cross examined extensively by the second respondent's attorney. During cross examination the applicant was unshaken in his evidence. He told the Court that prior to the exchange, the agreement was that each party had to be satisfied with the property being exchanged before delivery could be effected. It was the evidence of the applicant during cross examination that the second respondent never told him that when he inspected the TLB he found it to be non-functional. According to the applicant, the TLB could function-and in fact did function-without a proper shaft. The proper shaft, so the applicant posited is for the front excel which allows the

TLB to work as a 4 by 4. When the TLB was delivered to the second respondent, it was operating as a 4 by 2. It is the evidence of the applicant that when he delivered the TLB to the second respondent, he had no use of the proper shaft. The applicant denied that the TLB's brakes were not working when it was delivered to the second respondent.

[15] During cross examination the applicant stated that the second respondent did not cancel the oral agreement because he kept the TLB from February 2014 until August 2014 when the police detained the motor vehicle. It was the applicant's response during cross examination that if the second respondent had cancelled the agreement, he would not have accepted the money for the renewal of the licence disc for the motor vehicle given him by the applicant. It was later put to the applicant that he never gave the second respondent money to renew the licence disc. The applicant's response was that he gave the money to his second in command- Mancoba Ndzabandzaba who informed him that the second respondent had taken the money.

[16] According to the applicant, the TLB was never delivered to his work place at Mpaka. It remained on Timothy Myeni's truck for some time while parked at Mpaka and was later driven away while still on Myeni's truck to Myeni's place at Ray Camp, Hhelehhele. When Timothy Myeni tried to broach peace between the applicant and the second respondent and also intimated that he would like to buy the TLB, the applicant informed Myeni that the TLB belonged to the second respondent.

[17] It was put to the applicant that the agreement came to an end when he failed to deliver the TLB's blue book to Mamba. The applicant's response was that he only became aware that the TLB blue book was an issue when he asked the second respondent to renew the licence disc for the motor vehicle. The applicant told the Court that he later furnished the second respondent with the TLB's registration papers. The Court was referred to the TLB registration papers in the book of pleadings. It was the applicant's evidence that the second respondent could not have cancelled the oral agreement on delivery of the TLB because after delivery of the TLB he still came and collected the spares and parts of the TLB which had not been given him on delivery of the TLB.

[18] AW2 is Mancoba Ndzabandzaba who told the Court that he was employed by the applicant from the year 2011 up to the year 2016. He informed the Court that he is aware of an oral agreement between the applicant and the second respondent regarding an exchange of a motor vehicle and a TLB. AW2's role in this transaction was to help the second respondent with everything he required concerning the exchange of the TLB. During the exchange of the motor vehicle, this witness was called by the applicant and informed that there was someone who wanted to take the TLB and would exchange with a van. The applicant asked this witness to come and inspect the motor vehicle. The second respondent brought the motor vehicle and this witness inspected it and found it to be alright.

[19] The following day, this witness took the second respondent and his mechanic to inspect the TLB next to Salukazi around Maliyaduma area. The

second respondent and his mechanic inspected the TLB and were satisfied with its condition. The second respondent then delivered the motor vehicle at the site where this witness worked. This witness later delivered the TLB using a truck at Simunye where the second respondent was.

[20] The motor vehicle was used by this witness for some time before its licence disc expired and he gave the second respondent money from the applicant to renew the licence disc. The motor vehicle was registered in the name of Sugar Association. The second respondent took the money but refused to give this witness the licence disc arguing that there were parts of the TLB that were missing and the blue book of the TLB had not been furnished him. AW2 says he informed the second respondent that the previous owner of the TLB had not furnished them with the registration papers of the blue book; that they had not asked for the registration papers because they did not use the TLB on the public roads. He informed the second respondent that he would relay his concerns to the applicant. It was the evidence of this witness that a few days after the motor vehicle was detained by the police, he found the TLB at Mpaka on a truck. At Mpaka, the TLB could not be offloaded because the truck broke down. A few days later, the owner of the truck came and took the truck and the TLB which had still not been offloaded from the truck.

[21] AW2's evidence is that the TLB was in good working condition when it was inspected by the second respondent at Salukazi; it was his evidence that the TLB's cylinder was not broken. According to this witness, the TLB was in good condition when it was delivered at Simunye. AW2 stated that it is

untrue that the second respondent cancelled the oral agreement he had with the applicant on the day of delivery of the TLB. This he said was because a few days after the TLB was delivered, the second respondent came to collect the spare parts of the TLB that were inadvertently left when the TLB was delivered at Simunye. According to AW2 the second respondent collected the prop shaft because he wanted the TLB to work as a 4x4. It was AW2's evidence that at not stage did the second respondent communicate to this witness his cancellation of the oral agreement. During cross examination this witness insisted that he had given the second respondent the money for the renewal of the licence disc of the motor vehicle from the applicant. It is the evidence of this witness further that the second respondent, on receipt of the money to renew the licence disc stated that he needed to get a letter from his employer-in whose name the motor vehicle was registered- in order to be able to renew the licence disc. That as soon as that was done, he would let this witness know once he had paid for the renewal of the licence disc. According to AW2, the second respondent never complained that the TLB was not functioning. From February 2014 up to August 2014 the second respondent never returned the TLB.

[22] AW2's evidence is that the problem that the TLB had was that it could not carry a heavy load and it was slow when it lifted something heavy. The second respondent was also informed that the hydraulic pump of the TLB required service. The above issues were communicated to the second respondent who was in the company of his mechanic. The second respondent's mechanic said the problems were minor and they could be attended to. The second respondent agreed to take the TLB *voetstoot*.

[23] AW3 is Timothy Myeni. His evidence is that he was approached by the second respondent and asked to transport a TLB to Mpaka. At Mpaka, the TLB could not be offloaded from the truck. The TLB and Myeni's truck remained at Mpaka for about two months. Because he wanted to use the truck he drove it to his premises where there is a ramp and managed to offload it there. The TLB had a small damage as such it could not move. According to AW3, the TLB broke when they were trying to offload it at Mpaka.

[24] AW3 subsequently tried to convene a meeting between the second respondent and the applicant when he realised there was a dispute pertaining the TLB. He tried to mediate without success. He told the Court that the TLB is currently parked at his place at Hhelehhele and he has not been able to speak to the second respondent because he refuses to take his calls.

The case for the Second Respondent

[25] The second respondent led evidence in chief and stated that he works for the Sugar Association and is stationed at Simunye. He states that he is also self-employed and owns a business of trucks. He told the Court that he indeed entered into an oral agreement with the applicant where he agreed to exchange his motor vehicle for a TLB owned by the applicant. He took the motor vehicle to applicant's place of business at Mpaka where the applicant saw and satisfied himself with the motor vehicle. After three or four days the applicant requested the respondent to bring the motor vehicle to him. The respondent told the applicant that he still had not tested the TLB as such he was not sure if it was functional or not. The applicant is said to have told the

respondent that he would fix the TLB before the end of the week and that the respondent should, in the meantime deliver the motor vehicle to the applicant. Because the second respondent respected the applicant, he sent one Lucky Dlamini to deliver the motor vehicle. The second respondent retained the registration papers of the motor vehicle pending the TLB being fixed and delivered to him.

[26] The applicant told the second respondent to deal with Vusi Sihlongonyane on any matter regarding the TLB. The second respondent went with Vusi Sihlongonyane to inspect the TLB and found it did not have a cylinder so they could not start it. It is the evidence of the second respondent that the oral agreement never took effect when the applicant delivered a TLB that was defective. In his answering affidavit, the second respondent states that ‘the agreement failed on the day of delivery of the TLB when [he] discovered that the applicant had made serious misrepresentations regarding the condition of the machine²...’

[27] After the second respondent had made a number of phone calls to the applicant, he was informed that the TLB would be delivered the following week on a Saturday. The TLB was finally delivered on the said week but on a Sunday. The TLB was delivered by AW2 who offloaded it with great difficulty because its brakes were not functioning. The proper shaft was still not there; the TLB also failed to pick sand and load it on a truck and it failed

² See Second Respondent’s Answering Affidavit paragraph 10 at page 25 of the Reconstructed Book of Pleadings.

to do so because it did not have power. At that time, the second respondent knew that the TLB would not work properly.

[28] The second respondent says he called the applicant to report his disquiet about the condition of the TLB but the applicant did not respond to his calls. The second respondent says he then informed AW2 that he was not impressed with the TLB as it was not what he was told it was. He asked AW2 to take the TLB back but AW2 refused to do so. He instead asked to report second respondent's dissatisfaction with the TLB to the applicant. The second respondent stated that he enquired from AW2 about the TLB's registration papers and the response he got is that they did not have papers for the TLB because such were never delivered to them by the previous owner. It is the second respondent's case that the TLB had no registration plates, only an expired permit.

[29] The second respondent stated that on the following day he called the applicant and told him he was not happy with the TLB and that he had asked AW2 to return with it. The applicant asked the second respondent to be patient with him as he organized a mechanic who would attend to the TLB. The second respondent says he asked the applicant to take the TLB, fix it and return it when it was fixed and in working order. The second respondent states that his view was that while applicant fixed the TLB, he should return the motor vehicle to the second respondent.

[30] The second respondent never heard from the applicant again, nor did a mechanic come to fix the TLB. A month later, the applicant called the second respondent and requested a licence disc for the motor vehicle. The second respondent explained to the applicant that he should return the motor vehicle and take the TLB and fix it and return it to the second respondent when it is in good working condition. The response from the applicant was that *ngeke ngikubone loko; titawulima tiye etjeni*-which translates to the applicant will do nothing of the sort; that the applicant was not going to fix the TLB and that he would see how he will use the motor vehicle without the licence disc.

[31] Three months after the applicant had asked for the licence disc, the second respondent saw the motor vehicle he had exchanged with the applicant being driven along the Mafutseni/Manzini public road bearing a false registration number ESD 543BH instead of its original registration number plate of HSD 136AL. He called the police who subsequently arrested the driver and detained the motor vehicle. It is the evidence of the second respondent that although the blue book of the motor vehicle reflects that it is owned by the Royal Swaziland Sugar Association, he has a letter from the Royal Swaziland Sugar Association to the effect that the motor vehicle now belongs to him. The applicant subsequently instituted court proceedings when the motor vehicle had been detained by the police for its release to the applicant. It is the second respondent's evidence that he was shocked that the applicant instituted court proceedings to have the motor vehicle returned to him when what the second respondent knew is that the motor vehicle belonged to him and the TLB belonged to the applicant.

[32] It is the evidence of the second respondent that he later got a vehicle to transport the TLB to Mpaka but that vehicle broke down at Mliba en route to Mpaka. The second respondent had to hire a truck from Timothy Myeni to take the TLB from Mliba to Mpaka. The second respondent filled the petrol tank of Myeni's truck and paid the driver E500 and also used his car battery in Myeni's truck.

[33] When Myeni's truck got to Mpaka to offload the TLB, they failed to do so as Myeni's truck's engine ceased to function. The second respondent called the applicant to inform him that he had returned the TLB but the applicant did not respond to the call; he then left him a message. On a later date Myeni convened a meeting between himself, the second respondent and the applicant. Myeni intimated that he wanted to buy the TLB but the second respondent says he told him that the TLB belonged to the applicant. The applicant is said to have agreed to withdraw the matter from Court on condition the second respondent paid the applicant E10,000 for replacing the car tyres. The second respondent refused to pay the said amount and intimated that when he delivered the motor vehicle to the applicant it had tyres and that the applicant had been using the motor vehicle anyways.

[34] It appears from the second respondent's affidavit that he went with Manqoba Ndzabandzaba to inspect the TLB and not with Vusi Sihlongonyane. During cross examination, the second respondent denied that he went to applicant's place to collect the proper shaft. Through the questions posed by second respondent's lawyer it was stated that AW2 later brought the proper shaft to

the second respondent after the TLB had been delivered. During cross examination however, the second respondent stated that there was no proper shaft that was ever delivered to him by AW1 or Aw2. AW2 however stated that the second respondent came to collect the proper shaft for the TLB after it was delivered to him; he also took the money to renew the licence disc at the time. This evidence was denied by the second respondent during cross examination. During cross examination the second respondent intimated that he paid for the licence disc from his own pocket and kept the registration papers for the motor vehicle as he had cancelled the oral agreement with the applicant.

[35] The second respondent says he communicated the cancellation of the contract to the applicant on several occasions when they spoke over the phone.

[36] The second respondent only returned the TLB in August 2014 after the motor vehicle he had exchanged with the applicant had been detained by the police. He says he could not return the TLB sooner because he had not secured a means of transport for the TLB. It is strange however that once the motor vehicle was detained by the police, the second respondent was able to secure the means of transport two days later and yet he had waited for six months to return the TLB after the oral agreement was sealed.

[37] The second respondent was a poor witness as he seemed to be making his case as he went along. On the one hand he states that he called the applicant on

several occasions and the applicant did not take his calls; on the other hand, he states that he called and told the applicant that he was not happy with the condition of the TLB and the applicant said he should bear with him as he organized a mechanic to attend to the TLB. That the applicant said he will get a mechanic to attend to the TLB was never put to the applicant.

[38] The case of the second respondent is fraught with contradictions. After the TLB was delivered, the second respondent says he cancelled the oral agreement on the day the TLB was delivered because the applicant had made many misrepresentations about the condition of the TLB. What those misrepresentations are; when and how they were made by the applicant is not fully set out in second respondent's pleadings. On a different note, the second respondent says he called the applicant and told him to take the TLB, fix it and return it to second respondent in good working order. How the agreement could have been terminated when the TLB was delivered is unclear if the second respondent expected the TLB to be returned to him once it had been fixed and was in good working condition.

[39] The second respondent only complains of 'serious misrepresentations regarding the condition of the TLB' in his pleadings but does not spell out what those misrepresentations were. It is only when he gave evidence that the second respondent stated that the TLB had problems with brakes.

The applicant's pleading and the nature of the Cause of Action

[40] The applicant pleads that having bought the motor vehicle from the second respondent through a swap of his TLB, the applicant has a right to have his possession and ownership of the motor vehicle restored through an order that the second respondent should deliver the blue book to the applicant to enable him to facilitate registration of the motor vehicle in applicant's name. The applicant pleads further that the first respondent's conduct of refusing to release the motor vehicle to the applicant is unlawful, irregular and should therefore be set aside by the Court as applicant has a clear right of possession of the motor vehicle.

[41] It is in dispute that the second respondent cancelled the agreement as a result of the applicant's misrepresentations regarding the condition of the TLB after it was delivered to the second respondent or at all.

[42] Where a contract is cancelled (whether unilaterally or by agreement) the general principle is that the parties are required to return everything received thereunder³. This applies equally to the 'guilty' party and the 'innocent' party⁴. And gives rise to a 'distinct contractual remedy' to claim restitution⁵ albeit one that is subject to the Court's overriding equitable discretion to

³ *Baines Motors v Piek* 1955 (1) SA 534 (A) at 544.

⁴ *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (1) SA 708(C) at 717H-718A; See also *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1974 (1) SA 414 (NC) at 424C.

⁵ *Baker v Probert* 1985 (3) SA 429(A) at 438-439 where it was stated that 'restitutio' here is used in the non-technical sense of 'restoration' or 'return'; as opposed to the technical concept of *restitutio in integrum*.

decline an order for restitution where it would result in the other party being unjustly enriched⁶.

[43] In the current matter, the second respondent claims to have cancelled the contract when the TLB was delivered but keeps the TLB from February 2014 until August 2014 when the motor vehicle was detained by the police. The second respondent told the Court that he had asked the applicant to collect the TLB; that he did not have a truck to with which to return the TLB. That soon after the motor vehicle was detained by the police, the second respondent was able to secure a truck to transport the TLB raises doubt he could not have secured a truck earlier.

[44] In August 2014, the second respondent also purports to have returned the TLB but in reality, the TLB is currently at Myeni's premises at Ray Camp; and this is at the instance of the second respondent. Clearly, if the second respondent cancelled the agreement, he did not comply with the general principle that he ought to have returned the TLB once he opted to cancel the contract.

[45] The alleged cancellation of a contract by the second respondent pursuant to a breach is however, not the only context in which a contractant potentially has a right to restitution of performance.

[46] A purchaser seeking restitution of performance made under a contract of sale may claim *ex contractu* under the *action empti* for breach of the seller's

⁶ *Feinstein v Niggli and Another* 1981 (2) SA 684(A) at 700-701.

obligation to make effective (and not defective) performance. Since the presence of a latent defect in the *merx* does not in itself amount to a breach of contract, the purchaser must allege and prove not only a latent defect, but also one of the following:

- a) That the seller expressly or impliedly warranted the absence of defects or the presence of qualities lacking in the object sold;
- b) That the seller was a merchant or dealer who publicly professed to have skill and expert knowledge in relation to the kind of thing sold or was a manufacturing seller; or
- c) That the seller fraudulently concealed the defect.

[47] In his pleadings, all the second respondent says is that the applicant made serious misrepresentations of the condition of the TLB. What the applicant is alleged to have said when he made the misrepresentations is not clear from the pleadings. What is clear is that the applicant assigned Ndzabandzaba to deal with the second respondent on matters concerning the TLB. Ndzabandzaba says so much in his evidence. If the applicant assigned Ndzabandzaba-his mechanic to deal with the second respondent regarding the TLB- he could not have professed to have skill and expert knowledge concerning the condition of the TLB; it also implies that the applicant could not have warranted the absence of defects or presence of qualities lacking in the TLB-least of all that he fraudulently concealed the defect because AW2 stated that he informed the second respondent about the mechanical issues attendant to the TLB and the second respondent, on the advice of his mechanic said the issues were minor and could be fixed.

[48] A claim under *actio empti* has the advantage of allowing the purchaser the possibility of claiming consequential damages caused by the breach.

[49] Should the purchaser be unable to found its claim on the *actio empti* it may nevertheless be possible to invoke the *aedilitian* remedies, in particular the *actio redhibitoria*, for the restitution of performance as a result of the supply of a latently defective *merx*. This remedy arises from the residual obligation imposed on the seller ‘by operation of law’- as opposed to by the operation of the contract between the parties-not to sell goods that are defective⁷.

The purchaser must either plead or prove:

a) That the latent defect existed at the time of the sale that was sufficiently material to justify *redhibition*, in other words that it was of such a nature that the purchaser would not have concluded the sale had he been aware of it or, at least that he would not have concluded the sale on the terms that he did⁸.

b) That the seller made a *dictum et promissum*: that is, a positive statement (i.e. not an omission by silence) materially bearing on the quality of the *merx* ‘upon the faith of which [he] entered into the contract...[but which] turned out to be unfounded⁹.

⁷ *Phame Pty v Paizes* 1973 (3) SA 397 (A) at 416H.

⁸ *Vousvoukis v Queen Ace Cc t/a Ace Motors* 2016 (3) SA 188 (ECG) at paras 115-121; See also G. Glover *Kerr’s Law of Sale and Lease* 4 ed (2014) at 213 fn 230 and the authorities cited there.

⁹ *Phame v Paizes* at 417H-418H

[50] The second respondent states in his pleadings that he took the applicant's word concerning the condition of the TLB and assumed that it was in good condition because the applicant was using it¹⁰. Clearly, from this averment it cannot be said that the applicant concealed latent defects or made positive statements materially bearing on the quality of the TLB. The second respondent simply assumed that the TLB was in good condition because the applicant was using it. AW2 says he explained to the second respondent in the presence of his mechanic that the TLB did not have power to lift heavy things and load it on a truck. It was the evidence of AW2 that second respondent's mechanic said that problem was minor and it can be fixed. It is only late in the day that second respondent states in his evidence in chief that the TLB's brakes were not functioning and that the proper shaft was not there when the TLB was delivered. Consequently, the second respondent cannot invoke the *aedilitian* remedies.

[51] I am of the view that the second respondent's pleading is based on a claim for restitution of the motor vehicle that he gave to the applicant in exchange for applicant's TLB. This is an action based on *actio redhibitoria* given that the applicant simply seeks restitution of the motor vehicle and does not claim any damages.

The *voetstoot* Contract and Question of Fraudulent Concealment

[51] A *voetstoot* clause is ordinarily effective in exempting a seller from liability arising from latent defects under the *actio redhibitoria* but not where the purchaser/second respondent in this matter- shows not only that the

¹⁰ See the Second Respondent's Answering affidavit paragraph 9 at page 25 of the reconstructed book of pleadings.

applicant knew of the latent defect in the TLB and did not disclose it, but also that he deliberately concealed it with the intention to defraud i.e. *dolo malo*.

[52] In formulating the *dolo malo* test, the Appellate Division approved the more stringent approach that was followed in *Knight v Trollip*¹¹ where the Court said the following:

‘I think it resolves itself to this, viz that...the seller could be held liable only in respect of defects of which he knew at the time of the making of the contract being defects of which the purchaser did not then know. In respect of those defects the seller may be held liable where he has designedly concealed their existence from the purchaser, or where he has craftily refrained from informing the purchaser of their existence. In such circumstances, his liability is contingent on his having behaved in a way which amounts to a fraud on the purchaser, and it would seem to follow that, in order that the purchaser may make him liable for such defects, the purchaser must show directly or by inference, that the seller actually knew in general, -ignorance due to mere negligence or ineptitude is not,- in such a case equivalent to fraud’

[53] Broome J¹² held that the words ‘designedly’ and ‘craftily’ imply that there must be some element in the transaction beyond mere knowledge and non-disclosure and that ‘it may be that the seller’s awareness of the purchaser’s ignorance would supply that element¹³’.

[54] The requirement of *dolo malo* thus means that the purchaser must show that:

- a) The seller intentionally concealed the defect, that which would include the situation ‘where a seller recklessly tells a half truth or

¹¹ 1948 (3) SA 1009(D) at 1013.

¹² *Walter v Pienaar* 2004 (6) SA 303 (CC) at para 16.4 paraphrasing *Fosdick v Yongelson* 1949 (2) PH A57 (D).

¹³ *Walter v Pienaar* 2004 (6) SA 303 (CC) at para 16.4

knows the facts but does not reveal them because he has not bothered to consider their significance’

b) The seller ‘designedly’ or ‘craftily’ concealed the defect with the intention to defraud¹⁴’ for example with the object of concealing from the other party facts, the knowledge of which would be calculated to induce him to refrain from entering into the contract.

[55] As highlighted earlier, fraudulent concealment of a defect also gives rise to liability under the *actio empti*, and the existence of a *voetstoots* clause is in such a case irrelevant.

[56] In the matter at hand, I am not persuaded that the second respondent has met the test for fraudulent misrepresentation laid down by *Van der Merwe v Meades*.

[57] In the first place, the second respondent has not proved that the applicant was aware that the TLB had the defects (which were not pleaded but stated during the oral evidence of the second respondent) that the brakes were not functioning, that the proper shaft was not there and that the TLB did not have power to lift heavy things. It is evidence before the Court that the second respondent was notified of the problem with power of the TLB and he, through his mechanic stated that this problem was minor and it could be fixed. The second respondent states that he assumed the TLB was in good working condition because the applicant was using it-there is no mention of the

¹⁴ *Van der Merwe v Meades* 1991 (2) SA 1 (A) at 8E-F.

applicant intentionally, ‘designedly’ or ‘craftily’ concealing defects in the TLB.

[58] While the applicant may have been aware-if such was communicated to him by AW2-of the TLB not having power to lift heavy things, there is no evidence that he was aware that the brakes were not functioning or that the proper shaft was not there. In fact it is difficult to understand how the second respondent could have assumed the TLB was in good condition as it was being used by the applicant if it had the defects the second respondent complains about in his oral evidence.

[59] It is the evidence of AW2 however that whatever defects the TLB had, were communicated to the second respondent in the presence of his mechanic by AW2. The evidence before the Court is that the second respondent bought the TLB *voetstoots*. There is therefore no basis upon which to impute the presumed knowledge of AW2 (Manqoba Ndzabandzaba) of a defect of the TLB to the applicant¹⁵.

[60] Secondly, even if I were to ignore the fatal conclusion I have reached above and assume that the second respondent had indeed proved the requisite knowledge of the defect on the part of the applicant, the second respondent’s claim to have the motor vehicle returned to him fails because he has only demonstrated knowledge and non-disclosure. In seeking to identify an

¹⁵ *Van den Bergh v Coetzee* 2001 (4) SA 93(T) at 95D-96F.

element in the transaction beyond mere knowledge and non-disclosure that would demonstrate that the applicant's non-disclosure was intended to induce him to conclude the sale agreement, the second respondent averred that he made an assumption at the time of the sale/exchange that the TLB's condition was good because the applicant was using it. In essence, the second respondent claims that this assumption was willfully induced by the applicant's use of the TLB.

[61] The reason why this conduct cannot assist the second respondent is that there was no evidence that the applicant arranged for the TLB to be sold with the defects that the second respondent alleges it had with the intention that this would lead the second respondent to draw any conclusions at all. The evidence was quite simply that but for the TLB's lack of power to lift heavy things, it was in good working condition as second respondent and his mechanic said so much after they had finished testing it at Salukazi. There was no 'design' in this conduct.

[62] I thus find that, in addition to failing to prove requisite knowledge of a material latent defect, the second respondent has not proved that the applicant deliberately failed to disclose such a defect with the intention that the second respondent would rely on the non-disclosure in making his decision to conclude the sale agreement.

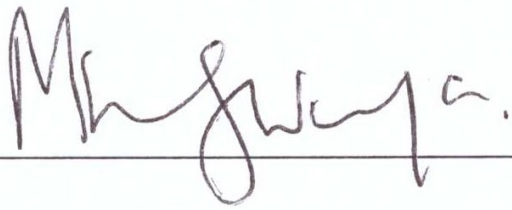
[63] In the circumstances, the second respondent's claim to have the motor vehicle to wit: Toyota; year of manufacture 2007; engine number 2KD7296307; Chassis number AHTCS12G307512269 and white in colour is dismissed and he is not entitled to the return of the motor vehicle under either the *actio empti* or the *actio redhibitoria*.

Accordingly, the following order is made:

[64] The first respondent is ordered to forthwith release to the applicant the motor vehicle whose particulars are: Toyota D4D, make 2007, registration number HSD 136 AL, engine number 2KD7296307, chassis number AHTCS12G307512269 and white in colour.

[65] The second respondent is ordered to deliver to the applicant the registration document (blue book) and any other documentation to enable registration of the motor vehicle: Toyota D4D, make 2007, registration number HSD 136 AL, engine number 2KD7296307, chassis number AHTCS12G307512269, white in color to the applicant.

[64] The second respondent retains ownership of the TLB heavy plant machinery
Costs to follow the event.



M. LANGWENYA J.

For the Applicant:

Mr. T. Sibandze

For the second Respondent:

Ms. L. R. Simelane