



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CIVIL CASE NO. 825/2017

In the matter between

SIKHUMBUZO ISAAC MAZIBUKO

APPLICANT

And

COLANI ZEPHANIA MASEKO

RESPONDENT

TIA DUSHU TRANSPORT

Neutral citation: *Sikhumbuzo Isaac Mazibuko v Colan/ Zephania Maseko tla Dushu Transport (825/17) SZHC 144 [2020] (24 June 2020).*

CORAM

TSHABALALA J

HEARD

13/06/18

DELIVERED

24/06/20

Summary: *Civil procedure -Application for summary judgment in terms of Rule 32(4)(a)- Defendant received monies from the plaintiff under an agreement to source funding from the bank for the latter for purchase of public transport motor*

vehicle. After 18 months the Defendant claims he is still waiting for loan approval from an undisclosed bank. The Plaintiff demanded refund of the money but Defendant insists he is bound by the agreement which does not stipulate time frame for him to honour his side of the obligation. Held: Applying the test of reasonable time, the Plaintiff was entitled to repudiate the agreement. Held further that Defendant has failed to disclose a valid defence to avert summary judgment.

JUDGMENT: APPLICATION FOR SUMMARY JUDGMENT

- [1] This is an application for summary judgment wherein the Plaintiff claims payment of a total amount of E1 20, 000.00 broken into two parts: Claim I E108, 000 and Claim II E1 2, 000.00, interest of 9% per annum and costs of suit. The amount claimed is in respect of an agreement gone wrong wherein the Plaintiff paid the money as deposit for purchase of a motor vehicle described as Toyota Quantum priced at E430, 800.00
- [2] The undisputed facts are that on the 10 November 2016 the Plaintiff deposited E30 000.00 into Defendant's business account and on the 11 November 2016, an amount of E76, 000.00 was deposited, and finally cash payment of E2, 000.00 was made on the 16 November 2016 bringing the total amount to the agreed E1 08, 000.00 to serve as deposit of the said purchase price.
- [3] The E1 2, 000.00 under Claim II of the summons was paid by Plaintiff to Defendant in cash as insurance premium for the motor vehicle yet to be purchased. The payment was made in terms of a further agreement

concluded by the parties on the 16 November 2016.

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- [4] The arrangement under their main agreement was that the Plaintiff who did not meet bank requirements for a loan to purchase a public transport motor vehicle would access the loan facility via the Defendant who had a public transport permit and therefore qualified for a bank loan.
- [5] The Defendant duly received the 25% deposit from the Plaintiff for the loan to purchase public transport vehicle on behalf of the Plaintiff. The Plaintiff believes that the bank purchased the motor vehicle from the Defendant, but the latter appropriated it for himself. This is denied by the Defendant who maintains that the bank is yet to approve the loan application, 18 months after he received deposit money from the Plaintiff.
- [6] The Plaintiff issued summons against the Defendant on the 14 June claiming that he pays back the amount of E120, 000.00. The Plaintiff avers in the summons that the Defendant breached the contract and therefore that *"the Defendant cancelled the sale agreement and demanded his money back."* However, despite demands Defendant fails or refuses to pay the said amount of E120, 000.00.
- [7] Defendant filed a Notice to Defend whereupon Plaintiffs application for summary judgment was filed. The Defendant has filed an affidavit resisting summary judgment in which he denies having obtained the bank loan and appropriating the motor vehicle for himself.
- [8] Defendant denies that he breached the agreement with the Plaintiff, asserting that there has been no loan approval from the bank yet. It is Defendant's case that the Plaintiff is not entitled to refund payment of his

monies because

there has been no breach of contract on Defendant's part and therefore, he is not indebted to the Plaintiff.

[9] Defendant states that summary judgment should be dismissed because he has a *bona fide* defence to the action. According to Defendant's affidavit resisting summary judgment, there is a contract in place in terms of which he received monies from the Plaintiff and that his obligation is to hand over a new motor vehicle described earlier in this judgment. For Defendant to deliver on his obligation he was required to enter into a hire purchase loan with a bank for the purchase of the said motor vehicle. Defendant's defence to the summons is that he is determined to deliver as expected in terms of the agreement, but so far has failed to secure the requisite bank loan. Defendant asserts that the lapse of 18 months without delivery on his part is reasonable because their agreement is silent on the time frame.

[10] Legal status of the said agreement between the parties is put into question in that it was entered into to deceive any bank that would be approached by the Defendant into believing that it was the Plaintiff who required financing whereas the loan was for the benefit of the Defendant. The element of deception arises because the Plaintiff who did not have a public transport permit did not qualify for public transport financing and would not be considered for such a loan.

[11] The Plaintiff has demonstrated that he paid the sum of money to the Defendant who in turn was supposed to secure funding for purchase of a motor vehicle. This is not in dispute. However, after a lapse of 18 months between the time of receiving the money and the date of launching of the summons, the Defendant has not secured the funding per the agreement. This is not disputed by the Defendant either. The Plaintiff now wants his

money back but the Defendant resists and wants to hold the Plaintiff to their agreement. The Defendant argues that since their agreement did not stipulate the time frame within which to deliver on his side of the agreement, there is no basis for the Plaintiff to cancel their agreement.

[12] There is no indication that the Defendant has any intent to perform what he promised in terms of the agreement. It was a bad and unnecessary agreement on the part of the Plaintiff who took a shortcut to secure a bank loan he did not qualify for and as a result put himself at the mercy of a less than scrupulous Defendant. The question is whether the Plaintiff is really bound to the chains of the agreement that the other party shows no intention to honour? There may be no specific time frame stipulated for Defendant to deliver. There may also be no specific provision on what happens next in the event of his failure. This is a case where the concept of reasonableness can be invoked. Is the period of 18 months reasonable to wait for a business loan from a bank, and still waiting? Simple common-sense dictates otherwise.

[13] One and half year is by all standards unreasonably long to be waiting to get loan approval from the bank. It is manifestly unjust for the Defendant to keep Plaintiffs money in the circumstances. It appears to me that the Plaintiff was entitled repudiate the agreement for breach, or to revoke whatever mandate he gave to the Defendant to source financing on his behalf and demand a refund of his money. In the absence of delivery on his side of the bargain the Defendant has no grounds to hold on the money whose sole purpose was as a hire-purchase deposit and motor insurance.

[14] I make a finding that the Plaintiff has made a case for repudiation of the agreement and to demand refund of all monies paid to the Defendant for

their intended transaction. There is no *bona fide* defence to the claim. Notice of intention to defend was clearly filed for delay purposes.

[15] The Application for summary judgment is therefore granted with costs at ordinary scale.

A handwritten signature in black ink, appearing to read 'D. Tshabalala', is written above a horizontal dashed line.

D. Tshabalala
Judge

For the Plaintiff: Mr Nhleko

For the Respondent: Mr W. Maseko