IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 1084/2016**

In the matter between:

ENSEMBLE PLASTIC (PTY) LTD **Applicant**

And

NAGRA MOTORS (PTY) **First Respondent**

UMPIRE MOTORS (PTY) **Second Respondent**

SWAZILAND REVENUE AUTHORITY **Third Respondent**

Neutral citation **:** ***Ensemble Plastic (Pty) Ltd v Nagra Motors (Pty) and 2 Others (1084/2016) [2020] SZHC… (8th May, 2020)***

Coram **:** **M. Dlamini J**

Heard **:** **30th April, 2020**

Delivered **:** **08th May, 2020**

Pleadings *:* ***The tendency by lawyers not to pay close attention when using legal terminology will***

lead to one unbearable scenario and that is a chaotic jurisprudence. Such conduct by Counsel of throwing to the court various defences in one basket for the court to decipher must be visited by costs orders de bonis propriis in the future. [11]

Caveat subscriptor plea **:** ***...it is clear that it is only invoked where a plaintiff says in as much as I signed the document, I was misled to think that I am assenting to what we had agreed to with the other party. So that when the document is read, it says something or contrary to what the signee perceived to have been assenting to.[17]***

Voetstoots **:** ***This doctrine is to the effect that "let the buyer be aware."[21]***

Summary: The Plaintiff claimed for the return of the sum of E195 000, the purchase price of a motor-vehicle from defendant. The basis for the claim was that the defendant had misrepresented to it that the said motor-vehicle was a 2000 whereas it was a 2005 model. The defendant has raised a special plea of caveat subscriptor.

<u>The Parties</u>

[1] The plaintiff is a company duly incorporated and registered in terms of the company laws of the Kingdom of Eswatini. Its principal place of business is situate at Corner of 13 Street and King Mswati III Avenue, Matsapha Industrial Site, region of Manzini.

[2] The 1st defendant is a company formed and registered as per the company laws of Eswatini. It established its main offices at Plot 150, Nkoseluhlaza Street, Manzini City, region of Manzini.

[3] The 2nd defendant is also a company registered in accordance with the laws of this country. It conducts its principal businesses at Manzini Club, Manzini.

[4] The 3rd defendant is a parastatal organisation tasked mainly with collection of government revenue in the country. Its head office is at Ezulwini Valley, region of Hhohho.

The Plaintiff's Particulars

[5] The plaintiff alleged that sometime in January 2015, it entered into a sale agreement with 1st defendant. The 1st defendant sold plaintiff a Toyota Hiace mini bus manufactured in 2000 with registration number QSD 175 AS. The engine number was 2KD1396211 and chassis number KDH 2005006677. The plaintiff duly paid defendant for the said motor-vehicle a sum of E195 000.00. The blue book

reflected as owner, the 2nd defendant. The plaintiff having paid the agreed purchase price, 1st defendant delivered the motor-vehicle to the plaintiff. Ownership was then transferred to plaintiff on 11th June 2015.

[6] On 24th June, 2015 plaintiff took the motor-vehicle for assessment. A certificate was issued by the assessor. Plaintiff again later took the motor-vehicle for assessment to a different assessor. A second certificate was issued. Both assessors opined that the said motor-vehicle's year of manufacture was 2005-2006, with its maximum market value at E150 000.00. This opinion by the assessors was verified from the chassis number which reflected as year of manufacture 2005 and not 2000.

[7] The plaintiff then pointed out:

> *"17.*
>
> *The plaintiff was able to ascertain that when the Vehicle was imported, the Defendant also misrepresented the Vehicle to the Swaziland Revenue Authority (hereafter "SRA"). By claiming that the value of the Vehicle was E33 588.59 (Thirty Three Thousand Five Hundred and Eighty Emalangeni and Fifty-Nine Cents) and consequently only paying E4 702 40 (Four Thousand Seven Hundred and Two Emalangeni and Forty Cents) in Import Tax. A copy of the SRA Customs Clearance Certificate is attached hereto marked "E".*

18.

Had the Plaintiff known that the details of the Registration Book did not match the Vehicle, it would never would have purchased the Vehicle. To date, the Plaintiff has been unable to insure the vehicle and, as such, the Vehicle is useless to it."

[8] The plaintiff concluded that despite demand for the cancellation of the contract and the return of the purchase price, the defendant refused to return the purchase price. Plaintiff then prayed:

"1 That the Agreement between the Plaintiff and the First Defendant is cancelled;

2. That the first Defendant pays to the Plaintiff an amount of E195 000.00 (One Hundred and Ninety-Five Thousand Emalangeni);

3. That the Plaintiff returns the Vehicle to the First Defendant upon payment of the aforesaid amount along with payment of interest and legal costs;

4. Interest on the amount of E195 000.00 to run at 9% per annum form purchase date of Vehicle to date of final payment by the First and Second Defendants;

5. That costs of this action be granted on attorney and own Client scale due to the fraud;

6. Further and /or alternative relief."

Defendants' Plea

[9] In order not to do injustice by paraphrasing its defence, I hereby quote it *verbatim*:

"1.

AD CAVEAT SUBSCRIPTOR

1.1 Plaintiff's claim is one founded on the sale agreement between the parties wherein Plaintiff claims its cancellation thereof and payment of the sum of E195, 000.00 (One Hundred and Ninety Five Thousand Emalangeni) purchase price, and that the plaintiff returns the vehicle to the 1st defendant upon payment of the aforesaid purchase amount along with payment of interest and legal costs.

1.2 The 1st defendant accordingly pleads that, the basis of Plaintiff's claim is legally ill-conceived as Plaintiff was well aware that the vehicle was sourced from 2nd Defendant, and worse the plaintiff never advertised the vehicle, never issued any guaranteed whatsoever but the plaintiff was interested in it and thereafter plaintiff's director came with his mechanic, vigorously inspected it and its registration papers, took it for a ride and then declared it to be in good condition hence purchasing it.

1.3 The 1st defendant has never prepared any registration documents for the vehicle as the plaintiff was well aware even before purchasing it that the vehicle belonged to the 2nd defendant. This is because the plaintiff's director and his mechanic perused the registration papers and were satisfied with everything.

1.4 To that end, 1st Defendant pleads that the ***Toyota Hiace Mini Bus*** *was sold as is "voetstoots". 1st Defendant never concealed that the 2nd defendant is the owner of the vehicle at the time of agreement nor did it profess to know the model year of the vehicle other than what was written down per the registration papers provided by the 2nd defendant. It is averred that liability would be dependent only on conduct which amounted to fraud on the part of 1st defendant in order to attach liability for the said defect. Plaintiff must show either directly or by inference that 1st defendant actually knew of the defect complained about and further concealed the same.*

1.5 1st defendant further avers that, Plaintiff subsequently went on to bind himself in the agreement and signed annexure "BM1" acknowledging that the vehicle has been received in good condition, having already discussed its terms with 1st Defendant hence plaintiff cannot then change tune now.

1.6 In this regard, it is averred that, Plaintiff is bound by the "Caveat subscriptor" principle being that principle being that he signed the contractual documents and signified his assent thereto thus he cannot then latter attempt to evade the consequences of what he entered into. Even annexure ***"B",*** *annexed by Plaintiff to its Particulars of Claim being the invoice states it clear at the bottom that there shall be no refund of money once a vehicle has been purchased and on that score alone plaintiff's claim stands to fail."*

Preliminary

[10] I must from the onset point out that the 1st defendant has clouded issues by its sub-heading, "*caveat subscriptor*". It has in fact raised a number of distinct pleas other than a *caveat subscriptor*. This is completely undesirable in law. If the 1st defendant wanted to give sub-headings to its pleas, then it should have divided it into various sub-titles. For instance, paragraphs 1.2 and 1.3 is not a *caveat subscriptor* defence. It is a defence denying liability on the basis that it was an agent and not the principal. Para 1.4 is a *voetstoots* defence as defendant alleges that the motor-vehicle was sold with both its patent and latent defects.

[11] It is only paragraph 1.5 and 1.6 where the sub-title *caveat subscriptor* fits. All the above defences cannot be used interchangeably with *caveat subscriptor* defence. The tendency by lawyers not to pay close

attention when using legal terminology will lead to one unbearable scenario and that is a chaotic jurisprudence. Such conduct by Counsel of throwing to the court various defences in one basket for the court to decipher must be visited by costs orders *de bonis propriis* in the future.

***Caveat subscriptor* - its Principles**

[12] It is a maxim to the effect that "*when a person signs an agreement, he or she is taken to be bound by the ordinary meaning and effect of the words which appear above his or her signature.*"[1]

[13] **Pagan CJ (George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 472A** echoed on the same principle:

> *"When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by so doing, his assent to whatever words appear above his signature. … the party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was thus signifying his assent. That must, in each case be a question of fact to be decided on all the evidence led in that particular case."*

[1] **Air Traffic and Navigation Services Company v Esterlinizen (668/2013) [20014] ZASCA 138 (25 September 2014) at para 22**

Case at hand

[14] From plaintiff's Particulars, the circumstances of the case unfolded: The plaintiff's intention was to purchase a motor-vehicle whose year of manufacture was 2000. Similarly, defendant posed to sell plaintiff a motor-vehicle manufactured in the year 2000. Both parties were at *ad idem* on the year of manufacturing of the *merx* as 2000. When plaintiff therefore appended its signature to the document relied upon by defendant (annexure A), it was assenting to a motor-vehicle of 2000. Plaintiff subsequently paid for that *merx* a sum of E195 000. Defendant delivered a merx whose year of manufacture was 2000.

Plaintiff's gripe

[15] Now plaintiff's woes started when he sought to insure the said motor-vehicle. The insurance assessor concluded that the motor-vehicle was a 2005. Plaintiff sought for an independent evaluation. The second evaluation pointed to the same conclusion i.e. the year of manufacture was 2005 and not 2000. The insurer declined to register the motor-vehicle. Plaintiff was left in a predicament as it could not utilize the motor-vehicle without it being insured. Plaintiff opted to resile from the contract.

Defendant's special pleas

[16] The 1st defendant raised as demonstrated above agency. However, when the court reset the matter for the parties to address it fully on 1st defendant's other special pleas, 1st defendant submitted that it was

withdrawing its special plea on agency. The court was addressed on *voetstoots*.

Caveat subscriptor

[17] From the discussed legal principles of caveat subscriptor, it is clear that it is only invoked where a plaintiff says in as much as I signed the document, I was misled to think that I am assenting to what we had agreed to with the other party. So that when the document is read, it says something or contrary to what the signee perceived to have been assenting to.

[18] The plaintiff's case is not that it is not bound by what it signed. The plaintiff is saying that I must be bound by what I signed for. What I gave assent to is not what was delivered to me. I assented to a 2000 model *merx* as depicted on the blue book given to me and annexure A where I appended my signature. It turned out that a *mer*x of 2005 was delivered to me.

[19] So if for instance the plaintiff was saying that when he appended his signature on annexure "A" it had perceived that it was signing for a 2005 model motor-vehicle whereas it later discovered that it however signed for a 2000 motor-vehicle, the *caveat subscriptor* defence might apply in the event the plaintiff fails to establish that its mistake was *iustus*.

[20] In *casu,* as already demonstrated, the plaintiff appended its signature for a 2000 model. The documents given to it were for a 2000 model. It resiled from the contract of sale because the *merx* delivered was not a 2000 model but a 2005. The defence of *caveat subscriptor* must fail for the sole reason that it cannot be invoked in the circumstances of the case at hand.

Voetstoots

[21] This doctrine is to the effect that "*let the buyer be aware"*. So if he buys a *merx*, he does so with all its latent and patent defects if he is granted the opportunity to inspect it. The risk passes on to the purchaser. Turning to the case at hand, it is clear that the plaintiff's gripe is not on the mechanical side of the motor-vehicle. It is complaining that it did not get a 2000 model but a 2005 with books reflecting that it was a 2000 model. It cannot utilize the motor-vehicle as it cannot be insured. ***Voetstoots*** presupposes defects on the *merx*. This is not plaintiff's case. The motor-vehicle is up and running. The only issue is that the model does not correspond to the documents handed to plaintiff. Plaintiff therefore pleads misrepresentation.

Ad merits

[22] The court noted in the plea that the 1st defendant repeated its special pleas in attending to the Particulars of Claim. On this note, the court

invited Counsel to address the court on this matter. 1st defendant Counsel referred the court to paragraph 10.2 which reads:

> *"10.2 1st defendant avers that, the paragraph referred to by Plaintiff in its* ***annexure "C"*** *is inconclusive and speculative as it states they suspect the vehicle is a 2005 or 2006 model. 1st Defendant avers therefore that such leaves the Court to entertain suspicious / speculative allegations which has no weight at all in proving or disproving anything."*

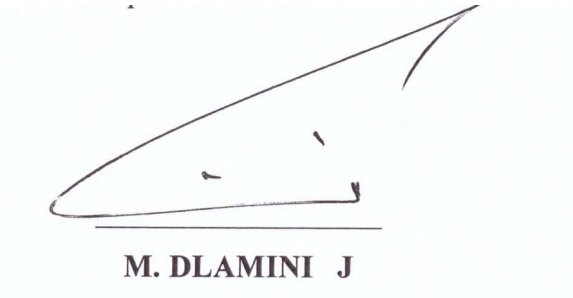
[23] The 1st defendant's attorney submitted that it was in the above allegations that the matter had to be referred to trial. Counsel for the plaintiff supported the submission by 1st defendant's Counsel in that regard.

[24] In the final analysis I enter the following orders:

24.1 1st defendant's special pleas are dismissed;

24.2 The matter is referred to trial on one issue as reflected at paragraphs 22 and 23 above;

24.3 Costs shall be costs in the cause.



M. DLAMINI J

For the Plaintiff : **B. Smith** of Boxshall Smith Attorney's

For the Defendant : **N.E. Ginindza** of N.E. Ginindza Attorneys