

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 452/2022

In Matter between :

THABO CRYIL MAGONGO

PLAINTIFF

And

LAWRENCE MATSE

DEFENDANT

Neutral citation: *Thabo Cyril Magongo v Lawrence Matse*
(452/2020)SZHC 278 [2020] (15 November 2022)

CORUM: Z. Magagula J

Dates heard: 21.04.22, 16.05.22, 09.06.22, 15.06.22, 27.09.22, &
18.11.22

Date delivered: 15.12.22

Summary: *Law of contract- agreement of sale of motor vehicle- motor vehicle delivered to purchaser after test drive-part of purchase price paid- purchaser resiling from agreement three days after delivery on*

grounds that motor vehicle is a "grey" or "import" when he had specifically asked for a "local"

Seller/defendant pleading that plaintiff knew that motor vehicle was an "import"- that agreement cancelled because the motor vehicle broke down- counter-claims for cost of repairs.

Held: Effect of cancellation of contract is that the parties are restored to their respective positions initio.

Held: On a balance of probabilities, the plaintiff's version not only improbable, but false.

Held: further: defendant ordered to refund purchase price less cost of repairs to motor vehicle.

JUDGMENT

- [1] The plaintiff issued a combined summon against the defendant claiming payment of the sum of E 110 000.00, interests at the rate of 9% per annum and cost of suit. The claim is defended.

In its particulars of claim, plaintiff alleged that the parties entered into an oral agreement for the sale of a motor vehicle in about June 2019. Both parties represented themselves. The plaintiff alleged that their agreement was specifically that the defendant was to sell to him a "locally manufactured car" a VW golf 7.

- [2] The phrase "locally manufactured" in this instance is not used to denote that the motor vehicle was manufactured in eSwatini, but it is used to differentiate between the motor vehicle available locally often through the South African market as opposed to vehicle imported directly into this country from abroad, mostly from at Asian countries; Commonly referred to on the street as "imports" as Dubai's" Through out this judgement. I shall use the terms "local" to refer to the former and "import" to refer to the later.

[3] The agreed purchase price according to plaintiff's particulars of claims was the sum of E 120 000. The plaintiff paid the sum of E 110 000 as part payment and the balance of E 10 000 was to be paid in the month of July.

The defendant delivered the motor vehicle to plaintiff on the 15th June 2019, the day the sum of E 110 000 was paid. Plaintiff alleged that he took delivery of the motor vehicle believing it was a "local" and that defendant actually assured him that the motor vehicle was a "local". He then took the motor vehicle to a car wash where another patron informed him that the motor vehicle was not a local but an "import" and pointed to him some features that differentiate between a "local" and an "import"

[4] On the 17th June 2022, two days after delivery of the motor vehicle, plaintiff called defendant to demand specific performance in the sense that or wanted delivery to him of a "local" motor vehicle, alternatively cancellation of the agreement and the sum of E 110 000.00 paid. The plaintiff alleges that the agreement was terminated by mutual agreement consequent to such termination, defendant collected from him the VW golf 7 and undertook to refund him within 2 weeks of the termination. Plaintiff further averred that as a security for the due performance of his obligation to repay the sum of E 11 000.00, the defendant left with him another motor vehicle, an Audi A4. When defendant failed to make payment as agreed, plaintiff instituted the present proceedings.

[5] In its plea, the defendant admitted that the parties entered into an oral agreement for the purchase and sale of a motor vehicle, but stated that the agreement was entered into on the 5th June 2019. Defendant pleaded that the agreed purchase price was the sum of E 150 000.00. That on the 5th June 2019, Plaintiff in the company of a mechanic test drove the motor vehicle and thereafter agreed to pay a deposit in the sum E 120 000 as part payment of the purchase price and to pay the balance thereof at the end of the month of June. Defendant further pleaded that the agreement between the parties was that the motor vehicle was sold as is or *veetstoots*.

[6] The defendant pleaded that 3 weeks after taking delivery of the motor vehicle to plaintiff when he called plaintiff about the balance, he indicated that he was experiencing problems with the motor vehicle. On the 26th June 2019, defendant was called by the serious crime unit of the eSwatin Royal Police service where he was told that he had misreported to the plaintiff

that the motor vehicle he sold him was a "local" yet it was an "import". Plaintiff stated that he did not want the motor vehicle anymore but could take defendant's Audi A4 in exchange and a deal was concluded on those terms.

- [7] When the defendant went to take the golf 7, from plaintiff, had parked it he found that it could not move. He had to transport it with a tow-truck and discovered that the gearbox was damaged. According to the defendant's plea when plaintiff was advised of the problem with the gear box, he told defendant to repair it and he, plaintiff, would re-imburse him the costs thereof.

The defendant further counter-claimed the sum of E 33 000 against the plaintiff in respect of the difference between the value of the Audi A4 at E 95 000, the costs of repairing and acquiring a second hand gear box for the golf 7 at E 48 000.00 and the sum of E 110 000.00 initially paid for the golf 7. Of course the plaintiff denied liability.

- [8] In his evidence in chief, the plaintiff stated that on or about the 12th June 2019 he saw the defendant's wife driving a motor vehicle which had a "for sale" sign on it. When he inquired about it she told him that it had already been sold. She then referred plaintiff to her husband, the defendant, who was in the business of selling motor vehicle, among others things. Together with his friend Melusi Sibandze, the plaintiff went to defendant's place of business at Moneni, Manzini city. They found a golf 7 motor vehicle that defendant confirmed was for sale. They test drove the motor vehicle from Moneni to Elangeni, a distance of some 21 km. he liked the motor vehicle and advised defendant that he wanted to purchase it. Plaintiff said before being shown the motor vehicle, he had specifically indicated to the defendant that he wanted a "local" not an "import"

- [9] The plaintiff said he was told the purchase price of the motor vehicle was the sum of E 140 000.00 he negotiated for a discount and the parties finally-agreed on E 120 000.00. he was to make an initial payment of E 110 000.00 on delivery of the motor vehicle then pay the balance of E 10 000.00 in two weeks. Plaintiff told the court that he paid an amount of E 2 000.00 as some kind of commitment to enable the defendant to change the tyres and perhaps shock absorbers as well.

[10] The day after making payment and taking delivery of the motor vehicle, which he believed was a "local" the plaintiff took it to a car wash. It was at the car was that another patron remarked on the beauty of the motor vehicle, that the import golf 7s looked very similar to the "local" version. The patron then delivered the bad news to plaintiff, that his golf 7 was an import, and proceeded to show him features in the motor vehicle that were only available in the import version . This, plaintiff said surprised him.

[11] The next day, a Sunday, plaintiff drove the motor vehicle to a friend of his has mare knowledge about cars, Mciniseli Zwane who confirmed that the motor vehicle was an "import". That same evening , plaintiff parked the motor vehicle at his work place, Nedbank, main branch, in Manzini, called the defendant and told him that he has disvored the motor vehicle was an "import". On the following Thursday plaintiff went to make a complaint at Manzini Regional Police headquarters that he had been defrauded by the defendant. Plaintiff explained that the defendant had agreed to take the motor vehicle, sell, it and refund him, the purchase price, he said he made the back complaint because he was not sure whether or not defendant would keep his promise.

[12] The police arranged a meeting between them where at defendant confirmed that he would take the golf 7 sell it and refund the plaintiff; that he would leave his other motor vehicle, an Audi A4 with plaintiff as surety. Defendant parked the Audi at plaintiff's place of employment gave the keys and registration documents to him. The plaintiff said he then got a telephone call from defendant who informed him that the golf 7 had broken down. He advised defendant to wait for him until noon when he could be free, so he could also see what was wrong with the motor vehicle. When he knocked off at noon he found the motor vehicle gone and the security officer who was present told him that the motor vehicle was pushed out of the Nedbank premises gate after that it was able to drive off-on under its own power. When plaintiff finally went to defendants place, he was told that the problem was the gear box. This surprised the plaintiff because, according to him, he had only driven the motor vehicle for two days. Plaintiff said he never agreed to repair or pay for the repair to the golf 7 and defendant after several days when they could not reach an agreement with defendant. Plaintiff opted to instruct his attorney. Plaintiff stated that he never used the Audi. It is still parked where it was left by the defendant.

[13] In Cross-examination, plaintiff denied that the purchase price agreed upon was the sum of E 150 000.00, he maintained that the parties had agreed on E 120 000.00, but he conceded that he introduced Melusi Sibandze to the defendant as a mechanic who had come to assist him determine if the motor vehicle was in a road worthy condition. It was put to the plaintiff that when he indicated his willingness to purchase the motor vehicle from defendant he did not say he was doing so because he thought it was a "local", or because he was informed it was a "local", he bought the motor vehicle that was being sold by the defendant as it was, of course, he denied this.

[14] The plaintiff called Mr Mandlenkhosi Junior Magongo as his second witness, Mr Magongo is a work colleague of the plaintiff. He told the court he recalled that some time during the month of June 2019 he had cashed a voucher for E 108 000.00 on behalf of the plaintiff. He said the money was paid to the defendant who asked that some of the money be paid in South African rands. PW2 said the sum of E 108 000.00 was for payment of a "locally manufactured" VW golf 7.

[15] It is not apparent how he could have come upon this information unless he was told by the plaintiff. His evidence does very little to enhance the plaintiff's case. Most of it sounds like it was tailor-made to corroborate the plaintiff's version even in parts where it adds no value. The plaintiff also called Melusi Sibandze. Mr Sibandze stated that he went to test drive the motor vehicle with the plaintiff. He sated that plaintiff had specified that he wanted to purchase a local as opposed to an import. On their way towards Langeni, on the test-drive the defendant was driving and he, PW3 drove on the way back for the first time the court heard from this witness that the defendant had said the motor vehicle was previously owned by a white-man who used to be employed by eSwatini Breweries. He said there were no indication on the motor vehicle both inside and outside that distinguished it as he was not a mechanic but a mechanical technician but on a part time basis he did service motor vehicles for his friends.

[16] In his defence, the defendant told a different tale to that of the plaintiff and his witness. The defendant told the court that his business in the buying and selling of motor vehicle including accident damaged motor vehicle. He said he got a telephone call from the plaintiff who told him that that he had been told that he was selling a motor vehicle. He was referring to the motor vehicle he had seen defendant's wife driving. When he was informed that

there was a Golf 7 available if he was interested, he came to take a look. Later on he test-drove the motor vehicle. When he test-drove the motor vehicle, he was in the company of a mechanic. The plaintiff complained about the tyres on the motor vehicle and said they should be changed. After test driving the motor vehicle plaintiff indicated that he was satisfied with it and offered to purchase it.

- [17] He paid the sum of E 2 000.00 as a commitment in order to have the tyres changed. The plaintiff had been told that the purchase price was the sum of E 150 000.00 . On the day the motor vehicle was delivered, plaintiff paid the sum of E 108 000.00 and said with the E 2 000.00 paid earlier, the had made payment of the sum of E 110 000.00. The plaintiff undertook to pay the balance in three weeks time. Defendant was then away in South Africa for the better part of the of the month of June and on his return, on a Monday he got a call from plaintiff who informed him that the motor vehicle dash board was showing a fault warning light. On Tuesday morning defendant, defendant got called to the Manzini Regional (Police) Headquarter to answer to the plaintiff's complaint of fraud.
- [18] The defend told the court after hearing his side, the police officer, a Mr Msibi advised the parties to discuss the matter among themselves. The plaintiff demanded to be given another motor vehicle other than the golf 7. Eventually the plaintiff agreed to accept an Audi A4 which was delivered to him. When defendant suggested that the golf 7 be sold he indicated that he did not care about it anymore. When defendant tried to drive away the golf 7 from where the plaintiff had parked it he found that it was not drivable. Defendant arranged breakdown to tow the motor vehicle to his garage in Moneni. In time plaintiff came to look at the motor vehicle and discussed ways of repairing same with defendant. Defendant purchased a second a second hand gear box in South Africa for the sum of E 38 000.00 and paid E 10 000.00 to have it fitted-throughout this process the defendant kept the plaintiff informed. The plaintiff saw the defendant driving in the motor vehicle after it was repaired and he called him on the telephone and asked that he should have the motor vehicle back now that it had been repaired . the defendant said the plaintiff had agreed to fund the repairs of the motor but then refused to pay when the motor vehicle had been repaired.

[19] The defendant told the court the oral agreement of sale of the motor vehicle was entered into on the 5th June 2019, and that about two to three weeks elapsed between the sale and the date he was called at the Police Regional Headquarters. Defendant said the motor vehicle was pushed out of the Nedbank premise in neutral, it was able to run down the slope after the gate as it was an incline and it was then loaded onto a breakdown.

[20] In respect of the counter-claim the defendant stated that the plaintiff had agreed to fund the repairs to the golf 7. He told the court that he purchased a second-hand gear box which costs E 38 000.00 and he paid the sum of E 10 000.00 to have it fitted. To this, he added the difference between the purchase price of the golf 7 paid (E 110 000.00) and the value of the Audi A4 E 95 000.00. the defendant then claimed the sum of E 43 000.00 being the difference.

[21] The second witness for the defence was Philemon Zweli Lukhele. He confirmed that he was present when the motor vehicle was delivered to the plaintiff and that when the motor vehicle came retrieved from the plaintiff, it was brought by tow-truck. This witness also told the court that the motor vehicle was with plaintiff for three weeks. The defendant also called Victor Mashaba who was employed by an import motor vehicle dealership called Nagra motors. He told the court that some time in June 2019, the plaintiff came to his workplace and asked if they could change the registration of the motor vehicle from the dealership's name to his name. The witness told the court that it was his duty to clear or attend to the change of registration of motor vehicle to customers who had purchased motor vehicles from his employer.

[22] It was Mashaba's evidence that he declined to assist the plaintiff because the motor vehicle had been purchased from them by the defendant. The plaintiff was told that he would have to get the defendants permission to have the motor vehicle transferred to him. This witness was carrying the motor vehicle registration documents or blue book.

[23] The plaintiff is alleging that he was induced to enter into the contract by the representation or misrepresentation made to it by the defendant. The plaintiff insisted in pleadings and in evidence (oral) before this court that he expressly told the defendant he wanted to purchase a "locally manufactured motor vehicle.

"misrepresentation or representation of incorrect facts which thereby induces the purchaser to buy or enter into a contract vitiates consent and the contract is void ab initio"

- [24] Per Matsebula AJA [as he then was] in **Zinhle Maseko/Mdluli vs Alodonia Lapidos and two others** [16/2019] [2019] SZHC 54 (28 November 2019). In the court were to find that the plaintiff was induced to enter into the contract by any misrepresentation made by the defendant, then the agreement would be null and void ab initio – the consequences of a void contract were eloquently stated by **LaNgwenya J in Mbongiseni Sihlongonyane vs the Commissioner of Police and two Others** (1113/2014) [2019] SZHC when she stated.

"where a contract is cancelled (whether unilaterally or by agreement) the general principle is that the parties are required to return everything received thereunder. This applies equally to the 'guilty' party and the innocent party...."

- [25] The court has first to satisfy itself that the agreement and/ or that the party claiming to have cancelled the agreement had a lawful reason to so. In order to arrive at this all important conclusion, the court has to weigh the evidence of each party. OTA JA (as she then was) stated in **James Ncongwane v Swaziland water Services Corporation** appeal case no: 52/2012

"...In this venture, the court is required to first of all put the totality of the testimony adduced by both parties on or imaginary scale. It will put the evidence adduced by the plaintiff on the one side of the scale and that of the defendant on the other side and weight them together. It will then see which one is heavier not by the number of witnesses called by each party, but the quality or the probative value of the testimony of those witnesses"

- [26] The evidence of the parties is mutually destructive in that other than the fact a motor vehicle, a VW golf 7 was delivered to plaintiff by defendant and that presently the plaintiff is in possession of another motor vehicle the Audi 4, every other piece of evidence is to a large extent disputed. In dealing with mutually destructive versions, the approach to be applied was spelt out by **Eksteen AJP in National Employers General Insurance Co. Limited v Jogars** 1984 (4) SA 437 E at 440E to 441A

"It seems to me with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests in a civil case the onus is obviously not as heavy as it is in a Criminal case, but never the less where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and fails to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of credibility of the witness will therefore be inexplicably bound up with a consideration of the probabilities of the case and if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false"

[27] The technique to be applied in circumstances where the trial court is faced with two irreconcilable versions was laid down in **Stellenbosch Farmers winery Group LTD v Martell et Cie 2003 (1) SA (1) (SCA)**. To come to a conclusion on the disputed issues a court must make findings on the following;

- (a) *The credibility of the various factual witnesses*
- (b) *Their reliability and;*
- (c) *The probabilities*

As to (a), the courts finding on the credibility of a particular witness will depended on its impression about the veracity of a witness; that will in turn depend upon a variety of subsidiary factors such as:

- (i) *The witness candour and demeanor in the witness box*
- (ii) *His bias latent or blatant*

- (iii) *Internal contradictions in his evidence*
- (iv) *External contradictions with what was pleaded or put on his behalf or with established fact or extra curial statements or actions*
- (v) *The probability or improbability of particulars aspects of his version the list is not exhaustive*

[28] As to (b) the witness reliability will depend, apart from the factors mention in (a) above on;

- (i) *The opportunity he had to experience or observe the event in question and ;*
- (ii) *The quality, integrity and independence of his recall thereof.*

As to (c) this necessitates an analysis and evaluation of the probability or improbability of each parties version on each of the disputed issues. In light of the assessment of (a), (b) or (c) the count will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.

[29] This task is not made any easier by the fact that while the onus of proving the Principal claim lies on the plaintiff. The defendant is burdened equally with the onus of proving his counter claim.

According to the plaintiff he saw a motor vehicle driven by defendant's wife being advertised for sale. He showed an interest therein and was advised that it had already sold but he could contact the defendant as there was another motor vehicle for sale. In time plaintiff went to see the motor vehicle, it was the VW golf 7. What is in my mind is that the plaintiff offered to purchase the motor vehicle that he inspected and test drove. It is difficult for me to conclude that having been shown a motor vehicle available for purchase, he actually placed an order for a different one.

[30] Plaintiff took delivery of the motor vehicle on the Friday, went to the car wash on Saturday where he was informed that the motor vehicle was an "import", drove it to his church mate on Sunday parked it. On Monday and reported the crime of fraud on Monday. If the intention was to terminate the contract of sale, then why not call the defendant , or drive to his place

of business on the Monday, surrender the motor vehicle and demand restitution.

- [31] It seems to me safe to conclude that the reason behind the cancellation of the agreement is that the motor vehicle broke down. The plaintiff's two witness unfortunately did not advance his version. PW2, Mr Junior Magongo's evidence is clearly unbelievable. His insistence that the plaintiff wanted to purchase a "local" motor vehicle is of no probative value because that might be what was said to him, but his evidence was not that defendant was told the same thing. PW3, Mr Melusi Sibandze as a person who dabbles in servicing motor vehicles would have been able to tell the difference between a "local" and an import. The plaintiff's version is not only unbelievable, it is in my opinion, false.
- [32] The defendant led evidence that he purchased a pre-used gear box for the sum of E 38 000.00 and further paid the sum of E 10 000.00 to have it fitted into the motor vehicle. Defendant is claiming payment of this amount – set-off against what plaintiff paid for the VW golf 7. Essentially he is claiming payment of the sum of E 33 000.00
- [33] The court is now called upon to determine whether or not on the available evidence, the plaintiff is liable to pay the sum of E 33 000.00 to the defendant in respect of the repairs to the motor vehicle. The defendant testified that plaintiff agreed to pay for the repairs to the motor vehicle and that he kept him informed of all developments concerning the purchasing and fitting of the gear box. This of course is denied by plaintiff. He countered by saying he did go see the motor vehicle at Moneni but did not agree to pay for the repair.
- [34] From the available evidence one can deduce that the motor vehicle broke down while in plaintiff's possession. It has not been alleged that the plaintiff acted negligently, resulting in the damage to the motor vehicle. Negligence is the basis of liability, but negligence must be alleged and proved.

[35] **Agyemena J** (as she then was) in **Mina Sibhenya Vilane v Manzini City Council** (unreported) civil case no: 2324/06 stated


“ But it is tute learning that when a party grounds on action in negligence, the act relied on as constituting the duty of care which the defendant had towards the plaintiff, had to be set out and proven ”

What remains to be considered is whether the plaintiff did correct to carry the repairs of the motor vehicle.

- [36] Having accepted that the motor vehicle broke down while in the possession of the plaintiff, and that the plaintiff apparently sought to conceal this fact by terminating “ The agreement of sole, it appears to me only fair and just that he should be liable for making good the damage that he caused. It behooves repeating that plaintiff’s conduct in this transaction was less than *condid*. If the motor vehicle had broken down in the normal cause of use, it was a pre – owned vehicle after all – there were better ways of handling it including but not limited to litigation.
- [37] in the absence of evidence controverting the defendants evidence that he purchased a second – hand gear box for the sum of E 38 000.00 and paid the sum of E 10 000.00 to have it fitted. I find no reason why this court should not find for him in the counter claim.

In the premise I make the following order;

1. The defendant is ordered to pay to the plaintiff the sum of E 75 000.00
2. The plaintiff is ordered to deliver to the defendant the Audi A4 motor vehicle with its registration documents in good working-order or road worthy condition.
3. Each party to pay its own costs.

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Z. Magagola
Judge of the High Court

Appearance :

Ms Ntshangase [NTM Ndlovu Attorneys]

Mr Sibandze [Rodrigues and Associates]