



# IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1869/2023

In the matter between:

**BUSISIWE ALICE KUNENE**

Plaintiff

And

**SHIZUOKA MOTORS INVESTMENTS (PTY) LTD t/a**

**SHIZUOKA MOTORS**

Defendant

**Neutral Citation:** *Busisiwe Alice Kunene v Shizuoka Motors (Pty) Ltd t/a Shizuoka Motors (1869/2023) [2024] SZHC 39 (12 March 2024)*

**CORAM:** **N.M. MASEKO J**

**FOR PLAINTIFF:** **M.V. NXUMALO**

**FOR DEFENDANT:** **N. PILISO**

**HEARD:** **22/12/2023**

**DELIVERED:** **12/03/2024**

**Preamble:** Civil Law – Civil Procedure – Combined Summons – Summary Judgment proceedings – Defendant to prove *bona fide* defence which is good in law and the existence of triable issue(s) necessitating the matter to go to trial – *In casu* the Defendant has not adduced a *bona fide* defence and triable issue(s) in the Plaintiff's claim for Summary Judgment.

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## JUDGMENT

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- [1] On the 09<sup>th</sup> August 2023, the Plaintiff sued out a Combined Summons against the Defendant for the payment of the sum of E100 000-00 (Emalangeneni One Hundred Thousand) interest thereon at the rate of 9% a *tempore morae*, and costs of suit at attorney and own client scale. Upon service of the Combined Summons the Defendant filed a Notice of Intention to Defend and the Plaintiff launched these Summary Judgment proceedings. The amount of E100 000-00 claimed is in respect of a motor vehicle which was sold and delivered to the Plaintiff by the Defendant on or about the 7<sup>th</sup> September 2022. The motor vehicle is described as follows:-

MAKE:	VW POLO
REGISTRATION NO:	CSD 793 DH
ENGINE NO:	CBZ O93 739
CHASSIS NO:	WVW ZZZ 6RZAU 071414
COLOUR:	RED

- [2] It is common cause that the Plaintiff paid a deposit of E75 000-00 (Emalangeneni Seventy Five Thousand) and the balance of E25 000-00 (Emalangeneni Twenty Five Thousand) to be paid in monthly instalments. The Plaintiff paid a further E15 400-00 (Emalangeneni Fifteen Thousand, Four Hundred) and a balance of E9 600 -00 (Emalangeneni Nine Thousand, Six Hundred) remained outstanding.

- [3] On the 22<sup>nd</sup> May 2023, the Defendant obtained an order to attach the aforesaid motor vehicle pending the payment of the balance of E9 600-00. Indeed the motor vehicle was attached as a result of the Court order.
- [4] It is common cause that the Plaintiff eventually settled the balance of E9 600-00 and further paid legal costs of E4 860-00.
- [5] It appears that after the execution of the order, the motor vehicle whilst being driven by ad hoc messenger of the Court after its attachment from the Plaintiff was involved in an accident, and according to the Plaintiff it was a write off. The Defendant on the other hand states that the motor vehicle was damaged but is in a state of repair.
- [6] The Plaintiff states that the Defendant never informed her that the motor vehicle was involved in an accident and never produced a police report of the accident to her. She argues that she was made to pay the balance of E9 600-00 plus E4 860-00 legal costs totally unaware that the motor vehicle was a wreck lying in the Defendant's garage. She states that she only discovered the motor vehicle in that state when she went to the Defendant's garage to claim possession of it after she had fully paid for the aforesaid motor vehicle in full.
- [7] The Plaintiff states that when she negotiated the payment terms of the balance of E9 600-00 plus the legal costs she was never informed that the motor vehicle had been involved in an accident. She states that the Defendant is holding on to her E100 000-00 and has not replaced the motor vehicle with another car of a similar make and value and accident free. She argues that the Defendant's refusal to pay her back her E100

000-00 and the failure to replace her car constitute unjust enrichment in the circumstances. The Plaintiff states that the Defendant has filed or entered an intention to defend the action proceedings solely to delay her claim because the Defendant has no *bona fide* defence to her claim. She states that it is not in dispute that she paid for the aforesaid VW Polo in full and that the motor vehicle was involved in an accident and is still in the possession of the Defendant.

- [8] On the other hand the Defendant states that it has a bona fide defence in that although the motor vehicle was involved in an accident along the Sidvokodvo Manzini public road it was slightly damaged in that only the fender, bonnet, windscreen and other parts were damaged but it is in a repairable state.. The Defendant states that the Plaintiff has not established a cause of action against the Defendant in as much as the accident was never caused by the Defendant. The Defendant states further that the Plaintiff's claim is one of damages where the Plaintiff has a duty to prove diminution in value of the item which is the subject matter in monetary value, and that the Plaintiff has not proven such. The Defendant states further that this is not a suitable case for Summary Judgment because the Plaintiff's claim is not one based on a liquid document.

**ANALYSIS OF THE MATTER AND THE LAW APPLICABLE:**  
**SUMMARY JUDGMENT:**

- [9] Summary Judgment is governed by Rule 32 of the Rules of Court. For ease of reference, I will reproduce Rule 32 (1) and (2) as follows:-

"32 (1) Where in an action to which this rule applies and a Combined Summons has been served on a defendant or a declaration has been delivered to him and that defendant has delivered Notice of Intention to Defend, the plaintiff may, on the ground that the defendant has no defence to a claim included in the summons or to a particular part of such claim, apply to the Court for Summary Judgment against the defendant.

- (2) This rule apply to such claims in the summons as is only –
- (a) on a liquid document
  - (b) for a liquidation amount of money
  - (c) for delivery of specified movable property; or
  - (d) ejectment

together with any other claims for interest and costs.

[10] The question *in casu* is whether there is **"a liquid document"**, and /or whether the amount claimed by Plaintiff is **"a liquidated amount of money"**. It appears to me that both sub-rule 2 (a) and (b) apply *in casu*.

[11] There is no doubt and it is not denied that the amount of E100 000-00 was paid in full by the Plaintiff for the motor vehicle, and that to date hereof the Plaintiff has not been afforded possession of the aforesaid VW Polo because it was damaged in a road traffic accident whilst in the possession of an ad hoc messenger of the Court, whilst in the execution of an interim order obtained by the Defendant. There is the contract for the sale of the motor vehicle as well as the receipts for the payments of the aforesaid motor vehicle.

- [12] The Plaintiff is not claiming for damages but a refund of the E100 000-00 purchase price which she paid for the aforesaid motor vehicle. The Defendant had a legal duty to disclose the accident to the Plaintiff as soon as it happened in order to maintain a relationship of trust between the parties. The Defendant was also under a legal duty to repair the motor vehicle with the knowledge of the Plaintiff if she had approved of the repairs, but to keep her E100,000.00 and the motor vehicle clearly constitute unjust enrichment on the part of the Defendant.
- [13] It is unfortunate and unfair on the part of the Plaintiff that she discovered that the motor vehicle was a wreck when she had fully paid for it and wanted to collect it. It bothers the mind why she was not informed timeously about the accident when she was still struggling to pay the balance of E9 600-00 plus the legal costs. Further she has stated that she was not even provided with a police report of the road traffic accident, this again does not demonstrate any *bona fides* on the part of the Defendant.
- [14] The Plaintiff and Defendant entered into the contract of sale of the aforesaid motor vehicle on the 9<sup>th</sup> September 2022 wherein the Plaintiff paid the E75 000-00 deposit and assumed possession of the motor vehicle. It was a term of the contract that she was to pay the balance of E25 000-00 within a period of six (6) months at E4 166-00 per month. She defaulted on the payments and the motor vehicle was repossessed from her. She did not forfeit her E75 000-00 deposit and the additional E15 400-00 which she had paid whilst in possession of the motor vehicle. The Court order is very clear that the motor vehicle is being attached pending payment of the balance of E9 600-00 plus legal costs.

[15] In the case of **MTN Swaziland v ZBK Services Case No. 3279/2011** Ota J, stated as follows at para 7:-

[7] In the Supreme Court of Swaziland Case of **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/07**, the Court enunciated these principles as follows, per Ramodibedi JA (as he then was):

“It is well-recognised that Summary Judgment is an extraordinary remedy. It is a very stringent one for that matter. This is because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for this reason that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the Defendant has no bona fide defence and where the appearance to defend has been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a plaintiff's claim against a defendant to which there is clearly no valid defence----”

[16] There is no way by which these proceedings have the potential to cause an injustice to the Defendant because there is no dispute that the Plaintiff paid in full for the aforesaid motor vehicle which is currently in the possession of the Defendant. There is no triable issue as regards the payment of the E100 000-00 and similarly there is no triable issue as regards the fact that the motor vehicle was damaged whilst in the possession of the Defendant.

[17] The affidavit of Zanele Motsa the Defendant's Credit Manager clearly demonstrates paragraph 4.3 that the aforesaid motor vehicle was indeed extensively damaged, *inter alia*:-

- damaged bonnet
- damaged windscreen

- damaged fender
- damaged other parts

[18] In the case of **Maharaj v Barclays Bank Ltd 1976 (1) SA 418 AD 236** para 15 Corbett CJ stated as follows when dealing with the defence by a Defendant resisting Summary Judgment:-

“[15] Accordingly, one of the ways in which a defendant may successfully oppose a claim for Summary Judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts are alleged by the plaintiff in his summary, or Combined Summons, are disputed or new facts alleged consisting a defence, the Court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. All that the Court enquires into is:-

- (a) whether the defendant has fully disclosed the nature and grounds of his defence and:
- (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse Summary Judgment, either wholly or in part as the case may be.”

[19] On the facts as disclosed in the Defendant’s affidavit resisting Summary Judgment, there is no bona fide defence good in law which the Defendant had advanced *in casu*.

[20] **Herbstein and Van Winsen** in their book titled *THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA 5<sup>th</sup> Ed, Juta 2012* define a liquidated amount in money as follows at page 519-520:-

‘A claim cannot be regarded as one for a liquidated amount in money unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a matter of mere calculation. According to Pothier-



“a debt is liquidated when it is evident that it is due, and to what amount *cum certum est an et quantum debeatur*. Even if it be evident that it is due, if it is not clear to what amount it is so, and if the liquidation depends on an account of which a long discussion would be necessary, the debt is not liquidated----”

In *Oos-Randse Bantoesake Administrasie v Santam* 1978 (1) SA 164 (W) at 168 Coleman J expressed a similar view, namely, that if the exact amount has not been fixed by agreement or by a Court **a money claim could still be regarded as a liquidated amount if the ascertainment of the amount would be a matter of mere calculation. He added the proviso, however, that the data upon which such a calculation was to be based would themselves have to be amounts about which there was no reason for uncertainty, estimation or debate.** (my emphasis)

**He, however, expressed the view that if a claim is based on contract, the probabilities are that its existence and character could speedily and promptly be proved to the satisfaction of the Court and that in our organised society with businesses, trades and professions organised as they are, it would normally not be difficult to determine the usual and current market price of articles sold or the reasonable remuneration for services rendered.** (my emphasis)

The nature of the cause of action is irrelevant to a determination whether the claim is liquidated or otherwise.”

[21] *In casu* the Plaintiff's claim is based on the refund (payment) of the purchase price of the aforesaid motor vehicle which was repossessed by the Defendant from the Plaintiff pending payment of the purchase price of E100 000-00 in full. The aforesaid motor vehicle was involved in an accident after it had been repossessed by the Defendant, and the fact of the accident was not disclosed by the Defendant to the Plaintiff, she only discovered that the aforesaid motor vehicle was extensively damaged after she had paid for the car in full when she went to the Defendant's garage to collect her car.

[22] Documents that prove the Plaintiff's claim comprise of the contract of sale itself together with the receipts for all the payments including the legal costs of the repossession of the motor vehicle. The point is that the Plaintiff demands payment of the E100 000-00 being the full purchase

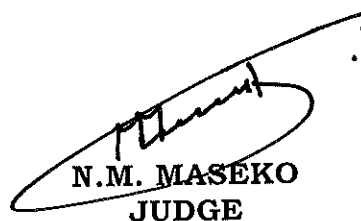
*pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.*

[33] *Having regard to its purpose and its proper application, Summary Judgment proceedings only hold terrors and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj's case at 425G-426E."*

[24] *In casu* the Plaintiff fully performed her obligations by paying the E100 000-00 in full for the aforesaid motor vehicle and on the other hand the Defendant has failed to disclose a bona fide defence which raises a triable issue or issues warranting this matter to be referred to trial.

[25] In the circumstances, I hereby grant Summary Judgment in terms of prayers:-

- I. (a), (b) and (c) of the Application for Summary Judgment dated with Registrar's stamp of the 5<sup>th</sup> September 2023.

  
**N.M. MASEKO**  
**JUDGE**