APPEAL CASE NO.25_02

In the matter between:

THOMAS KIRK APPELLANT

VS

FARREL DUNN RESPONDENT

CORAM LEON JP

STEYN JA

TEBBUTT JA

FOR APPELLANT : ADV. P.E. FLYNN

FOR RESPONDENT : MR. J.T. RODRIGUES

JUDGMENT

Tebbutt JA:

The interpretation of a document, which purported to be an agreement of sale, was the issue in this appeal.

The appellant, on notice of motion, sought an order in the High Court directing the respondent to deliver forthwith to him a 1988 Toyota Hino Truck SD 927 GS which he alleged he had bought from the respondent in terms of a written deed of sale. He averred that he had paid the purchase price of E30 000, 00 for it but despite being requested to do so, the respondent had failed to deliver it to him, hence his application.

The respondent's averment, in response to the application, was that the transaction between and the appellant was a loan of E30

000,00 which the appellant had made to him and although the written agreement purports to be a deed of sale, it in fact reflected the loan and the terms and conditions relating to the repayment of it. There was therefore in reality no sale of the truck by him to the appellant. He had also tendered repayment of the E30 000,00 to the appellant which the latter had refused to accept. He again tendered it in his opposing affidavit.

In considering whether the document in question gave rise to an enforceable agreement of sale, Sapire CJ found that its terms were so uncertain that it could not be enforced and refused the application, with costs.

It is against that judgment that the appellant came on appeal to this Court.

At the conclusion of the hearing of the appeal the Court dismissed it, with costs and stated that it

would file its reasons for so doing later. These are the reasons.

It is clear - as Mr. Flynn, who appeared for the appellant, conceded - that unless the appellant could establish that the agreement between him and the respondent was an agreement of sale, his application had rightly been dismissed by the court a aquo and that, in consequence, his appeal must fail. I accordingly set out the agreement, which is very short, in full. It reads as follows:

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"FULL AND FINAL DEED OF SALE

BETWEEN FARRELL DUNN Representing D & O MARKETING

AND THOMAS KIRK

One 1988 Toyota HINO Truck SD 927 GS

Full purchase price = E30,000.00 (thirty thousand Emalangeni)

Paid in full cheque Number 0139

Conditions of Sales

This sale is subject to an expressed 14 days buy back period agreement between both parties.

Payment to be effected in full on signature of this agreement. This truck must be insured.

As excess or uncovered damages. Farrel Dunn pledges his NISSAN LDV SD 785 PM for all full costs.

Purchaser's Signature Seller's Signature

Witnesses: Witnesses:

1. _____ 1. _____

2. _____ 2. _____"

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Although the respondent is referred to in the document as "representing D & O Marketing" it is common cause that nothing turns on this.

It is obvious from the wording of the document that it was drawn up by a layman and not a lawyer. The heading "Full and Final Deed of Sale" is evidence of that. It would seem, however, that that wording was used to attempt to cloak what was a loan agreement with the trappings of a deed of sale. That would also appear from other wording in the document.

It is common cause that the E30 000,00 was paid by cheque on the day the agreement was entered into. The document states "Paid in full cheque number 0139". The words "Payment to be effected in full on signature of this agreement", which could obviously not refer to respondent's

so-called option to repurchase, were therefore meaningless unless they were intended, again, to obfuscate the true nature of the agreement.

The condition that the "truck must be insured" gives rise to further doubt as to what the agreement really was. The appellant avers that it was the respondent's obligation to insure the truck. He says that he paid the premium in respect of it for the respondent and it is common cause that he sought to reclaim the amount of it viz E11 192,00 from the respondent. That amount represented a full year's premium. Again one asks, if the appellant had bought the truck and become the owner of it, why the respondent should pay a year's premium? If, however, the vehicle was to serve as security for repayment of a loan, then imposing the responsibility on the respondent to insure it makes sense. It cannot be argued that it was only to cover the 14-day buy-back period because what was claimed by appellant was the premium for a full year's insurance.

The "buy-back" portion of the agreement is equally vague. In his founding affidavit the appellant averred that the respondent had "an option" to repurchase the truck within fourteen days. In his

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opposing affidavit the respondent said that he had exercised that "option", if such it be, by repayment of the E30 000,00. Faced with this, the appellant said that what was intended was that after the 14 day period, if the respondent said that he wanted to exercise his "option", the two of them would have had to negotiate a purchase price on a willing-seller and willing-buyer basis. There is nothing to suggest this. Again, the "buy-back" seems to me to be nothing other than a reflection of a loan for 14 days and that the loan agreement would cease to exist in the event of the respondent repaying the loan within the 14-day period. The vague wording of the "buy-back option" certainly does not support the appellant's contention that the document reflects a valid enforceable agreement of sale.

Finally, the purported pledge by respondent of his Nissan LDV "for all full costs" of "excess or uncovered damages" has no place in what appellant avers is a simple agreement of sale of a defined merx, i.e the truck, for a purchase price of E30 000,00. It would, however, not be out of place as additional security for such items as the insurance premium and any other costs connected with a loan and its repayment.

The onus was on the appellant to establish an enforceable agreement of sale. For the reasons set out above, he failed to do so and the learned Chief Justice was therefore correct in dismissing his application. It followed that this Court should dismiss the appeal which, as stated above, it did, with costs.

DELIVERED IN OPEN COURT THIS 22nd DAY OF NOVEMBER 2002.

P.H. TEBBUTT

JUDGE OF APPEAL

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I agree

R.N. LEON

JUDGE PRESIDENT

I agree

J.H. STEYN

JUDGE OF APPEAL