

IN THE HIGH COURT OF SWAZILAND**DAVID MAKHUBU t/a EKHWEZI GROCERY**

Applicant

And

T & F MOTORS (PTY) LTD

Respondent

Civil Case No. 3274/2006

Coram	S.B. MAPHALALA - J
For the Applicant	MR. S.P.MAMBA
For the Respondent	MR. A. LUKHELE

JUDGMENT14th September 2007

[1] Serving before court is an application in the long form for an order in the following terms:

1. Directing the Respondent to repay to the Applicant the sum of E35, 000-00 (Thirty Five Thousand Emalangi) being in respect of the purchase price of a motor vehicle sold by the Respondent to the Applicant to wit;

MAKE:	Nissan L.D.V
MODEL:	1995
ENGINE NO:	LI84-266445G
CHASSIS NO:	J043867
REGISTRATION NO.:	SD 543 EN

2. Interest thereupon at the rate of 9% per annum calculated from the date of service of this application on the Respondent to the date of payment;

3. Costs of application;

4. Further and/or alternative relief.

[2] The founding affidavit of the Applicant relates at length the history of the matter leading to the dispute between the parties. An agreement between T & F Motors (Pty) Ltd ("the Respondent") and Ekhwezi Grocery (cited as "the Applicant) in this matter is attached. A letter from the Regional Commander, Manzini to Applicant's attorneys dated 8th August 2006 is also filed. A Blue Book of the motor vehicle is also filed.

[3] The Respondent oppose the granting of this order and has filed an Answering affidavit of one Fernando Rocha who is the Managing Director of the Respondent. In the said affidavit annexures are attached being a police clearance certificate, a gate pass/certificate of clearance and a letter from Applicant's attorneys Dunseith Attorneys to the Central Registry Office dated 27th September 2006.

[4] In arguments before me Counsel for the Respondent *Mr. Lukhele* submitted that the matter ought to be referred to oral evidence as there are disputes of fact. In this regard the court was referred to the provisions of Rule 6 (1) of the High Court Rules.

[5] On the other hand Counsel for the Applicant contended that there are no disputes of facts in this matter and that the court can rule the issues on the papers as they stand. Counsel for the Applicant filed very comprehensive Heads of Argument on the issues for decision. The gravamen of the argument offered is that the Respondent having failed to set out its version of the relevant facts but only contended itself with a bare or unsubstantiated denial amounts to an admission by the Respondent that it was indeed an implied term of the agreement that the Applicant had a warranty against eviction in respect of the motor vehicle.

[6] In this regard Counsel for the Applicant referred the court to a number of legal authorities including *Aimer's Precedents of Pleadings, 3rd Edition* at page 311, the cases of *Lammers and hammers vs Glovannoni 1995 (3) S.A. 385 (A)*, *Olivier vs Van der Berch 1956 (1) S.A. 802*, *Garden City Motors (Pty) Ltd vs Bank of the Orange Free State Ltd*

1983 (3) S.A. 104 (N), *Westeel Engineering (Pty) Ltd vs Sidney Clow & Co. Ltd* 1968 (3) S.A. 458 and also *John's Transport (Pty) Ltd vs Manual Roberio - Civil Case No. 197/2000 (unreported)* at pages 6 - 7.

[7] The Applicant further contends that he gave proper notice to the Respondent of the seizure of the motor vehicle by the police and solicited its assistance in defending its rights to own and possess the motor vehicle or its title thereto. The Respondent was unsuccessful in assisting the Applicant reclaiming its motor vehicle from the police. Besides and in the event the court holds that no proper notice was given to the Respondent to assist Applicant defend its title to the motor vehicle. The police had an unassailable right to detain the motor vehicle owing to the tempering of the engine and chassis numbers. Therefore the Applicant has successfully established a claim against the Respondent for a breach of a legally implied warranty against eviction from the motor vehicle.

[8] The Respondent on the other hand contends that on the facts of the present case the purchaser has no right against the Respondent. That a party relying on a warranty of eviction it is necessary for him to allege that the default in the seller's title existed at the date of the sale or if it arises subsequently thereto that it was the result of the seller's default. That *in casu* there is no allegation to this effect by the Applicant. On the contrary the evidence shows that firstly, the sale was concluded on the 31st July 1999 whereupon the Applicant took delivery of the motor vehicle. Secondly, the motor vehicle was impounded by the police on the 23rd June 2006 after the Applicant has been using it without any problems and thirdly, that the motor vehicle had previously been cleared by the members of the Royal Swaziland Police. That on these facts no fault can be imputed on the Respondent as the seller. In this regard Counsel for the Respondent cited the legal authority of *Ellison Kahn, Principles of the Law of Sale and Lease (Juta and Company) (1998)* at page 21.

[9] In my assessment of the arguments by the parties it is clear on the face of annexure "A" in Clause 13 (a) that the parties expressly excluded the warranty against eviction. The effect of such an exclusion of a warranty against eviction is that the evicted purchaser may not claim damages or a refund from the seller arising out of any eviction. It appears to me that on the facts of the present case the purchaser has no claim against the Respondent. Furthermore, for a party relying on a warranty of eviction it is necessary for him to allege that the default in the seller's title existed at the date of the sale or if it arises subsequently thereto that it was the result of the seller's default. On the facts of the present case there is no allegations to this effect by the Applicant.

[10] In this regard I further agree with what is stated by the Respondent in paragraph 9.1, 9.2 and 9.3 of his Heads of Arguments that on the contrary the evidence show that the sale was concluded on the 31st July 1999 whereupon the Applicant took delivery of the motor vehicle. Further that the motor vehicle was impounded by the police on the 23rd June 2006 after the Applicant has been using it without any problems. Furthermore that the motor vehicle had previously been cleared by members of the Royal Swaziland Police. On these facts no fault can be imputed on Respondent as the seller.

[11] In the result, for the afore-going reasons the warranty against eviction cannot be of assistance to the seller and the application is dismissed with costs.

S.B. MAPHALALA

JUDGE