

# IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 3305/03

In the matter between:

**LUNGILE NDZINISA**

**APPLICANT**

v

**MCCARTHY SWAZILAND (PTY) LTD**

**T/A SAVELLS FURNISHERS**

**RESPONDENT**

CORAM: Q.M. MABUZA-J

FOR THE APPLICANT: MR. B.S. DLAMINI

FOR THE RESPONDENT: MR. S.K. DLAMINI

## JUDGMENT

**26/10/07**

[1] The Applicant seeks an order as follows:

***"b) That an order be and is hereby issued directing that the Hire Purchase Agreement entered into by and between the parties hereto is cancelled forthwith.***

***c) That an order be and is hereby issued directing the Respondent to pay forthwith to Applicant the sum of E3 500.00 (Three Thousand Five Hundred Emalangi) already paid by Applicant to Respondent on the basis of the said Hire Purchase Agreement.***

***d) That an order be and is hereby issued directing the Respondent to pay costs of the application on the scale as between Attorney and our client.***

**e) Further and/or alternative relief."**

[2] The Respondent has opposed the application on the grounds ***inter alia*** that it is not in breach of the hire-purchase agreement.

[3] The Respondent has filed a counter application in which it seeks the following order:

***2. Cancelling the Hire-Purchase Agreement entered into between the parties hereto.***

***3. Directing and authorising the Respondent to repossess the Kic Double Door KT2SS refrigerator which is leased to the Applicant by the Respondent,***

***4. Alternatively declaring the Kic Double Door KT255 refrigerator repossessed by the Applicant.***

***5. Costs of suit.***

***6. Further and/or alternative relief."***

For the sake of convenience the parties will be referred to as hereinbefore.

[4] The Applicant called Thobile Dlamini as her first witness. Miss Dlamini informed the court that on the 6/5/2003 she purchased a refrigerator from the Respondent on hire-purchase. The refrigerator developed some faults in that it had cracks on the corners. She reported the fault to the Respondent who came to inspect it and ultimately came to fetch it so that they would have it repaired and in the event that they could not repair it they would replace it. She spoke

to the saleslady Eunice Dlamini. Before a month had expired the Respondent replaced the troublesome refrigerator with a new one. She told the court that even this new refrigerator developed cracks.

[5] She informed the court that at some point in time the Applicant and her worked together and she knew that the Applicant Miss Lungile Ndzinisa had purchased a similar refrigerator from the Respondent. The Applicant revealed to her that she had also encountered the same problems with her refrigerator. Miss Dlamini informed the court that she had not contributed to the fault and she suspected that it was a factory fault especially as the Applicant's refrigerator developed a similar problem.

[6] Miss Dlamini was cross-examined by the Respondent's attorney. She revealed that the Applicant also lived 100 metres away from her and that they had worked together at the SPA Supermarket at Nhlangano. She further revealed that the cracks were everywhere on the doors, both top and bottom doors and not only on the edges but on the body of the doors.

[7] It emerged from the cross-examination of Miss Dlamini that she had an extended warranty that she was not aware of. The extended warranty entitled her to a new refrigerator which replaced the faulty one. The Respondent did not explain to her what the problem was with the replaced refrigerator. They just informed her that they had failed to repair it. According to her the refrigerator began to give her problems 3 - 5 months after she had purchased it.

[8] The second witness was the Applicant. Miss Ndzinisa informed the

court that during 2002, she purchased a refrigerator from the Respondent on hire-purchase. It was delivered to her house on the 7/5/2002. She paid monthly instalments of E233.00. Towards the end of the 9<sup>th</sup> month the refrigerator developed cracks on the upper and lower doors.

[9] She went to the Respondent and reported the problem to a Mrs Msibi who in turn referred her to the saleslady Mrs. Eunice Dlamini. Mrs Msibi advised her to clean out the refrigerator and the Respondent would take it to Messrs Hoageys in Mbabane to be repaired. The refrigerator was not fetched immediately but ultimately during the middle of February 2003 the Respondent fetched the refrigerator.

[10] On the 24<sup>th</sup> April 2003 the Respondent returned the refrigerator unrepaired. Instead the Respondent's employees advised the Applicant to repair the refrigerator herself. They accused her of having damaged the refrigerator by banging its doors. She denied this accusation nevertheless they left the refrigerator.

[11] The Applicant went to see the saleslady Mrs. Dlamini who was reluctant to welcome her. The Applicant asked Mrs. Dlamini to explain what the Respondent's employees meant that she should fix the refrigerator as she had damaged it. Mrs Dlamini responded that Messrs Hoageys had failed to repair the refrigerator and had in turn advised that the Applicant should repair it herself. She revealed that the total purchase price was E5173.04.

[12] She also revealed that she believed it was still under guarantee as she had used it for nine months before it developed the cracks. She

consulted her attorney who wrote to the Respondent. Upon receipt of her attorney's letter, the Respondent fetched the refrigerator on the 17/10/07 and has never returned it to her. At the time they fetched the refrigerator she had paid a total of E3506.00. Unfortunately for her she did not have an extended warranty for her to be given a new refrigerator as a replacement.

[13] The Applicant confirmed having discussed the defects on the refrigerator with Thobile Dlamini. The latter had also purchased a refrigerator from the Respondent and it too had developed cracks on its doors. But because she had an extended warrant on her purchase, the Respondent replaced her defective refrigerator with a new one.

[14] The Applicant was cross-examined by the Mr. Dlamini. What emerged therefrom was that the Applicant had refused to sign an extended warranty because she felt that her repayment would be too high. The Applicant denies this and says she was never told about it. Indeed the amount thereof is E499.00 as evidenced from the hire-purchase agreement on page 35 of the Book of Pleadings. It is pertinent to mention here that this amount was not deducted under Item 3: Payment plan. The final balance reflected therein is E5746.16 and the instalment is recorded as E274.00 per month.

[15] The Applicant also revealed that she was advised by the Respondent to pay E233.00 per month but she paid E250.00 instead. Counsel for the Respondent suggested that the payment of E233.00 was consistent with the fact that the amount representing the extended warranty had been deducted hence the reduction in repayment instalment. The Applicant denied this.

[16] It was put to her by Respondent's Counsel that the defects on the refrigerator were caused by her negligence but she denied that she was in any way negligent in her use of the refrigerator. She also agreed that any guarantee over the refrigerator would not cover negligent usage. The Applicant thereafter closed her case.

[17] The Respondent called two witnesses. The first witness was Mrs. S.N. Dlamini (RI) an employee of the Respondent. She confirmed that during April 2002 the Applicant purchased a refrigerator from the Respondent.

[18] During February 2003 the Applicant had come to this witness to report that the refrigerator had certain faults. It could not balance and had cracks on the doors. The Applicant is alleged to have referred to these faults as factory faults.

[19] This witness thereafter dispatched two employees of the Respondent, a driver and his assistance to Applicant's home to inspect the refrigerator and report back to her about it. They left in the company of the Applicant and returned with her. They were able to balance the refrigerator but could not fix the cracks.

[20] I may add here that the Respondent's employees seem to make much of the Applicant's assertions that the cracks were a factory fault. I will take cognisance of the fact that the Applicant is no expert and her use of this phrase is for want of a better explanation.

[21] Ultimately the refrigerator was fetched by the Respondent during March 2003 and was taken to Messrs Hoageys Ltd in Mbabane to be repaired. Messrs Hoageys sent back word that the cracks on the refrigerator were not a factory fault but were due to the negligent use of the refrigerator by the Applicant.

[22] When the Applicant was advised of the above she refused to take the refrigerator back and discontinued payments for it.

[23] Mrs Dlamini also informed the Court that the Applicant had refused the extended warranty which entitled her to having the refrigerator repaired or as in the case of Thobile Dlamini (PW1) a replacement of the refrigerator. This witness was able to furnish the instalment agreement. She informed the Court that the agreement provided for repossession of the refrigerator should the purchaser fail to pay therefore. In this instance the witness requested possession of the refrigerator as the Applicant had failed to pay for it.

[24] Counsel for the Applicant cross-examined Mrs. Dlamini. Cross-examination revealed that Mrs Dlamini had caused the refrigerator to be taken to Hoageys in order for the latter to advise her whether the fault complained of was a factory fault or not. They responded that it was not a factory fault.

[25] Mrs. Dlamini also revealed that as the Applicant had refused to sign the extended warranty the amount of E499.00 which had been provided therefore was deducted from the Applicant's invoices or statement even though it was not deleted on the agreement itself.

Consequently the Applicant's repayment instalment was reduced. Mrs. Dlamini's evidence supports that of the Applicant that ultimately she paid E233.00 per month instead of E274.00 per month (see paragraph 8 hereinabove).

[26] It was not possible for the second witness Brian Carrington to come to give evidence. However he deposed to an affidavit on the 18/12/03. Mr. Carrington is employed by Hoageys Limited as a workshop manager at the Industrial sites, Mbabane.

[27] Pertinent portions of his affidavit state:

***"Para 3 Hoageys Ltd specialises in, among other things, repairs of refrigerators and air conditioners and we are also agents of refrigerator manufacturers, Whirlpool for whom we carry out repairs to their products under warranty where the damage thereto is attributable to factory fault.***

***5. On or about the 17<sup>th</sup> December 2003, a KIC Double Door KT255 refrigerator registered as leased to Lungile Ndzinisa was brought into our workshop by the Respondent's employees for assessment pertaining to cracks on its door.***

***6. On due assessment of the refrigerator at our workshop, the cracks I found on the door were inconsistent with factory defect or fault. Therefore, my professional opinion is that the damage to it is not attributable to the manufacturer.***

***8. Therefore, assuming that the refrigerator was delivered to the customer without the cracks, the said cracks will most***

***likely have occurred during its use from the date of delivery.***

[28] Unfortunately Mr. Carrington's evidence could not be tested by cross-examination especially as Ms. Thobile Dlamini's (PW1) refrigerator also developed cracks which were even worse than the Applicants. As an expert he would have explained to the Court how the use of the refrigerator could cause it to develop cracks. He would have explained whether it was possible to repair it notwithstanding that it was not a factory fault. He would have explained to the court as to what had made him conclude that it was not a factory fault.

[29] The Applicant purchased the refrigerator during April 2002. It developed problems and during February 2003 the Respondent took it for repairs and returned it on the 24<sup>th</sup> April 2003 not having repaired it. It was again taken by the Respondent during October 2003 as it has been with them since.

[30] There has been no evidence led as to what the period of guarantee was. The Applicant reported the faults during the 9<sup>th</sup> month of purchase which was too early for it to begin giving problems. The refrigerator ought to have been repaired at the Respondents expense or failing that it ought to have been replaced.

[31] The use of South African legislation in Swaziland is illegal and is not applicable. Swaziland has its own Hire Purchase Act. What then becomes of an agreement such as the one before this Court? My considered view is that it is void. What then governs the contract between the parties? Their contract is subject to the common law. However, I was not asked to make a finding on the law to be applied

and my remarks are merely *obiter dictum*.

[32] It is obvious to me that the Respondent cannot repair the refrigerator and is also not prepared to replace it with a new one. I cannot force them to do either. The Applicant on the other hand has stopped paying for the refrigerator. There is justification in my view for this stance. Both parties wish for the agreement to be cancelled.

The Respondent wishes the Court to declare the refrigerator repossessed.

[33] The Applicant has prayed for an order directing that the Respondents repay the sum of E3500.00 already paid by her to the Respondent. Counsel for the Respondent in cross-examining the Applicant suggested that as she had used the refrigerator, the Respondent should be allowed to keep part of the payment. I cannot allow this. The amount that the Applicant has paid includes the following:

280.00	handling fees
1209.61	insurance
4.00	stamp duty
1127.69	finance charges
<u>125.00</u>	administration fees
<b><u>2746.30</u></b>	<b>Total</b>

[35] The repayment instalment includes the above payments. There is no indication as to what fraction goes towards payment of the refrigerator itself, consequently I must reject the Respondents

contention and find for the Applicant.

[36] The Applicant did not motivate the prayer for costs on the attorney and client scale. She was however put to great inconvenience by the Respondent. The order to repay the sum of E3500.00 is appropriate in the circumstances.

The Court orders as follows:

- (a) The Hire-Purchase agreement entered into between the parties is hereby cancelled.
- (b) The KIC Double Door KT 255 refrigerator is declared repossessed by the Respondent.
- (c) The Respondent is hereby directed to repay the sum of E3500.00 to the Applicant.
- (d) The Respondent is ordered to pay costs hereof on the ordinary scale.

**Q.M. MABUZA-J**