IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 240/97

In the matter between

Michael Austin Beale Plaintiff

And

Lionel David Pieterse Defendant

Quoram Hlophe J

For the Plaintiff Mr.M. Z. Mkhwanazi

For the Defendant Mr. J. E. Henwood

Judgment

HLOPHE J

[1] The Plaintiff instituted action proceedings against the Defendant claiming payment of the sum of E62 200.00, interest thereon at 9% per annum and costs of suit.

[2] Plaintiffs aforesaid claim arises from an alleged verbal agreement of sale of a certain truck whose full description is - Toyota Hino, 1998 model. The Plaintiff alleges in his papers that the purchase price for the said truck was a sum of E220 000.00, payable in terms of a deposit of E30 000.00 and subsequent monthly instalments of E10 000.00 until the full purchase price would have been paid. I must however highlight at this stage that although the agreement of sale was said to be verbal it is clear when considering what transpired during the hearing of the matter that same was partly verbal and partly written. This aspect of the matter shall be considered later on in this judgment.

[3] The Plaintiffs claim is defended by the Defendant who although he does not deny the alleged agreement of sale, he does dispute or denies its terms. He for instance denies the purchase price as having been fixed at E220 000.00 but alleges

that same was fixed at EI50 000.00 payable in instalments of not less than E5 000.00.

[4] The Plaintiff was the only witness for his case whilst the Defendant was the only witness for the Defence.

[5] From the pleadings and from the papers filed of record, the issues are what the purchase price agreed upon between the parties was and whether or not such price has since been paid in full. If the purchase price would be found not to have been paid in full, the further issue for determination would be what the outstanding balance is and if it is found to have been paid in full, that should signal the end of the matter.

[6] In trying to answer these questions the Plaintiff gave evidence and stated that sometime in early 2004, the Defendant approached him and asked him (Plaintiff] to sell him (Defendant) the truck referred to above. The Plaintiff had not advertised the truck for sale and was not selling same although he had had several purchase offers which he claimed to have turned down.

Following discussions between them, he claims to have eventually agreed to sell his truck to the Defendant, who was very well known to him and had been his employee for sometime either previously or then.

[7] According to the Plaintiff, the purchase price was fixed at E220 000.00. This amount was allegedly payable through a deposit in the sum of E30 000.00 and subsequent monthly instalments of E10 000.00. It is however acknowledged by the Plaintiff that the above terms were subsequently varied only as relates to the deposit that had to be paid, as it ended up being fixed at El5 000.00, after the Defendant had requested it be so fixed in order to enable him take care of the tyres which needed attention, with the other El5 000.00.

[8] Although he maintained that there was never a specific agreement to vary the monthly instalments from E10 000.00 to anything above E5 000.00 or not less than E5 000.00 as contended by the Defendant, the Plaintiff acknowledges that he only received one instalment of E10 000.00 which was the second

instalment of the transaction, he had accepted the instalments of not less than E5 000.00 because it was the best thing to do in the circumstances and in his words, "half a loaf of bread was better than nothing."

[9] Based on my consideration of the pleadings filed of record; which comprised both the papers in the main matter and those in the rescission application brought by the Defendant at some stage after a default judgment had been entered against him as well as having listened to the evidence of the witnesses, I have no doubt that although it may not have been specifically or expressly agreed that the terms as regards the instalment were being varied, they were in reality.

[10] The position is settled that a contract can be concluded expressly, impliedly or tacitly. This in my view comprised a tacit term to vary the agreement terms in the contract by the Defendant when considering the continued acceptance of the amount of not less than E5 000.00 paid as monthly instalments towards the liquidation of the purchase price. Indeed the basis for

the Plaintiffs claim is not that the Defendant was paying a lower instalment than the one he was required to pay but that he was no longer paying what he had been paying.

[11] In their book titled, **General Principles of Commercial Law Sixth Edition, Juta, Peter Havenga and Others,**

express the position as follows at page 102:-

> although it may not have been specifically or expressly agreed that the terms as regards the instalment were being varied, they were in reality.

[10] The position is settled that a contract can be concluded expressly, impliedly or tacitly. This in my view comprised a tacit term to vary the agreement terms in the contract by the Defendant when considering the continued acceptance of the amount of not less than E5 000.00 paid as monthly instalments towards the liquidation of the purchase price. Indeed the basis for the Plaintiffs claim is not that the Defendant was paying a lower

instalment than the one he was required to pay but that he was no longer paying what he had been paying.

> *"A tacit term is inferred by the Court from the expressed terms and surrounding circumstances which can include the recognition of terms customarily included or observed in a specific trade and which were known to both parties."*

[12] The Plaintiff further stated in his evidence that there is a document on which he used to record the payments by the Defendant and which the latter had signed at the time of conclusion of their agreement. He however, never produced such a document nor handed it in as part of his evidence. When considering the discovery of documents for purposes of trial, the Plaintiffs first schedule to the Discovery Affidavit stated the list of documents discovered as all the pleadings between the parties.

[13] Taking into account that the parties relied upon the pleadings in the rescission application as well, it is a fact that such pleadings had, as an annexure to the Respondent's (Plaintiff in the main matter's) answering affidavit, a document referred to

as annexure MB 1. This document bore at the top the words "Tax Invoice" as well as the heading or title of Plaintiffs business, "Mantenga Stores." Together with its postal address which wa written in smaller print to that of the Heading. It had been addressed to Mr. David L. Pieterse (the Defendant). Under a column headed Description, there was entered by hand writing the words describing the truck sold by the Plaintiff to the Defendant next to which and on the extreme right, there appeared an entry of E220 000.00.

[14] From the sum of E220 000.00, there appeared the reducing entries of the sums paid on various dates as instalments on a balance reducing basis. On the body of this document there appear the following words under the column headed "Description" overlapping to the following one written "Cartage Charges" at the top:-

"*I Lionel Pieterse do promise to pay E10 000.00 Emalangeni every month.*

Signed"

When giving evidence, the Defendant confirmed under cross examination that he had signed that document including his confirming the signature as his.

[15] Otherwise the document records the instalments in a balance reducing method until the last payment is shown as having been made on the 3rd October 2006, leaving a balance of E62 200.00. I have observed that in all there are about 26 (twenty six) instalments shown as having been paid further to the deposit. These include a sum of E200.00 entered as a sum borrowed by the Defendant had the effect of raising the balance as of then by E200.00. This gives an explanation on why the balance outstanding has a sum of E200.00 added to the sum of E62 000.00 then outstanding so as to reflect a sum of E62 200.00.

[16] Although he had not produced nor handed in the document as part of his evidence during his testimony, the Plaintiff was cross examined at length on it including its being produced and displayed in Court. As stated above, the said document had been annexed to the pleadings. The Plaintiff confirmed same depicted

the transactions between them and was actually signed by the Defendant who undertook to liquidate his indebtedness recorded therein in instalments of E10 000.00. There was no doubt that the document concerned was the one referred to at paragraph [12] by the Plaintiff and analysed in the subsequent paragraphs.

[17] The question becomes the propriety or otherwise of the admissibility of such a document in law. It seems to me that such a document becomes admissible if it was discovered, as this one was, but merely not referred to in trial, where it is since introduced in Court by the Defendant who even cross-examined on it. In my view, the Court cannot ignore such a document particularly where it has not occasioned prejudice to the party who introduces it in Court.

[18] In his evidence, the Defendant admitted concluding the said agreement with the Plaintiff but disputed the purchase price as alleged by the Plaintiff. He said that the purchase price was a sum of El50 000.00 payable in instalments of not less than E5 000.00

per month. Although it had initially been agreed that a sum of E10 000.00 be paid as a monthly instalments, same ended up being reduced by consent to a sum not less than E5 000.00.

[19] Defendant further states in his evidence that he had eventually paid the agreed amount of El50 000.00 in full to the extent of over paying given that he had eventually paid a sum of E153 000.00 as of the 23 May 2006, which according to him was the last payment. I can only observe that, it is not in dispute that he had already paid El53 000.00 except that there is a dispute on when such a mark was reached in Defendant's payment. Whilst he claims same to have been done in May 2006, the Plaintiff claims such was only reached in October of 2006.

[20] The Defendant was cross examined on the document referred to above which had by now become central to the matter. I must mention that in the rescission application papers of the then Applicant, the Defendant in this matter, and whilst setting out his defence so as to meet the requirements of that relief, the Defendant had annexed a hand written document

listing some of the instalments paid by the Defendant. It enters the last instalments paid as that of 23rd May 2006 and suggests that by then a total of EI53 000.00 had been paid.

[21] I observe that as opposed to the one relied upon by the Plaintiff, albeit introduced under his cross examination by the Defendant, other than just listing certain alleged payments, the document does not comprehensively speak for itself. It also conflicts with the Defendant's own evidence or vice versa in that it now, in a very unsatisfactory manner, indicates that some two payments were made after the 23rd May 2006, on the 3rd August 2006 and 4th June 2006. The sequence of such payment is itself unclear and not convincing as these payments are recorded as having been paid upside down with what would normally be the last payment on the 3rd August 2006, being shown above the payments of 31st September 2004, June 2006 and 23rd May 2006. Furthermore, to the Defendant's disfavour, it records only 20 transactions as opposed to the 26 graphically recorded on the other document. In fact if the Defendant stopped paying on the 23rd May 2006, then in my view according to my calculations, he

had not paid the sum of E153 000.00 he alleges, but that of E142 000.00 or thereabout. This would mean he owed much more therefore.

[22] It is for these reasons that I have accepted the document introduced at the cross examination of the Plaintiff which depicts 26 instalments as having been paid over and above the deposit so as to translate to a sum of El57 000.00 having been paid and as contended by the Plaintiff. This invariably means that what would be outstanding would be the sum of E62 200.00 indeed. This therefore in my view would answer the question of how much was owed by the Defendant, if I were to find that the purchase price was the sum of E220 000.00 as contended by the Plaintiff. This is the issue I must now determine.

[23] I have no hesitation in accepting the evidence of the Plaintiff who struck me as the credible witness of the two including his being truthful. His evidence tallies or is consistent with and is corroborated by the document described as MB1 referred to above. This document bears the signature of the Defendant

himself, yet it bears the purchase price as a sum of E220 000.00. Although the instalment payable thereof in the Defendant's own words was a sum of E10 000.00, the Plaintiff easily admitted that he had ended up having to accept the instalments paid which were less than the agreed E10 OOO.OO. Furthermore, the Plaintiff avoided taking advantage of the Defendant when he could have easily done so by claiming more than the sum of E62 200.00 he claims when taking into account what the Defendant claims to have been his last payment date, including the number of the transactions which indicate that only a sum of El42 000.00 or thereabout was paid which would mean he still owed Plaintiff a sum of more than E62 200.00 as claimed by the latter.

[24] Further, the Defendant has failed to sufficiently explain why he had to pay more than what he claims to have been owing resorting to conveniently saying the further E3 000.00 he claims to have paid Plaintiff was a mere gift which is inconceivable particularly because calculating his own recorded payments indicates a much lower amount than El53 000.00. Clearly his contentions lack credibility and have no basis as well. I cannot

accept when taking into account all the circumstances of the matter.

[25] For the foregoing reasons, I have come to the conclusion that the purchase price as agreed between the parties, was a sum of E220 000.00. I have also found that the Defendant's last payment was not on the 23rd May 2006, which would have meant he was liable to the Plaintiff for more, but that his last payment was on the 3rd October 2006.

[26] Consequently, this leads me to conclude that the Defendant is indebted to the Plaintiff in the sum of E62 200.00 whose basis is clearly established by the evidence tendered in Court, particularly the document upon which the Plaintiff was cross examined after it had been discovered.

[27] I accordingly make the following order: -

27.1. The Defendant be and is hereby ordered to pay Plaintiff the following: -

27.1.1. The sum of E62 200.00

27.1.2. Interest calculated at 9% per annum on the said sum of E62 200.00 from date of summons to date of payment.

27.1.3. The costs of suit.

Delivered in this open Court on this the 20th day of July 2011.

N. J. Hlophe
JUDGE