



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

Case No. 1325/18

In the matter between:

LONDON HENWOOD

PLAINTIFF

AND

SIFISO STANLEY DLAMINI

DEFENDANT

Neutral Citation: London Henwood v. Sifiso S. Dlamini (1325/18) [2018]

SZHC 31 (14 December 2018)

Coram: J.S Magagula J

Date Heard: 14 December 2018

Date Delivered: 14 December 2018

- [1] In this matter I heard arguments on the 14th December 2018 and delivered an ex – tempore judgment on the same day. I have now been requested to give written reasons for my judgment and I proceed to do so hereunder.
- [2] The matter came before me as an application for Summary Judgment wherein the Plaintiff sought an order for payment of the sum of E171 000-00 (One hundred and seventy one thousand Emalangeni) together with interest and costs of suit.
- [3] The claim arises from the sale of a motor vehicle which Plaintiff claims that it was sold with latent defects. Plaintiff maintains that he tried to fix the defects but upon realizing that he was not scoring much success he elected to cancel the agreement of sale and claim a refund of the purchase price.

Plaintiff further alleges that the Defendant agreed to the cancellation and promised to refund the purchase price. Defendant, according to plaintiff actually promised to make a down payment of E100 000-00 (One Hundred Thousand Emalangeni) on a specific day and the rest would be paid in instalments. However when plaintiff came for the down payment on the appointed day, he did not get payment from the Defendant. To date hereof the Defendant has not effected the refund.

- [4] The following matters are common cause:
- 4.1 The Defendant did sell the motor vehicle to the plaintiff for the sum of E171 000.00.
- 4.2 The plaintiff paid the defendant the sum of E171 000-00 in full.

4.3 The plaintiff returned the motor vehicle to the defendant stating that he was cancelling the sale agreement and claimed a refund of the purchase price.

4.4 The Defendant has not refunded the purchase price to date hereof.

4.5 The Defendant is currently in possession of both the purchase money and the motor vehicle.

[5] The Defendant has raised a variety of technical issues some of which are so frivolous that in my view do not even warrant a discussion in this judgment. For instance Defendant contends that Plaintiff has no right to cancel the contract unless there is provision for such cancellation in the agreement. This contention is totally ill – conceived as it is one of the elementary principles of the law of sale that a purchaser is entitled to claim cancellation of the agreement and a refund of the purchase price if the merx is found to have latent defects. The right to cancel need not be provided for in the agreement.

Plaintiff's claim is based on the *Actio empti* which entitles a purchaser to either cancel the agreement or claim damages where the merx is found to have been sold with latent defects. (see for instance HOLMDENE BRICKWORKS (PTY) LTD v. ROBERTS CONSTRUCTION CO. LTD 1977(3) SA 670).

[6] Defendant further claims that by effecting repairs on the motor vehicle the plaintiff waived his right to claim cancellation of the agreement. This argument is oblivious of the fact that the motor vehicle was a second hand. It was only reasonable and fair for the plaintiff to attend to faults that manifested themselves after Plaintiff had received delivery of the motor

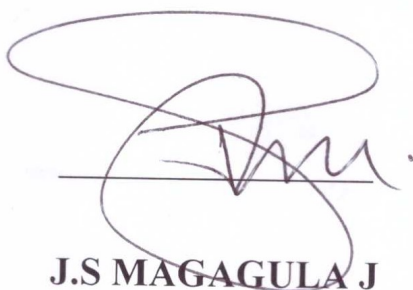
vehicle. It was only when he realized that the defects were so major that it was unreasonable to expect him to continue trying to repair the motor vehicle that he decided to cancel the agreement. Plaintiff did not therefore in my view waive his right to cancellation on account of latent defects.

- [7] The Defendant also contends that the vehicle was sold “**voetstoots**”. I reject this contention outright. The defendant alleges that he expended a total sum of E19 000-00 repairing the motor vehicle after plaintiff complained of latent defects. Such expenditure is not commensurate with a sale being **voetstoots**.
- [8] Defendant also maintains that he never agreed to take the vehicle back and refund the plaintiff. He maintains that the vehicle was forcefully left by the plaintiff on defendant’s premises. However defendant also alleges that after the plaintiff had left the motor vehicle on his premises he proceeded to effect repairs on the vehicle expending an amount of E13 000-00. Why would he even touch a vehicle forcefully left on his premises? This suggests to me that he actually accepted the vehicle and agreed to refund the plaintiff.
- [9] The defendant further contends that it is not clear if the claim is based on plaintiff’s right to cancel the sale on account of latent defects or on a mutual agreement of the parties to cancel the agreement. In my view there is no reason why the claim cannot be based on either or both such causes of action. The real question is whether the plaintiff establishes any of these causes of action.
- [10] In any event the real question to be answered in a Summary Judgment application is whether or not there is a triable issue warranting that the matter be referred to trial. From the common cause facts enumerated in

paragraph 4 hereof there is no doubt in my mind that there is no triable issue raised by the Defendant which warrants that I should refer the matter to trial.

[11] For the foregoing reasons Summary Judgment is granted for:

- (i) Payment of the sum of E171 000-00
- (ii) Interest thereon at the rate of 9% a tempore morae to final date of payment.
- (iii) Costs of suit.



J.S MAGAGULA J

For the Plaintiff: Z. Magagula

For the Defendant: T.S Maseko