

IN THE HIGH COURT OF LESOTHO

In the matter between :

LELIEHOEK MOTORS (Pty) Ltd.

Plaintiff

v

Y. MAHOMED

Defendant

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice M.L. Lehohla
on the 16th day of February, 1989.

On 17th June 1987 judgment was entered for plaintiff on attorney and client scale by this Court for the following reasons :-

The cause of action arose from a breach of warranty committed by defendant in that he failed to warrant plaintiff's title against eviction by third parties in respect of property bought by plaintiff from him.

In its summons plaintiff claimed against defendant

1. Payment of the sum of R10,000.00 being in respect of monies lent and advanced by the plaintiff to the defendant at the latter's special instance and request during or about July 1982 which amount is presently due and payable.
2. Interest thereon at the rate of 2% per month as from 15th July 1982 to date of payment (a tempora morae)
3. Costs of suit and/or alternative relief.

When the disparity was pointed out as to subject matter of its claim in paragraph 3 of plaintiff's Particulars of Claim its counsel decided to abandon contents of

/paragraph 1

paragraph 1 of the summons and pursue plaintiff's claim in terms of paragraph 3 thereof. This was a wise move because defendant had in any case pleaded to the particulars of plaintiff's claim.

Paragraph 3 of the Particulars of plaintiff's claim sets out that

"..... During or about July 1982, and at Ladybrand in the Republic of South Africa, plaintiff and Defendant entered into a verbal agreement of sale whereby plaintiff purchased from Defendant a certain 1981 B M W Executive bearing registration number A 3777. It was agreed between the parties that the value of the said vehicle was M10,000 and plaintiff duly gave Defendant credit for that amount."

To defendant's request for further Particulars raised in 1(a) of that request regarding the full terms of the alleged verbal agreement of sale plaintiff stated that :-

- (a)(i) Plaintiff bought a certain 1981 B M W Executive Motor vehicle from Defendant and sold a certain 1982 Canter L W B, 3 ton drop-side truck to the Defendant at the latter's instance and request.
- (ii) Plaintiff was to give Defendant a credit for the value of the said B M W motor vehicle on the purchase price of the said Canter Truck.
- (iii) It was an express, alternatively implied term of the agreement entered into between the parties that Defendant had the lawful right and title to sell the said B M W to Plaintiff.

Plaintiff pleaded that on 21st July 1982 it had to, and did in fact deliver up the B M W to the South African Police who claimed it and who had, at all material times including this occasion, the lawful right to claim and remove the said vehicle. It was at this point when police seized possession of the car from plaintiff that it dawned on plaintiff that, at the time of the agreement mentioned above and date of its eviction from possession by police, defendant had

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not the lawful right or title to sell the said B M W vehicle.

Plaintiff claims that in consequence of the afore-said eviction, it has suffered damages in the amount of M10,000. It also alleges that around 15th July 1982 it informed defendant of this eviction and made a demand to him for payment of the alleged damages. However despite demand defendant refuses, neglects or has failed to effect payment of the said M10,000.

Defendant's pleadings are prolix and argumantative. Plaintiff's supply of further and better particulars helped clarify the basis of its claim. Further contentious issues were elucidated by oral evidence.

Mr. Blenerhassitt Edward Eager testified for plaintiff that he is an admitted attorney in Lasotho though not practising. He moved an application Annexure "A" before the Supreme Court of South Africa at Bloemfontein. The purpose for that application was to found jurisdiction in the Republic of South Africa and consequently attach the truck that had been sold to defendant by plaintiff. Although he succeeded in obtaining the order he didn't pursue it because the truck could not be traced for it had been removed to Lesotho and had desisted from its practice of travelling to Ladybrand daily.

Information elicited from this witness under cross-examination was that this vehicle belonged to one Hymers. See Annexure E written in Afrikaanse.

It was Eager's further evidence that he didn't know if J. Hymers was compensated for the loss of his B M W vehicle by any Insurance Company. However it was elicited in cross-examination that according to one Cloeter J. Hymers had been compensated. See Annexure "D" where P.W.1 referred the Court to a note of a telephonic conversation between himself and Cloeter.

/P.W.1

P.W.1 further stated under cross examination that according to his notes this vehicle was sold by the Insurance Company for R4000 as being the property of that Insurance Company. At that stage this vehicle was no longer in the custody of the Ladybrand police obviously. Mr. Eager had failed to find out from plaintiff what the defendant had done with this vehicle for this witness came into this matter nine months after the vehicle had been taken. In re-examination he testified that it was his own decision to institute proceedings against defendant.

P.W.2 one J.C. Abraham told the court that he is the managing director of plaintiff and has had upwards of twenty three years experience selling motor cars. Defendant traded in to P.W.2's garage a metallic silver coloured B M W car. Defendant had told P.W.2 that he had bought it from Mr. Wong for R8000. There upon P.W.2 offered R10,000 for the B M W as a trade-in. The transaction and discussion took place in Lesotho. P.W.2 checked with the South African police at the Boarder Post and asked Mr. Wong if he had paid for the vehicle. Change of ownership form was signed by Wong in whose name the vehicle was still registered.

The South African police had no record of this vehicle having been stolen. On 14th July however South African police came to P.W.2's garage and took away the vehicle for they maintained it was stolen property.

Insisting that the Border Post police had cleared this vehicle P.W.2 refused to hand it over pending proof that it had in fact been stolen. Thereupon the police told P.W.2 that the theft had obviously not been discovered at the time this vehicle was cleared.

P.W.2 phoned defendant telling him what had happened. Defendant suggested that P.W.2 and he should go to Wong and claim the money back. P.W.2 was emphatic that at no stage did defendant say he should not surrender the vehicle to the police. Nor did

/defendant

defendant offer to assist P.W.2 keep the car. Police verified with the B M W factory in P.W.2's presence that the chassis and engine numbers on this vehicle belonged to a different yellow B M W car. However on removal of the radio fitted in this vehicle it was revealed that the numbers shown underneath the radio as well as the axle numbers of the car showed that they belonged to a silver B M W car sold to J. Hymers. As it was apparent that the complainant in respect of the theft of this car was Hymers and that it was a stolen car and because P.W.2 was eager not to lose the R10,000 he instructed P.W.1 to proceed against defendant for the recovery of the money. Defendant urged P.W.2 to go with him to Wong to recover the money. Wong referred them to one Kosié. Clearly he could not brook being shuttled from place to place this way.

Then P.W.2 went to see an attorney Mr. Masoabi who suggested that defendant should pay P.W.2 and proceed against Wong himself.

Defendant did not deny that police were entitled to take the car from P.W.2. It remained with the police for about a year. Nothing of consequence ensued from the cross-examination to which P.W.2 was subjected save that Mr. Masoabi is said to have declined acting against defendant on plaintiff's behalf because defendant was also his client. P.W.2 was also shown a power of attorney on which it appeared he authorised Mr. Masoabi to proceed against Wong. However P.W.2 was emphatic that he never authorised anybody to proceed on his behalf against Wong for he had had no dealing with him. He nonetheless remembered signing a power of attorney in Mr. Masoabi's office for purposes of having action instituted against defendant notwithstanding that the latter was his friend.

Under re-examination P.W.2 testified that he couldn't have bought the B M W Car without radio and axle. Further that there would have been no reason for him not to tell defendant all the facts pertaining to this matter. He

/explained

explained that vehicle body and chassis constitute what he termed a monoframe and as such could not be removed from each other. He testified that the chassis number is attached to the vehicle by means of a metal steel plate which can be removed. The silver B M W had not the chassis of the other vehicle but just the steel plate. Nothing showed that any of the parts of this car were obtained from a scrap yard. The surface of this car was not re-sprayed. According to Annexure "F" it appeared that this vehicle had been stolen in Hilbrow in the Republic and was after being traced, kept at Ladybrand police station. Plaintiff paid the purchase price for the B M W by deducting it from the purchase price of the truck sold to defendant.

In his evidence defendant admitted having had dealings with plaintiff which was represented by P.W.2. He admitted having obtained the B M W car from Wong in whose name it had been registered. At the time defendant was transacting its sale to P.W.2 the transfer of ownership forms were not in defendant's names. Defendant testified that he was present when Wong signed change of ownership of the B.M W in favour of P.W.2. Defendant had had this car for five to six months before trading it in in favour of the plaintiff. He testified further that while this car was in his possession he used to cross into the Republic of South Africa in it. This he said he did many times. He admitted having received a report after his transaction with P.W.2 that this was a stolen car. This report was received over the phone.

He recollected that he and P.W.2 held a meeting before Mr. Masoabi where it was agreed that Wong be sued for it was felt that it was P.W.2's responsibility to recover his money from Wong. He said he wasn't aware if any proceedings were instituted against Wong. He said he would have come to P.W.2's assistance if he said police had come to disturb his possession. But as it is he didn't know anything. He didn't know that this was a stolen vehicle. He said he was not

/aware

aware if this vehicle had been cleared either by Lesotho or R.S.A. police apart from what P.W.2 stated when giving evidence that it had been cleared by the R.S.A. police. Defendant thus denied liability to plaintiff in the aforementioned sum of M10,000.00.

Though D.W.1 said under cross-examination that he didn't remember if the change of ownership form was blank when Wong signed it, the form is before court marked "G" and is blank.

D.W.1 conceded that because he had paid for the car he was of the attitude that he could trade it in.

He conceded that he accepted the report that the B.M W was a stolen car hence his willingness to go along with P.W.2 to Wong to claim the money back from him.

He conceded that he had no reason to doubt P.W.2's report that this was stolen car. This was also a feature in the discussion held at a meeting with Mr. Masoabi at his office.

D.W.1 however denied that Mr. Masoabi advised him to pay plaintiff and sue Wong.

He admitted the knowledge received through P.W.2 that the vehicle was standing at Ladybrand South African Police Station.

The following now betrays some form of guilty knowledge or fear regarding the "spotlessness" of this car.

"You never went to S.A.P. Ladybrand to discuss matters relating to this car with them - ?

I said Mr. Masoabi could, as I was afraid of going myself.

You could have gone to talk to the police if you wanted to - ?

I wouldn't unless accompanied by my lawyer.

/You

You knew police wanted to discuss the matter with you -' ?

I have never been informed anywhere that police wanted to speak to me."

Under re-examination defendant explained that he was shocked to learn the vehicle was a stolen car and thus feared the police would arrest him.

Mr. Edling registered his objection to Mr. Masoabi giving evidence on the grounds that it was likely to amount to breach of privilege between attorney and client and also that it was irrelevant.

In his brief evidence D.W.2 Mr. Masoabi testified that P.W.2 was once his client and that he signed a power of attorney empowering him to sue Wong. Mr. Masoabi said the signing was effected in his presence. Much was made during the proceedings that Wong was the Chinese gentleman. On this score it was to be wondered how Mr. Masoabi could have accepted the brief to sue him in view of the fact that he had in a criminal trial before Kheola J. stated that every Chinese who was in this country at that time was his client. No indication exists that before that time Wong was not in Lesotho.

There is therefore credit in P.W.2's evidence that Wong was also Mr. Masoabi's client. In any event plaintiff's counsel did not cross-examine Mr. Masoabi and urged the court to disregard his evidence for as it was there was no need to pile discredit on a man who had already been discredited previously on other occasions before the other Judges of this Court.

It seems to me that Mr. Edling's objection is indeed well-founded that any evidence besides that intended to amplify the pleadings would be irrelevant. See Mastlite (Pty) Ltd vs. Stavracopoulos 1978(3) SA. 296 at 299 where Innes C.J.'s remarks were extracted by Le Roux J. as follows :-

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"The object of pleadings is to define issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigations into all circumstances has been as thorough and as patient as in this instance, there is no justification for interference merely because the pleading of the opponent has not been as explicit as it might have been."

The submission on behalf of defendant that he had been exonerated by plaintiff cannot hold because it was never pleaded. The objection against consideration by this Court of Mr. Masoabi's evidence would thus also seem to be well-founded.

What has been clearly elicited through evidence and properly pleaded in this case is that plaintiff has based its claim on warranty against eviction. Indeed the proper understanding of the principle on which this claim is based leads to the conclusion that a seller does not guarantee ownership but undisturbed possession.

In this case there is no doubt that plaintiff's possession was disturbed. It is axiomatic that when there is a threat to evict a buyer he must protest and notify the seller so that the latter can defend him against the threat.

In this case I am of the view that the buyer acted reasonably. He refused to hand the car over to the police and insisted on being given satisfactory proof that it was in possession of a car which had been stolen. Furthermore with a view to achieving this end plaintiff asked P.W.1 to investigate the matter further. P.W.1 in turn stated that it was waste of time and money to try to recover the vehicle from the police, for the confiscation was lawful. Indeed there was no challenge to this position. Nor is it disputed that

/plaintiff

plaintiff through P.W.1 notified defendant of what was happening all along.

Needless to emphasise: A seller has a duty to protect the buyer's possession but defendant never did that. He neither approached the police in whose possession the car was, nor did he sue them for its recovery.

There is also some striking difference between defendant's plea and his evidence.

In his plea he denied trading in the B M W to plaintiff but in his evidence he admitted doing so. He denied notification of the confiscation by police, but in evidence he admitted it. He called in question plaintiff's surrender of the vehicle to police, but in evidence he accepted that plaintiff had no choice at all. His defences in his plea are contradicted by his own evidence.

Under cross-examination he accepts all what constitutes plaintiff's case except two irrelevant points; namely

- (1) Whether the story as to serial number on the radio had been explained fully.
- (2) The question relating to the meeting at Mr. Masoabi's office.

There is therefore no other reasonable conclusion to reach but that the evidence of plaintiff in combination with that of defendant supports plaintiff's evidence as pleaded.

The last minute attempt therefore to rely on new defence should be foiled. I may just highlight the importance of the holding in Lammers and Lammers vs Giovannoni 1955(3) SA. at 385 that

"Once the seller had been called upon to defend the buyer in his possession but had washed his hands of the whole matter, that it was not open to him to meet the buyer's claim by

/saying

saying that the latter could or should have resisted the true owner's claim more energetically or skilfully, for it was open to him, the seller, to have taken steps to protect the buyer and himself."

Didcott J. in Garden City Motors vs Bank of O.F.S.
1983(2) SA. 104 at 107 said :

"Eviction has a wider meaning, however, in the law of sale. The purchaser does not have to be dispossessed of the property he has bought before such occurs, or to be disturbed in his possession of it. He is also evicted when he surrenders it voluntarily or pays its value in order to retain it, and even when he agrees to do one or the other without having yet done either, provided that in each instance it has been claimed from him on grounds he could not successfully have contested."

With regard to a claim for costs on attorney and client scale I am satisfied that though this was not canvassed in the summons it is enough that defendant was warned of this claim as early as 1st June 1987. All that is needed to satisfy the requirements is that there be advanced warning. See Cilliers on Law of Costs at 57. Also Butterworths 1972. Attorney and client costs are not punitive. See Nel vs Waterberg Landbouwers Ko-operatiewe Vereniging 1946 A.D. 597. C/F Cilliers pp. 59 and 65.

I am of the view that attorney and client costs would be justified in a case where as in this one the plea bristles with false defences. Defendant has falsely denied trading with plaintiff. He has falsely denied that the vehicle cost M10,000. Further that he traded it in, or that plaintiff should have handed it to police, or that plaintiff ever informed him of the confiscation by them of this vehicle.

This amounts to abuse of Court process. He further displayed clear example of lack of bona fide defence.

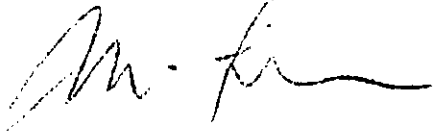
Arguments raised were without legal or factual foundation. Regard must be had to the fact that

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meantime plaintiff had been put out of pocket for five years at least. It is the duty of the court to ensure that plaintiff is not unnecessarily punished.

Consequently I make an order for

- (1) payment by defendant to plaintiff of M10,000;
- (2) Interest thereon at 2% per month from 15th July 1982;
- (3) Costs on attorney and client scale.



J U D G E.

16th February, 1989.

For Plaintiff : Mr. Edeling assisted by Mr. Redlinghaus
For Defendant : Mr. Mphalane.