IN THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU **C OF A (CIV) NO. 19/2017**

In the matter between:

MOQENEHELOA MONATE **APPELLANT**

AND

MORAPELI MEFANE **RESPONDENT**

CORAM: DR. MUSONDA AJA
CHINHENGO AJA
PEETE JA

HEARD : 22nd November 2018

DELIVERED : 7th December 2018

SUMMARY

Sale motor vehicle – Motor vehicle confiscated by the police on suspicion that it is a stolen vehicle – Plaintiff claim's refund of purchase price and damages – Defendant's duty to help the plaintiff recover the motor vehicle – In default he is in breach of contract entitling plaintiff to annul the contract – Special damages must be strictly proved.

JUDGEMENT

DR. MUSONDA AJA

BACKGROUND

[1] This is an appeal against the award of damages for selling a suspected stolen motor vehicle. For convenience we shall refer to the parties as they were in the *Court a quo*, the appellant as defendant and the respondent as plaintiff.

[2] The plaintiff entered into a written agreement with the defendant for the purchase of a Toyota Hilux double cab motor vehicle registration number C 3018 on 12th April 2010 at the price of M80,000.00. During the negotiations plaintiff made it clear to the defendant that he wanted to purchase a clean motor vehicle.

[3] Defendant represented to the plaintiff that the motor vehicle was not stolen. However, the motor vehicle was impounded in Ladybrand South Africa on suspicion of being stolen.

[4] The plaintiff in the Court a quo claimed M80,000.00 purchase price and M4,800.00 purchase of the canopy,

insurance M9,415.00, Tyres M4,400.00, Road worthy certificate M110.00, number plates M60.00 plus M30.00 loss of opportunity for two months as plaintiff had secured a lease contract for the vehicle from a contractor in Maseru City, for which he was to be paid M15,000.00 a month.

[5] He claimed the above sums plus costs and the interest of 18.5 percent thereon.

[6] It was common cause in the *Court a quo* and in this court that a sale did take place, that the motor vehicle was registered in Leribe district with the same particulars, that were found to be suspected having been registered by the defendant.

[7] The police kept the motor vehicle impounded and instructed the plaintiff to fetch the papers for the motor vehicle and the seller.

[8] The defendant never went to Ladybrand with the plaintiff. They never met face to face. After plaintiff's

second call, the defendant told the plaintiff, he would come to Maseru the following day, so that they can proceed to Ladybrand. The defendant did not show up. When he called him on that day, defendant said he had just arrived from Natal. Defendant promised to call the plaintiff the following day and that he could go to Ladybrand to fetch the motor vehicle and he would call plaintiff to pick it, but defendant became unavailable for weeks.

[9] Defendant on the other hand, testified that he had bought the motor vehicle from Bloemfontein and had been given a receipt, which he handed in as evidence, as well as the registration certificate. He testified that it was a damaged vehicle so he repaired it and bought an engine, for it so that it became a complete vehicle to drive and he obtained the necessary clearance from South Africa and Lesotho to register it.

[10] The evidence tendered in defence and the trend of the learned defence counsel's cross-examination was intended to demonstrate that the plaintiff had been sold

a clean car, which had been examined and cleared in both South Africa and Lesotho. The process of clearing the vehicle was repeated just before defendant sold the vehicle to the plaintiff.

[11] In his plea defendant stated that:

> "*However defendant undertakes out of pity and knowing that the vehicle is not a stolen vehicle to refund plaintiff the purchase price together with the price of the canopy".*

[12] The learned Judge noted that it was only plaintiff and defendant who gave evidence and that the judgment was going to be based on common cause facts and the credibility of the plaintiff or defendant where they differ.

[13] The court agreed with the plaintiff 's counsel that the defendant sold the plaintiff a stolen vehicle or one reasonably suspected to have been stolen. The defendant was in breach of the sale agreement, and therefore plaintiff was entitled to annul the contract. The plaintiff was entitled to damages for the purchase

of the vehicle, special damages including the loss of opportunity to consummate a M15,000.00 per month contract for two months plus costs on attorney and client scale and interest of 18.5 percent, so she ordered.

[14] Dissatisfied with judgment the defendant noted an appeal to this Court.

[15] The defendant filed three grounds of appeal. These are:-

a) The learned Judge in the *Court a quo* erred and/or misdirected himself in upholding the respondent's claim when he had not made a finding that the subject matter hereof was a stolen vehicle;

b) Respondent had failed to prove his claim against the appellant by failing to bring admissible evidence that the vehicle herein concerned was a stolen vehicle; and

c) The learned Judge in the *Court a quo* erred and/or misdirected himself in making a finding that the appellant misled the court where there was no evidence to that effect.

[16] The sharp focus of the defendant's case was to rebut the allegation that the vehicle was stolen. It was valiantly argued for the defendant that the plaintiff had not proved that the vehicle was stolen on the balance of probability. And that it was a principle in civil cases in our jurisdiction that he "who asserts must prove". The case of ***Pillay v Krishna and Another***[1] was cited in support of that proposition. More closer home was **Ramodibedi P** judgment ***in Botsane vs Commissioner of Police***, where he said:

> *"Now it is both a basic and fundamental principle of our law, following Pillay vs. Krishna and Another, which has consistently been followed in this jurisdiction that he who alleges must prove".*[2]

[17] It was the plaintiff's contention that the honourable *Court a quo* neither erred nor did it misdirect itself in upholding the plaintiff's claims that the vehicle, that is the subject matter of the dispute was in fact stolen vehicle.

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[1] (1946) AD 946

[2] Botsane v Commissioner of Police & Another C of A (CIV) No. 23 of 2011 at p.6

[18] It was argued that while the plaintiff had proved that the vehicle AL 586 belonged to him, the defendant did not prove that the vehicle was not stolen. The *Court a quo* had made a finding that the vehicle was stolen.

[19] On the issue of costs, it was canvassed that, that was in the discretion of the court, which discretion must be exercised judicially upon the consideration of all the facts and relevant circumstances of each case. These would, *inter alia*, include the nature of the proceedings and the conduct of the parties. In essence, it is a matter of fairness to both parties. A *plethora* of authorities were cited in support, ***Ramakarane v Gentle (PTY) Ltd***.[3] ***Intercontinental Exports (PTY) Ltd. Foules, Ferreira v. Sevin***[4] *and* ***Vryenhoek v Power***[5]

THE ISSUES

[20] The issues as we discern them in this appeal are:

[3] 4907/2006
[4] (1999) (2) SA 1045 ACCA at Par (25)
[5] 1999 (20) SA 62

i. Was there sufficient evidence in the *Court a quo* that the motor vehicle was stolen;
ii. Did the seller (defendant) have a duty to ensure that the plaintiff was protected from dispossession of the vehicle;
iii. What did the offer of the refund of M85,000.00 amount to; and
iv. Were the damages proved?

CONCIDERATION OF THE APPEAL

[21] We agree with the appellant that there was no evidence that the vehicle was stolen, though we disagree that theft, which is a criminal matter had to be proved on the balance of probability. It has to be proved above the balance of probability. This is why the police did not hurry to make such a conclusion. We reverse that finding of fact as it is perverse to the evidence. This court is of the view that the sharp focus on whether vehicle was stolen or not was triggered by inappropriate the pleading. The case for the plaintiff ought to have been anchored on total failure of consideration as the plaintiff had been dispossessed of the vehicle because of being suspected to have been stolen, when he had

made a condition of the vehicle being clean as part of the contract to purchase the vehicle.

[22] In ***York & Co (PVT) Ltd. v. Jones No. 2***[6] Murray CJ held that the duty of the seller was:

a) To give transfer;
b) To give physical possession; and
c) To guarantee the purchase from ejection

In the circumstances of this case, 'c' can be replaced by, "*to guarantee the purchaser from dispossession of the motor vehicle*". It was the duty of the defendant to ensure that the plaintiff was not dispossessed of the motor vehicle, and in the performance of that duty he lamentably failed. In this case the defendant as seller warranted that the plaintiff as purchaser of the said vehicle would be given undisturbed possession thereof.

[23] The defendant avers that he had offered to pay M85,000.00 *out of pity*. The court below never entered judgment in that sum nor did the defendant pay that

[6] (1962) I SA 72 at 73

sum into court, pursuant to **Rule 38** of the High Court **Rules 1980**, in order to mitigate interest and costs.

[24] The plaintiff need not prove the admitted sum of M85,000.00, but he had a duty to prove the other damages which were special in nature. He had proved that he had paid M9,415.00 for insurance, he had purchased tyres for M4,400.00, he had paid M110.00 for the road worthy certificate and had paid M60.00 for the number plates and he tendered receipts in evidence in the *court a quo*.

[25] These expenses were inevitable, if the vehicle was going to be on the road and more so used for the purpose which was communicated to the defendant before plaintiff paid for the vehicle. These damages were therefore consequential and undeniably foreseeable by the defendant. As we said in ***M & C Contractors v. Lesotho Housing and Land Corporation***[7] para [34],

[7] C of A (CIV) No. 9/2015

these damages naturally flow from the breach of contract.

[26] The plaintiff had entered into a lease with L & S Civil Contractors to lease his vehicle for 3 months and he was claiming loss of opportunity to earn M15,000.00 for two months. In ***M & C Contractors (supra)***, we said 'Loss of opportunity" is the deprivation of productively employing the proceeds of the asset to generate income. The loss is the profit the plaintiff or claimant would have made, had he not been deprived of the opportunity and this must be proved.

[27] The plaintiff tendered evidence of the global figure per month. He never tendered to court, what were the taxes and running expenses as graciously conceded by **Adv. Molati** and we quote:

> "*As a matter of law M30,000.00 is taxable in terms of section 4 of the Income Tax 1994. I would claim net profit. The court cannot grant an amount which is not certain. In law we claim the profit.*

In our view **Adv. Molati** was conceding that the amount remained unproved.

[28] In ***Lesotho Bank v. Khabo***,[8] This Court **per Gauntlett JA** said:

> "*In an action for damages, the question whether or not the claimant should be non-suited for failure to adduce evidence depends on whether he or she has adduced minimally sufficient evidence reasonably available to him, or her at the time of trial. If there is proof by the best evidence available to the claimant that the loss caused by the defendant has in fact occurred, the court is bound to make use of that evidence and award damages even if such evidence is not entirely of a conclusive character and does not permit of a mathematical, calculations of the damages suffered. That exercise may lead to the application of the maxim semper in obscusis quod minimum est sequimur (always in doubtful matters, that which is least minimum applies) in order to select that amount of damages which most reasonably accords with the nature of the evidence adduced. On the other hand, the court is not so bound to award damages in the case where evidence is readily available to the claimant but he or she has not adduced it. In such a case the court ought to order absolution from the instance*"

[8] (2000-2004) LAC 91

[29] In this court, we said in ***Commissioner of Traffic and Others v. Manaheng Maichu***

We ordered at para 3

> *"The case is referred back to the court a quo for the hearing of evidence in regard to the damages suffered by the applicant (in the court a quo) and for the proper determination of damages suffered by the applicant in the form of loss of profit, as opposed to loss of income and with due regard to the rule of the mitigation of damages".*

[30] The plaintiff was in possession of running expenses of the vehicle, if he employed the driver, the wages payable, but never adduced it.

[31] **Conclusion**

The appeal is in main dismissed and the following orders are made. The order of the Court is set aside and replaced with the following.

1. The claim for M30,000.00 is dismissed.

2. The defendant shall pay interest at the rate of 18.5% per annum in the sum of M85,000.00 from the date of the summons until final payment.

3. The Defendant shall pay the sum of M13,585.00 together with interest at the rate of 18.5 per annum..

4. The defendant shall pay costs on attorney client scale.

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DR. JUSTICE PHILLIP MUSONDA

ACTING JUSTICE OF APPEAL

I agree: _____

CHINHENGO

ACTING JUSTICE OF APPEAL

I agree: _____

S. PEETE

JUSTICE OF APPEAL

For Appellants: Adv. B.M. Masiphole

For respondent: Adv. L.M. Molati