



LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

**C OF A (CIV) 17/2023
CCA/0005/2022**

In the matter between-

LIRAHALIBONOE QHOBELA

APPELLANT

and

**HLAKANTSO MAKHEKHENE
RESPONDENT**

1ST

**HMR HOLDINGS (PTY) LTD
RESPONDENT**

2ND

CORAM: DAMASEB AJA

CHINHENGO AJA

BANYANE AJA

HEARD: 13 OCTOBER 2023

DELIVERED: 17 NOVEMBER 2023

SUMMARY

Appellant sells own motor vehicle through agent (HMR) to 1st respondent(respondent) - Transaction done and completed between respondent and agent with respondent paying M46 000.00 to agent as purchase and taking possession of motor vehicle; Agent not passing purchase price to appellant, and though agent acknowledging receipt of purchase price to appellant and promising to pay-over purchase price, fails to do so; Apparently appellant had stipulated a floor or minimum sale price to agent of M55 000.00;

Appellant not having received any money from agent, engaging respondent on matter; Appellant and respondent agreeing, as a compromise, on respondent having to pay an additional M6 000.00 to bring purchase price to M52 000.00; Later respondent suing appellant for specific performance by delivering to him the registration documents of motor vehicle to enable change of ownership; Appellant kind of counter applying for full purchase price of M52 000.00 or return of motor vehicle and damages from respondent for use of vehicle whilst in respondent's possession;

High Court granting respondent's claim and dismissing appellant's counter-claim on basis that payment was due to him from his agent but court not deciding on whether respondent should pay M6 000.00 as agreed;

On appeal, High Court decision confirmed with respect to M46 000.00 but amended to include order for respondent to pay M6 000.00 to appellant whereupon respondent would deliver motor vehicle registration documents and facilitate change of ownership to respondent; No order as to costs of appeal made

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] Before the hearing of this appeal, we were informed that the appeal was not opposed. We requested the parties to file a draft order to that effect. What we received was a document titled 'Consent Order' signed by the parties' legal representatives and bearing the registrar's office stamp dated 13 October 2023. It reads-

"The parties and their respective Counsel agree the appeal hereof shall proceed uncontested."

[2] The 'consent order' filed was obviously not a draft of the order that we asked for and would have to make. We directed that the legal representatives should appear in court on the date of hearing. Only the appellant's counsel appeared. Counsel for the respondent must have thought it was unnecessary for him to do so since respondent was not opposing the appeal. We asked appellant's counsel to make a brief presentation explaining the position adopted by both parties. In our view the mere fact that one party does not oppose an appeal does not mean that the other party will be granted the relief sought as a matter of course.

[3] This appeal raises two issues. The first is whether a principal may escape liability or the consequences, as against a third party, of his agent's failure to carry out the terms of an agency agreement. The second is whether the non-payment of portion of the purchase price of the subject-matter of a sale

agreement, in this case the non-payment of an additional M6 000.00 for a motor vehicle, disentitles the buyer from obtaining specific performance – obtaining delivery of the subject-matter of the sale and attendant documents of registration where the buyer does not tender payment of the outstanding amount of the purchase price.

Factual Background

[4] The appellant appointed a company MHR Holdings (Pty) Ltd (“the agent”) to sell his motor vehicle, a Mercedes Benz Model C-Class, apparently for not less than M55 000.00. The respondent, interacting exclusively with the agent, offered to buy the motor vehicle. The agent sold it to him for M46 000.00. The sale was completed without the agent disclosing to the respondent any minimum price stipulated by its principal or that the principal was selling the motor vehicle for M55 000. The respondent paid the purchase price as advised to him by the agent and the motor vehicle was handed over to him but without the registration documents, which were still in the appellant’s possession. Without the appellant’s cooperation the motor vehicle could not legally be transferred to the respondent.

[5] The agent did not pass on the sum of M46 000.00 to its principal, the appellant. Inevitably, a problem arose from the failure of the agent to pass on to the appellant the purchase price. The appellant refused to hand over the motor vehicle

registration documents until he was paid the purchase price. In consequence of the problems that arose from the non-payment of the purchase price, the appellant and the respondent, to the exclusion of the agent, entered into another agreement on 12 April 2022 in terms of which the respondent agreed to pay an additional M6 000.00 to bring the total purchase price to M52 000.00. This latter agreement was therefore entered into without the agent being advised about it.

[6] Apart from stipulating the agreed sale price of M52 000.00, the new agreement, in the relevant paragraphs, provides that -

“3.The Buyer has paid an amount of M46 000.00 (Forty-six thousand Maloti) to the agent namely HRM Holdings (Pty) Ltd, appointed by the Seller to sell the vehicle in issue. The Buyer undertakes to take all legal steps to ensure payment of such money to the Seller and further undertakes to pay an additional M6 000.00 (Six thousand Maloti) to make the total agreed purchase amount.

5. The ownership rights of the vehicle shall be extinguished with the Seller and vest in the Buyer upon payment of the purchase price. However the vehicle shall be in the lawful possession of the Buyer until the purchase amount has been fully settled.”

[7] As can readily be seen, the dispute between the parties arose partly from the agent's failure to pass on to the appellant the sum of M46 000.00 which it had received from the respondent. As a result, the appellant refused to give to the respondent the motor vehicle registration documents or facilitate the change of ownership.

Respondent's claim in High Court

[8] By notice of motion, the respondent sued the appellant and the agent in the High Court. He sought an order of specific performance of the agreement of sale; that appellant "*deliver into the [respondent's] possession the certificate of registration of the motor vehicle purchased by the [respondent] as per the agreement of sale and to effect the change of ownership [of the motor vehicle] into the [respondent's] names.*" In the alternative, "*an order for the cancellation of the agreement of sale entered into between the parties on the 23rd day of February 2022 and the 12th day of April 2022 [Annexure MH2] respectively, and "an order directing the [appellant] to pay to the [respondent] the sum of Forty Six thousand Maloti (M46 000.00 paid as the purchase price for the motor vehicle in issue.*" Respondent also claimed interest on the M46 000.00 at the rate of 18.5% per annum and costs on attorney and client scale.

[9] Although the respondent cited appellant and his agent as respondents, the notice of motion did not seek any specific relief against the agent nor did it claim that the liability of the

appellant and the respondent for the M46 000.00 and interest, was joint and several, the one paying the other to be absolved.

[10] In the founding affidavit the respondent averred that on 23 February 2022 he and the 2nd respondent “who had been at all material times acting on behalf of and [as] agent of the [appellant]” entered into a sale agreement for the motor vehicle for M46 000.00 and promised that, after the sale, the appellant would avail to respondent the motor vehicle registration certificate. In the presence of the respondent, the agent telephonically agreed with the appellant that upon payment of the purchase price, appellant would deliver the registration certificate on the same day. Annexure MH1 is proof of payment to the agent of M46 000.00 on 23 February 2022. The appellant however later refused to deliver the certificate of registration because he wanted the purchase price reflected in his bank account before he could do so.

[11] Respondent averred that on 12 April 2022, the appellant sought to repossess the motor vehicle. The two could not agree. The respondent claimed that he had the right to retain possession of the motor vehicle. They agreed to see the respondent’s lawyer together. When they met the respondent’s lawyer, it was the first time the appellant informed him that he (appellant) had authorized the agent to sell the motor vehicle for M52 000.00 and not for any lesser amount. The appellant and respondent felt that they both had been victims of the agent’s deception and reached a compromise agreement in

terms of which the respondent was to pay M6 000.00 more than what he had already paid to bring the purchase price to what the appellant wanted, M52 000.00. It was then that they signed the agreement, Annexure MH2.

[12] The respondent averred that, apparently, appellant did not receive M46 000.00 from his agent and has on several occasions demanded the return of the motor vehicle. On 5 August 2022, appellant advised the respondent that he did not consider that he was bound by the agreement of 12 April 2022 and wanted his motor vehicle back. Respondent said he accepted the appellant's repudiation of the agreement and opted for the cancellation of both agreements.

[13] The respondent's claim as stated at the end of his founding affidavit is inconsistent with his claim in the notice of motion. He framed it this way -

"... I aver that the 1st respondent has from the 23rd day of February 2022 been in breach of the sale agreement and as such I admit the repudiation and I have opted for the cancellation of both agreements. I aver that in the circumstances the 1st respondent is therefore liable to reimburse me with the purchase amount I have paid to the 2nd respondent as his agent.

I am making this affidavit in support of the prayers as outlined in the Notice of Motion."

[14] I consider that the relief as framed in the founding affidavit is inconsistent with that claimed in the notice of motion because in the latter, the main relief sought is specific performance, i.e., delivery of the registration certificate and change of ownership of the motor vehicle and, alternatively, cancellation of the two agreements and a refund of M46 000.00. As framed in the penultimate paragraph of the founding affidavit the relief is cancellation of both agreements and reimbursement of M46 000.00 with interest thereon.

Appellant's defence in High Court

[15] The appellant's defence is that in January 2022 he entered into a verbal agreement with the agent to sell the motor vehicle for not less than M55 000.00 and of that amount 3% was the agent's commission. They agreed that the proceeds of the sale were to be "sent" to his personal bank account before he could release the certificate of registration of the motor vehicle. On 23 February 2022, he received a call from the agent advising him that a buyer, willing to pay the purchase price, had come forth. Appellant directed the agent to accept the purchase price and deposit it into appellant's personal bank account "immediately and without delay" so that by the time the respondent arrived in Butha Buthe to collect the certificate of registration, the purchase price would be reflected in his personal bank account.

[16] On 23 February 2022 the appellant inquired from the agent if the money had been deposited into his account and continued to do so several times in the following days. The answer was in the negative. Appellant discussed the matter with the agent's representatives who informed him that the motor vehicle had been sold for M46 000.00; that the amount was paid by the respondent but not paid into appellant's account. Appellant stated agent's representative, the managing director, proposed to pay M4000.00 to bring the purchase price to M50 000.00. Appellant refused and insisted on payment of the original purchase price. The agent's managing director undertook that the original purchase price of M52 000.00 would be paid by the agent within a short time. When it was not paid the appellant demanded the return of his motor vehicle.

[17] On 30 March 2022, the appellant laid a complaint with the Police against the agent and the respondent, the latter because he was using the motor vehicle when the appellant had not yet received the purchase price. The agent's managing director was called by the police. He confirmed to the Police that he had received payment from the respondent and undertook to pay the amount received to the appellant during the following week. During that following week the appellant, the agent's representative and the respondent met, and after discussing the impasse, they agreed that the appellant would take back the motor vehicle and leave the agent and the respondent to deal with each other in respect of the amount already paid. Appellant repossessed the motor vehicle.

[18] On 12 April 2022, the respondent pleaded with appellant to return the motor vehicle. It was then that they went to respondent's lawyer and agreed as reflected in the second agreement, Annexure MH2. Respondent's lawyer undertook to pursue the agent for payment of the M46 000.00. The appellant then agreed to release the motor vehicle to the respondent. What happened thereafter is captured by the appellant in these words -

"I aver that the [respondent] as per the agreement made on 12th April 2022 failed to effect any payment to me until I approached his counsel of record on 05/08/2022 after the [respondent] indicated that he had failed to pursue the agreement since his counsel of record demanded that he pays a total of M2 000 for deposit. [Respondent] and I verbally agreed that the agreement be cancelled on grounds of non-performance and breach of contract from the [respondent]. I should indicate that the [respondent's] counsel of record was not available and or was rather sceptical to do what I asked him to do as I asked him until I was served with this application. [Respondent] herein wants to be unjustly enriched by lodging this application."

[19] In specific responses to the respondent's averments in the founding affidavit, the appellant stated that the agent acted outside his mandate and in breach of the agency agreement. He took issue with respondent's claim for specific performance

and reimbursement of the amount he paid as the purchase price, the same I commented on as inconsistent. He averred that after the agreement of 12 April 2022, the respondent did not perform. He therefore wanted respondent to pay to him M46 000.00 plus M6 000.00 and, at the same time, expressed doubt that the respondent had paid M46 000.00 to the agent. Without that happening he was not releasing the motor vehicle registration certificate. His position is summarised in the last paragraph of the answering affidavit:

“10. Wherefore I am making this affidavit in support of the contention that the application be dismissed with costs and that both the agency agreement and the agreement of sale entered on 12th April 2022 be cancelled and the car be returned to me with the mileage not exceeding 182 108 km and in the event the milage is more than that I charge jointly and severally the [respondent] and the 2nd respondent M200.00 fee per km.”

[20] The respondent’s reply does not add much to his essential averments in the founding affidavit.

High Court judgment

[21] The High Court (MOKHORO J) granted an order directing the appellant to surrender the registration documents to the respondent for transfer of ownership to be made to him. She also ordered the appellant to pay costs on the attorney and client scale. The learned judge’s order reads –

“1. The application is granted.

2. The 1st respondent, Lirahalibonoe Qhobela, is ordered to deliver into the Applicant’s possession, Hlakantso Makhekhenene, the registration certificate of the motor vehicle as per the agreement of sale and to effect the change of ownership into Applicant’s name, to wit:

Make: Mercedes Benz C Class

Registration Number: B7787

Engine Number 27194030159844

Vin: WDC2030422R112470

3. Costs shall be on attorney and client scale.”

[22] It is against this order that the appeal lies. Predictably, no order was made against the agent because no relief had been sought against it, although it was a party to the proceedings and the party, as is common cause on the pleadings, that kept the bulk of the purchase price, M46 000.00, to itself. The failure to claim relief against it explains to some degree why the agent did not defend the matter.

[23] A part of the High Court judgment is devoted to dealing with an interlocutory application filed by the appellant with a view to preserving the motor vehicle in the hands of the

registrar of the High Court pending the finalisation of the main application. The learned judge dismissed the interlocutory application for non-compliance with the rules of court, in particular rule 8 as read with rule 30 of the High Court Rules 1980, after which she proceeded to deal with the main application. No appeal was noted against the interlocutory ruling.

[24] The learned judge set out the background facts of the case and the nature of the dispute between the parties. Regarding the dispute, the learned judge delineates it as being that-

“The [appellant] alleges that the [agent] sold his vehicle at M46 000.00, a price lower than M55 000.00, being the price agreed upon by the two respondents (appellant and agent) and further that he has not received the said lower amount into his bank account. The [appellant] therefore declines liability towards the [respondent] based on the above-mentioned grounds. The [respondent] has therefore approached this court seeking specific performance against [appellant] with the alternative of cancellation of the agreement and reimbursement.”

[25] She identified two issues for decision, namely, whether the agent was indeed the appellant’s agent and whether the appellant could escape liability on the basis that his agent had been dishonest. On the first issue the learned judge in reliance

on *C. A Bothma v Chalmar Beef*¹ and *Gibson*² found that the agent was indeed an agent of the appellant. She quotes from *Gibson* –

“The general rule is that where an agent has acted within the scope of his authority (express, implied or ostensible) or where his previous unauthorised act has been ratified by the principal, the principal is liable to any third party with whom the agent has contracted and no contractual liability to the third party attaches to the agent.”

[26] The learned judge accordingly rejected the appellant’s contention that he could not be ordered to surrender the registration certificate of the motor vehicle because he had not received the purchase price and because the contract had not been perfected. In doing so she distinguished *Thorpe and Another v BOE Bank and Another*³ in which the court said –

“When a contract of purchase and sale is entered into, subject to a suspensive condition, no contract of sale is then and there concluded and the binding contractual relationship which does arise is not a contravention of a statute prohibiting the conclusion of a contract of purchase and sale and only matures into such a contract on the fulfilment of the condition.”

¹ Case No. 2145/2017 at p 5 para 17

² *South African Mercantile and Company Law* 8th ed. p 230

³ 2006 (3) SA 427 SCA

[27] She found that the facts of the case before her were that the respondent made the payment to the agent after the appellant authorised the agent, not only to receive and deposit payment into his bank account, but also to conclude the sale and handover the motor vehicle. She concluded that there was no basis upon which the appellant, having received the purchase price through his agent, could refuse to surrender to the respondent the registration certificate of the motor vehicle, even if, as it transpired, his agent did not pay over the sale proceeds to him.

[28] On the second issue the learned judge concluded that the appellant could not escape the consequences of his agent's conduct. She found support for this conclusion in *Boipabolo Junior School v MZA Estates Agency (Pty) Ltd and 3 Others*⁴, a similar case in which agency was involved, where MATHABA J said –

“If indeed the 3rd respondent did not receive all the money that was paid to the 1st respondent by the applicant, I sympathise with him, but in law, he cannot escape contractual liability based on that fact. He is taken to have contracted with the applicant notwithstanding the fact that he did not append his signature on the deed of sale.”

⁴ CCA/0112/2022, p 15 para 34 (unreported)

[29] The reasoning of MOKHORO J is correct and amply supported by authority and the facts of the case. I find no fault with it.

High Court treatment of agreement of 12 April 2022

[30] The High Court considered briefly the agreement of 12 April 2022 between the respondent and the appellant. It is recalled that the appellant raised the significance of that agreement in the answering affidavit. Admittedly he did not make a specific counterclaim for the payment of the amount of the top up of the purchase price in the sum of M6 000.00 but, as we have seen, he grounded his claims for its cancellation together with the agreement of 23 February 2022 and the return of his vehicle and claim for damages of M200.00 per km on that agreement. The learned judge made short shrift of the appellant's contention:

“[24] There is also the aspect of a Memorandum of Agreement which was entered into between the [respondent] and the [appellant] on the 12th of April 2022 which states that the [respondent] as buyer had already paid M46 000.00 to the agent, HRM Holdings (Pty) Ltd, who was appointed by the seller, being the [appellant]. The agreement goes further to provide that the purchase price was actually M52 000 (and not M55 000 now being alleged to be the purchase price). This Memorandum appears to now shift the burden of ensuring that the agent transfers

the money to his principal and also pay whatever difference alleged to be outstanding on the buyer, the [respondent], which difference, if any was not known to the [respondent].

It was never explained to the court as to what legal standing this Memorandum of Agreement held as the agreement of sale had already been concluded between the [respondent] and the [agent] as agent of the [appellant] and the legal consequences of agency have already been expounded above.”

[31] On this basis the High Court did not address the agreement of 12 April 2022 or its significance to the parties. Both wanted it dealt with and possibly cancelled but for different reasons. It was a compromise agreement voluntarily entered into by the respondent and the appellant. I think the learned judge erred in not considering the agreement.

Grounds of appeal

[32] The appellant’s grounds of appeal in the record of proceedings are eight in number. They are that the learned judge erred or misdirected herself in –

- (a) misconstruing the facts and finding that the appellant had not been in continuous possession of the motor vehicle when it was not disputed that the appellant had repossessed the motor vehicle before the agreement of

12 April 2022 and only returned it into the respondent's possession after that agreement;

- (b) finding that the legal implications of the Memorandum of Agreement between the respondent and the agent as contrasted with that between the respondent and the appellant did not justify the disregard of the existence and legality of the Memorandum of Agreement as done by the learned judge;
- (c) granting the order in favour of respondent in circumstances where the sale was based on a suspensive condition as contended by the appellant in the answering affidavit;
- (d) not recognising that the issue whether the respondent had discharged his obligations of paying the full purchase price had to be dealt and if left where it is, it remains undecided by the High Court;
- (e) not granting the interlocutory application where the subject of the sale was prone to depreciation and the licence disk was expiring in a short period of time;
- (f) relying on Gibson⁵ and ignoring the fact that the appellant had not ratified the agent's unauthorised act

⁵ Op cit

of selling the motor vehicle “way below its agreed price”;

(g) not recognizing that the appellant’s real argument was that the sale between the respondent and appellant was not *perfecta* because appellant had not received the purchase price and that the first agreement had been cancelled hence the second agreement;

(h) finding that the respondent was not privy to the agreement between the appellant and his agent when the respondent knew as from 23 February 2022 that the appellant would only release the certificate of registration of the motor vehicle upon receipt of the purchase price: the suspensive condition had always been expressly communicated.

[33] Ground of appeal (a) is not significant for the purpose of this appeal. The duration over which either the appellant or the respondent was in possession of the motor vehicle is not important in any consideration of the liability of the appellant to handover the registration certificate so that the respondent may retain the motor vehicle as owner thereof. It is only relevant to the consideration of the quantum of damages based on the claim of M200 00 per km, should that claim succeed. Ground appeal (e) concerning the interlocutory ruling is no longer necessary to consider. The learned judge made her

decision and proceeded to deal with the merits of the main claim. Nothing beneficial to the appellant arises from a consideration of that ground of appeal even were the appellant to succeed. I shall therefore not consider these two grounds of appeal for purposes of my decision in this appeal.

Appellant's heads of argument and submissions on appeal

[34] As earlier stated this Court called upon the appellant's legal representative to clarify what he was proposing as the appropriate order to be made by the Court in light of the fact that the parties had not filed a draft order as directed as well as in light of the trite position that a failure to oppose an appeal is not an open licence for the appellant to obtain an order as he pleases: the court must nonetheless consider whether the order sought is merited.

[35] In the heads of argument the appellant contended that the agreement of 12 April 2022 was the one to be given effect to by the court *a quo*. It stipulated a new purchase price of M52 000.00 which required that the respondent would pay an additional M6 000.00 over and above the M46 000.00 he had paid to the agent. According to the appellant the respondent also made an undertaking to recover the money paid to the agent, proceeding from the premise that the parties had agreed that the registration documents would not be released to the respondent until the purchase price was paid in full while with the motor vehicle would be released back to the appellant in

the meantime. Thus, appellant argued that the question on appeal was whether the court *a quo* erred in not giving effect to the agreement of 12 April 2022 and enforcing the first agreement that had in effect been superseded and cancelled by the parties.

[36] Appellant further argued that the court *a quo* failed to appreciate that two principles of law were implicated in the case before that court -that of novation and the parole evidence rule. In regard to novation the appellant referred to several authorities - *SA Post Service Ltd v. Commissioner L Nowosenetz & Ors*⁶; *ABSA Bank Ltd v Coombs*⁷; *Shackleton Credit Management v. Standard Bank of South Africa (Pty) Ltd & Ors*⁸; *Swadif (Pty) Ltd v. Duke NO.*⁹ and *Novartis SA (Pty) Ltd v Maphil.*¹⁰ They are all to the same effect as *ABSA Bank*, that -

"[23] A contract of novation is one that extinguishes an existing obligation and at the same time replaces it with a fresh obligation. In other words the existing obligation is replaced with a new one, the existing obligation being discharged.

A party alleging novation must allege and prove it. Although an express declaration from the parties to novate is not a requirement, the party alleging novation

⁶ Case No: JR 663/2011 Para 23-30 [www.https://saflii.org/za/cases](http://www.saflii.org/za/cases)

⁷ 4187/2015 at Para 23

⁸ 4103/2012[2023] ZAGPPHC 9-10 (20 March 2023) [www.https://saflii.org/za/cases](https://saflii.org/za/cases)

⁹ 1978(1) SA 940 G-H (<https://lawlibrary.org.za> at Para 16)

¹⁰ 20229/2014[2015]ZASCA 111 (3 September 2015) at Para 28
www.https://saflii.org/za/cases

must place sufficient evidence before the court from which a necessary inference of novation could be drawn.

There is a presumption against novation. In determining whether novation has occurred, the intention to novate is not presumed. Novation is essentially a question of intention. In the absence of an express declaration of the parties to novate, the intention to effect novation cannot be held to exist except by way of necessary inference from all the circumstances of the case."

[36] In regard to the parole evidence rule, appellant relied on *Metsing v. DPP*¹¹ and *Zeffert and Hoffman*¹². In the latter, the law is stated to be that –

"The general rule is that a document is conclusive as to the terms of the transaction which was intended, or required by the law, to embody. But this statement requires considerable amplification, and it will be convenient to give separate treatment to the effect of the rule on four kinds of documents: contracts which the parties have agreed to reduce to writing, transactions which are required by law to be in writing, negotiable instruments and certain judicial quasi-judicial record."

And in *Metsing*:

¹¹ [20201 LSHC 46 (12 June 2020), para 96

¹² *The South African Law of Evidence* 4th ed., p 294

“[96] It is of paramount importance to note that as a general rule, extrinsic evidence is inadmissible because it tends to alter the terms of the already written contract which may prejudice another party to the contract. This was well inscribed in Samuel Gatri and Another V Badumelleng Brady Melk in these terms:

‘The general rule is that a party to a contract which has been integrated into a single and complete written memorial may not contradict, add, amend or modify the contract by reference to extrinsic evidence and in that way redefine the terms of the contract.’”

Discussion and Disposition

[37] The appellant’s submission arising from the authorities that he referred to on novation is basically that the judge *a quo* was not entitled to ignore the agreement of 12 April 2022 which had supplanted the one of 23 February 2022. The latter was verbal between the respondent and the agent and the former was written between the respondent and the appellant.

[38] The point of departure, which the appellant does not appear to have appreciated is that in terms of the agreement of 23 February 2022, the contract of sale was completed when the agent and the respondent agreed on the purchase price of M46 000.00 and the respondent paid that amount to the agent, who should have passed it on to the appellant but for his defalcation

by misappropriation after it received the money in a fiduciary capacity for its principal. The contract of 23 February 2022 was entered into by the respondent without any knowledge of the floor price for the motor vehicle or other instruction given by the appellant to his agent. What he was advised was simply that upon payment of the purchase price of M46 000.00 the motor vehicle's registration documents would be handed over to him.

[39] The agreement of 12 April 2022 was entered into as a compromise between the respondent, who had validly concluded a contract with the appellant's agent and the appellant, who had, as it now appears, been cheated out of his money by the agent. That the respondent undertook to recover from the agent the amount he had paid to it so as to say he assumed an unshakable obligation to so recover, is an exaggeration by the appellant of the agreed relevant term of the 12 April 2022 agreement. In my view the respondent undertook no more than to endeavour to recover that money from the agent through his legal representative, who had in the circumstances, and for all intents and purposes, become legal representative of both the respondent and the appellant in order for both of them to overcome the shared predicament created by the appellant's agent. In the words of the written agreement the *"Buyer undertakes to take all necessary legal steps to ensure that payment of such money to the Seller and further undertakes to pay an additional M6 000.00 to make the total agreed purchase price [of M52 000.00]."*

[40] Nothing was said about what the respondent's failure to recover the money paid to the agent would entail. What is clear beyond per adventure is that the respondent assumed the singular and unshakable obligation to pay an additional M6 000.00 and bring the total compromise purchase price to M52 000.00 and not to the sum of M55 000.00, purportedly given by appellant to the agent as the floor price.

[41] The dealings or exchanges between the appellant and his agent prior to the institution of the application in the High Court, spoken to extensively by the appellant in the answering affidavit under the subheading 'Background Facts', fourth paragraph thereof, the appellant states in relation to his meeting with the agent's managing director, Mr Mohale:

"I aver that Mr Mohale and I met and he stated that indeed the car was sold and had been sold at M46 000.00 against our agreement. He further asked to top up the amount paid by the [respondent] by M4 000.00 so that my proceeds would be at M50 000.00. I aver that I repudiated the offer on the notion that I don't believe it was true that his employees would sell my car below the offered price and as such I don't accept the amount, I requested the [agent] to give me my money as agreed and or in the alternative my car should be returned. The [agent's] MD undertook to pay the agreed price on the following Tuesday. I then insisted that the [respondent] should

return my car since no payment had reflected on my account.”

[42] The appellant does not appear to me to have correctly grasped the issue as to the person against whom his arrows were to point or be directed. He dithered between his agent and the respondent in the vain hope that he would be paid the full purchase price by either of them. That approach would not, and did not, wash with the respondent, nor does it with me. The respondent had paid the purchase price as required of him by the agent acting for the appellant. In the agreement of 12 April, the respondent agreed, as a compromise, to pay an additional M6 000.00.

[43] The question must be answered, as submitted by appellant’s counsel, whether the agreement of 12 April 2022, novating the earlier agreement as alleged, created a completely new agreement requiring the respondent to pay the full M52 000.00 in addition to the M46 000.00 he had paid to the agent. The emphatic answer is a resounding NO. The agreement of 12 April 2022 did not supplant the verbal agreement of 23 February 2022 between the agent and the respondent. That one remained intact. The agreement of 12 April is the kind of agreement covered by what is aptly described by Christie¹³ in these words:

“When the common intention is to vary on obligation of the old contract, such as the price in a contract of sale,

¹³ *The Law of Contract in South Africa*, 5th ed., Butterworths, p 451

leaving all the other terms intact, it is sometimes said that there has been a novation of that one obligation, but this is really a misuse of the word novation. The contract has not been novated but varied, and any action would be properly be brought on the old contract as varied, not on a purely imaginary new contract containing all the old contract's terms and one of its own."

[44] The parties varied their agreement to require the respondent to pay an additional amount. They did not replace the entire verbal agreement of 23 February 2022. I therefore do not accept the argument that the verbal agreement was novated in its entirety. In my view the only error that the judge *a quo* committed was not to enforce the agreement of 12 April 2022 to the extent, and only to that extent, that it required the respondent to pay an additional M6 000.00 to the appellant. Thus, she fell into error in her consideration of the second agreement between the appellant and the respondent.

[45] Asked to provide a formulation of the order that he was seeking in this Court, appellant's counsel hazarded that it was one setting aside the order of the High Court and declaring that the agreement of 23 February 2022 was novated by the agreement of 12 April 2022. Formulated in that way, the proposed order would leave the parties to their own devices, it can be safely presumed. It seems to me, from information given to us by appellant's counsel that the motivation for this formulation of the proposed order was an endeavour to

accommodate the proceedings instituted by the appellant in the High Court (Northern Division), wherein he seeks certain relief arising from the events that gave rise to the present litigation. The record of those proceedings was not availed to this Court.

[46] There can be no doubt, in my view, that the learned judge *a quo* was correct in her conclusion that the respondent had discharged his obligation under the verbal agreement of 23 February 2022 and was therefore entitled to the relief he sought. That relief must, of necessity, take into account the changes infused into the verbal agreement by the agreement of 12 April 2022 requiring the respondent to pay an additional M6 000.00 to the appellant. There is nothing inconsistent between the two agreements: the one is foundational to the obligations of the parties and the other is additional to those obligations.

[47] The learned judge *a quo* reckoned that the appellant had not squarely put his claims for cancellation of the two agreements, the “agency agreement” (by which I think she was referring to the agreement between the agent and the respondent and not between appellant and his agent), the return of the motor vehicle and for damages, before the High Court in the form of a counterclaim. I am satisfied that the claim was sufficiently pleaded for the purpose of its adjudication by the court below. However, the claim for damages was not sufficiently particularised. There is no evidence of what distance the respondent had covered in

excess of the 182 108 km on the clock during the time it was his possession. That evidence would have been readily available if proper procedures had been followed for obtaining it. However, the damages claim could only have been considered if the respondent's claim had failed. It must be apparent from the foregoing that the respondent's claim is not poised to collapse, as the final disposition of the appeal will show. It is therefore not necessary to consider the damages claim any further.

[48] The judgment of the court *a quo* and concomitant order are unassailable to the extent indicated above. The order must however be adjusted to require the respondent to pay to the appellant the additional M6 000.00 as agreed on 12 April 2022.

[49] The High Court order of costs on attorney and client scale was not justified in the judgment and it is not clear why costs were not granted on the ordinary scale. I think that although no relief was sought against the agent, it must be held liable for the respondent's costs in the High Court. It brought about the dispute and has not defended the application.

[50] The costs on appeal must be considered against the backdrop of the respondent's decision not to oppose the appeal. Whilst I think that that posture was ill-advised, there is no good enough reason to make an order of costs adverse to any of the parties, more so in light of the "consent order", which does not advert to the issue of costs. The appellant has

partially succeeded on appeal but that does not entitle him to an order of costs regard being had to antecedents in the disposition of this matter.

[51] The order I make is that –

1. Paragraph 2 of the High Court order is upheld in its entirety.
2. Paragraph 3 of the High Court order is set aside.
3. The High Court order as a whole is amended and substituted with the following order –

“1. The 1st respondent, Lirahalibonoe Qhobela, shall deliver to the applicant, Hlakantso Makhekhenene, the registration certificate of the motor vehicle with details below, and facilitate its change of ownership into applicant’s names:

Make: Mercedes Benz C Class

Registration Number: B7787

Engine Number 27194030159844

Vin: WDC2030422R112470

2. Should the 1st respondent refuse or neglect to facilitate the change of ownership of the motor

vehicle, the Deputy Sheriff of the High Court shall take necessary steps and sign all documents to procure the registration of the said motor vehicle into the applicant's names.

3. The applicant shall pay to the 1st respondent the sum of M6 000.00 and interest thereon at 18.50% from the date of this order to the date of payment in full.


4. The 1st and 2nd respondents shall pay the applicant's costs of suit jointly and severally, the one paying the other to be absolved."

[52] There shall be no order of costs of appeal.



MH CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:



PT DAMASEB

ACTING JUSTICE OF APPEAL

I agree



P BANYANE

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV L D MOLAPO

FOR THE RESPONDENTS: NO APPEARANCE