IN THE HIGH COURT OF LESOTHO
(HELD AT MASERU)

CIV/T/132/2010

In the matter between:

TEBOHO NTOANE **PLAINTIFF**

AND

MOTS'AMA BERENG **DEFENDANT**

JUDGMENT

Coram	**:**	Honourable Justice E.F.M. Makara
Heard	**:**	8 April, 2018
Delivered	**:**	8 May, 2018

Summary

Plaintiff asking the Court to in the main award him damages against the Defendant for having used his tractor after despoiling him of its lawful and peaceful possession - The Court in dismissing the case found that the Plaintiff had voluntarily taken the tractor to the Defendant as a temporary solution pending a repair of a mechanically dysfunctional milling part of the earlier tractor which the Defendant had bought from the Plaintiff for M25.000 00 after the seller had assured the buyer that it was functional – instead, the Defendant sold the original tractor to a third party for M30 000 00. Secondly, it held that the Plaintiff had through chicanery against the Defendant been unjustly enriched – This being against public policy and societal morals.

ANNOTATIONS

CITED CASES

1. **Mutual and Federal Insurance Company Ltd v The Municipality of Oudtshoorn**http://www.saflii.org/za/cases/ZASCA
2. **Tactical Reaction services CC v Beverley Estate II Homeowners' Association [2010] ZAGPJHC 109**
3. **Jajbhay v Cassim1933**

MAKARA J

Introduction

[1] The Plaintiff has instituted these proceedings against the Defendant asking for the intervention of this Court by ordering the Defendant to pay him:

a) Damages in the amount of **M313,030.00**;
b) Interest thereon at the rate of 18.5% per annum from the date of summons to date of repayment;
c) Costs of suit;
d) Further and/or alternative relief

The Common Cause Facts

[2] The background facts which occasioned this case are basically subscribed to by both parties. They unfold that sometime during 2008, the Plaintiff and the Defendant initially concluded a verbal contract in terms of which the former would sell a Massey Ferguson tractor to the latter. A material term of the agreement was that the tractor was required for milling of fodder for the Defendant to feed

his dairy cows. Thus, he even asked the Defendant to install a PTO gear which would be indispensable for that task.

[3] At the end of the negotiations the Defendant paid the Plaintiff the purchase price of M 25.000. Subsequently, the Plaintiff drafted an agreement couched in the following fairly translated terms:

> This is the agreement for the sale of a second hand tractor, model is Massey Ferguson 178 between the buyer and seller. The agreed amount is Twenty-Five Thousand Maloti M25, 000.00 which has been paid in full. Engine Number 248 4A 302 15.

[4] In another important development the Plaintiff showed the Defendant how the gears operate and then the latter drove the Ferguson to his home. Along the way, the Defendant called the Plaintiff to report to him that the tractor was giving him a problem. Plaintiff rushed to a place where tractor was and discovered that the cause of the problem was the inability of the Defendant to operate its gears and instructed him how to do so. The impression thereof is that after the Plaintiff had intervened, the tractor was safely driven to its intended destination.

[5] Upon the arrival of the Ferguson at the home of the Defendant, he tested its milling functionality by adjoining its PTO to a milling machine and it failed to turn the rota for the harmers. This was well confirmed by Qabola Pheko who is a tractor mechanic of long

experience whom the Defendant engaged to repair the problem but all in vain. In that predicament, the Defendant called the Plaintiff to inform him about the inoperativeness of its PTO to turn the shaft of the milling machine. This was done on the same day.

[6] The Plaintiff proceeded to the home of the Defendant where he confirmed that the reported mechanical problem was a reality. In response, the Plaintiff fetched his Stayer tractor to lend it to the Defendant so that he could continue milling fodder for his cows and instructed him on its effective utilization for the intended purpose. The stayer improvisation worked successfully. In the meanwhile, the Plaintiff took away the Fergusson to fix it and then return it back to the Defendant who had by then assumed its ownership. The Plaintiff, latter sold it to a third person for Thirty Thousand Maluti (M30 000. 00) without any reference to the Defendant or a refund of a purchase price he paid for it.

Points of Divergences between the Parties

[7] Basically these commences from the purpose for which the Stayer tractor was given to the Defendant. According to the Plaintiff he had by agreement lended it to the Defendant pending the mechanical fixing of the Fergusson and that he charged him for its use. Moreover, he argued that he had incurred expenses for its towing to his home, refueling, and labour incurred for repairs and

feeding of the mechanics. A suggestion is that it was on that basis that he sold the Fergusson apparently to settle his expenditures and that their calculations were determined on the Government tariff for charges on plowing fields, milling including standing ones. Ironically, however, he only provided the Court with the tariff concerning plowing.

[8] The Defendant counter argued his case from the premise that the subject matter of the contract was the Fergusson tractor and not the Stayer. To highlight the point, he drew to the attention of the Court that he had specifically chosen it among the several tractors which the Plaintiff had advised him that they including the Stayer, were available for sale. In that background, he advised the Court that he had throughout understood that the Fergusson constituted the subject matter of the contract under consideration and that it was on that account that he had consistently demanded that it be returned to him.

[9] The Plaintiff introduced a legal point that the act of the Defendant to keep the Stayer despite his demand for its return constitutes an act of spoliation. In response the Defendant disputed the charge upon reasoning that the Defendant voluntarily brought the Stayer to his house to temporarily substitute the Fergusson for the milling. He illustrated the argument by stressing that this

happened when he insisted on the return of a functional Fergusson which was the subject matter of their contract or otherwise that he be refunded the whole purchase price.

The Decision

[10] In law, the parties must treat their contract *ubrima fides* (outmost good faith) irrespective of whether it is verbally conduct wise or documentally concluded. This was well articulated in **Mutual and Federal Insurance Company Ltd v The Municipality of Oudtshoorn**[1] The contract under consideration commenced from verbal negotiations, was later partially reduced to writing and it is also inferable from the conduct of the parties. The latter dimension is inferable from the circumstances surrounding the decision of the Plaintiff when handing over the Stayer tractor to the Defendant for the said milling. It is common cause that this happened at the time the Fergusson which is the subject matter of the contract could not drive the PTO for milling. In this regard, Gibson postulates that legally binding agreements can also be created by the conduct of the parties without a word passing between them[2].

[11] A logically decipherable message is that the Stayer was provided as a **temporary** substitute for the execution of the milling task for

[1] http://www.saflii.org/za/cases/ZASCA @ 26
[2] SOUTH AFRICAN MERCANTILE AND COMPANY LAW Juta: 5TH EDITION @ p.46

which the Fergusson was bought by the Defendant. This is perceivable form the background that the Defendant had tenaciously demanded the Fergusson with a functioning PTO be returned to him or otherwise that the Plaintiff should refund him his Twenty Five Thousand Maluti (M25 000. 00) purchase amount. Their reciprocal conduct towards each other is indicative that the contract was provisionally altered for improvisation pending the repair of the Fergusson and that it would only be thereafter that the Stayer would be returned to the Plaintiff.

[12] Consequently, the contract bears all the essential elements of a valid contract with the necessary novation temporarily dictated by the circumstances and qualifies to be enforced as such. There is nothing *contra bones mores* to render it otherwise. The classical requirements for a contract were pronounced in **Tactical Reaction services CC v Beverley Estate II Homeowners' Association**[3] in the following terms:

> It is trite law that a contract is created by offer and acceptance. Furthermore, acceptance of an offer by the offeree must be clear, unequivocal and unambiguous. See *Boerne v Harris* 1949 (1) SA 793 (A) at 799-800, *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 421-2, *Potchefstroomse Stadsraad v Kotze* 1960 (3) SA 616 at 634 (per Malan AJA dissenting.)

[3] [2010] ZAGPJHC 109 para 19

[13] The Court is in principle enjoined to enforce a contract voluntarily concluded between the parties to it except where it is *ultra vires* the law. Though in the instant case the Fergusson was not sold as a new tractor and therefore, bought on *as it is* basis; it emerges from the negotiations between the parties that the Defendant consistently maintained that he wanted the Fergusson with a functional PTO that would turn the harmers of a milling machine. A narrative is that the operation of the *voet stood* principle when one buys an old item in particular a machine, did not apply to the PTO system hence the Plaintiff assured the defendant that it was mechanically functional. This is even reinforced by the subsequent measures that the Plaintiff took to repair same. Perhaps, it could be something else if the complaint was over a different part of the Fergusson.

[14] On a different but relevant legal point, common law has been developed to detest unjust enrichment even in cases where one of the parties unjustly benefited from an unlawfully concluded contract. This has *inter alia* been elucidated by Stratford C J in **Jajbhay v Cassim**[4] in these words:

> Public policy should properly take into account the doing of simple justice between man and man. Each case must be decided on its own facts and, in the present instance, an important aspect of public policy to be taken into account is that it is against public policy that one party should be unjustly enriched at the expense of another.

[4] 1933 AD 337

[15] In applying the principle against *unjust enrichment* it emerges from the case at hand that the seller had initially craftily undermined a material term of the agreement with the buyer by misrepresenting to him that the PTO of the Fergusson Tractor intended for milling was operative. Secondly, he took that tractor to his home under the pretext of going to repair that essential part but instead unilaterally sold it to a third party for M30 000 00 on top of the M25 000 00 price for which he had already sold same to the Defendant. In the end he had accumulated M55 000 00 from selling the same tractor to two different individuals and had not reimbursed the Defendant with his M 25 000 00. This obtained despite the insistent demand by the Defendant that the Plaintiff should either return to him his PTO repaired Fergusson or the M25 000 00 that he had paid for its purchase. Thus, the Plaintiff finally became *unjustly enriched* and the Court must indicate its indignation towards such a behavior.

[16] There are no factual or legal grounds to substantiate the argument that the Defendant has committed an act of spoliation by continuing to keep the Stayer. The essential to be proven to sustain the claim were narrated in the classical case of Nino Bonino to consist of:

> Any illicit depravation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right.[5]

[17] In the instant case, there is no dispute whatsoever that the Plaintiff had at his own initiative taken the Stayer to premises of the Defendant as a temporary intervention for the milling of the fodder to continue pending the repairing of the PTO of the Fergusson and its return to the Defendant. There is therefore, no indication that the latter had in any manner whatsoever, unlawfully disturbed the Plaintiff of its lawful and peaceful possession. In any event a case for spoliation should have been brought by way of a spoliation application and not just be raised in the litigation process.

[18] Penultimately, the Court finds it disturbing that the Plaintiff had the audacity to have instituted what it sees as a foundationless case against the defendant. It would have been a humanely act for him to have realized that he has inhumanely treated another humankind through deceitfulness and unjust enrichment. A mere fact that he had the audacity to resell the Fergusson to the third party without reference to the Defendant, let alone his approval, made a legally and morally unjustifiable profits over that, has a telling about the nature of his selfish personality. His sense of right and reason ought to have dictated to him that the best practical way to mitigate

[5] Nino Bonino v De Lange 1906 TS @ 122

the financial harm he inflicted against the Defendant was to have negotiated with him for some amicable settlement.

[19] Actually, the Plaintiff deserves to be visited with a punitive scale of costs. The Court simply refrains from doing so because he had placed his trust upon his erstwhile counsel who instituted the case on his behalf.

[20] In the premises, the case of the Plaintiff is dismissed with costs.

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E.F.M. MAKARA
JUDGE

For Plaintiff : Nthloki K.C instructed by Mosotho Attorneys
For Defendant : Adv. Pheko instructed by Messers T. Maieane