

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCT/0427/2018

In the matter between:

BASIA RAMPUTI

PLAINTIFF

AND

YASIR HUSSAIN t/a MIAN MOTORS

DEFENDANT

Neutral Citation: Basia Ramputi v Yasir Hussain t/a Mian Motors [2022] LSHC
231 Comm. (27TH OCTOBER 2022)

CORAM: MOKHESI J

HEARD: 24TH MAY 2022, 02 JUNE 2022 and 06th September 2022

DELIVERED: 27TH OCTOBER 2022

SUMMARY

LAW OF SALE : *Actio redhibitoria*- The plaintiff sued out summons claiming the return of the purchase price of the motor vehicle which was sold and delivered- the plaintiff bought the vehicle knowing that it had a faulty sunroof- the agreement between the parties stated that the vehicle was sold voetstoots- on further and thorough investigation when the problem could not fixed, it emerged that there was a faulty electrical system-Held, the plaintiff failed to prove that the defendant knew of the fault and concealed it with the intention of defrauding him.

ANNOTATIONS

Cases:

Knight v Trollip 1948 (3) SA 1009 (D)

Mahabeer v Sharma NO 1985 (3) SA 729 (A)

Odendaal v Ferraris 2009 (4) SA 313 (SCA)

Trytsman v Dohne 1951 (1) SA 736 (N)

[1] **Introduction**

The plaintiff sued out summons against the defendant in terms of which he sought the following reliefs:

- a) *Cancellation of the agreements between the parties dated 2 December 2017 and 17 September 2018.*
- b) *Payment of the sum of M64,932.18.*
- c) *Interest on the aforesaid sum of money at the rate of 18.5% per annum from 1 October 2018 to date of payment;*
- d) *Costs of suit.*

[2] **Factual Background**

On 2 December 2017 the two parties entered into a sale agreement in terms of which the defendant sold and delivered to the plaintiff a Nissan Dualis sedan. The express and material terms of the agreement were that; the purchase price for the vehicle was the sum of M80,000.00; The plaintiff would pay the sum of M50,000.00 and pay the balance M30,000.00 in three (3) equal monthly instalments, and that the defendant would deliver the vehicle once the M50,000.00 will have been paid. One of the terms of the agreement is that “2) *we sell the vehicle as they are voetstood, we would not fix or repair anything or give GURANTEE (sic) on the vehicles as they are second hand*”. After the vehicle was delivered to the plaintiff, it experienced electrical problems which affected the functionality of its sunroof. The vehicle was ultimately returned to the defendant after some time. As to why it was returned is a matter that is highly disputed as between the parties.

[3] **Respective Parties' evidence**

It is plaintiff's evidence that he and the defendant concluded the agreement for purchase of the sedan on terms outlined above. He says after test-driving the vehicle with one of the defendant's employees, they discovered that its sunroof was not opening. They informed the defendant about this state of affairs. The defendant urged him to pay the purchase price and take delivery of the vehicle and promised to cause his mechanic who was not present that day, to attend to the problem. He urged the plaintiff to return the vehicle in three days so that it could be attended to. They signed an agreement of sale which was marked as Exhibit "A", after the defendant undertook to repair the vehicle.

[4] The plaintiff testified that he took the vehicle and returned it in three days so that it could be diagnosed and repaired. He says after the mechanic had checked the sunroof, he advised him to take the vehicle to Lesotho Nissan. Lesotho Nissan refused to attend to the vehicle for the reason that the imported vehicles have a lot of problems. After calling the defendant about the Lesotho Nissan response, the defendant advised him to have the vehicle repaired by the mechanic of his choice and to present him with the receipts of payment to be refunded the expenses incurred. The mechanic of the defendant's choice urged the plaintiff to buy a sunroof motor as it was the one causing problems. The plaintiff bought the motor for M9000.00 and returned to the same mechanic to fix the sunroof. The sunroof was only functional for two weeks. The plaintiff then took the vehicle to PW2, one Thabo Maloka, who fixed it. It only functioned for three days. He testified that he left the vehicle with PW2, who after two weeks of diagnostics,

reported to him that the vehicle had electricity problem. He paid PW2, an amount of M2150.00.

- [5] He testified that when he reported the electrical problem to the defendant, the latter became enraged and demanded the balance of the purchase price which the plaintiff had not paid by that time. He said, according to PW2, the electrical problems were so bad that there was a possibility that the vehicle could catch fire and cause fatalities. Faced with this grim reality, the plaintiff proposed to the defendant that he exchange the vehicle for the one of the value of the amount already paid. The defendant rejected the proposal. The plaintiff testified that after what he called “couple of months” he was summoned to the Central Charge Office, where he found the defendant who had sought help regarding the payment of the balance of purchase price. The police then urged the parties to reach a settlement. After going outside to negotiating, they reached an agreement which was the reduced into writing. The said agreement was marked “EXH. D”. “EXH. D” was signed on the 17 September 2018. In terms of the agreement, the car was returned to the defendant, and materially, it provides that:

“So the agreement is that the car will be sold at negotiable price and all the decision of on sale (sic) will be taken by me and the owner of the mian motors. The car will not be taken by the new buyer without my concern (sic). If there will be loss during sales, we will share the loss with mian and in the same way, if there is profit the (sic) will be sharing.”

- [6] Under cross-examination the plaintiff told the court that he works at Nedbank, as a Manager and that he has an Honours Degree. He said the

agreement that the defendant would repair the vehicle was concluded before the sale agreement, and that when they concluded the agreement, he knew that the defendant had undertaken to repair the sunroof.

[7] A question was put to the plaintiff, in chief whether he understood the clause 2 in the agreement. In cross-examination he was asked whether he signed the agreement without reading it, his answer was that he scanned it. He was asked whether he could have seen clause 2 when scanning the agreement and he provided an evasive answer that he cannot answer in the affirmative. He told the court that while at home he read the agreement and could not see that it made no provision for repairs. PW1 was asked what he understood about the clause 2. He said he did not understand the rest of the clause apart from the word 'voetstood'. He was asked whether a person of his level of education could sign a document without reading it. He said he only skimmed the document. It was put to the witness that there was never an agreement that the sunroof be repaired. The witness' answer was that the defendant would not have accepted the vehicle when returned if there was no such agreement. It was put to him that the defendant could not have agreed to repair the vehicle as it was second-hand. The witness answered that he disagreed as the defendant could not have taken him to his mechanic. Under cross-examination the plaintiff told the court that the repair agreement was verbal.

[8] It was put to the plaintiff that he did not complain about the vehicle until 2018. The plaintiff denied the assertion as he said he called the defendant several times about the problematic sunroof. It was put to PW1 that when he bought the vehicle, he was aware that the sunroof was not working. The

plaintiff's answer was that "hence why we had a verbal agreement that he will repair it." It was further put to him that he used the vehicle for nine (9) months until he complained about electrical defects. The witness said he used it for a month and that is when he realized it had problems. It was put to the witness that the defendant referred the plaintiff to the mechanic at Industrial area merely because he was helping and not because he was accepting any liability. The witness denied this assertion.

[9] PW2, Mr Thabo Maloka testified as the second plaintiff witness. He told the court that he has qualifications motor mechanic and auto-electricity, and that he has twelve years' experience. He examined the plaintiff's vehicle and found that its wires had mingled over a long distance leading into the chassis. Only the wires leading to the sunroof were mingled with the potential for a short circuit, which could possibly cause the vehicle to catch fire. He told the court that the vehicle was in a dangerous electrical and also potentially dangerous to be driven around. This witness was not cross-examined.

[10] DW1, the defendant, was the only defence witness. The defendant confirmed that the plaintiff bought the sedan in question. He denied that he ever had a verbal agreement with the plaintiff to repair the vehicle because there was no guarantee on it as it was second-hand. He testified that when the plaintiff bought the vehicle, he was made aware that its sunroof cover was not opening. This disclosure was made before the plaintiff test-drove the vehicle. He said that the plaintiff was told that the defendant would not be liable for the sunroof malfunction. He confirmed that a few days after the plaintiff had bought the car he came back and needed to be assisted with the

mechanic to fix the malfunctioning sunroof. The defendant then took him to his mechanic.

[11] The defendant said after the plaintiff had sought his own mechanics, he never came back. The defendant testified that because the plaintiff could not pay the balance of purchase price and was not answering his phone when he called him to demand the balance of the purchase price, he took him to the police where an agreement was negotiated. In terms of that agreement the plaintiff was to leave the vehicle at the defendant's place for it to be sold, and that when it is ultimately sold, the parties would share the profits and losses. Under cross-examination it was put to the defendant that there is no word termed "voetstoot". The defendant said it meant the car was sold as is. It was put to the witness that regarding the first part of clause 2, the parties did not have an intention to be bound by it because they did not understand what it meant. The witness disagreed. The witness agreed that the sunroof motor was defective at the time the plaintiff bought the vehicle.

[12] The witness was asked whether he normally takes the vehicles back after selling them. The witness agreed and said that happens in circumstances where a customer did not like the car and if the customer had an emergency to solve with money. He was asked what problem was there refunding the plaintiff if as a policy he takes the vehicles upon being returned. His answer was that the plaintiff did not come back to pay the balance. It emerged that the vehicle had been in possession of the plaintiff for ten (10) months.

[13] **Evaluation**

It is common ground that the parties had concluded a contract for the sale of a motor vehicle. The contract had a clause exempting the seller's liability and it was couched as follows "2) we sell the vehicles as they are VOETSTOOD (sic), we would not fix or repair anything or give GURANTEE (sic) on the vehicles as they are second hand." Due to electrical defects, the plaintiff returned the car to the defendant who would sell it, and the parties to share either profits or losses depending on how much the vehicle would be sold for. The parties concluded an agreement in that regard.

- [14] Stripped of inconsequential fringe material, the point of divergence between the parties lies in whether the presence of the voetstoets clause in the agreement serves to exempt the defendant from liability for a latent defect. As I understand the plaintiff's case, the reason why he instituted the current proceedings, is not because the vehicle had a malfunctioning sunroof, but instead, because the defendant did not disclose the presence of a latent defect in the vehicle, in the form of faulty electrical system. The plaintiff could not rely on the sunroof malfunction because he bought it knowing that it was malfunctioning. He, however, did not know the root cause of such a malfunction which came to the fore upon the vehicle being subjected to thorough diagnostics by PW2, Mr Maloka. He could not rely on sunroof malfunction to cancel the contract because he impliedly waived his right to rescind the sale under the *actio redhibitoria* when he took its possession of the vehicle knowing it had sunroof problem (see: **Mahabeer v Sharma NO 1985 (3) SA 729 (A); Trytsman v Dohne 1951 (1) SA 736 (N)**).

- [15] **Issues for determination**

- (1) Whether the plaintiff proved the requisite knowledge on the part of the defendant, of the electrical defect.

[16] **The law on latent defects and discussion.**

It is trite that when a seller sells the *merx*, he warrants that it is free from latent defects. Latent defect does not only relate to the physical attributes of a thing sold, but also to issues which affect its use (**Odendaal v Ferraris 2009 (4) SA 313 (SCA)** (4 Sep. 2008) at paras. 24-25).

- [17] In the **Odendaal v Ferraris (ibid)** at para. 24, it was held that the exclusionary scope of a voetstoots clause should be determined in the light of the facts of each case. In order to be able to avoid the consequences of a voetstoots clause, the plaintiff (buyer) must not only show that the seller knew of the latent defect and deliberately concealed their presence, but also that his concealment of the fact of their existence was with the intention to defraud him (*dolo malo*). This principle was stated thus in **Knight v Trollip 1948 (3) SA 1009 (D)** at 1003:

“I think it resolves itself to this, viz that here the seller could be held liable only in respect of defects of which he knew at the time of the making of the contract, being defects of which the purchaser did not know. In respect of those defects, the seller may be held liable where he has designedly concealed their existence from the purchaser, or where he has craftly refrained from informing the purchaser of their existence. In such circumstances, his liability is contingent on his having behaved in a way which amounts to fraud on the purchaser, and it would thus seem to follow that, in order that a purchaser may make

*him liable for such defects, the purchaser must show directly or by inference, that the seller actually knew. In general, ignorance due to mere negligence or ineptitude is not, in such a case equivalent to fraud.” (See also: **Odendaal v Ferraris (above)**)*

- [18] It is the plaintiff’s case that the defendant “failed and/or neglected to disclose” that the vehicle’s electric system was defective and faulty. He pleads that it was an express, alternatively, an implied and material terms of the parties’ agreement that the defendant would disclose all the defects. The plaintiff argued that the presence of the voetstoots clause is of no moment and could not be used to protect the defendant from liability. The plaintiff further contended that the parties never intended to be bound by the voetstoots clause, because the defendant, in cross-examination did not even know the terms that were used in the clause in question. The term that was used is “voetstood”. The plaintiff’s counsel put it to the defendant that there is no such a term in law, and therefore, because there is no such a term in law, the parties could not have intended to be bound by it.
- [19] The defendant on the one hand argued that there was no contract in terms of which the defendant was obliged to disclose latent defects of the car because the sunroof problem was discovered during the test-driving of the vehicle. He argued that the agreement contained a voetstoots clause. He argued that contrary to the plaintiff’s argument that he did not understand the word ‘voetstood’, the clause further, in a definitional form, stated under the same clause 2 that “...we would not fix or repair anything or give qurantee (sic) on the vehicles as they are second hand.” Apart from imperfections in the

drafting of the agreement, the court is convinced that the agreement contains a voetstoots clause.

[20] It is the basis of the plaintiff's pleaded case that the defendant failed to disclose that the entire electrical system of the vehicle was defective, and secondly, that he discovered on taking possession of the vehicle that its sunroof was defective. Regarding the defective sunroof, it is not in dispute that despite discovering that it was defective on test-driving the vehicle the plaintiff nonetheless proceeded to buy the vehicle. This defect was known to both parties at that point, and the plaintiff cannot base his case on it to rescind the contract of sale under *actio redhibitoria*. The plaintiff sought to circumvent this difficulty by saying he had a verbal agreement with the defendant to repair the vehicle, a contract which he says he concluded before signing the purchase agreement, however, the plaintiff's case is not based on the breach of the said contract.

[21] I agree with Mr Mosoeu, for the defendant, that there is no way the parties could have concluded the sale agreement when the vehicle had not been repaired, with the sale agreement now containing a clause which is at variance with the earlier verbal agreement to repay the vehicle. I find it improbable, therefore, that there was no such a verbal agreement. The defendant's contention that he was merely helping the plaintiff secure a mechanic out of his own volition, is probable.

[22] With respect to the disclosure of faulty electrical system, being the only leg on which the plaintiff's case rests, it is no doubt that it is a latent defect. But

as already said, in order to escape the effects of a voetstoets clause, the plaintiff must show that the defendant knew of the latent defect and that he deliberately concealed it with the intention of defrauding him (*dolo malo*). From the way the case for the plaintiff is pleaded, he is not saying that the defendant knew of the defect (i.e. faulty electrical system) and that he concealed it. Even from the evidence which was led the plaintiff did not say that the defendant knew of the faulty electrical system. What emerged from the evidence is that after several fruitless attempts at repairing the sunroof malfunction, Mr Maloka (PW1) revealed the underlying problem. It is not the plaintiff's case that the defendant knew of this electrical fault. In the circumstances, I find that the plaintiff has failed to discharge the onus resting on him of showing that the defendant knew of the faulty electrical system and that he concealed it in order to defraud him. This conclusion does not in any way affect the arrangement the parties had to sell the vehicle.

[23] The plaintiff had sought cancellation of the agreement the parties concluded to sell the vehicle. The reason for seeking this relief is because the plaintiff states that the defendant sold the vehicle without consulting him. But as it emerged on evidence, the vehicle has not been sold.

[24] In the result the following order is made:

a) The action is dismissed with costs.

MOKHESI J

For the Plaintiff: Adv. Fiee instructed by Mei & Mei Attorneys

For the Defendant: Adv. L. Masoeu instructed by T. Matooane & Co. Attorneys