IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 1345/2005

In the matter between

Abednego Ntshangase Plaintiff

and

Vusi Thwala Defendant

Coram: Annandale, ACJ

For Plaintiff: Ms. L. Zwane of L.R. Mamba and Associates

For Defendant: Mr. B. Mdluli of C.J. Littler & Company

JUDGMENT
3 February 2006

[1] The plaintiff in this matter sold a motor vehicle to the defendant for which a part payment has been made. The balance of the sale price was paid for by a cheque which was dishonoured by the bank as payment was stopped. Thereafter the defendant was sued for the outstanding amount with the action being defended. Prior to filing of a plea, the defendant excepts against the particulars of claim, alleging that it does not disclose a cause of action. It is the exception taken to the pleadings which is the subject matter of this interlocutory application.

[2] In its notice of exception, the defendant *verbatim* avers as follows :-

> "*a) Plaintiff, contrary to the peremptory provisions of section 7(1) of the Theft of Motor Vehicles Act No. 16 of 1991 (as amended A. 9/1992) failed to provide the defendant with a deed of sale and/or document effecting the sale at the time of the sale. Section 7(1) provides: Any person who sells, transfers or otherwise disposes of a motor vehicle commits an offence if at the time of the sale, disposal or transfer of the motor vehicle he does not furnish the purchaser or transferee with a document effecting the sale or disposal or transfer of the motor vehicle. It is trite law that illegal contracts are not enforceable in our law.*
>
> *b) The plaintiff despite numerous demands failed to furnish the defendant with the necessary document effecting the purchase of the motor vehicle being:*
>
> | | |
> |---|---|
> | *Make* | *Mercedes Benz* |
> | *Registration No.* | *SD 007 RG* |

Model	*1996*
Colour	*White*
Engine No.	*4990220368198100*
Chassis No.	*1400326A087008*"

[3] The second part of the exception, as set out in paragraph (b), cannot be considered as an exception. It seems to me that it was inserted as an afterthought or for some other purpose, but not as a serious exception to the particulars of claim. I fail to see how it can be held to be interpreted as indicative that the particulars of claim does not disclose a cause of action. It is more in line with a pleading in a counterclaim to the action or possibly as part of a defence to the claim.

[4] At the hearing of argument, this aspect, pertaining to paragraph (b) of the exception, was not properly ventilated by either of the attorneys. The nearest it came was when Mr. Mdluli, in his replication, stated that the defendant "tenders return of the vehicle without also expecting to be refunded the E30 000 already paid."

[5] For all practical purposes I shall ignore paragraph (b) of the notice of exception and hereinafter deal with paragraph (a) only.

[6] To this paragraph, the plaintiff contends that the exception is bad in law in that it falls short of the requirements of Rule 23(3) which reads that:

> "*(W)here an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.*"

[7] This "main argument" against the formulation of the exception does not hold water. Clearly, concisely and with motivation the exception is stated to be based on the contention that the contract is not enforceable due to non-compliance with a statutory enactment. Whether the exception is good or bad, Ms Zwane cannot be correct to argue that the defendant does not state why it believes that there is no cause of action. The defendant does do so, as is required of him by the Rules. He avers that because it is a statutory offence to sell a motor vehicle without "furnishing the purchaser with a document effecting the sale" at the time of the sale, the excipient believes the sale to be illegal and unenforceable whereby the plaintiff is deprived of a cause of action. It is common cause that the plaintiff pleads that he "orally sold" the motor vehicle to the defendant and that his cause of action is a breach by the defendant whose cheque for payment of the balance of the purchase price for the car delivered to him, was dishonoured. He is sued for the balance of the agreed purchase price.

[8] It is therefore wrong to contend, as the plaintiffs attorney does, that the exception stands to be dismissed on the basis that it does not comply with Rule 23(3). The exception must be considered on its merits.

[9] In its amended particulars of claim, the plaintiff pleads that:

> "On *or about October, 2003 at Manzini, the plaintiff orally sold to defendant for the sum of E95 000 the hereunder described motor vehicle*".
> He then sets out details of a Mercedes Benz motor car.

[10] Plaintiff then avers the terms of their agreement of sale as an oral undertaking to pay E95 000 within two months of delivery. Since then, only E20 000 is said to have been paid as a cheque for E65 000 was dishonoured by the bank, endorsed "Payment Stopped". He now claims that amount plus *mora* interest from October 2003 and costs.

[11] The essence of the defendant's exception is that the agreement of sale was oral and not in writing. Section 7(1) of the Theft of Motor Vehicles Act, 1991 (Act 16 of 1991) (quoted above) requires of the seller of a motor vehicle to furnish the purchaser, at the time of the sale, with a document effecting the sale or disposal or transfer of the motor vehicle. If not done, that person commits an offence.

[12] Likewise, Section 7(2) of the Act creates a statutory offence if the purchaser of a motor vehicle, at the time of purchasing or receiving it, he does not demand from the seller a document effecting the purchasing or receiving of the motor vehicle.

[13] Each of these subsections carry a maximum penalty of E5 000 or two years imprisonment.

[14] What the defendant seeks to have read into the statute is that if an agreement to sell a motor vehicle is not in writing, i.e. a written contract of sale, it would be a nullity and unenforceable, or as stated, that the seller can have no cause of action against the purchaser if the purchaser does not pay.

[15] The excipient's attorney, Mr. Mdluli, argues that this claim is unenforceable because of the provisions of the statute. The relevant statute does not purport to nullify or vitiate an oral

agreement of sale of a motor vehicle. What it clearly and patently does is to create an offence if the seller does not "furnish the purchaser or transferee with a document effecting the sale or disposal or transfer of the motor vehicle". Likewise, if the purchaser does not demand such document from the seller.

[16] Ostensibly and *prima facie* it seems as if each of the two litigants might find themselves on the wrong side of the law and it is therefore ordered that the Registrar bring this matter to the attention of the Commissioner of Police.

[17] For his contention that the agreement of sale is void, by operation of statute, the defendant's attorney argued that it "does not disclose a cause of action because the court takes judicial cognisance of statutes and because the validity of statutes can not ordinarily be challenged." That the latter part of this argument could be so bears no quarrel as it is not an issue in contention as to whether the theft of Motor Vehicle Act is valid or not. The other aspect of this argument, namely that the claim is unenforceable because of the provision of the statute bears further consideration.

[18] The premise of the excipient is that the statute invalidates the agreement of sale between the parties because it was orally concluded. For this to be so it would have been specifically stated as such in the Act. A pleading is only excipiable in the basis that no possible evidence led on the pleadings can disclose a cause of action - see for instance *SA Defence and Aid Fund v Minister of Justice* 1967(1) SA 31(C) at 37-H and *F J Hawkes and Co. Ltd v Nagel* 1957(3) SA 126(W) at 130 F - G. The evidence that the plaintiff will have to prove at a trial, if so required, would be to prove the contract of sale, as pleaded. I

will revert to the penal aspect of the statutory provision below.

[19] The further argument of Mr. Mdluli is that the plaintiff has to allege all the facts necessary to bring his claim within the statute, otherwise, if it cannot be so implied, the summons is said to disclose no cause of action. This argument misses the point. It is not so that the plaintiff needs to prove any statutory regulation which it relies on to prove its claim. It is the other way around, namely that the excipient relies on a statutory provision, of which judicial notice is taken, which it seeks to be interpreted in such a manner that it be found to negativate the claim. In my reading of the statute that the defendant relies upon, there is no provision that nullifies an oral agreement of sale of a motor vehicle. That it might criminalise both the non furnishing and non demand of a document effecting the sale is quite another matter.

[20] Whichever way one reads sections 7(1) and (3) of the Act, the applicable test, as formulated in *Metro Western Cape (Pty) Ltd v Ross* 1986(3) SA 181(A), is to establish whether the legislature intended the agreement to be void, and no such intention is expressed in the Act. If the legislature wanted to do so, it would have expressly done so.

[21] Mr. Mdluli further relies on *Amler's Precedents, 3rd edition by Harms* at page 71, where it is stated that when the type of contract requires compliance with statutory formalities it must appear *ex facie* the pleadings that those formalities have been complied with. This is not the present position. The statute does not cause the sale of a motor vehicle void if there is no written agreement of sale. What it does is to criminalise the nonfurnishing and non demand of a document effecting the

sale, at the time of the sale. Herein, the excipient may well be *in pari delicto* but the agreement to sell the vehicle at a certain price and the liability of the defendant to pay for it does not disappear into cyberspace due to the statutory provisions of the Act, as contended by the excipient.

Ms Zwane correctly argued that Section 7(1) of the Act is not a peremptory provision which negativates the contract of sale, causing it to be void, but rather that it contains a penal provision, which criminalises a commission and/or an omission. Non-compliance with the statute creates an offence but it does not render the sale itself to be void.

In this regard, the words of Solomon JA in *Standard Bank v Estate van Rhym,* 1925 AD 266 at 274-5 are most instructive. He held that:-

"*The contention on behalf of the respondent is that when the legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the legislature, and, if we are satisfied in any case that the legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet (1.13.16) puts it - 'but that which is done contrary to law is not* ipso jure *null and void, where the law is content with a penalty laid down against those who contravene it.' Then after giving some instances in illustration of this principle, he proceeds: 'The reason for all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the*

rescission of what was done that would follow the act itself done contrary to the law."'

In similar vein, Stratford CJ stated in *Jajbhay v Cassim* 1939 AD 537 that:...the *punishment of criminals is for the criminal and not the civil courts*". He went on to say at 544-5 that:

> "*Public Policy should properly take into account the doing of simple justice between man and man and that the rule expressed in the maxim in* pari delicto potior conditio defendentis is *not one that can or ought to be applied in all cases, that is subject to exceptions which in each case must be found to exist only by regard to the principle of public policy ... And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore ordinarily speaking should not by its order increase the punishment of the one deliquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not forseeably affected by a grant or a refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.*"

[25] I cannot but respectfully agree with this exposition of the legal principle which equally applies in the present matter. It would be absurd to hold that the plaintiff must be deprived, should the exception be upheld, of a claim worth some E65 000 simply because of the defendant's incorrect interpretation of Section 7(1) of the Act. If the legislature intended to do as the

defendant argues, it would expressly have stated so. The Act does not read like this at all.

[26] Whatever defence the defendant might raise and why he stopped payment of the cheque are issues to ventilate at an appropriate stage. What the defendant cannot now do is to have it found that his exception is good in law, i.e. that the plaintiff's particulars of claim does not disclose a cause of action. It does.

[27] For these reasons, the exception stands to be dismissed and it is so ordered. Costs follow the event.

JACOBUS P. ANNANDALE
ACTING CHIEF JUSTICE