IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 1398/2009**

In the matter between:

GABRIEL HELLIO GEORGE **PLAINTIFF**

VS

ZIA INVESTMENTS (PTY) LTD

T/A ZIA MOTORS **DEFENDANT**

CORAM **OTA, J**

FOR THE PLAINTIFF **T. M. NDLOVU**

FOR THE DEFENDANT **M. DA SILVA**

JUDGMENT

OTA J,

This is an action commenced by way of combined summons wherein the Plaintiff claimed the follows reliefs against the Defendant:-

1. Payment by Defendant to the Plaintiff of the sum of E11,000-00 (Eleven Thousand Emalangeni)
2. Interest thereon at 9% per annum from date of issue hereof,
3. Costs of suit
4. Further and or alternative relief.

The Defendant, it is on record, filed a plea which is dated the 3rd day of June 2009. Thereafter, the Plaintiff filed a replication dated the 16th day of June 2009. I will come to these pleadings anon.

Suffice it to say, that I heard evidence from both sides to this contest on the 27th of July 2011, on which day the Plaintiff was represented by **Mr T M Ndlovu,** and the Defendant represented by **Ms M. Da Silva**. Both the Plaintiff, **Mr Gabriel Hellio George** and a director in the Defendant company, **Mr Siaf Uwlah,** testified in support of their respective stance on the issues herein evolved. Both sides called no witness.

At the end of the day, I ordered both counsel to file written closing submissions. **Mr T M Ndlovu** was to file Plaintiff's written submissions by the 28th of July 2011, whilst **Ms Da Silva** was ordered to file the Defendant's written submission on the 1st of August 2011. It is on record that **Mr Ndlovu** filed Plaintiff's written submissions on the 28th of July 2011, as ordered. However, **Ms Da Silva** has failed, refused or neglected to file the Defendant's written submissions up till date.

The record further demonstrates, that by letter dated the

11th of October 2011, written by **Masina Ndlovu Mzizi Attorneys to Sipho Matse Attorneys** as per **Ms Da Silva,** a copy which is duly forwarded to this Court, that **Mr Ndlovu** sought to compel **Ms Da Silva,** to file the said submissions and for this case to proceed to judgment. It cannot be gainsaid that his efforts proved abortive, as until date no such submissions have been filed.

I have had to stay judgment in this case for an upwards of 4 months to accommodate the supervening circumstances imposed in the preceeding months, by the lawyers boycott.

As the case lies, in the absence of any tangible explanation from **Ms Da Silva,** as to the reason why she failed to comply with the Courts orders in these respects, I deem it expedient at this stage to proceed to judgment.

The foregoing said and done, let me now proceed to consider the substance of this case.

Now, the gist of the Plaintiff's case as demonstrated both by his plea and oral testimony in Court, is that on or about the 19th of July 2008, the Plaintiff approached the Defendant, which is described in his plea as a company situate at Ngwane street in the Manzini Region and engaged in the business of sale of imported cars. The Plaintiff indicated an interest in the purchase of one of the Defendant's cars, a BMW. Thereafter, the parties entered into an oral negotiation regarding a possible sale of the motor vehicle. The Defendant indicated an intention to sell the said motor vehicle to the Plaintiff upon the latter demonstrating an ability to pay a minimum deposit of E12,000-00 (Twelve Thousand Emalangeni).

It is further the Plaintiff's case, that in a bid to demonstrate his ability to pay, he deposited the sum of E1,000-00 with the Defendant, on the 19th of July 2008. That he was then allowed to test drive the vehicle for about 10minutes. That whilst in the process of test driving the vehicle, the Plaintiff

heard some noise from the rear suspension of the car. By reason of this defect identified, the Plaintiff returned the vehicle to the Defendant which promised to look into it.

On the 9th of August 2008, the Plaintiff again returned to the Defendants premises, where he deposited another E10,000-00 still in a bid to demonstrate his ability to pay for the vehicle. Once again, Plaintiff was allowed to test drive the vehicle for about 20 minutes, with the sales man from the Defendant company right beside him. It is the Plaintiff's case, that the noise from the rear suspension of the vehicle persisted. Plaintiff again returned the vehicle to the Defendant on the same day, and thereafter left for South where he works.

Plaintiff further stated that he returned from South Africa on the 11th August 2008, and discovered that the Defendant had sold the vehicle. That he was not notified by the

Defendant that it intended to sell the vehicle. That Plaintiff promptly demanded a refund of the E11,000-00 deposit paid for the vehicle. That the Defendant agreed to refund only E6,000-00 and retain E5,000-00, except the Plaintiff purchased another vehicle from it.

Plaintfull denied that he ever agreed to pay a non refundable commission fee of E2,000-00 to the Defendant. He denied that he is liable to the Defendant in damages in the sum of E3,000-00, being the difference between the amount of E40,000-00 purchase price for the car and the amount of E37,000-00 for which the Defendant allegedly eventually sold the vehicle. This is essentially the case for the Plaintiff.

As I have already indicated in this judgment, the Defendant led evidence through it's director **Mr Saif Uwlah.** (DW I). He told the Court that he negotiated and agreed with the Plaintiff on a price of E40,000-00 for the vehicle. He agreed that the Plaintiff paid a deposit of E11,000-00. He also

agreed that when Plaintiff test drove the car, he indicated that the vehicle, was defective, which defect the Defendant sought to fix with Boldline motors in Manzini.

It was further DW I's evidence, that the defect in the vehicle was repaired, but that the Plaintiff failed to pay the E40,000-00 purchase price for the vehicle, dispite repeated demands. That the Defendant ''held'' the vehicle for the Plaintiff for about three months before selling it to another buyer for E37,000-00, resulting in the loss of E3,000-00 from the original purchase price. That Defendant is thus entitled to retain the sum of E3,000-00 as well as the non refundable fee of E2,000-00 from the deposit of E11,000-00 paid by the Plaintiff, thus the offer to refund to the Plaintiff E6,000-00, which offer the Plaintiff rejected. That the issue of the non refundable commission fee was discussed with the Plaintiff from the outset of these transactions and is also clearly indicated on the receipts given to the Plaintiff for the deposits he paid exhibit A.

I have already indicated in this judgment that the Plaintiff duly filed final written submissions via counsel. Suffice it to say that I have very carefully considered the said submissions, and I shall be making references to such portions of same as I deem expedient in the course of determining this matter.

Having carefully considered the pleadings and evidence, tendered, I must say that the only issue I find thrown up for determination, is, whether the Plaintiff is entitled to a full refund of the amount of E11,000-00 deposit paid in this transaction?

Let me first start by saying that I agree entirely with **Mr Ndlovu,** as submitted in paragraphs 5(a) and (b) of the Plaintiff's written submissions, that the parties herein merely negotiated a possible sale and that no actual agreement of sale of the motor vehicle was entered into.

I say this notwithstanding the posturing of the Defendant in oral evidence. My conviction, on these issues, irrespective, is informed by the Defendant's plea, wherein the Defendant categorically admitted the material facts pleaded by the Plaintiff in support of these issues. For avoidance of doubts, I find it imperative to detail hereunder the portions of the respective pleadings that hold sway in these circumstances.

Now, in paragraph 4.2 of the Plantiff's plea (page 3 of the book), the Plaintiff averred as follows:-

> *'' 4.2 In order to demonstrate his ability to pay a deposit, the Plaintiff on the 19th July 2008 and 9th August 2008 respectively placed into the defendant's physical possession, in installments, amounts of E1,000-00 (One Thousand Emalangeni) and E10,000-00 (Ten Thousand Emalangeni) respectively. Thereafter the parties had to negotiate a sale and agree on terms''.*

The Defendant admitted the foregoing allegations, in paragraph I of it's plea (page 11 of the book) as follows:-

‘‘ *AD PARAGRAPH 1,2,3,4,4.4 and 4.2*

The contents herein are admitted’’

Furthermore, in the Plaintiff’s alternative claim as captured in paragraphs 5.3 and 5.4 of his pleadings, (page 4 of the book), the Plaintiff deposed as follows:-

*5.3 The terms of the sale were to be agreed on and reduced into writing (**as per section 7 of the Theft of Motor Vehicle Act 16 of 1991 as amended)** at a later date, and upon the Plaintiff placing into the defendants physical possession a sum exceeding at least E12,000-00 (Twelve Thousand Emalangeni).*

5.4 In the course of such negotiations Plaintiff advanced to the defendant a sum of E1,000-00 (One Thousand Emalangeni). Plaintiff and on the 9th August 2008 advanced to the defendant a further sum of E10,000-00 (Ten Thousand Emalangeni). The said sums were intended by Plaintiff to serve as part payment towards the deposit of the motor vehicle that Plaintiff intended to purchase from defendant at a later date, most particularly upon

attainment of the E12,000-00 (Twelve Thousand Emalangeni) mark sought as a deposit''.

The Defendant's reaction to the foregoing allegations amount to the following which appears in paragraph 23 of his plea, (page 12 of the book)

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''AD PARAGRAPHS 5.1, 5.2, 5.3, and 5.4

The contents herein are not in issue''

It is apposite for one to state here, that it is a cardinal principle of pleadings, one of universal antiquity, respected and hallowed across jurisdictions, that parties are bound by their pleadings. It is obvious to me therefore that the Defendant is bound by it's admissions, that as at the time the Plaintiff paid the deposit of E11,000-00, that the parties were merely negotiating a possible sale and that no actual agreement of sale of the motor vehicle was entered into as

‘‘the parties had to negotiate a sale and agree on terms’’ after the deposits had been paid, It is thus beyond any per adventure, that there was no valid sale of the motor vehicle in the absence of an agreement to sell.

Furthermore, it is common cause that whilst still on the negotiating table, and in the process of testing the motor vehicle, the Plaintiff detected certain defects in the vehicle, engendering him to promptly return same to the Defendant.

The discovery of the defect as per the rear suspension of the vehicle, caused the Plaintiff to promptly return same to the Defendant for repairs. DW I admitted the fact of said defects, but says that they were duly repaired, but the Plaintiff failed to honour his side of the bargain to pay the E40,000-00 purchase price for the vehicle.

It is also common cause that the Plaintiff never at any time took possession of the said vehicle, other than to test drive it on the two occasions also demonstrated in this judgment,

and on which occasions the Plaintiff was accompanied by the Defendant's sales representative. This fact is not disputed.

It appears to me therefore, that having promptly returned the said vehicle to the Defendant, upon realization of the defects, and having not retained possession of same or altered its state in any wise, that the Plaintiff by his conduct fully demonstrated that he did not accept the transaction. In the Plaintiff's own words, a defective vehicle would not serve the purpose for which he required same, which was to travel from his residence in Swaziland to his place of work in the Republic of South Africa. The Plaintiff is thus in my views, entitled to a refund of the E11,000-00 deposit paid in relation to these transaction.

This is the position of the Roman Dutch Common law which holds sway in this jurisdiction. This would be the position even if the sale had been concluded (which is not the position here) and the Plaintiff returned the vehicle to the Defendant in these circumstances.

In coming to these conclusions, I am guided by a decision from the Courts in England, a jurisdiction of which case law is of high persuation in the Kingdom. The case of reference is the case of **Goldblatt Vs Sweeney 1918 CPD 320**, rightly urged by **Mr Ndlovu**, in these proceedings.

In that case the Court held as follows:-

> *‘‘ As was said in the case of* ***Truter V Dunn (1905, O.B.C.p 125)*** *‘‘ The very object of the redhibitory action is to put each party back into his original condition before the sale, the purchaser shall restore the thing in its original condition, and the seller the price, and consequently the purchase cannot repudiate the sale unless he is prepared to restore the thing as it was before the sale, reasonable wear and tear alone expected----. These remarks appear to me to be equally applicable to the action redhibitoria which it has been assumed in argument is the Plaintiff’s action here, or to a restitution integrum by the action ex ento and they are entirely in point in this case, bearing in mind that the repairs which Plaintiff caused to be effected bore no relation to the defect Plaintiff now relies on, and were not done for the purpose of remedying it and that there was no reason whatsoever why Plaintiff should not have insisted on*

returning the car then and there, when he found out the condition of the shaft. It was not until December that any offer to return the car was made, four months after the sale and more than two months after the defect was known''.

In casu, assuming without conceding, that a sale did take place, the Plaintiff promptly returned the motor vehicle to the Defendant, never took possession of same nor altered its state in any way. Plaintiff is in my considered view entitled to a refund of the E11,000-00 paid as deposit.

It is apparent to me from the totality of the evidence tendered, that the Defendant whilst appreciating the fact of Plaintiff's entitlements to a refund, however contends that the amount due to the Plaintiff is the sum of E6,000-00. The Defendant's justification for it's bid to retain E5,000-00 of the deposit, is the allegation that the Plaintiff agreed to pay a non refundable commission fee of E2,000-00 and that the Defendant having ''held'' the said vehicle for the Plaintiff for

3 months, in honour of the transaction between the parties, subsequently sold same at E37,000-00, thus recording a loss of E3,000-00 from the original purchase price of E40,000-00. The Defendant contends that it is therefore entitled to the said sum of E3,000-00 lost, as damages.

I see several loopholes in the Defendants stance on this issue. In the first instance, even though the Defendant contends that Plaintiff agreed to pay the said non refundable deposit of E2,000-00 and that the condition is expressly stated in exhibit A, which are the receipts of the deposit of E11,000-00, the Plaintiff however denies this allegation. I have taken the liberty of scrutinizing the receipts tendered as exhibit A, and I find that they do bear the word's '' commitment fee not refundable'' in small fine print on their left bottom. The foregoing not withstanding, I find that I agree entirely with **Mr Ndlovu** in his contentions, in paragraph 15 (ii) and (iii) of the Plaintiffs written submissions, that exhibit A directly does not reflect any payment of a non refundable commitment fee of E2,000-00.

The space provided in exhibit A directly above the words ‘‘commitment fee not refundable’’ which is reasonably where any sums paid in pursuance of the alleged commitment fee ought to be written, does not have any indications of such. All that exhibit A demonstrates, is that the Plaintiff paid the sum of E1,000-00 and E10,000-00 respectively, as deposits on these transactions.

The foregoing facts most certainly lend credence to the Plaintiff’s evidence, that the question of a commitment fee of E2,000-00 was never discussed by the parties and that he never agreed to pay same.

My view on this issue is strengthened by the fact that the Defendant, as I have already demonstrated herein, expressly accepted the Plaintiff’s allegations as detailed in paragraphs 4.2 and 5.4 of his plea, that the sums of E1,000-00 and E10,000-00 respectively, paid by the Plaintiff represented part payments towards the deposits of the motor vehicle.

The Defendant is bound by these facts pleaded and cannot now seek to resile from same.

I also agree with **Mr Ndlovu** that the Defendant's assertions its that it exercises discretion on when or not to charge the alleged non refundable commission, also goes to strengthen the plaintiffs case, especially in view of the fact that there is no amount indicated on exhibit A, as having been paid towards the alleged commitment fee. The only deduction to be drawn in the light of the totality of the foregoing, and this Court will draw that deduction, is that the parties never agreed on payment of any non refundable commission fee. On the whole I accept the Plaintiffs case and reject the case put forward by the Defendant, in these circumstances.

What remains to be decided is the controversy over the sum of E3,000-00, which the Defendant alleges to be entitled to by way of damages.

I must say that the Defendants allegation that he ‘‘held’’ the said vehicle for the Plaintiff for about 3 months, eventually selling at a loss of E3,000-00 Emalangeni, holds absolutely no water.

The Plaintiffs case was that he paid the second deposit of E10,000-00 on the 9th of August, 2008 and upon his return to the Defendant’s shop on the 11th of August 2008, the vehicle had been sold. The Defendant who disputes this fact rather contending that he sold the said vehicle about three months after the 9th of August 2008, has failed to furnish the Court with dates or even documentation of said sale at the price of E37,000-00, to enable the Court guage the efficacy of his claims. The Defendant appears to be withholding these information from the Court, even in the face of DWI’s representation in oral evidence, that he does possess these documentary proof. In the circumstances, I find Plaintiffs account to be the more probable of the two accounts and accept it.

In the final analysis, I have put the case for the Plaintiff and that for the Defendant on an imaginary scale and I have weighed them, and the case for the Plaintiff far outweighs that of the Defendant. I thus find that the Plaintiff has proved his case on the balance of probabilities.

On these premises, I enter judgment for the Plaintiff as follows:-

1. Payment by Defendant to the plaintiff of the sum of E11,000-00 (Eleven Thousand Emalangeni) claimed.

2. Interest thereon at 9% per annum from date of issue hereof.

3. Costs of suit.