

LESOTHO / JUDGMENT

Sekhobe Lerotholi V Tebello Nkune (CCT/0396/2022) [2025] LSHC 119 (30 May 2025)

[2025] LSHC 119

COURT
High CourtCASE / FILE NUMBER
CCT/0396/2022

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IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)
HELD AT MASERU
CCT/0396/2022

In the matter between: SEKHOBÉ LEROTHOLI
 PLAINTIFF
 AND
 TEBELLO NKUNE
 DEFENDANT
Neutral Citation: Sekhobe Lerotholi v Tebello Nkune [2025] LSHC 119 Comm.
(30 MAY 2025)

CORAM: MOKHESI J
 HEARD: 02 APRIL 2025
 DELIVERED: 30 MAY 2025

Summary

Contract of Sale: In this action the plaintiff is seeking a relief for cancellation of the contract of the sale of an Isuzu engine and refund of the sale price- In the counterclaim, the defendant claims the balance of the purchase price for the said engine and other reliefs- Held: The main action succeeds with costs in terms of Prayer 1- Further on the issue of cost, because the action should have been instituted

in the magistrates Courts costs should be on the scale of that court -Counterclaim is dismissed with costs on the same scale as well.

Annotations:

Books

O'Donovan Mackeurtan's Sale of Goods in South Africa (1996)

Nagel et al Commercial Law 4ed. (2011)

Cases

Barnard v SA Mutual and Fire General Insurance Co. 1979 (2) SA 1012 (SECLD)

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd 1977 (3) SA 670 (A)

Kotze v Newmarch 1940 NPD 112

Norwich Union Fire Insurance Society Ltd v Tutt 1960 (4) SA 851 (A)

Small v Goldreich Buildings Ltd and Reid & Knuckey (Pty) Ltd 1943 WLD 101

White v Saker and Company 1938 WLD 173

JUDGMENT

[1]

Introduction

This matter contains the main claim and counterclaim. In the main claim the plaintiff is claiming for the cancellation of the contract of the sale of Isuzu engine and refund of the sale price. In the counterclaim, the defendant claims the balance of the purchase price for the said engine and other reliefs. [2] Plaintiff's case was anchored only on his evidence while the defendant's case was based on the evidence of two witnesses. PW1 (Mr Lerotholi) owns Isuzu van. When its engine started giving him problems, he approached the defendant who had a van of the same model. The defendant's van was parked and not functional. The defendant agreed verbally, to sell him engine of his van for M20,000.00. The plaintiff paid M18,000.00 with the balance of M2,000.00 to be paid later. The defendant did not remove the engine from the vehicle but instead gave the plaintiff permission to use his own mechanic to remove it.

- [3] The plaintiff's mechanic removed the engine from the defendant's vehicle and fitted it into his. He told the court that when he started the engine it showed signs that it had a knock by displaying the same problems his engine had been devilled with. When he told the defendant about the problem the latter told him that he sold him the engine as is and was not liable. It is the plaintiff's case that when the defendant sold him the engine, he promised him that it was in a good running order. He told the court that he would not have bought the engine had he known that it had the same problems as his engine.
- [4] He told the court that when the engine he bought from the defendant showed signs of having a knock, he informed the latter, who also listened to its sound. The defendant suggested that the vehicle be taken for a test drive, but when that was due to be done the mechanic discovered that the plaintiff vehicle's release bearing was worn out. Plaintiff borrowed the used release bearing from the defendant. After defendant's release bearing was fitted into the plaintiff's vehicle, it was taken for a test drive, but the engine sound got worse when the vehicle went up a steep hill at Sehlabeng. When it was clear that the engine had serious problems, the defendant told the plaintiff to repair it with the parts of his engine. Defendant said he must do whatever he could as he did not have money to refund

him the purchase price of the engine. The plaintiff never used the engine. He used the vehicle for transporting the vegetables from the farms in South Africa to be sold. The engine is still at his home after the defendant had refused to take it back. The plaintiff's brother volunteered to repair his old engine and used the vehicle. The plaintiff even took the defendant to mediation before the police but to no avail.

- [5] Under cross-examination he was asked as to what happened to the old engine. His reply was that it had oil sludge which ended up causing a knock. It was put to the plaintiff that he cannot claim for cancellation of the agreement after having kept the engine for two years. Plaintiff replied that he kept the engine because the defendant refused to accept it being returned to him, and that the period of two years was spend waiting for this matter to be heard not because he was acknowledging that a valid contract of sale had been made. It was put to the plaintiff that because he used the uncertified oil for servicing the engine that could have caused the oil pump to not function properly. The plaintiff's response was that he did not use the engine oil he was used to buying for his old engine. It was put to the plaintiff that because he was not a trained mechanic, he was not in a position to tell whether the engine he bought had a knocking sound. His answer was that he was familiar with the sound because his old engine had a similar knocking sound and that he used that type of engine for a long time to know how a knocking sound sounds like.
- [6] DW1 was Mr Tebello Nkune (defendant). He told the court that he owns Isuzu KB 360 van which he bought second hand in South Africa in good condition. He used the vehicle for many years until it stopped running. DW2, who is his mechanic told him that it had a computer box problem. Because he could not find the computer box, he parked the vehicle until PW1 came along and wanted to buy his vehicle's engine. They concluded a verbal agreement for the sale of this engine. Sometime after purchasing the engine, the plaintiff came back complaining that it had a knocking sound. He told the court that when he sold the vehicle to the plaintiff, it was in a good running order. The plaintiff has always been using the engine, and it remained with him for the past two years. He told the court that when the plaintiff came back to him saying he wanted to cancel the contract he told him that he did not have a problem, but that his only problem was that he did not have money to refund him the purchase price. He also wanted plaintiff to re-install the engine into his vehicle at his own expenses. He asked plaintiff for repayment arrangement, but the plaintiff did not return. That was the last time he saw him.
- [7] Under cross-examination defendant did not deny that plaintiff wanted to return the engine. He told the court that he did not refuse when the plaintiff wanted to return the engine. He said their agreement was that the plaintiff was buying his engine to repair his engine with the parts of the one he bought from him. He said his engine was not faulty. He acknowledged that when he sold the engine his vehicle had been parked for a long time, and that the engine was not tested before being sold to the plaintiff. He maintained that the plaintiff bought his engine to repair his. His vehicle was towed to his residence after being diagnosed with computer-box problem and has been standing idle ever since. The witness

was not re-examined.

- [8] DW2, was Mr Tšitso Alotsi. He is the defendant's mechanic. He runs an auto clinic. He has over twenty (20) years' experience as a mechanic having worked as such at Bloemfontein Auto Technicians and Mr Auto Maseru before opening his own workshop. He knows the defendant because he is one of his customers. He attended to the defendant's vehicle. Its engine was in a fair running condition. He was engaged by the defendant to assess the vehicle before he bought it in Ficksburg. After assessing it he found it to be in a good working order. DW2 serviced the vehicle on intervals and that its only problem was the computer box which had to be replaced.
- [9] Under cross-examination he confirmed that he did not test the engine before the defendant sold it to the plaintiff. He however insisted that he did not test it because the last time it was with him the only problem it had was the computer box, otherwise its engine was in a good running order. He said he could not test the engine because of the faulty computer box. He acknowledged that the engine had not been running for a long time before it was sold to the plaintiff because the defendant would not buy a replacement computer box. It was put to him that when he diagnosed the vehicle with computer box problem, he did not test its engine to find out that it was working. His answer was that because the computer box was faulty the engine could not run. He was at pains to concede that since the defendant's vehicle had been broken for a long time before he sold the engine to the plaintiff, he cannot tell the court that the engine was in a good working order. He said he would not vouch that the engine did not have a knocking sound when the plaintiff bought it. Under re-examination the witness told the court that if the vehicle is running and the engine is removed and kept for months it will still run properly when it is used.
- [10] Principles of the law of sale When two parties conclude a contract of sale, by operation of the law, the seller warrants that the goods sold are free of latent defects. A latent defect in the thing sold constitute an impairment to the usefulness of the thing and is not discoverable upon reasonable inspection by an ordinary person (O'Donovan Mackeurtan's Sale of Goods in South Africa (1996) 338-240)). A determination whether the usefulness of the thing has been impaired is made objectively. In Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd 1977 (3) SA 670 (A) 860, a latent defect was defined as the abnormal quality of the thing which substantially impairs its utility. The question to be asked is whether the defect was easily visible or discoverable at the time of sale or discoverable at the time of sale by the ordinary purchaser. The test is whether the defect impairs its usefulness and is not dependent on the special skill of the purchaser.

- [11] The warranty against the presence of latent defects may be excluded by agreement in a case where the goods are sold “as is” or voetstoots. By agreeing that their contract should include a voetstoots clause the parties exclude the aedilician actions as well as actio empti. Aedilician remedies are available where there is a breach of a warranty against latent defects and where no express or tacit guarantee was made by the seller and the warranty was not expressly excluded by the parties (Nagel et al Commercial Law 4ed.
- (2011) 226-227). Actio empti on the one hand is available in situations where there is either no express or tacit warranty against latent defect agreed upon by the parties or of good or absence of bad characteristics in a thing; where the seller concealed the defect and where the seller is the manufacturer of the goods sold (see Nagel et al at 224-226).
- [12] Evaluation of the merits It is common ground that the plaintiff had a problematic engine which hampered his business endeavours of buying and selling fruits. He contacted the defendant, and the latter sold him the engine. After the engine was installed into his vehicle it presented similar problems – it had a knocking sound. After the engine was taken for a test drive the plaintiff was convinced that it had the same problems as his engine. He tried to convince the defendant that the engine was not functional, but the latter told him he sold him the engine “as is”. Intervention was sought from the police but to no avail – the defendant would not agree to return the purchase price and to take back the possession of his engine.
- [13] The engine was uninstalled and kept at the plaintiff’s place while his brother repaired his and used the vehicle. Although the defendant’s counsel kept hammering the fact that the plaintiff did not maintain his vehicle according to the manufacturer’s specifications in my view that did not take his point anywhere because, uncontroverted evidence of the plaintiff is that the engine did not live up to expectation or utility. Engagement between the parties ensued immediately after the engine was installed but the defendant was adamant that he was not liable. He even resisted mediation by the police, leading to the plaintiff to institute the present matter. It is clear that the plaintiff did not get to use the engine in question. The point which was pursued by the defendant’s counsel to the effect that the plaintiff used the engine for two years and therefore could not claim his money back is without any basis in facts.
- [14] Another line of argument which was pursued by the defendant is that the plaintiff bought his engine in order to repair his with it. I find this to be improbable given that immediately after the plaintiff bought the engine, he installed it into his vehicle. I find it difficult to accept that that plaintiff’s conduct was consistent with the intention to repair his engine with the parts of the engine he bought from the defendant. The fact that the plaintiff immediately installed the engine was probably because he was given the impression that it was in a good running order. DW1’s evidence could not take the defendant’s case anywhere as he could not vouch for the engine’s good health when it was bought by the plaintiff. He tried hard to suggest that it was in a good running order even though he acknowledged that he did not test it before it was sold to the plaintiff.

- [15] The defendant would have this court belief that he agreed to have the engine returned but the plaintiff refused to return it. I find it improbable that the plaintiff would complain about the engine and refuse to return it. As I said earlier the fact that the plaintiff ended up seeking mediation by the police shows that they had reached a dead end in their dispute regarding this engine. An issue arose during the plaintiff and defendant's testimonies that when the former complained about the engine the latter told the former that he sold it as it was, and he was not liable. As I listened to the evidence of both witnesses, they did not say that the defendant's liability for latent defect was excluded by agreement. The assertion that the engine was sold at it only came up when the defendant was confronted by the defendant about the dysfunctional engine. Otherwise, if this was part of the agreement it would have been pleaded as a defence to the plaintiff's claim. It was merely a statement which was uttered when the defendant was confronted about the dysfunctionality of the engine. In terms of the legal principles articulated in the preceding paragraphs where, as in this case, liability for latent defects has not been excluded by agreement, by operation of the law, the seller is held liable for latent defects in the goods sold. In the present matter the engine has impaired utility which justifies the plaintiff instituting *actio redhibitoria* claiming the return of the purchase price.
- [16] Counter claim The above conclusion renders the reliefs sought in the counter claim largely moot, that the relief for payment of M2000.00 being the balance of the purchase price of the engine and M25,000.00 for damages supposedly occasioned by the breach of contract by the plaintiff. What therefore remains is the payment of the sum of M3000.00 being the balance on the purchase price of the release bearing. It should be stated that there was no evidence adduced that the bearing in question was sold to the plaintiff. What is clear from the evidence is that the plaintiff borrowed the defendant's used release bearing. It was removed from the defendant's vehicle. No evidence as to the basis of value of the release bearing was adduced apart from the defendant claiming that it was worth M3,000.00. Costs
- [17] It is trite that the issue of costs falls within the discretion of the court, which discretion should be exercised judicially taking into account all the surrounding facts of each case, which "in essence it is a question of fairness to both sides" (*Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 (A) at 854). At the hearing of the matter Advocate Makhera, for the plaintiff, intimated that the plaintiff was no longer pursuing a claim for damages in the amount of M80,000.00 because of certain development which took place after the institution of the case. Those developments were not spelled out to the court. Without a claim for damages this case would have been justiciable in the Magistrate's court. As I see it, this case is one of those cases which are instituted before this court unnecessarily. What counsel do is to include, on top of a claim which is tenable before the lower court, an amount of damages which would bring the case within the jurisdiction of this court, only to abandon the claim for damages when the trial is proceeding or by not proving it. This practice causes unnecessary backlog of cases in this court by clogging the system with matters which should have been instituted in the lower courts.

- [18] As a matter of practice where this behaviour is evident , as in this case, a plaintiff who obtains judgment before this court with regard to a matter which falls within the jurisdiction of the magistrate court, will be awarded costs at the scale of the Magistrate's Court especially where the circumstances which may justify the exercise of the discretion in favour of awarding costs on the High Court scale are absent, such as the complexity of the matter or fraud or misrepresentation on the plaintiff (Barnard v SA Mutual and Fire General Insurance Co. 1979 (2) SA 1012 (SECLD) at 1014H): see also Small v Goldreich Buildings Ltd and Reid & Knuckey (Pty) Ltd 1943 WLD 101). The court will in the final analysis determine whether it was reasonable for the plaintiff to institute the proceedings before the Higher Court (White v Saker and Company 1938 WLD 173 at 174). The court may also take into account developments subsequent to the institution of the case which may have played a role in the plaintiff's decision to revise its initial claim (Kotze v Newmarch 1940 NPD 112). In the present matter the court was not told of the developments which led to the abandonment of the claim for damages.
- [19] In the result the following order is made: (i) The main action succeeds with costs in terms of Prayer 1. (ii) Costs should be on the Magistrate Court scale. (iii) Payment of interest at the rate of 10% per annum from July 2022 to date of final payment. (iv) Counterclaim is dismissed with costs; which costs should be on the Magistrate Courts scale.

MOKHESI J For the Plaintiff in the main action and Defendant in the counterclaim: Adv: N. E. Makhera instructed by T. Maieane & Co. Attorneys For the Defendant in the main action And Plaintiff in the counterclaim: Adv. N. Mabulu instructed by V. Mokaloba & Co. Attorneys 13

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