TEDDY YOMENA vs S W MOTORS I 227/97

HEARD ON: 1997/02/06

DELIVERED ON: 1997/02/12

JUDGMENT

Plaintiff gave a vehicle to Defendant to sell. Defendant sold vehicle but failed to pay the purchase price to Plaintiff maintaining that the terms of the contract were different from those alleged by Plaintiff.

Onus on Plaintiff to prove his version of contract.

Contract concluded Plaintiff's version therefore not contradicted with a person who was not called to testify.

CASE NO. I 227/97

IN THE HIGH COURT OF NAMIBIA

In the matter between

TEDDY YOMENA	**PLAINTIFF**
versus	
S W MOTORS	**DEFENDANT**

CORAM: LEVY, A.J.

Heard on: 1997/02/06

Delivered on: 1997/02/12

JUDGMENT

LEVY, A.**J**.: Plaintiff is one Teddy Yomena described herein as a student residing in Katutura while defendant is cited as S W Motors, a firm which carried on business at the corner of Ausspann Street and Rehobother Road, Windhoek.

Plaintiff is represented by Adv Turck and defendant is represented by one Deon Posthuma who described himself as the defendant trading as S W Motors.

Plaintiff alleges, as far as is relevant hereto, that early in June, 1994, he entered into an oral agreement with defendant in terms whereof defendant would sell the plaintiff's motor vehicle, a 1991 Volkswagen Caravelle, with registration number ND163988. On the sale of the said vehicle, defendant would pay plaintiff an amount of N$55 000. Plaintiff alleges that pursuant to their

agreement defendant sold the vehicle and on or about 10th July, 1994, paid plaintiff N$9 000 leaving a balance of N$46 000 due and owing to plaintiff.

Plaintiff claims the said N$46 000, 20% interest a tempore morae and costs of suit.

Defendant requested further particulars which included the question as to whom it was who acted for defendant, in concluding the contract with plaintiff. Plaintiff replied that one Robert Posthuma acted for defendant. It subsequently transpired in evidence that Robert Posthuma was the brother of the defendant and was employed by the latter.

Defendant filed a plea wherein it admitted that it undertook to sell the said motor vehicle and that defendant would pay plaintiff N$55 000 after the sale in the event of certain terms and conditions being complied with. More particularly defendant alleged that plaintiff was to prove that he was the owner of this vehicle and to do this he had to deliver to defendant:

> "(a) The original motor vehicle licence;
>
> (b) The original agreement of sale in terms of which Plaintiff purchased the vehicle from the previous owner;
>
> (c) Particulars of the previous registration of the said motor vehicle;
>
> (d) Proof that the full purchase price of the vehicle had been paid to the previous owner;
>
> (e) Proof that the vehicle was fully paid for when the Plaintiff purchased it from the previous owner;

(f) Full particulars of all the previous owners of the motor vehicle from the date when it was first released from the manufacturer and proof of the transactions in terms of which these owners sold the vehicle to subsequent owners;

(g) Proof that the vehicle was not reported stolen in the Republic of South Africa and in the Republic of Namibia.

Defendant admitted that at the end of June it sold the vehicle and that plaintiff was paid N$9 000 but it said that the person who paid this was not authorised to do so.

Plaintiff denied these allegations.

The onus to prove its contract lay on plaintiff. He was assisted by the fact that defendant admitted the essence thereof namely that defendant was required to sell the vehicle and pay N$55 000 to plaintiff but he alleged that this agreement was subject to the aforementioned conditions. Plaintiff had to prove that the terms and conditions alleged by defendant were not attached to the said contract. (See Kriegler v Minitzer & Another. 1949(4) SA 821 (A) at 826. Seedat v Tucker's Shoe Co. 1952(3) SA 513 (T) at 515 H.)

Defendant testified that his brother, Robert Posthuma, had been employed by the firm. In his plea defendant did not deny that Robert Posthuma had concluded the original contract with plaintiff. In his evidence Deon Posthuma very lamely said that he himself had negotiated the original contract. He was unconvincing on this issue and was imprecise as to the exact terms. In any event he did not amend his plea and failed to explain why he had originally

in his plea admitted that Robert Posthuma had concluded the contract.

It is permissible to withdraw an admission in the pleadings provided the making thereof can be adequately explained: (Jennings v Paraq, 1955(1) SA 290 (T)).

Where it is not withdrawn a defendant is bound thereby. (Mthanti v Netherlands Ins. Co of SA, 1971(2) SA 305 (N)).

Defendant failed to amend his plea and is bound thereby.

Defendant testified that the reason he required this documentation from plaintiff was that the purchaser of the vehicle would hold him, defendant, responsible if the vehicle was a stolen vehicle. In cross-examination he conceded that he acted as an agent in the sale and could therefore not be held liable. He also conceded that the balance of the N$55 000, namely N$46 000, which he had received belonged to plaintiff but he said he spent it. He could not explain why he had in fact sold the vehicle before he had received the documentation which he originally said would be required before selling the vehicle.

Defendant admitted that he had received two clearance certificates in respect of this vehicle from the South African Police and one such clearance certificate from the Namibian Police. He, however, said that this was not adequate.

Defendant testified that Robert Posthuma was his brother and was at present in Swakopmund. Although available to testify, defendant did not call him.

Plaintiff's version of the contract could therefore not be contested and was in fact not contradicted.

Furthermore, plaintiff testified that he had telephoned defendant from the United States of America to ask him to pay the money due to plaintiff, to plaintiff's wife and defendant undertook to do so. Notwithstanding this undertaking he failed to make any payment other than the N$9 000.

I accordingly find that plaintiff has discharged the onus and has proved his case.

Defendant was an extremely unsatisfactory witness. In order to pay less than the amount due by him, he handed into Court a "Used Car Record Card" and testified that this card appertained to plaintiff's vehicle.

The card set out a series of repairs or parts supplied to a vehicle but the dates whereon these repairs were executed purported to be in April, 1994 whereas the plaintiff's vehicle was only handed to defendant in June, 1994.

I am satisfied that plaintiff has proved his case. I give judgment in plaintiff's favour and order defendant to pay plaintiff N$46 000, interest thereon at the rate of 20% per

annum, calculated as from 19th August, 1994 to date payment and costs of suit.

LEVY, JACTING **JUDGE**

ON BEHALF OF THE PLAINTIFF: Mv s TURCK

Instructed by

Diekmann & Ass.

ON BEHALF OF DEFENDANT- T - ^ *

x- DEON POSTHUMA