REPUBLIC OF NAMIBIA

CASE NO. I 3004/2010

HELD AT THE HIGH COURT OF NAMIBIA, MAIN DIVISION

IN THE MATTER BETWEEN:

KAREL JOHANNES MADJIET **PLAINTIFF**

and

JACOB DANIEL BESTER **DEFENDANT**

QUORUM: **DAMASEB, JP**

HEARD ON: 29 MAY 2012; 16 JULY 2012

DELIVERED ON: 18 JULY 2012

JUDGMENT

DAMASEB, JP: [1] This is a claim for the balance of a purchase price of a motor vehicle. It is alleged in the particulars of claim that on 3 July 2006, and at Swakopmund, the plaintiff and the defendant entered into an oral agreement in terms of which the plaintiff sold a Corsa 160i

Elegance, 2003 model ('the subject vehicle') to the defendant for N$85,000.00. In terms of the oral agreement, it is further alleged, the purchase price was to be paid off in monthly installments of N$ 1 500.00, with interest at the 'legal rate' and that ownership over the subject vehicle would only pass to defendant upon l payment of the full purchase price. The agreement to sell the vehicle to the defendant is admitted, but it is denied that the purchase price was N$85,000.00; or that there would be interest on the balance or that ownership would only pass upon payment in full of the purchase price.

[2] It is common cause that the defendant had paid a total of N$30 000, 00 to the plaintiff as at 26 March 2008. The plaintiff's version is that *that* amount is made up as follows:

(a) N$ 5000, 00 paid by the defendant to the plaintiff on 3 July 2006 in respect of new rims and tyres that were allegedly fitted on the subject vehicle which the plaintiff wanted to remove when he sold the car, but which items the defendant asked the plaintiff to retain on the car in consideration for the amount of N$ 5000.00;

(b) N$25 000, 00 was paid by the defendant towards the purchase price in installments between 3 July 2006 and 26 March 2008.

[3] The defendant's version is that the N$5000, 00 was the agreed deposit on the purchase price of N$30 000, 00 and the N$25 000, 00 was paid in installments to settle the balance remaining on the purchase price. According to the defendant, that ended his obligations under

the oral agreement. The plaintiff sues for the balance of N$66 000,00, which he claims is due and payable, since reduced to N$ 60 000.

[4] The following evidence was led by the plaintiff:

(a) That he and the defendant are and had been close acquaintances, friends and family, and had been so for a very long time;

(b) That defendant's brother, one Desmond Bester, had suggested to the plaintiff to sell the vehicle to the defendant;

(c) That he , on the date he sold the vehicle, owned three cars; including the subject vehicle;

(d) That he had bought the vehicle on hire purchase with Bank Windhoek and had an outstanding balance in favour of Bank Windhoek in the amount of N$ 85 000,00.

(e) That about a month before the sale transaction with the defendant, he changed bankers, from Bank Windhoek to First national Bank (FNB) and, by means of a loan from the latter bank, settled his indebtedness to Bank Windhoek in respect of the vehicle, in the amount of N$ 85 410,00.

(f) That he informed the defendant that he wished to sell the vehicle for N$ 85 000, 00 which was equivalent to what he paid to Bank Windhoek to settle the debt on the vehicle; and that the defendant accepted the purchase price and there was no dispute over it.

(g) That the defendant offered to pay N$ 1 500, 00 per month towards the purchase price as this was the same amount that the defendant had to pay on his hire purchase to the bank for the car he owned at the time - undertaking further to

make the necessary arrangements to obtain a loan to pay off the balance of the purchase price of N$ 85 000, 00.

(h) That the defendant initially only paid installments in the amount of N$ 1000,00 per month for the first ten months; and only after he threatened to repossess the car, did the defendant change his monthly installments to N$1 500,00.

(i) That the plaintiff continued to pay insurance in respect of the subject vehicle for the period August 2006-January 2007, while waiting for the defendant to get his finances in order to pay off the purchase price.

(j) That in terms of the agreement, the subject vehicle was to remain his property until the purchase price was fully paid.

(k) That the defendant informed the plaintiff on or about March 2009 at Walvisbay that he had sold the subject vehicle to a third party, a car dealer, at a price of N$ 55 000,00 and that the latter will pay a certain amount of money to the plaintiff towards the agreed purchase price, but this never happened.

[5] Under cross-examination, the plaintiff denied that he approached the defendant to buy the car and stated that it was the defendants' brother who approached the plaintiff instead. When questioned why the contract was not reduced to writing, the plaintiff testified that the defendant came to get the car unexpected and in a hurry such that the two did not have time to reduce the terms of the contract in writing. Additionally, the plaintiff testified that he trusted the defendant and did not see the need to put the contract in writing. Something that he says he has since regretted.

[6] The following evidence is either admitted, not denied, or challenged under cross examination and therefore remains unchallenged:

(a) The plaintiff had 3 vehicles when he entered into the agreement with the defendant;

(b) He owed the amount of N$84,410.00 to Bank Windhoek in respect of the subject vehicle, which he had repaid in full just before he agreed to sell the vehicle to the defendant;

(c) The subject vehicle was worth considerably more than the N$30,000.00 which defendant says was the agreed purchase price. In fact, the defendant had sold it for about N$55,000.00 after having driven the vehicle for 6-7 months. (That its value was more at the time the defendant took delivery of it therefore goes without saying.)

[7] The defendant testified on his own behalf. He was adamant that the agreed purchase price was N$30,000.00 and that if the plaintiff had told him that it was N$85,000.00, he would not have been interested. He, in-chief, testified that the plaintiff approached him and offered to sell the subject vehicle to him. That he told him at the time that he had a car in respect of which he was still indebted to the Bank; and that he would have to sell it first before he could buy the plaintiff's vehicle. He testified that the plaintiff told him that he had three cars and wished to dispose off the subject vehicle but that the offers he was getting from motor dealers were not acceptable to him. The defendant also testified that he did inquiries from motor dealers and established that if he bought the subject vehicle and sold it on, he would make a profit on it.

[8] Under cross-examination, the defendant could not provide a plausible explanation why the plaintiff would sell the vehicle to him at the rather low price of N$30,000.00, considering that, (i) the plaintiff had paid 85,410 to Bank Windhoek to liquidate the debt owing on the vehicle; (ii) the vehicle was in good condition; (iii) there was no apparent reason why the plaintiff would have wanted to sell it for such a low price. The defendant not only stated that he knew of no such reason but also stated that even he would not, given the circumstances, have done such a thing – accepting that the transaction relied upon by the defendant does not make much business sense.

[9] This being a civil case, the test I must apply is the one correctly referred to by Mr Grobler for the plaintiff as contained in, for example, Sakusheka *v Minister of Home Affairs*[1] - where the Court held that where two versions are mutually destructive, the plaintiff can only succeed if he establishes on a balance of probabilities that his version is accurate and acceptable and the defendant's false and liable to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the parties' allegations against the general probabilities. If the probabilities favour the plaintiff's version, he must succeed.

[10] *Probabilities*

It is now common cause that the subject vehicle was worth considerably more than the N$30,000.00 which the defendant says was the purchase price. The defendant even went on to sell the vehicle for a profit. If the defendant's version is accepted, the plaintiff made a deal which would have the result that he sold the subject vehicle to the defendant at a price which

[1] 2009 (2) NR 524 (HC) at 540 I – 541 B.

had not relationship to the financial commitment borne by the plaintiff in respect of it. The defendant has not as much as suggested what the reason could be for this most altruistic and generous gesture on plaintiff's part towards him which, in effect, amounts to a donation. In our law there is a presumption against donation and the party wishing to rely on it must allege it in clear terms and prove it by evidence. A donation is however not pleaded in this case and no evidence proferred for it; although the conduct attributed to the plaintiff amounts to that.

[11] It remains plaintiff's undisputed evidence that whilst the subject vehicle remained under the defendant's possession, the plaintiff continued (for the period August 2006 – January 2007) to pay for the insurance on the vehicle. Why would the plaintiffs do that if what was agreed was not, on defendant's version, that the vehicle would remain the plaintiff's property until the purchase price was fully paid? I must therefore accept the plaintiff's version that it was agreed between the parties that the subject vehicle was to remain plaintiff's property until the purchase price was fully paid.

[12] Another significant piece of evidence that adds to the probabilities favouring the plaintiff's version is the equally unchallenged evidence that just before he sold the subject vehicle to the defendant, the plaintiff, who was then banking with Bank Windhoek, moved his portfolio to FNB. As part of that transfer, he had to borrow from his new bank the amount equal to his indebtedness to Bank Windhoek in respect of the subject vehicle. He did so and paid off the subject vehicle but continued to remain indebted to FNB for the money borrowed to pay Bank Windhoek. As I understood his evidence, the reason he chose to sell the vehicle to the defendant for what he alleges to be the purchase price of N$85,000.00, was to recover what he remained indebted for in respect of the subject vehicle, having since paid it off with an FNB

loan. That accords with common sense and is inconsistent with any suggestion that he wanted to simply get rid of the car at a loss.

[13] It is most improbable that the plaintiff would have sold the car to the defendant for N$30,000.00 when, on defendant's own version, the dealers were prepared to offer for the vehicle in excess of the N$30,000.00. As the defendant testified, that is the reason he agreed to buy the vehicle. What are the probabilities that the defendant could determine from dealers that the car was worth more than 30,000 and the plaintiff could not? The proposition only needs to be put to be rejected.

[14] In his plea, the defendant had admitted that it was agreed that he was to pay an installment of N$1,500.00 per month towards the purchase price. In his evidence in chief, however, he testified that the agreed installment was N$800.00 but that he, of his own accord, increased that amount to N$1 500.00. There is therefore a conflict between his own plea and the evidence which he has not explained, either satisfactorily or at all.

[15] On a conspectus of the evidence I come to the conclusion that the probabilities do not favour the defendant's version of events and point more to that of the plaintiff being true, i.e. that the agreed purchase price was N$85,000.00.

[16] N*$5000 paid upon delivery*

Mr Grobler conceded, correctly in my view, that the plaintiff had failed to challenge the defendant in cross-examination that the N$5000.00 paid on 3 July 2006 when delivery of the vehicle was taken, was not in reduction of the purchase price but for the tires and rims which the defendant had allegedly agreed to pay for separately from the purchase price. In the circumstances, I accept the defendant's version that the N$5000.00 paid on 3 July 2006 was a deposit on the purchase price, in preference to the plaintiff's version that it was not.

[17] The *claim for interest*

The particulars of claim include an averment (at para 4.2) that it was an express term of the agreement that the defendant would pay interest on the outstanding balance at the 'legal rate'. The defendant denied that such interest was agreed. The plaintiff bears the *onus* in respect of that aspect of the claim too. He, in his evidence in-chief, made no mention of what in his understanding was interest on the 'legal rate'. The defendant was also not in any meaningful and serious way challenged with the allegation and confronted with the version that interest at the 'legal rate' was agreed; or that he knew what it meant. I am satisfied, for all of the above reasons, that the plaintiff failed to discharge the *onus* that it was agreed that the balance of the outstanding purchase price would attract interest at 'the legal rate'. The claim in respect of interest at 'the legal rate' should therefore fail; the plaintiff having failed to prove *mora ex re.*

[18] Interest *a tempore morae*

Prayer 2 to the particulars of claim asks for 'interest on the amount of N$66,000.00 a *tempore morae* from 1 September 2008 to date of payment.' On a liquidated claim, interest begins to run on the amount of defendant's liability from the date of *mora*. It was incumbent on the plaintiff to allege and prove when the interest claimed began to run. A *tempore morae* means 'from the moment the debtor is in default'.[2] It is trite that a debtor is in *mora* once a proper demand has been made for payment; and in that case interest runs from the date of demand.[3]

[19] The plaintiff has failed to prove when exactly he made demand for payment once the amount became due and payable. Although he had issued summons on 6 March 2009 in the Magistrate's Court, the same was withdrawn and was only again issued in the High Court in September 2010. I am unable to find any evidence on the record why the defendant could not have assumed that the summons having been withdrawn, no further steps were being contemplated against him. He could therefore not have been in *mora* on account of that summons. Interest a *tempore morae* can therefore only run from the date of service of the summons issued out of this Court in September 2010.[4] The return of service shows *that* summons was served on the defendant 27 September 2010.

[2] Intramed (Pty) Ltd (In liquidation) v Standard Bank of SA Ltd 2008 (2) SA 466 at 470, para (96)
[3] Standard Bank of SA Ltd v Lotze 1950 (2) SA 698 (C)
[4] Commission of Inland Revenue v First National Industrial Bank Ltd 1990 (3) SA 641 (A) 654; Thoroughbond Breeders' Association of SA v Price Waterhouse 2001 (4) SA 551 (SCA) paras 80-86.

Conclusion

[20] The plaintiff now seeks judgment for the sum of N$ 66 000. However, he succeeded to prove only N$55,000.00, as the balance still due on the purchase price of N$85,000.00 – if one deducts the amount of NN5,000.00 paid as deposit on 3 July 2006. Mr Grobler correctly conceded as much. Judgment will therefore be entered in that amount, including interest a *tempore morae* calculated from the 27th September 2010. Costs must follow the event.

[21] Accordingly, I make the following order:

a) There shall be judgment for the plaintiff against the defendant in the amount of N$55,000.00; with
b) Interest a *tempore morae* calculated from 27 September 2010 to date of payment.
c) Costs of suit.

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DAMASEB, JP

ON BEHALF OF THE PLAINTIFF:	Mr Z Grobler
Of:	**Grobler & Co**
ON BEHALF OF THE DEFNDANT:	Mr D Bugan
Instructed By:	**PD Theron & Associates**