

**Courts of Magistrates Gozo
Inferior Jurisdiction**

**Magistrate Dr Brigitte Sultana LL.D. LL.M. (Cardiff) Adv. Trib. Eccl.
Melit.**

Sitting of the 21st of January 2020

Notice No. 6/2017 BS

J. Zammit Ltd

-vs-

Sophie Bay Mawby

The Court:

Having seen the application filed by plaintiff Company J. Zammit Limited (C 37945) dated 3rd July 2017 which stated that –

To say why, in terms of the law as well as the agreement signed by respondent and the applicant on the 24th November, 2015 [copy attached as document A], with which agreement respondent acquired the vehicle Vauxhall Astra (registration no. CLV531) [copy of the logbook attached as document B], respondent should not pay the applicant the value of seven thousand, seven hundred and nineteen Euro and thirty-two cents [EUR 7,719.32 due as to four thousand, forty-four Euro and thirty-two cents [EUR 4 044.32] by way of matured bills of exchange [copies attached as document C] and the remaining value in expenses related to the storage of the vehicle Vauxhall Astra which respondent abandoned without a valid reason and notwithstanding the obligations respondent assumed by the signing of the mentioned agreement and the discussions held between respondent and the applicant including through the following correspondence [i] a legal letter dated the 14th January, 2016, and; [ii] a legal letter dated the 18th January, 2016 [copies attached as documents D and E].

Reference is also made to the additional judicial acts filed against respondent such being: [i] the judicial letter numbered 267/17, [ii] the warrant of seizure numbered 59/2017 JVC, and; [iii] the

garnishee order numbered 58/2017 JVC; all of which were filed on the 13th June, 2017 to safeguard the rights of the applicant due to respondent's defaults.

This demand is being made without any prejudice to the remaining bills of exchange relating to the mentioned agreement which are still to mature and which shall be executed against respondent as appropriate and in accordance with the law and to the additional amounts that shall become due in case respondent persists with her default.

With judicial costs and legal interest as applicable according to the Laws of Malta against respondent, as of now could to give evidence.

Having seen the sworn reply of defendant Sophie Bay Mawby Limited filed on the 04th August 2017 wherein the following pleas were raised -

1. That the plaintiff pleas are totally unfounded in fact and at Law and should be dismissed in full;
2. There is no amount due given that the vehicle merit of this case was not in a good working condition and in fact when the defendant collected the vehicle, it ceased to work and had to be pushed on the Gozo Channel vessel and the defendant had to take the vehicle to her mechanic and the same vehicle had to be returned back to the plaintiff just five (5) days following its collection date, that is on the fifth (5th) December, of the year two thousand and fifteen (2015);
3. That furthermore, the defendant incurred various expenses so that the vehicle could be returned back to the plaintiff;
4. That without prejudice to the above, there are pending other procedures in front of the Consumer Claims Tribunal Number 799/16B in the names Sophie Bay Mawby vs Ray Auto Dealer - J. Zammit Limited, which procedures are still pending and which concern the merits of these procedures;
5. That furthermore, the defendant communicated as from the beginning with the plaintiff in the sense that the agreement had to be rescinded immediately and she returned the vehicle and correspondence was exchanged along these lines and there were proposals about what amount would be refunded back to the defendant from what she had already paid. In this sense, the defendant also formally communicated to the plaintiff through Judicial Letter 654/16 of the 11th March, 2016;
6. That all this will be proven in detail throughout this case;

7. Saving further defences in fact and at Law.

Saw that during the sitting dated 19th October 2017 the Court upheld defendant's request for the proceedings to continue in the English language.

Saw all the evidence brought forward by the parties.

Saw the Note of Submissions filed by the plaintiff Company. Noted that the defendant failed to file her reply to the note of submissions even though duly notified of the said note.

Saw that the case was adjourned for judgement for today.

Saw all the other acts of the case.

Considered:

IN the present case the Plaintiff J. Zammit Limited [C37945] filed an application asking the court to find the defendant, Ms. Sophie Bay Mawby, responsible for the payment of:

a) Seven thousand, seven hundred and nineteen Euro and thirty two cents [€ 7,719.32] due as to:

- i) Four thousand and forty four Euro and thirty two cents [€4,044.32] by way of matured bills of exchange signed by the Defendant in guarantee of payment on her acquisition of a vehicle model: Vauxhall Astra, Registration Number CLV531] from the Plaintiff;
- ii) Three thousand six hundred and seventy five Euro [€3,675] due as to three thousand six hundred and seventeen Euro [€3,617] in storage expenses accumulated after the Defendant abandoned the said vehicle at a garage following service works done onto it by the Plaintiff on the Defendant's request; and
- iii) the balance of fifty eight Euro [€58] in judicial expenses.

By means of a note of reduction filed on the 29th November, 2018¹ plaintiff proceeded to reduce the amount to three thousand six hundred and seventeen Euro [€3,617] being the value representing the storage expenses accumulated after the defendant abandoned the vehicle at a garage following service works done onto it by the plaintiff.

¹ a fol 189

The plaintiff also made reference to the judicial acts filed against the defendant and reserved its rights to other bills of exchange relating to the same vehicle and agreement which were, at the time of filing of the demand, still to mature as well as to additional amounts that would become due in case the Defendant persisted with her default.

On her part the defendant rebutted the claims levelled against her by stating that:

- a) she owed no money to the plaintiff since the vehicle was found to be defective;
- b) she had undergone several expenses in order to return the car back;
- c) she had initiated proceedings before the Consumer Claims Tribunal which proceedings were still pending²;
- d) She had immediately asked for the sale to be rescinded so much so that she returned the car back to the plaintiff immediately. There were also negotiations as to the amount to be refunded.

FACTS OF THE CASE.

On the 24th November, 2015, Sophie Bay Mawby signed a hire-purchase agreement by virtue of which she acquired a vehicle, Vauxhall Astra [CLV531], from the plaintiff. In order to secure payment the parties signed a number of bills of exchange on the same day as the signature of the contract. In the course of the proceedings defendant alleged that the contract was not explained to her. Yet it also transpired that the vehicle purchased on the 24th November, 2015 was the second one purchased by the same defendant from the same plaintiff company. It also transpired that the contract signed by the defendant on the 24th November, 2015 was identical to the earlier one signed by her when she had purchased another vehicle.

By way of defence the defendant claimed that the vehicle sold to her was defective. The Plaintiff rebutted this claim by presenting evidence that prior to the sale of the vehicle he had carried out a full service which was provided by Christopher Mallia. A test drive was also carried out. *xhieda in footnote)

From the evidence produced it transpires that the Defendant took possession of the vehicle on the same day she signed the contract. Later in the day defendant called the plaintiff and informed him that whereas she had driven the vehicle onto the Gozo Ferry yet she had to be pushed out of the same ferry as the vehicle failed to start.

² The Consumer Claims Tribunal delivered the sentence on the 25th October, 2018. A copy is at Fol 185 to 188.

Since the vehicle was in Gozo the Plaintiff's administrative team agreed with the Defendant to take the vehicle to her mechanic in Gozo. They agreed that defendant was to have the car repaired and plaintiff was to reimburse her the expenses paid subject to him approving the repairs³. Following the first incident however the vehicle developed another problem and defendant claims that the mechanic advised her to return the vehicle back to the plaintiff. The vehicle was eventually driven back to the Plaintiff in Malta on the 9th of December, 2015. The Plaintiff repaired the vehicle⁴ and the Defendant was requested to pick up the vehicle. Communication was a Facebook Messenger text dated 15th December, 2015.

The Plaintiff claimed that the required repairs were minor and did not render the vehicle unsuitable for use. However in spite of the fact that the vehicle was ready Defendant failed to pick up the vehicle and she abandoned it at the Plaintiff's end. The expense for safekeeping and storage of the vehicle while it lay abandoned by the Defendant at the Plaintiff's end amounted to three thousand, six hundred and seventeen Euro [€ 3,617].

On the 13th January, 2016 Defendant, wrote to the Plaintiff asking for the refund of €2000 plus the €190 representing the money spent by her on repairs. This claim was rebutted by the Plaintiff who demanded the defendant to collect the vehicle in order to honour the contract she had signed⁵.

CONSIDERED.

After a thorough examination of the Defendant's reply to the Plaintiff's claim it is clear to this Court that the main defence raised by Ms. Mawby is that the vehicle was defective. The Court notes that the line of defence chosen by the defendant constitutes the basis of an action known as the *actio redhibitoria*⁶ wherein the buyer claims that product purchased by him is defective and hence files an action asking to restore the thing and have the price repaid to him. Furthermore when the object sold is a movable, the buyer has to file his claim within 6 months from the date of the delivery of the thing sold⁷. It is clear therefore that this action cannot be pursued by way of a defence to an action filed by the seller against the purchaser for the payment of what is due to him following the sale of an object. The *actio redhibitoria* can only be advanced by the buyer *per via d'azione* when he wants to advance a claim against the seller. Indeed this precise conclusion was reached by the First Hall of Civil Court wherein it was decided that:

³ Evidence given by Sergio Attard a fol 35 .

⁴ Deposition by Emanuel Sciberras a fol 92.

⁵ Letter by Plaintiff dated 18th January 2016, A Fol 88.

⁶ Article 1427 of the Civil Code.

⁷ Article 1431 of the Civil Code.

“Meta l-haga kunsinnata mill-bejjiegh tkun afflitta minn xi vizzju okkult, ir-rimedji tal-bejjiegh ikunu dawk previsti minn dan l-artikolu u cioe' jew l-azzjoni redibitorja jew l-azzjoni kwantu minoris. Il-ligi tipprovdi li x-xerrej jista' jaghzel billi jigi 'l quddiem bl-azzjoni redibitorja li jaghti lura l-haga u jitlob ir-radd tal-prezz inkella billi jigi 'l quddiem bl-azzjoni aestimatorja, izomm il-haga u jitlob lura dik il-bicca mill-prezz li tigi stabbilita mill-Qorti.

Gie kostantement ritenut minn dawn il-Qrati u dan jirrizulta wkoll mit-test tal-ligi, illi d-dritt naxxenti minn vizzju redibitorju ma jistax jigi dedott b'eccezzjoni imma ghandu jigi ezercitat fi zmien utili b'azzjoni.”⁸

In the present case, the Court notes that the defendant failed to file an action in terms of Article 1431 of the Civil Code. The parties agree that the defendant signed the contract on the 24th November, in 2015. She acquired possession of the vehicle immediately upon signature, hence the clock started ticking on the 24th. Defendant had 6 months within which she could have pursued her claim based on the *actio redhibitoria* and yet she only raised the argument based on latent defects after she was faced by the claim for the payment of the balance due. In the light of the above considerations it is the opinion of this Court that the defendant failed to avail herself of the action as aforementioned and hence the Court rejects defendants' defence.

For the sake of completeness it is very clear that the relationship between the two parties in this suit is regulated by the provisions of the contract they signed on the 24th November, 2015⁹. The defendant in the contract is the “Hirer” and the Plaintiff is the “Owner”. Though the Defendant claims that no one explained the contents of the said contract, yet the court notes that at no point in time did the defendant ask for any clarification. More so the contract signed on the 24th November is identical to the first one signed by her with the same plaintiff company when she had purchased a BMW. Under cross examination defendant accepted that the contents of the first hire purchase agreement had been explained to her. She further agreed that when she was handed the hire purchase agreement in November, 2015 she looked at it and acknowledged that it was identical to the previous one she had signed when she had purchased the BMW. She accepted that she understood and was familiar with the contents of the first contract.

This contract is a standard form contract. Clause 5 deals with the risks and warranty. Clause 5.1 provides that:

⁸ Zammit Automobiles Limited vs Charles Bezzina, 30th June, 2003.

⁹ A fol 2 – Fol 6.

“The Hirer agrees that he shall bear all risks relating to the Motor Vehicle as from delivery in accordance with the foregoing clauses.”

Under Clause 5.2 it is further provided that:

“The Hirer hereby acknowledges and accepts that the Owner is not the original manufacturer or supplier. Hirer further accepts that she has chosen the vehicle and that the purchase is being made *tale quale*. The Owner does not bear any responsibility for any latent defect present on the vehicle either at the time of the sale or following the date of such sale. Any costs and expenses paid out to repair any malfunction or damage are to be borne exclusively by the hirer without the right of reimbursement from the Owner.”

The Court also notes that Clause 5.4 provides that:

“The parties agree that the Motor Vehicle has been seen, tested and inspected by the Hirer and found to be to his complete satisfaction”.

Then Clause 5.5 provides that:

“The Owner warrants in favour of the Hirer against any defect, limitidely in relation to the engine or manual gear box, for a period of six months as long as the defect is not the result of improper use or fault of the Hirer.”

The Court cannot but note that when the defendant signed the contract she was in essence declaring that she had indeed agreed to all the clauses stated therein including the declaration that the vehicle was to her satisfaction. The onus was on her to have the vehicle inspected prior to the purchase. Furthermore according to Sergio Attard¹⁰ the defendant was specifically asked whether she wished to take the car to a mechanic and have it checked out but she declined. Defendant rebuts this version, yet it is the opinion of this Court that since she was well aware of the contents of the contract she also knew that she could have the car checked to her satisfaction. She decided to proceed with the purchase and so forfeited the right aforementioned. On the other hand from the evidence produced it resulted that Plaintiff had effected a service on the vehicle prior to the sale and even carried out a test drive.

During the course of the proceedings it also transpired that the defendant had instituted an action before the Consumer Claims Tribunal asking for the recession of the contract on the basis that the vehicle had 'defects'. This claim was rejected on the 25th October, 2018 as the Tribunal held that any 'defect' that may have developed after the sale of the vehicle's sale was not of a serious nature thereby not rendering the vehicle unsuitable for

¹⁰ A fol 31

use. The claim was therefore rejected. The Tribunal ordered the defendant to resume possession of the vehicle. Yet Ms. Mawby failed to abide by the Tribunal's final stance.

All the above leads the Court to conclude that all of defendant's arguments should be rejected.

Decide.

The Court therefore:

- a) rejects the defendant's defence and all her objections;
- b) upholds Plaintiff's claim;
- c) orders defendant Sophie Bay Mawby to pay the plaintiff company the sum of three thousand, six hundred and seventeen Euro (€3617) representing the storage fees of the vehicle Vauxhall Astra CLV 531, including all the legal expenses and legal interest due as from the date of the date of the judicial letter 267/17.
- d) Costs of these proceedings shall be borne solely by the defendant.

(sgd.) Dr. Brigitte Sultana
Magistrate.

(sgd.) Maureen Xuereb
D/Registrar

True copy

D/Registrar