

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2021/ 25131

Reportable: No
Of interest to other Judges: No
<u>1 June 2023</u>
Date:                      Signature

**In the matter between:**

**FIRSTRAND BANK LIMITED T/A WESBANK**

**Plaintiff**

**And**

**LEON GREGORY GOVENDER**

**Defendant**

**NEUTRAL CITATION:** *Firstrand Bank Limited t/a Wesbank vs Leon Gregory Govendor* (Case Number: 2021/25131) [2023] ZAGPJHC 610 (1 June 2023)

**Delivery:** This judgment was delivered electronically by means of email to the legal representatives of the parties and uploaded on caselines. The judgment is deemed to be delivered on 1 June 2023.

**Summary:** Credit agreement concluded by electronic means. The defendant failing to comply with the contract and plaintiff claiming the return of the motor vehicle which is the subject of the credit agreement. Contract concluded electronically in terms of section 13 of the Electronic Transaction Act.

Legal effects of contracts concluded electronic means discussed. Application of section 4 of the Regulation of Interception of Communications Act. The recording of

the telephone conversation between the defendant and the plaintiff's call centre accepted into evidence.

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## JUDGMENT

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### Molahehi J

#### Introduction

[1] The plaintiff, in this action, seeks an order directing the defendant to return the motor vehicle described as 2016 BMW X5 XDRIVE30D M-SPORT A/T (F150 (the vehicle) to it and further that he pays for the damages consequent to the breach of the purchase and sale agreement between the parties.

[2] The essential terms of the agreement, set out in the particulars of claim, were as follows:

"6.2. The total purchase price, including finance charges, payable by the defendant was the sum of R1,553,249.10 which amount would be payable in monthly instalments of R17,902.50 payable from the 1st day of November 2016 for a period of 71 months subject to interest there on calculated at a variable interest rate of prime 1.5%- per annum. A final balloon payment would be payable at the conclusion of the agreement term;

6.3. The plaintiff would remain the owner of the vehicle until all amounts due under the agreement have been paid in full."

[3] The agreement further provided for what could happen should the defendant breach any of the terms of the agreement. In that event, the plaintiff would be entitled to take the following actions:

"7.1 Claim immediate payment of the outstanding balance together with the interest and all amount owing and claimable by the plaintiff, irrespective of whether such amounts are due at that stage,

7.2. Take possession of the vehicle in terms of an attachment order and;

7.3 Retain all payments made the defendant in terms of the agreement and,

7.4. Claim as liquidated damages payment of the difference between the balance outstanding and the market value of the vehicle, which amount shall be immediately due and payable."

- [4] The plaintiff contends that it has complied with its obligations under the contract, in particular, that of having delivered the vehicle to the defendant in accordance with the terms of the agreement. It further avers that it had to institute these proceedings because the defendant breached the contract by failing to make the full and or punctual payments of the amount due under the agreement and is accordingly in arrears in respect of the instalment owing and has remained in default for at least twenty business days.
- [5] The plaintiff instituted this action following the defendant's failure to surrender the vehicle to it as contemplated in terms of the provisions of section 127 of the National Credit Act.
- [6] The plaintiff further avers that it has complied with the provisions of section 129(1)(a) of the National Credit Act (NCA),<sup>1</sup> by serving notice on the defendant's *domicilium* address by the registered post on 29 April 2021.
- [7] The defendant filed a notice to defend the claim and, in his plea, denies having entered into the sale agreement with the plaintiff, which, as will appear later, was alleged to have been signed online or electronically. He further contends that there was no compliance with section 13 of the Electronic Communication and Transactions, (ECTA).<sup>2</sup>
- [8] The defendant further pleaded that the vehicle sale was concluded with his former employer and brother-in-law, Mr Claude Bolus Azar, without his consent.

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<sup>1</sup> Act number 34 of 2005.

<sup>2</sup> Act number 25 of 2002.

## **The plaintiff's case**

[9] In support of its case, that it is entitled to the relief sought, the plaintiff presented its version through two witnesses, Ms Herold and Ms Hlongwane.

[10] Ms Herold was, at the relevant time, until 2018, employed as finance and insurance manager by the plaintiff. She is currently self-employed. Her testimony focused on the general process undertaken by a dealer when a customer wishes to purchase a motor vehicle through a loan from the plaintiff. She testified that in the present instance, the defendant would have arrived at the dealership and been assisted by a sales consultant in identifying and choosing the vehicle he wished to purchase.

[11] She further testified that the appearance of her name on the iContract means that she is the one who dealt with the defendant. Furthermore, the plaintiff's watermark stamp in the middle of each contract page proves that the defendant signed the contract electronically. This, according to her, means that the defendant received an SMS or email containing a link to register his details on the documents from the plaintiff. After that, the defendant would have received a number generated by the electronic system known as the One Time Pin (OTP), which allowed him to choose his communication with the plaintiff, namely through email or SMS. The OTP would also allow the defendant access to the iContract. This process would allow the defendant to produce his identity documents and other relevant documents after he entered the OTP in his phone, ensuring that he was the only one who would have access to the contract.

[12] The witness conceded during evidence in chief that there were instances in which the salesperson on the dealership floor would hand documents to process to the customer. She, however, emphasized that she always insisted that the salesperson should provide her with all the original documents.

[13] During her employment with the plaintiff, she dealt with about 5000 clients, and in 2016 she facilitated the contract between the defendant and the plaintiff. She

pointed to the defendant in court and contended that she was satisfied with his identity documents.

[14] The plaintiff's second witness Ms Hlongwane is an employee of the plaintiff and a qualified attorney employed as the plaintiff's specialist in dealing with legal matters. She acquired knowledge of this matter from reading the documents and studying the plaintiff's electronic system.

[15] Ms Hlongwane testified that she never met the defendant, nor did she have any discussion about the matter with the first witness. She had listened to the audio recording discovered in the supplementary discovery affidavit of the plaintiff. She concluded from listening to the audio recording that it was apparent that the defendant was the person who purchased the vehicle in question and paid the monthly instalment for four years. She testified that there was no evidence from the documents or the electronic system that suggested that the contract was concluded between the defendant's brother-in-law and the plaintiff. There was also, according to her, no evidence of the arrangement between the defendant and his brother-in-law about the purchase of the vehicle.

[16] The witness insisted that a contract was concluded between the plaintiff and the defendant electronically through the process described earlier by the first witness. According to the witness, this was further supported by what was said by the defendant in the audio recording, where he (the defendant) made arrangements to pay for the vehicle for four months through the monthly debit of his bank account.

[17] Ms Hlongwane insisted during cross-examination that the contract between the plaintiff and the defendant was in compliance with the ECTA. Accordingly, there is a valid electronic contract concluded between the parties.

### **The defendant's case**

[18] At the relevant time, the defendant was employed as a factory manager at Home Building Investment and Marketing, trading as Kmart, owned by his

brother-in-law, Mr Azar. He disputed having signed the electronic contract upon which the plaintiff claims ownership of the vehicle and the right for its return.

[19] He said that he discovered the existence of the contract when his bank account was debited. He further testified that he found that the debit was for the payment of the vehicle purchased by his brother-in-law, Mr Azar, who took his identity book, salary advice slips, and insurance documents and arranged for the purchase of the car from the dealership through the loan from the plaintiff.

[20] The witness testified that upon discovering that a motor vehicle had been purchased and had been paid through a debit order from his account, he confronted his brother-in-law, who owned up that he had purchased the motor vehicle from the plaintiff in the defendant's name.

[21] According to the defendant, Mr Azar undertook to ensure that the funds were placed in his bank account to cover the motor vehicle payment.

[22] The defendant did not deny having had possession of the cell phone through which the OTP was posted but contended that it was a company phone to which Mr Azar also had access. This means that Mr Azar could have activated the OTP and electronically signed the contract.

[23] The defendant conceded that the identity document and the driver's license used as part of the necessary documents in the purchase the vehicle belonged to him.

### **The legal consequences of an electronic contract**

[24] In our law, the uncertainty of the contracts concluded electronically was settled with the passing of the ECTA. The ECTA governs both the electronic contracts and the signatures placed on them. The process of facilitating electronic transactions is dealt with in Chapter 3 Part 1 of ECTA.

[25] Section 12 of ECTA provides that where the law requires that information or documents be in writing such a requirement is satisfied if the electronic information or contract satisfy the following requirements:

- (a) be in the form of a data message, and
- (b) accessible in a manner usable for subsequent reference.

[26] The effect of the provisions of the ECTA is that data messages or electronic signatures are now recognized in our law as equivalent to a proper basis upon which a written contract can be concluded. Thus, a valid written contract can be concluded electronically.

[27] The same requirements as those applicable for a valid contract under the common law apply to contracts entered into online or those concluded through data messages. The requirements are, among others:

- (a) An offer and acceptance.
- (b) The agreement must be legal.
- (c) The terms of the agreement must be clearly spelt out.

[28] As indicated earlier, one of the defences of the defendant is that the plaintiff did not comply with the provisions of the ECTA. Section 11 of the BECTA provides:

"(1) Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message."

[29] Section 13 of a ECTA provides:

"(1) Where the signature of a person is required by law, and such law does not specify the type of signature that requirement in relation to it to permit data message is met only if an advanced electronic signature is used."

(2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is an electromagnetic form.

(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if

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- (a) a method is used to identify the person and to indicate the presence approval of the information communicated; and

- (b) Having regard to all the relevant circumstances at the time the method was used. The method was as reliable as was appropriate for the purpose for which the information was communicated.
- (4) where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly unless the contrary is proved.”

[30] The other point raised by the defendant relates to the telephone conversation recording, which was discovered in the supplementary discovery affidavit by the plaintiff.

[31] The issue of the use of the audio recordings used by the plaintiff in these proceedings is governed by section 4 (1) of the Regulation of Interception of Communications Act (RICA), which provides:

“(l) Any person, other than a law enforcement officer, may intercept any communication if he or she is a party to the communication. unless such communication is intercepted by such person for purposes of committing an offence.”

### **Evaluation and Analysis,**

[32] It is apparent from the plaintiff's particulars of claim that its cause of action is based on a breach of the written electronic contract, which was signed by way of electronic means. The written contract was attached to the particulars of claim as required by rule 18 of the Uniform Rules of the High Court.

[33] As indicated above, the defendant's defence is that the contract was concluded unlawfully in his name by his brother-in-law. He states in his plea that:

“The Defendant further pleads that his former employer, Mr Claude Bolous Azar, is the person who dealt with the Plaintiff in relation to this matter, and it appears contracted without the Defendant's consent, in the name of the Defendant.” (underlining).

[34] In my view, the facts presented before this court do not support the version of the defendant. The defendant did not become aware of the transaction at the point when the plaintiff issued the summons. He became aware of the



transaction long before the institution of these proceedings. He took no step to reverse the alleged illegal conduct of his brother-in-law. He did not report the matter to the relevant authorities. The allegation that Mr Azar, who has since passed away, misrepresented the defendant is not supported by any evidence. In the absence of evidence to support this allegation, the only conclusion to draw is that the defendant concluded the contract with the plaintiff.

[35] The allegation that the contract was unlawfully concluded by Mr Azar is further unsustainable when regard is had to the following facts presented by the defendant:

- (a) he allowed the monthly payments of the vehicle to continue being debited from his bank account even after discovering what the alleged to be an unlawful transaction concluded by his brother-in-law in his name.
- (b) he only stopped paying for the vehicle eight months after the death of Mr Azar.

[36] The explanation as to how he managed to pay for the vehicle before the death of Mr Azar is unsustainable. In relation to the payment before the death of Mr Azar, the explanation is that Mr Azar used to deposit the amount of R10,000 in his bank account. He does not, however, provide any evidence to support this allegation. It should be noted that the monthly instalment in terms of the contract is R17,902.50.

[37] The explanation of how he sustained the payment after the death of Mr Azar is also unsustainable. He initially testified that he never applied for COVID-19 relief from the plaintiff in as far as the monthly payment of the vehicle was concerned. He later contradicted this by stating that he did receive the COVID-19 relief from the plaintiff. The allegation that he received financial support from the family members was also not substantiated.

[38] It is important to note that the defendant did not dispute any of his documents used in the conclusion of the transaction, and that includes, in particular, the copy of his identity document and the driver's license.

[39] I turn now to deal with the issue of the recording of the telephone conversations between the defendant and the plaintiff's call centre.

[40] The contention of the defendant that the evidence relating to recording telephone conversation with the call centre should not be considered because he was not warned that it might be used in court is also unsustainable. He did not dispute that he was informed that the conversation was recorded. He volunteered the information that is destructive to his case based on the contention that he is not the one who concluded the sale agreement with the plaintiff. In this regard, it is quite clear from the recordings that he conceded that he had concluded the contract and that he sought an arrangement to pay for the motor vehicle.

[41] In my view, there is no basis to conclude that the recording did not comply with the RICA.

### **Conclusion**

[42] There is overwhelming evidence that the defendant concluded the credit agreement for the purchase of the vehicle from the plaintiff. He breached the contract by failing to pay the monthly instalments. The plaintiff is accordingly entitled to cancel the contract and claim the return of the motor vehicle, including payment of damages consequent to the breach of the contract.

[43] Regarding compliance with section 129 (1) of the National Credit Act, there is no doubt from the papers that the plaintiff issued the notice and served it on the defendant at the *domicilium* chosen by the defendant.

### **Order**

[44] In the premises, the following order is made:

1. The purchase and sale of the motor vehicle described below between the plaintiff and the defendant is cancelled.

2. The defendant is directed to forthwith return the motor vehicle described as 2016 BMW X5 XDRIVE30D M-SPORT A/T (F150) to the plaintiff.
3. Failing to comply with the above order the Sheriff of this Court or his deputy is authorised, directed and empowered to attach, seize the vehicle described above wherever he may find same and hand over to the plaintiff.
4. The claim for damages suffered by the plaintiff consequent the breach of the contract by the defendant is postponed *sine die* pending the return of the vehicle to the plaintiff, its evaluation and sale.
5. The interest on the amount is to be paid at the prescribed rate from 20 April 2021.
6. The defendant is to pay the costs.

**E MOLAHEHI**

**JUDGE OF THE HIGH COURT,**

**Gauteng Division,**

**JOHANNESBURG**

**Representation:**

For the plaintiff: Adv J Govender

Instructed by: Smith van der Walt Attorneys

For the defendant: Adv Zimmerman

Instructed by: Taitz Skikne Attorneys

Date heard: 28 February 2023

Date delivered: 1 June 2023.