REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 15666/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

8/12/2017
DATE

SIGNATURE

In the matter between

MOLATHLEGI JJ LEGOETE **Applicant**

and

MERCEDES BENZ FINANCIAL SERVICES SA (PTY) LTD **Respondent**

JUDGMENT

BRAND, AJ

This is an application for leave to appeal against the whole of my judgment and order in the matter of *Mercedes Benz Financial Services SA (Pty) Ltd v MJJ Legoete* case no 15666/2014, handed down on 20 October 2017. For the sake of clarity, I refer to the parties as at trial.

[2] In my judgment I held that a settlement agreement with respect to an instalment sale agreement for the purchase of a motor vehicle was void *ab initio* on grounds of *iustus error*, such error being a dramatic understatement of the outstanding balance on the instalment sale agreement in the settlement quotation, resulting on its acceptance in a loss of R270 105.10 for the Plaintiff. I order payment of this amount by the Defendant to the Plaintiff, with costs.

[3] The notice of application for leave to appeal comprises some 56 paragraphs and is a model of neither clarity nor structure. Much of it constitutes re-argument of the initial case, without specific and discrete alleged errors in my judgment being identified and described. Nevertheless five grounds on the law and the facts can be distilled upon close reading, in light of the oral submissions of the attorney for the Defendant, Mr Molele. These are:

1) That I adopted the incorrect approach in law to determining the validity of the contract between the parties on the basis of *iustus error*;

2) That I had erred on the facts and in my assessment of the evidence in finding that the Defendant himself had received and was aware of the the settlement quotation offer before its acceptance, so that knowledge of the Plaintiff's error could be imputed to him;

3) That I had erred on the facts and in my assessment of the evidence in finding that the Plaintiff's error was *bona fide*;

4) That I had erred on the law and the facts in failing to take account of the prejudice caused to the Defendant by the Plaintiff's error in my decision that the settlement contract is void (this ground was raised only in oral argument); and

5) That I had erred in holding, once I had held the settlement agreement to be void, that the Defendant was on the basis of the instalment sale agreement, liable for repayment of the outstanding sum of R270 105.10.
Below I address each of these grounds in turn.

Approach to unilateral mistake

[4] Although this did not appear from the notice of application for leave to appeal itself, upon amplification of that notice during oral argument, Mr Molele for the Defendant submitted that my approach to the doctrine of unilateral mistake as vitiating an otherwise valid contract was mistaken.

[5] Relying on the matter of *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (AD) the Defendant describes the proper approach as comprising three questions, namely 1) whether there was a misrepresentation (whether intentionally or negligently); 2) who made the representation; and 3) whether the other party was misled by the misrepresentation.

[6] The approach I had followed in my judgment (relying also in part on the *Sonap* judgment) was to distinguish between cases where the party who did not make the mistake either knew or should reasonably have known of the mistake and those where that party did not know and could not be expected to have known. In the former examples, to escape the contract, the mistaken party would only have to show the mistake, and that it was made in good faith; in the latter, the mistaken party would in addition have to show that the mistake was reasonable and excusable in the circumstances, excluding cases of mistake due to the mistaken party's own fault.[1] In short, to put it in the Defendant's terms, in the former situation, because the party who seeks to rely on the contract knew of the mistake by the other party or can have knowledge imputed to him, he could not

[1] See paragraphs [14] to [16] of the judgment.

have been or was not misled, and the third leg of the inquiry as posited by the Defendant falls away.

[7] Upon being pressed on this at the hearing of this application, Mr Molele conceded that the approach described by him in essence does not differ from the approach as described and applied in my judgment, so that this ground for leave to appeal on the law, if indeed it was properly formulated in the notice of application for leave to appeal, fell away and need not be dealt with.

Was knowledge properly imputed to the Defendant?

[8] Much of the rest of the notice focusses on the question whether I was correct in finding that knowledge of the Plaintiff's mistake can be imputed to the Defendant, with the Defendant asserting that I erred in finding that it could.

[9] The nub of this ground for leave to appeal seems to be that there was not sufficient evidence placed before me by the Plaintiff on the basis of which to find that the Defendant himself ever received the mistaken settlement quotation. The Defendant's point of departure here is that the Plaintiff only ever communicated directly with the dealership about the quotation and not the Defendant himself (indeed, as much was clear from the facts and not disputed by the Plaintiff, and I made a finding to this effect in my judgment).

[10] On that basis, the Defendant then proceeds to assert, as he did at trial, that a) the Plaintiff placed no evidence before me that the settlement quotation was ever, before it was accepted, in fact received by the Defendant; and b) that supposed findings of fact that I made in my judgment that he did receive it, were made in error, so that I could make no finding about whether knowledge can be imputed to the Defendant.

[11] I needed to make and did make no findings of fact in my judgment about the question whether the settlement quotation came to the attention of the Defendant

himself. The need to do so was obviated by the Defendant's admission in its particulars of claim that the Defendant was provided with the settlement quotation. Likewise, in light of this admission, there was no need for the the Plaintiff to place any evidence before court about the relationship between the dealership and the Defendant, the scope of any mandate the dealership might have had from the Defendant, whether the settlement quotation at the time came to the attention of the Defendant himself rather than only the dealership and whether the Dealership had knowledge of the previous settlement quotations sent to other dealers. In light of the Defendant's admission, these all were simply not triable issues. The Plaintiff was entitled, and this court bound, to accept that the Defendant had sight of the settlement quotation before it was accepted on his behalf by the dealership.

[12] As at trial, the Defendant in these proceedings does no more than simply assert that the relevant paragraph of the particulars of claim (paragraph 11) 'only' means that the quotation was provided to the Defendant and not that he received it. As at trial, this interpretation of the paragraph and its admission in the Defendant's plea stands to be rejected. It was open to the Defendant in its plea to deny that the quotation was provided to him and respond that it was only provided to the dealership. He did not do so. The only way in which, in this light, the admission can be understood, is that the quotation was provided *to the Defendant*, that is, that it was directly communicated to the dealer (as is indeed common cause), but was then transmitted to the Defendant.

[13] There is to my mind no prospect of success, reasonable or otherwise on this ground, so that it is rejected.

[14] In further amplification of this ground for the application for leave to appeal, the Defendant also focussed on supposed findings of fact that I made in my judgment with respect to the question. One of these is my remark 'that it borders on the far-fetched to suggest that the dealership would be authorised to decline

and accept settlement offers on behalf of the Defendant without the Defendant's knowledge of the offers or his instructions with respect to them – in particular that the dealership would be authorised to pay over a considerable sum of the Defendant's money to the Plaintiff without his knowledge.'

[15] The Defendant characterises this remark as a finding of fact made through the application of what he terms 'the probabilities test'. From the notice of application for leave to appeal it appears that with this the Defendant means a 'balance of probabilities' test. He then proceeds to assert that a balance of probabilities test did not apply in this matter, as the Defendant had closed its case without leading evidence, so that there were no two mutually destructive versions to evaluate against each other in terms of this test.

[16] The Defendant is mistaken in asserting that I applied a balance of probabilities test here. I did assess the probability on its own terms of the possibility that the dealership could have accepted the settlement offer on behalf of the Defendant and paid over the settlement amount without the knowledge of the Defendant; I remarked that it was highly improbable. Moreover, this remark is not a finding of fact on which my judgment relies: the basis upon which I held that the Defendant had sight of the settlement offer before it was accepted is the admission in the plea that the offer had been provided to him.

Was the Plaintiff's error in good faith

[17] The Defendant avers that I was mistaken in holding that the Plaintiff's mistake was in good faith. He refers to an episode during examination in chief of the Plaintiff's only witness, Ms Kaylaser, where she was asked to speculate about the circumstances under which and way in which the mistake occurred, matters about which she had neither first, nor for that matter, second-hand knowledge. Ms Kaylaser responded that she would have to guess, but thought that it could be that the person who prepared the settlement quotation on the computer template had simply forgotten to delete and replace the settlement figure for the

previous quotation, so that it was carried over to the one provided to the Defendant. The Defendant alleges that I erred in relying on Ms Kaylaser's suggestion in this regard as evidence. I did not. I assessed the inherent probability of the Plaintiff's version that the mistake was committed in good faith in light also (i.e. among other things) of Ms Kayaker's guess as to what might have happened and found not that the mistake occurred as Ms Kaylaser suggested, but the it was highly probable that it occurred in good faith, however it happened.

[18] Also on this ground, there are not reasonable prospects of success on appeal.

Failure to take account of prejudice caused the Defendant

[19] For this ground, which was not raised in the notice, but simply from the bar during the hearing of this application, the Defendant relies on the matter of *Brink v Humphries & Jewell (Pty) Ltd* [2005] 2 All SA 343 (SCA). It can be disposed of simply by pointing out that *Brink,* being a matter in which the party seeking to resile from the contract is the mistaken party itself, in whom the mistake (failing to read a contract and to notice an agreement of suretyship) had been induced by the conduct of the other party (contract drafted in a misleading way, as a 'trap' to the unwary contractor), does not apply to this case. In any event, *Brink* seems not to me to be authority for the proposition that the Defendant seeks to rely on, which is that prejudice caused the innocent party in case of mistake must be taken into account in deciding whether or not the contract is void.

[20] Again, this ground offers no reasonable prospects of success for the Defendant.

Error in holding the Defendant liable for repayment of outstanding balance on basis of the underlying instalment sales agreement

[21] This 'ground for leave to appeal' amounts to little more than a restatement of an submission made during trial: in short, that it makes no sense to hold the

Defendant liable for payment on the basis of an instalment sales agreement that has been and still remains extinguished.

[22] As it was when first presented at trial, this ground is entirely circular. What one is left with once the settlement agreement was held to be void, is an instalment sales agreement that had been extinguished by the sale, by the Defendant, of the object of that agreement to a third party. Under such circumstances the instalment sales agreement determines that, although the agreement would be extinguished, the Defendant would remain liable for any outstanding balance on the original agreement.

[23] Also this ground offers the Defendant no reasonable prospects of success.

'Evidence' put to the witness under cross-examination

[24] The Defendant points to a number of instances in which the Defendant put aspects of its version to Ms Kaylaser during cross-examination, which she then supposedly conceded. Although not in itself presented as a ground for leave to appeal, this issue must be dealt with.

[25] Given that the Defendant chose not to lead evidence in support of its case, the putting of aspects of that version to a witness for the Plaintiff under cross examination serves no purpose and any concession she might make holds no water. One example would suffice. The Defendant asserts that it was put to Ms Kaylaser that the Defendant had become aware of the error only 58 days after payment was made and that she conceded this point. Apart from the fact that Ms Kaylaser did not concede this point but instead simply said she had no knowledge of it: even had she conceded it her concession would have borne no weight, as she has no knowledge of when the Defendant became aware of the error.

[26] The point is, that without evidence put forth by the Defendant backing up concessions elicited from Ms Kaylaser, those concessions on matters with respect to which she has no personal knowledge can bear no weight whatsoever.

Conclusion

[27] In conclusion: none of the grounds for leave to appeal offer the Defendant any reasonable prospects of success on appeal.

[28] Accordingly the application must be dismissed.

Order

[29] The application for leave to appeal is dismissed, with costs.

JFD Brand

Acting Judge of the High Court