



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 60571/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 26/10/2018

SIGNATURE: _____

In the matter between:

NEDBANK LIMITED

Plaintiff

(t/a MFC, A DIVISION OF NEDBANK LIMITED)

and

PHILLEMONT DAMOYI NKOSI

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The plaintiff's action is based on a written Instalment Sale Agreement in respect of the purchase of an X5 BMW vehicle ("the vehicle"). The agreement was concluded on 26 March 2013 between Ms Brits on behalf of the plaintiff and the defendant. It is not in dispute that the plaintiff complied with the terms of the Instalment Sale Agreement.
- [2] It is furthermore not in dispute that the defendant fell in arrears with the payment of the monthly instalments. The plaintiff issued summons and obtained an order on 10 October 2014, confirming the cancellation of the agreement and ordering the defendant to forthwith return the vehicle to the plaintiff.
- [3] The defendant failed to return the vehicle and notwithstanding numerous endeavours, the plaintiff was unsuccessful in recovering the vehicle. Due to the aforesaid, the plaintiff amended its particulars of claim in terms of which it abandoned ownership of the vehicle and claimed the outstanding amount of R 430 487, 70 together with interest and costs.

Issue in dispute

- [4] The only issue in dispute is whether the defendant had the necessary intention to enter into the agreement with the plaintiff. The defendant's plea in this regard reads as follows:

"AD PARAGRAPH 3 THEREOF:

Save to admit that the Defendant was present at the offices of Auto Elegance on 26 March 2013, the contents of this paragraph are denied and Plaintiff is put to the proof thereof. The Defendant specifically pleads that he was victim of fraud in that he was misled by Mr. Moitshepi Thabang Motau. Mr Motau requested the Defendant to sign the "release forms" to release Mr Motau's new business vehicle to him, as Mr Motau had to sign the "release form" for another business vehicle that Mr Motau had purchased together with the BMW X5."

EVIDENCE

- [5] Ms Brits testified on behalf of the plaintiff. She was employed at the dealership, Auto Elegance, at the time the defendant purchased the vehicle. Ms Brits testified that she has 18 years' experience in the motor vehicle industry and more particularly in finance and insurance of vehicles.
- [6] Ms Brits explained that she attends to the financing of vehicles that are sold by sales persons at dealerships. To this end she assists customers in completing an application for finance. During this process and due to FICA

requirements, the customer must provide an identification document, a driver's licence, proof of residence, a salary advice slip and bank statements. The aforesaid documents must be original and after copies have been made of the documents, the copies must be endorsed as being true copies of the originals.

- [7] Once approval is received from the financial institution, a tax invoice for the purchase price of the vehicle is issued by the sales person and the customer is contacted to sign the Instalment Sale Agreement.
- [8] It is part of her duties to explain the contents of the agreement to a customer prior to the signing of the agreement. This includes the purchase price, the type of vehicle, the finance costs, etc. She confirmed that she had received training at the bank and in the motor industry in respect of the exact process to be followed before a customer signs an agreement.
- [9] Ms Brits was referred to the documents pertaining to the agreement *in casu*. The application for Instalment Finance Agreement was completed on 25 March 2013 by her colleague, William Mokoto. Mr Mokoto certified the copies of the defendant's FICA documents as being copies of the original documents. The documents consisted of a copy of the defendant's Identity document and his driver's licence, a salary advice slip from Brandcoach (Pty)

Ltd indicating that the defendant was a financial director earning a net salary of R 63 873, 61, bank statements from the defendant's FNB account and a Totalsports account.

- [10] The FNB account is for the period 20 December 2012 to 20 March 2013. According to the statements, the defendant received the salary of R 63 873, 61 on 18 January 2013, 20 February 2013 and 20 March 2013.
- [11] The Instalment Finance Agreement was approved by the plaintiff and Mr Mokoto issued a tax invoice for the vehicle. Ms Brits testified that she was not at work on 25 March 2013. On 26 March 2013, Mr Mokoto brought the defendant to her office for purposes of completing the Instalment Sale Agreement. She requested to see the originals of the copies that were attached to the finance application and after being satisfied that the originals did correspond with the copies, she proceeded to explain the details of the agreement to the defendant. The defendant signed and initialled the agreement in her presence. She and Mr Moloto both signed as witnesses.
- [12] The defendant filled in his bank details for purposes of a debit order. Ms Brits testified that the defendant did not have any questions in respect of the agreement.

[13] During cross-examination it was put to Ms Brits that the defendant was not at Auto Elegance on 25 March 2013 and that he did not apply for Instalment Finance. The defendant merely accompanied his employer Mr Motau to Auto Elegance on 26 March 2016 to sign for the delivery of the vehicle. Importantly, the version of Ms Brits as to what transpired in her office during the signing of the agreement was not placed in dispute.

[14] The remainder of the defendant's version will be dealt with *infra*.

[15] The plaintiff did not call any further witnesses and the defendant was called to the witness stand. The defendant testified that he matriculated in 2005 and after successfully completing an exemption course, enrolled in 2013 to study business administration at Unisa. Due to financial constraints, he takes one or two modules a year and has not been able to finalise his degree. Since leaving school he has never had any formal employment and depends on his family for financial support. He obtains temporary work from time to time in order to pay for his studies. He still lives with his mother at 109 Jensen Street, the Orchards.

[16] He was introduced to Mr Motau by a fellow church member. This was at the end of 2012 when he was once again unemployed. Mr Motau was a

successful businessman and apparently interested in helping young people to make a success of their lives.

[17] The defendant was appointed by Mr Motau in January 2013 as a sales person in Mr Motau's printing business. He did not receive a fixed salary but received commission on products sold. In February 2013, Mr Motau informed him that he must open an FNB account for purposes of the payment of his commission. Mr Motau explained that the business had an account at FNB and opening an FNB account would simplify the payment of commission to the defendant.

[18] Mr Motau accompanied the defendant and a co-employee to a FNB branch at The Reds Mall, Centurion. Upon arrival Mr Motau proceeded to a certain lady who apparently assisted him with his bank accounts. He had copies of the defendant's Identity document and his driver's licence in a so-called employment file, which documents he handed to the lady assisting him.

[19] A while later the lady called the defendant and his co-employee. The lady wanted to see their original Identity documents and obtained their personal details from them. She informed them that the bank accounts were opened in their names and that they will be notified when their bank cards are available. I pause to mention that this evidence does not accord with the bank

statements supplied by the defendant to Mr Mokoto. It is clear from the statements that the defendant's FNB bank account had an opening balance of R 63 864, 61 on 20 December 2012.

- [20] Be that as it may, the defendant testified that, shortly after he collected his bank card, Mr Motau told him that he has changed his mind. Mr Motau no longer deemed it a good idea to pay commission into the FNB account. He requested the defendant's bank card and undertook to close the account.
- [21] The defendant attended to a lot of administrative tasks on behalf of Mr Motau's business Brandcoach. He would *inter alia* collect stock for him, apply to Government departments for the company to be included on a supplier's list, attend at SARS to obtain tax clearance certificates, etc. He was aware of all the documents necessary to apply to be included on a Government supplier's list, to wit documents proving the existence of the company, tax clearance certificates, etc.
- [22] On 26 March 2013 Mr Motau informed the defendant that he had to collect two new business vehicles for the company and requested the defendant to accompany him. Upon arrival at the dealership Mr Motau went inside the dealership whilst the defendant remained outside. Mr Motau met a friend of his at the dealership. After a while Mr Motau joined the defendant outside

and informed him that it would speed the process up if the defendant signed for the delivery of one of the vehicles whilst Mr Motau attended to the delivery of the other vehicle.

[23] The defendant accompanied Mr Motau to the desk of the sales person and it was explained to him that he merely had to sign for the delivery of the one vehicle. He was taken by the sales person to a lady's office. He cannot recall whether it was Ms Brits. The lady merely asked him if he understands what he is doing and he confirmed that he did.

[24] The lady then indicated where he must sign on the document, which he did. The defendant testified that he did not read the document and believed that he was signing for the delivery of the vehicle. Mr van den Berg, counsel for the plaintiff, pointed out during cross-examination that the defendant appended either his signature or initials at least thirteen times on the Instalment Sale Agreement. The headings of the agreement, for instance, *"PRE-AGREEMENT STATEMENT AND QUOTATION PREPARED BY MFC A DIVISION OF NEDBANK (AS CREDIT PROVIDER) FOR PHILLEMONT DAMOYI NKOSI IDENTITY NUMBER 8610115687087"* and *"COST OF CREDIT TO VARIABLE RATE INSTALMENT SALE AGREEMENT – ANNEXURE A (TAX INVOICE)"*, appears in bold and in a much larger font

size than the rest of the document. The defendant, however, maintained, that he did not read the documents and merely signed where he was told to sign.

- [25] After he signed the "*delivery documents*" he joined Mr Motau who informed him that the other vehicle was not ready yet and that the defendant should drive Mr Motau's vehicle back to the business' offices in Sunnyside. Mr Motau and his friend would follow in the new vehicle. He did as he was told and the vehicle was parked at the business' offices in Sunnyside. This was the last time that he saw the vehicle.
- [26] He left Mr Motau's employment in August / September 2013. The defendant obtained other employment and during October 2013 the bank phoned him in respect of the arrears on the vehicle's monthly instalments. He told the bank that he did not buy a vehicle and phoned Mr Motau to find out what was going on. Mr Motau promised to sort out the problem with the bank. He phoned Mr Motau twice thereafter, but Mr Motau did not answer his phone.
- [27] The defendant told his brother about the problem, who advised him to report the incident to the police. The defendant proceeded to the police station and deposed to an affidavit. The defendant was referred to the affidavit during cross-examination. The affidavit did not mention the purported fraud

perpetrated by Mr Motau. The relevant portion of the affidavit reads as follows:

"I, the undersigned, Damoyi Phillemon Nkosi, ID No: 861011 5687 087, hereby declare under oath that I have never applied for motor vehicle finance from Wesbank or Nedbank MFC, neither have I opened any clothing accounts at Foschini or Edgars for the following reasons:

- 1. I am single, unmarried and unemployed and live with my mother.*
- 2. My ID document is in my possession 24 hours a day – how can it be used without my knowledge?*

As far as I am concerned this is fraudulent activity which was done without consent, knowledge by either one of your bank employees or an unknown third person. How can vehicle finance and clothing accounts be approved without me being present to verify my ID or details or signature? ..."

[28] The version in the affidavit differs from the evidence that emerged during the trial. First of all, a copy was made of the defendant's Identity document, which on his own version he has in his possession 24 hours per day and secondly, he admitted that he signed the Instalment Sale Agreement.

[29] The defendant during cross-examination reluctantly conceded that he stated in the affidavit that he is unemployed whilst he testified in court that he was employed at the time. The defendant's explanation for this clear contradiction, was that the police told him what to write.

- [30] When pressed on the contents of the affidavit and more specifically the fact that the affidavit does not contain the version he gave under oath during his evidence, the defendant answered that the bank required the affidavit and that he merely deposed to the affidavit to comply with the bank's request.
- [31] Notwithstanding thorough cross-examination, the defendant could not provide a feasible explanation for his failure to include the fraud perpetrated on him by Mr Motau in his affidavit.
- [32] The defendant, however, made it clear that Ms Brits, acting on behalf of the plaintiff, did not misrepresent anything to him. He further confirmed that no one exerted pressure on him to sign the agreement.
- [33] The defendant's counsel, Ms Gouws, indicated that the defendant wants to present the evidence of two further witnesses, a co-employee of the defendant who was also defrauded by Mr Motau and the defendant's sister. Considering the issue in dispute between the parties, Ms Gouws could not indicate what the relevance of their evidence will be and closed the case on behalf of the defendant.

Legal principle

[34] Mr van den Berg, correctly pointed out that the defendant's only defence is that he did not read the document that he signed.

[35] Consequently the legal principle of *caveat subscriptor* applies. The principle is long established and was, with reference to *Burger v Central South African Railways*, 1903 T.S. 571, confirmed by the Appellate Division in *George v Fairmead (Pty) Ltd* 1958 (2) 471 AD at page 470:

"In *Burger v Central South African Railways*, 1903 T.S. 571, INNES, C.J., said at p. 578:

'It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he had put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which this note was signed. Neither fraud nor misrepresentation has been alleged; nothing was said by any railway official which misled the signatory; the language of the document was one which the consignor understood; no pressure of any kind was exercised. All that can be said is that the consignor did not choose to read what he was signing, and after he had signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching

consequences, and it would be a principle unsupported by any principle of our law. The mistake or error of the signatory in the present case was not such justus error as would entitle him to claim a restitution in integrum, or as could be successfully pleaded as a defence to an action founded upon the written contract, and therefore it cannot be used for the purpose of attacking that contract when the railway seeks to rely upon it."

Discussion

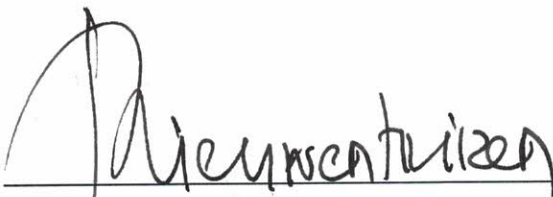
- [36] I agree with Mr van den Berg that the principle of *caveat subscriptor* as confirmed by the appellate division in *Goodmead supra* is on *par* with the facts *in casu*.
- [37] The defendant admitted that that Ms Brits did not misrepresent anything to him. Neither did she commit fraud nor did she exert pressure on the defendant to sign the Instalment Sale Agreement.
- [38] The defendant simply decided to sign an eleven page document at various places, without reading the contents thereof. To allow the defendant to escape the obligations conferred on him in the Instalment Sale Agreement would, as stated in *Goodmead supra*, "*be a decision involving far-reaching consequences, and it would be a principle unsupported by any principle of our law.*"

[39] Having rejected the defendant's only defence to the plaintiff's claim, it follows that the plaintiff is entitled to judgment as claimed.

ORDER

[40] In the premises, the defendant is ordered to pay to the plaintiff:

1. The amount of R 430 489, 70 with interest at a rate of 13,55%, calculated and capitalised from 17 September 2015, to date of payment, both days inclusive.
2. Costs of suit.

A handwritten signature in black ink, appearing to read 'Janse van Nieuwenhuizen', is written over a horizontal line.

JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD

17 October 2018

JUDGMENT DELIVERED

26 October 2018

APPEARANCES

Counsel for the Plaintiff:

Advocate J. Van den Berg

Instructed by:

VHI Attorneys

(012 430 6600)

Ref: W Van Heerden/KM1773

Counsel for the Defendant:

Advocate B. Gouws

Instructed by:

Van Zyl Le Roux Inc

(012 435 9444)

Ref: MAT94804/N Erasmus (NG)