NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No: AR 212/2021

In the matter between:

KEMPSTON MOTOR GROUP TRUST	**APPELLANT**
t/a PEUGEOT CITROEN PINETOWN	**(Defendant *a quo*)**
and	
HASSIMS PACKAGING CC	**RESPONDENT**
	(Plaintiff *a quo*)

ORDER

The following order is made:

1. **The appeal is upheld with costs, such to include the costs of senior counsel.**

2. **The order of the court *a quo* is set aside and replaced with the following order:**

   "The plaintiff's claim is dismissed with costs".

J U D G M E N T

Delivered on: Friday, 10 June 2022

OLSEN J (BALTON J et BEZUIDENHOUT J concurring)

[1] This appeal comes to us with the leave of the Supreme Court of Appeal. The appellant is a Trust formed by the Kempston Motor Group, which carries on business as the Peugeot car dealer in Pinetown. The appeal is against the grant of an order for specific performance made by the High Court at Durban (Kruger J) at the conclusion of a trial in an action in which the respondent (Hassims Packaging CC) sought such an order. I find it convenient to refer to the parties as they were in the court *a quo*.

[2] During February 2013 the plaintiff purchased two Peugeot 2.2l 4 ton delivery vehicles from the defendant for R270 000 each. During or by November and December 2014 those two vehicles suffered from mechanical problems of a kind which caused the plaintiff to want to replace them. Against that background the plaintiff pleaded that on 7 May 2015 a partly written and partly oral agreement was concluded between the plaintiff (represented by Mr Sikander Hassim) and the defendant (represented by Mr Etienne Gerber) in terms of which the defendant would return the two 2.2l Peugeot Boxer delivery vehicles to the plaintiff who would replace them with two new (2015 model) Peugeot Boxer delivery vehicles with an engine capacity of 3 litres. In terms of the agreement the only amount payable by the plaintiff to the defendant was R41 000. The defendant repudiated that agreement, and the plaintiff sought specific performance of it.

[3] In its plea the defendant

(a) denied the conclusion of the agreement relied upon by the plaintiff;

(b) expanded upon that denial by pleading that anything done by Mr Gerber and relied upon by the plaintiff to establish the agreement was done without authority.

[4] The plaintiff delivered a replication asserting that Mr Gerber had ostensible authority to conclude the contract contended for by the plaintiff.

[5] Mr Hassim was the only witness called by the plaintiff. The defendant called three witnesses concerned with the administration of its affairs and sales. But Mr Gerber was not called. For present purposes the only relevance of the evidence of the three witnesses called by the plaintiff is that it established that the price of one new Peugeot Boxer 3l delivery vehicle in May 2015 was R481 000, and that Mr Gerber, who was the service manager, had no actual authority to conclude any contract on behalf of the defendant for the sale of new vehicles.

[6] The trial was conducted in two parts separated by some two years. Mr Hassim was still in the witness stand when the first phase of the trial ended with an adjournment. It was apparent during that first phase of the trial that the defendant hoped to run its defence without the evidence of Mr Gerber. When the trial resumed the defendant had experienced a change of heart. It intended to call Mr Gerber. However on the day that he was to be called the defendant applied for an adjournment explaining that the problem with Mr Gerber was that he had suffered what might for convenience sake be called a nervous breakdown, and had been under treatment for that condition for a considerable period of time. The psychiatrist responsible for his care had conveyed to the defendant's attorneys that the prospect of giving evidence had caused a relapse in Mr Gerber's condition, and suggested that his participation in the trial be delayed and that it would be at least more certain that Mr Gerber would cope with giving evidence if arrangements were made for him to do so remotely. This was less likely to cause him the stress which the prospect of giving evidence in court had caused, and which had resulted in his relapse. The defendant applied for a further adjournment in anticipation of putting such arrangements in place, but the application was refused. The defendant's case was closed without Mr Gerber's evidence.

[7] Before us counsel for the defendant advanced four arguments in support of the appeal, namely

(a) that the plaintiff had not proved the contract relied upon;
(b) that the discretionary remedy of specific performance should not have been granted;
(c) that the plaintiff had failed to prove Mr Gerber's authority (actual or ostensible); and
(d) that the application for an adjournment should not have been refused, and constituted a material misdirection which resulted in a failure of justice.

[8] The starting point is obviously the question as to whether the contract was ever concluded. This involves a consideration of the evidence given by Mr Hassim. It is not disputed that by January 2015 he had lost all faith in the two delivery vehicles he had bought in 2013 and wanted to do a deal with the defendant to replace them with 2015 models on terms which Mr Hassim might find acceptable. To that end he was dealing with a Mr Mangan whom he described as the general manager of the defendant. Although in his evidence Mr Hassim claimed that Mr Mangan had introduced him to Mr Gerber, given that Mr Hassim's anxiety was generated by the break down of the vehicles he had bought in 2013, it is unlikely that Mr Hassim did not know Mr Gerber.

[9] On being referred to an email from Mr Mangan to him sent on 20 January 2015, Mr Hassim said this.

'Okay, it was during the course of January 2015 that Mr Mangan sent me an email saying that I think he was going on leave or he was leaving the company and a Mr Ethienne Gerber would be contacting me and he has explained further – basically introduced me to Mr Gerber as my contact point there onwards. However during this period of time I had maintained communication with Mr Mangan till he left the company as well as Mr Gerber.'

The email to which Mr Hassim was speaking actually reads as follows.

'I am unfortunately tied up and so have asked my service manager Ethienne just to give you a call for now and I will follow up as soon as I am free.'

Mr Hassim's evidence a little later on is to the effect that Mr Mangan simply disappeared (having left the defendant) and that he continued thereafter to deal with Mr Gerber. Counsel for the plaintiff accepted in argument that there was no

evidence of any representation by the defendant that Mr Gerber had authority to conclude the contract relied upon by the plaintiff, beyond Mr Hassim's contention that Mr Mangan, before his departure, said that Mr Hassim should deal with Mr Gerber. I have dealt with this subject in overview, as there is no need for this court to make any finding on this issue. However the available evidence on this issue does provide some context when considering what it is that Mr Gerber is said to have done.

[10] Mr Hassim's evidence was to the effect that the contract he contends for was concluded orally between him and Mr Gerber; and that he asked for confirmation in writing and received it. That was on or about 7 May 2015. The last figures he had received from Mr Mangan, and rejected, are reflected in an email of 5 February 2015 as follows.

'2013 Boxer trade-in R260 000.00
New 2015 Boxer R475 000.00.
Balance to pay R215 000.00.'

Mr Hassim's evidence as to the agreement he concluded with Mr Gerber is as follows.

'The agreement of the deal that Mr Etienne Gerber had put forth was that he would take both my vehicles in, I would tender a payment of R41 000.00 and I would receive two new Peugeot Boxers the equivalent of what I have.'

This was done over the telephone.

[11] The writing relied upon by the plaintiff was identified by Mr Hassim in his evidence. There were three emails. The first email from Mr Gerber (dated 7 May 2015, as are the others) reads as follows.

'As discussed earlier herewith a breakdown.
New price: R481 000.00.
Trade-in: R360 000.00.
Discount: R80 000.00.
To pay in: R41 000.00.
Trust you will find the above in order.'

Mr Hassim replied as follows.

'Okay got this one

And the one about the other being changed no charge.'

Mr Gerber responded as follows.

'Sorry I forgot to include. The other vehicle will be exchanged by Peugeot Customer Care with a Boxer from them as soon as the stock arrives.'

[12] The meaning of the first of these emails is clear.

(a) Firstly, what it spoke about was the supply of one new vehicle. The evidence is clear that one 2015 model vehicle was then being sold for R481 000. The second email, Mr Hassim's response, shows that he too understood that the first email dealt with the supply of only one new vehicle to the plaintiff.

(b) Secondly, the trade-in figure of R360 000 was in respect of the trade-in of both the 2013 models. They had been bought two years earlier for R270 000 each. Counsel for the plaintiff before us candidly stated that he was unable to argue that the trade-in figure of R360 000 was for only one of the 2013 models. Clearly that concession had to be made.

(c) Accordingly, what Mr Gerber was talking about was the defendant supplying the plaintiff with one new 2015 model in exchange for the two 2013 models and R41 000.

[13] As to the third of the emails referred to above, the plaintiff's case must be taken to be that Mr Gerber otherwise undertook on behalf of the defendant that it would provide another 2015 model to the plaintiff for free. Of course that is not what the email says. Counsel for the defendant argues that what the third email conveys is that a loan vehicle then in the possession of the plaintiff (because the 2013 model, or models, were out of action) would be exchanged not by the defendant, but by Peugeot Customer Care. (The evidence reveals that Mr Hassim was less than happy with the loan vehicle which was too small.) This argument appears correct on the probabilities. But the crucial point is that the email does not convey, and indeed

contradicts the proposition, that the defendant undertook to deliver a second 2015 model to the plaintiff. The defendant is not "Peugeot Customer Care".

[14] The evidence at trial covered more ground than that which I have discussed above, but none of it, and none of the disputes (minor in nature) which arose in connection with it, disturbs the analysis just given of what happened on or about 7 May 2015.

[15] The basis upon which the learned Judge *a quo* found for the plaintiff is encapsulated in two paragraphs of his judgment.

'[12] It is, in my view, clear from the evidence presented that an agreement was reached between Hassim, on behalf of the Plaintiff and Gerber on behalf of the Defendant. It is noted that it is only Hassim's evidence relating to the agreement that is before the Court. The Defendant has not presented any evidence to gainsay same. The Defendant has submitted that the emails forwarded by Gerber and relied upon by Hassim are nothing more than a "breakdown" of the costing and that it did not constitute an agreement. However, Mr Gerber was not called to testify. The Defendant's counsel at the time informed the Court that Mr Gerber would not be testifying. Later (and when new counsel was engaged) when it became clear that his evidence was crucial, Mr Gerber was not available to testify.

[13] Mr Hassim testified in a clear and straightforward manner. It became clear that he is an astute businessman who carefully recorded and filed all his dealings and interactions with the Defendant. I found him to be an honest and credible witness and accept his version of the events as they unfolded. As stated earlier, there is nothing to gainsay his version.'

[16] In my respectful view the learned Judge misdirected himself in two respects. Firstly, he failed properly to analyse the emails which according to Mr Hassim supported his version of what had been agreed in his conversations with Mr Gerber. Secondly, the learned Judge incorrectly relied upon the veracity of Mr Hassim's evidence without considering the probabilities.

[17] The fact that evidence stands uncontradicted does not mean that it has to be accepted; or that it suffices as proof of the facts to which it speaks. The position was put as follows by Greenberg JA in *Schenker Brothers v Bester* 1952 (3) SA 664 (A) at 670.

‘The evidence of these two witnesses, as was to be expected, has not been contradicted by any evidence led on behalf of the defendants, but this fact does not relieve the plaintiff of the obligation to discharge the onus resting on him. (See *Siffman v Kriel* 1909 T.S. 538; *Katz v Bloomfield and Keith,* 1914 T.P.D 379; *Nelson v Marich* – AD 1952, not yet reported.) In the first of these cases, Innes, C.J. said:
‘It does not follow, because evidence is uncontradicted, that therefore it is true. … The story told by the person on whom the onus rests may be so improbable as not to discharge it.’

Similarly, the circumstance that evidence is uncontradicted is no justification for shutting one’s eyes to the fact, if it be a fact, that it is too vague and contradictory to serve as proof of the question in issue.’

[18] As was held in *National Employers’ General Insurance v Jagers* 1984 (4) SA 437 (E) at 440, a consideration of the credibility of a witness is “inextricably bound up with a consideration of the probabilities of the case”. It is not “desirable for a court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry.”

[19] In the present case the learned Judge *a quo* made a credibility finding in favour of Mr Hassim, and found the contract proved on that basis, without considering the probabilities. In the light of the emails referred to earlier, the learned Judge should have, but did not grapple with the proposition that Mr Gerber (duly authorised by the defendants) undertook on behalf of the defendant to deliver one of the 2015 model delivery vehicles worth R481 000 to the plaintiff for free. That proposition is so improbable that it had to be rejected, which meant that, no matter how the learned Judge viewed the presentation of Mr Hassim’s evidence, it could not be found to be credible.

[20] The contract relied upon by the plaintiff was not proved. There is accordingly no need to deal with the other three bases upon which the defendant advanced its claim that this appeal should be upheld.

The following order is made.

1. **The appeal is upheld with costs, such to include the costs of senior counsel.**

2. **The order of the court *a quo* is set aside and replaced with the following order:**

   "The plaintiff's claim is dismissed with costs".

_____
OLSEN J

I agree

_____
BALTON J

I agree

_____
BEZUIDENHOUT J

Date of Hearing:	Friday, 22 APRIL 2022
Date of Judgment:	Friday, 10 June 2022
For Appellant:	Mr M Pillemer SC
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