

SOUTH AFRICA / JUDGMENT

# BMW Financial Services v De Lange (A3063/03) [2004]

## ZAGPHC 19 (27 January 2004)

[2004] ZAGPHC 19

## COURT

High Courts - Gauteng

## BEFORE

Willis, Gildenhuys

## CASE / FILE NUMBER

A3063/03

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: A3063/03

DATE:2004-01-27

In the matter between

BMW FINANCIAL SERVICES..... Appellant

and

JOHANNES STEPHANUS DE LANGE.....Respondent

## JUDGMENT

WILLIS, J: The appellant appeals against the judgment of the learned magistrate, Ms Kroukamp, given in the Magistrate's Court in Alberton on 9 January 2003 in which she dismissed with costs the appellant's claim as plaintiff for payment of a sum of R132 553,58 together with interests and costs.

The respondent, who was the defendant in the court a quo, had consented to the jurisdiction of the Magistrate's Court.

The appellant's claim was based on a written "instalment sale agreement" entered into on 8 November 1999 in terms of which the appellant sold to the respondent a Ford Courier 2.5 TD 4 X 4 double cab motor vehicle for a total price of R347 519,92 including

interest. There was no deposit and the debt was to be repaid by way of 59 equal monthly instalments.

There is no dispute that the agreement was in fact entered into between the parties, that the respondent fell into arrears and that the appellant cancelled the agreement and obtained the return of the motor vehicle from the respondent. The appellant claimed payment of the sum of R132 553,58 being the difference between the full outstanding balance and the value of the vehicle. The agreement between the parties provided that the appellant would be able to make such a claim. Towards the end of the case in the court a quo, the respondent admitted that it did not dispute the amount in question.

It is common cause that, prima facie, the agreement falls foul of Regulation 2 of the regulations promulgated under Government Notice

R401 dated 27 February 1981 in terms of the Credit Agreements Act No. 75 of 1980, as amended, in as much as no deposit was paid and the repayment period exceeded the limit of 54 months provided for in the regulations.

The respondent, in his plea, pleaded that the agreement was invalid and unenforceable in terms of the provisions of section 6(6) of the Credit Agreements Act No. 75 of 1980. The appellant relied, however, on a qualification to regulation 2 contained in regulation

4(1), the relevant portion of it provides that:

"... the conditions laid down in Regulation 2 shall not apply to such credit transaction if payments in terms of the transaction, or amounts representing depreciation or wear and tear of the goods purchased, are amounts allowed to be wholly or partially deducted

from or set off against the taxable income of the credit receiver under Part 1 of Chapter 11 of the Income Tax Act, 1962 ..."

The appellant's case was that the respondent in his application for credit signed a document in which the following appears:

"I certify the above details are true and correct, and warrant that, if an initial payment less than that specified in the Credit Agreements Act is to be paid, the payments or depreciation and wear and tear are tax deductible." In that same document the respondent records that he was, at the time, a salaried employee earning R25 000 per month. He also received "car allowance" of R6 000 per month. He was employed as a manager at a waste metals company in Alberton. In the "Insurance Confirmation", which the appellant required the respondent to sign at about the same time as all other documentation relevant to the purchase of the motor vehicle, the respondent records that the vehicle was "(a) to be used for private use" and "(b) not to be used for business purposes". The learned magistrate found that there was insufficient proof that the respondent

had indeed signed the document in which he "warrants" that expenses in relation to the vehicle were tax deductible and, on this basis, dismissed the appellant's claim. In my opinion the learned magistrate erred in finding that there was insufficient proof that the respondent signed the document in question.

Ms Maria Helen Luis, the financing insurance manager of the appellant, who approved the respondent's request for financial assistance to purchase the motor vehicle, testified that the respondent had signed the document. Admittedly this evidence was of a hearsay nature but nevertheless the document was handed in to court as an exhibit without objection from the respondent. The evidence that it was indeed the signature of the respondent which appeared on that document was never challenged during cross-examination. The

respondent himself closed his case without leading any evidence. In my view opinion the probabilities indicate that it may safely be accepted that the respondent did in fact sign the document in question.

That is not, however, the end of the matter. In my opinion the case falls to be decided by reference to the case of *Oosthuizen and Another v Standard Credit Corporation* [1993] ZASCA 59; 1993 (3) SA 891 {A}. Although there was a difference of opinion between the majority and the minority judgments on the question of the manner in which the purpose of the purchaser or the lessee was to be established, both judgments agreed as to the result and were otherwise in harmony with each other.

There is clear agreement in that case but the purpose of the legislature is to protect persons from "the temptations and hazards of extensive credit terms" (see 909C and 903G-904F), that any subterfuge would be disregarded and the maxim plus valid quodagitur

quam quod simulate concipitur would apply (what is actually done is more important than that which seems to have been done) (See 912A and 905G-H); that the purpose for which the goods were purchased is an objective fact (see 90SG and 906J-907H) and the onus of proving the tax deductibility of the expenses in question rests on the person invoking the exemption (see 907G and 909F-G).

In other words, the mere say-so of a purchaser or even an agreement between the parties does not establish the necessary purpose for which the purchase was made (see especially at 909A-909C). Moreover, it cannot establish the tax deductibility of the expense in question.

Nicholas AJA, delivering the majority judgment, said at 907F: "It is generally appropriate to consider whether or not a deduction is permitted by section 11 (a) and whether or not it is prohibited under 20(c)". (The sections referred to are those of the Income Tax Act).

Section 11 (a), both before and after the amendment by Act 59 of 2000, allows the deduction of expenses "actually incurred in the production of income, provided such expenditure and losses are of a capital nature".

Quite how the repayments in respect of this vehicle would actually would have been incurred in the production of the income of the respondent, a salaried manager, is not readily apparent. Then there is the fact that in the "insurance confirmation" form respondent disclosed that the vehicle would be used for private and not business purposes. It is also very unclear why the repayments would not have been of a capital nature.

The appellant also sought to rely on the fact that the respondent received a "car allowance". It is far from self-evident

that this would make the repayments tax deductible. Indeed, the "car allowance" would probably be taxable. The appellant failed to discharge the onus which it bore to show that, as a matter of objective fact, the repayments would have been tax deductible.

Obviously, a misrepresentation by a purchaser, provided other necessary elements were satisfied, could give rise to a delictual claim but the appellant's case has not been founded in delict. I express this view merely to indicate that a bona fide credit grantor is not faced with insurmountable obstacles in lending to someone in circumstances where he decides to rely on the exemption provisions of regulation 4(1).

I propose that the following order be made:

The appeal is dismissed with costs.

GILDENHUYS, J: I agree.

WILLIS: It is so ordered.

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Prepared on 14 October 2026 · Esheria