

SOUTH AFRICA / JUDGMENT

Boyede v Pekar Holdings (Pty) Ltd t/a We Buy Bakkies (NCT/150994/2020/141(1)(b)) [2021] ZANCT 49 (25 November 2021)

[2021] ZANCT 49

COURT

National Consumer Tribunal

BEFORE

K Moodaliyar, F Manamela, B Dumisa

CASE / FILE NUMBER

NCT/150994/2020/141(1)(b)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

Case

number: NCT/150994/2020/141(1)(b)

In

the matter between:

ADEMOLA
BOYEDE
APPLICANT
and
PEKAR
HOLDINGS (PTY) LTD
T/A
WE BUY
BAKKIES
RESPONDENT

Coram: Prof
K Moodaliyar –
Presiding Tribunal member
Adv
F Manamela –
Tribunal member
Prof
B Dumisa
–
Tribunal Member
Date
of Hearing -
5 October
2021 via Microsoft Teams audio-visual platform
Applicant's
Heads of Argument received- 25 October 2021 Respondent's Heads of
Argument received- 26 October 2021

JUDGMENT

AND REASONS

APPLICANT

1. The Applicant in this matter is Ademola Boyede, based in Centurion, Gauteng (hereinafter referred to as "the Applicant" or "Mr Boyede").

2. At the hearing, the Applicant was represented by Adv. Christiaan

Sterk briefed by Cilliers and Reynders Attorneys.

RESPONDENT

3. The Respondent is PEKAR HOLDINGS (PTY) LTD T/A WE BUY BAKKIES, a registered juristic person with registration number 1998/015165/07 (hereinafter referred to as "We Buy Bakkies" or "the Respondent"), with its registered address at Unit 2 Sterling Business Park, 81 Sterling Road, Kosmosdal, in the Gauteng Province. The Respondent is not a registered credit provider.

4. The Respondent was represented at the hearing by Hendrick Haasbroek Attorneys.

APPLICATION TYPE

5. This is an application in terms of Section 136 of the National Credit Act 34 of 2005 ("the NCA").

6. The Applicant's submission is that the sale agreement he entered into with the Respondent titled 'Purchase Order' was a simulated agreement in that it was not a sale agreement but rather a pawn transaction which the Respondent is by law prohibited from concluding and therefore wants the Tribunal to declare the agreement unlawful and void.
7. In terms of section 27 of the NCA, the Tribunal has jurisdiction to hear this matter.

BACKGROUND

The Applicant's

Submissions

8. On 6 August 2018, Mr Ademola Boyede approached We Buy Bakkies to effect the sale of his vehicle, a 2007 Nissan Navara ('the vehicle').
9. The Applicant approached the Respondent and offered to sell his vehicle to them for R120 000.00. The Respondent declined the offer and countered with an offer to buy the vehicle for R60 000.00. This offer was, in turn, declined by the Applicant.[1]
10. According to the Applicant, the Respondent then suggested that they could loan R50 000.00 to the Applicant, who was then required to leave the vehicle and its registration papers in the possession of the Respondent as security. The Applicant was then afforded the opportunity to repay an amount of R74 300.00 on or before 6 October 2018 to regain possession of his vehicle in lieu of which the vehicle will be sold to cover the Applicant's obligations. This offer was accepted by the Applicant, and on 6 August 2018, the Respondent deposited R50 000 into the Applicant's account.
11. The Applicant signed a document presented to him by the Respondent which was titled "Purchase Order," which contained the whole of the agreement between the parties.
12. In the lead up to 6 October 2018, the Applicant fell ill and was unable to attend the Respondent's premises on the due date to repay what was owed.
13. When the Applicant did return to the Respondent, he discovered that his vehicle had been sold, to cover the Applicant's obligations, despite the Applicant, as alleged, not signing any transfer of ownership documents.
14. The Applicant then approached the National Credit Regulator ('the NCR') on 29 July 2019, for relief claiming that the agreement concluded between the parties was simulated and was in fact a "pawn transaction" and not a sale agreement. The Applicant argued that the agreement was therefore unlawful as the NCA regulates pawn transactions, and the Respondent was not a registered credit provider.
15. On 11 December 2019, the NCR issued a Notice of Non-Referral in terms of section 139(1) of the National Credit Act. The reasons the NCR provided for the non-referral were that the Respondent bought the Applicant's vehicle for R50 000, and the purchase order allowed for a

buy-back of the vehicle. When the Applicant failed to return on the agreed date, the Respondent was within their right to sell the vehicle and that the agreement made no mention of a pawn transaction. The Applicant subsequently approached the National Consumer Tribunal ('NCT') in terms of section 141 of the National Credit Act. The Tribunal granted the Applicant's leave to refer on 7 May 2021.

Sanctions Prayed For By the Applicant

16. The Applicant is asking the Tribunal to make the following orders:

16.1 Declaring the conduct of the Respondent to be prohibited conduct in terms of section 150 of the NCA;

16.2 Declaring that the Respondent was at the time of entering into the agreement with the Applicant, required to be registered with the NCR;

16.3 Declaring the agreement concluded between the Applicant and the Respondent to be a pawn transaction as contemplated In the NCA;

16.4 Declaring the agreement between the Applicant and the Respondent to be unlawful and void in terms of section 40(3) and (4) of the NCA;

16.5 Setting aside the obligations of the Applicant in terms of that agreement and;

16.6 Ordering the Respondent to pay the Applicant an amount of R120 000 together with mora interest from 6 October 2018 to date of payment, in lieu of the Applicant's damages.

THE RESPONDENT'S

SUBMISSIONS

17. The Respondent's position is that it does operate as a credit provider, as defined under the Act.

18. The Respondent submits that their business model is based on purchasing second-hand vehicles from vehicle owners at the best possible prices, followed by the later resale of such vehicles for a profit.

19. According to the Respondent, it purchased the Applicant's vehicle for R50 000.00, and in terms of the purchase agreement, the Applicant was entitled, pursuant to an option, to purchase the vehicle back from the Respondent on or before 6 October 2018 for an amount of R74 300.00 after numerous costly repairs were done on the vehicle, with

the full and clear knowledge of the Applicant.

20. After the Applicant failed to exercise the option and, on or about 10 October 2018, the Respondent sold the vehicle to a third-party purchaser.

21. The Respondent identified the following items to be repaired and/or replaced before the vehicle could be sold to the public by the Respondent:
- a) Front windscreen is chipped, and the bonnet is scratched or chipped;
 - b) Roof is worn and chipped;
 - c) Left front fender needs buffing & polishing as there are signs of spraying;
 - d) Left front door is scratched;
 - e) Left rear door is scratched and chipped;
 - f) Left rear fender has signs of spray and a scratch;
 - g) Left rear and front tyres must be replaced;
 - h) Right front fender has signs of spray, a scratch and a chip;
 - i) Right front door is scratched and chipped;
 - j) Right rear door is scratched and chipped;
 - k) Right rear fender is dented with signs of spray;
 - l) Right rear tyre must be replaced;
 - m) Right front tyre must be replaced;
 - n) Front bumper is scratched, chipped and has signs of overspray;
 - o) Rear bumper is scratched and dented;
 - p) Tail gate is scratched, dented and cracked;
 - q) Interior is damaged and worn;
 - r) Interior and vehicle must be pressure washed and valeted;
 - s) Battery must be replaced;
 - t) Switch for back window is not working;
 - u) Service tools e.g. the jack and tools are missing and must be replaced;
 - v) New spare key must be obtained;
 - w) Steering wheel is broken and worn;
 - x) Interior door panels are scratched.
22. When viewing the nature of the agreement the Respondent stated that a sale agreement constitutes an agreement whereby the parties agree (i) to purchase and sell, (ii) to the thing sold and purchased and (iii) on the price of the thing. [2]

23. In terms of the express terms of the agreement, the Applicant and the Respondent agreed to the following:

23.1 That the Applicant would sell the vehicle to the Respondent (the agreement being titled "Purchase Order", and the Applicant being defined as the "Purchaser", or that the vehicle is "Purchased From" the Applicant;

23.2 The vehicle is clearly described as a 2007 Nissan Navara, 2.5 4x2, with registration number HC06VRGP and VIN Number VSKCVAS4020199231; and

23.3 The Applicant and the Respondent agreed on the purchase price, being R50 000.00 (the Agreement as set out in the "Purchase Order" recording that "We accept the above-mentioned amount as the full purchase price").

24. The Respondent further states that to the extent that the Applicant alleges that he was not aware of the terms of the agreement, the Applicant is bound by the principle of caveat subscriptor, which implies that:

"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 above his signature".[3]

25. The Respondent states that the agreement is to be interpreted with the current law on legal interpretation as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production".[4]

26. The expression of the law, according to the Respondent, was recently reconfirmed by the Supreme Court of Appeal in the following terms:

"... This court has consistently stated that in the interpretation exercise, the point of departure is the language of the document in question. Without the written text, there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue ...".[5]

27. The Respondent argued that the party that advanced the money or granted the credit is entitled on expiry of a defined period to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations under the agreement, and therefore the Applicant is unable to prove any of these terms and the express wording of the agreement clearly, and, reflects the terms of a sale agreement.

28. With regard to simulated transactions, the Respondent argued that the South African law on simulated transactions does not merely permit the party to argue simulation. The Respondent relies on *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd*, which held:

"I wish to draw particular attention to the words "a real intention, definitely ascertainable, which differs from the simulated intention", because they indicate clearly what the learned Judge meant by a "disguised" transaction. A transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it...".[6]

29. The Respondent contends that this means that the alleged "real intention" must be "definitely ascertainable". It relies on the matter heard by Supreme Court of Appeal in respect of simulated transactions, which held:

"... [a]nd it suggested that simulation was to be established not only by considering the terms of the transactions but also the probabilities and the context in which they were concluded".[7]

30. The Respondent disputes that the transaction was a simulated one because, as it states, the Applicant has failed to prove a "definitely ascertainable" alternative intention between the Applicant and the Respondent (merely alleging same without providing any substantiating proof and notes that in *Michau v Maize Board* it was held that: "A Court will seek to ascertain the true intention of the parties from all the relevant circumstances, including the manner in which the contract is implemented. The onus is upon the party who alleges that the transaction is simulated".[8]

31. The Respondent puts forth that the Applicant has not brought any evidence that proves a simulated transaction and that the dispute of facts cannot be resolved.
32. The Respondent submits that the Tribunal does not have the relevant authority, powers and jurisdiction to, in any event, declare an agreement, a simulated transaction.

CONSIDERATION OF THE EVIDENCE

33. The Applicant alleges that the Respondent is engaged in a credit sales provision, whilst the Respondent contends that their business model falls outside the Act.
34. The Respondent's submission was that they made no representations to the Applicant outside what appears in their standard Sale Agreement.
35. In every case in which a dispute of fact has been raised, the Tribunal must examine an alleged dispute of fact and determine whether the dispute of fact is real or genuine.[9]
36. The question that arises is whether the transaction in question is an ordinary sale agreement or a simulated transaction that amounts to a pawn agreement. If this is a pawn transaction, then the Respondent should have been a registered credit provider, which it is common cause that it is not a registered credit provider.

37. It is also common cause that the Respondent purchased the Applicant's vehicle for R50 000. There is a dispute regarding the value of the vehicle which the Applicant says it is valued at R120 000 and the Respondent values the vehicle at R119 000[10]. There is a minimal difference in these valuations.
38. It is also common cause that the parties agreed to a buy-back option in that the Applicant would return on 6 October 2018 to repurchase the vehicle for the amount of R74 300.00. When the Applicant did not return on said date, the vehicle was sold.
39. The Respondent disagrees that it initially offered the Applicant R60 000.00 to purchase the vehicle, and the Applicant disagrees that the vehicle required all the repair work that the Respondent carried out before it sold the vehicle. The Applicant was under the impression that he would be able to purchase the vehicle back, and that he did not sign a transfer of ownership when he handed over the vehicle.
40. In terms of the actual nature of the transaction, it appears there is no factual dispute between the parties. Both parties agree that the Respondent paid R50 000.00 to the Applicant and took possession of the vehicle and that it was agreed that the Applicant would return to buy back the vehicle for a certain amount on a certain day. In addition, when the Applicant did not return on the said date, the Respondent was entitled to sell the vehicle and indeed did so. The Plascon-Evans rule will thus have a limited application in this case. The Tribunal turns to the nature of the transaction which is in dispute.
41. At the hearing, when asked by a Tribunal member about the nature of the transaction, the Respondent intimated that it had never done a transaction like this with a customer before. Usually, customers sell the vehicle to the Respondent and don't expect to come back to repurchase it.

Pawn Transactions

42. Section 1 of the NCA defines a pawn transaction as: "an agreement, irrespective of its form, in terms of which-
- (a) one party advances money or grants credit to another and at the time of doing so, takes possession of goods as security for the money advanced or credit granted
 - (b)
 - (c) The party that advanced the money or granted the credit is entitled on the expiry of a defined period to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations under the agreement."

43. In this case, what is required is for the agreement to advance money or provide credit and that the Respondent, who advanced the money, took possession of certain goods as security. After a defined period, the Respondent would be entitled to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations

under the agreement.

44. In this case, the agreement entered into by the parties appears to reflect the requirements of a pawn transaction, despite the face value appearances of the purported sale agreement.

44.1 The consumer used his car as security for a loan (disguised as a purchase price);

44.2 The consumer got a loan (disguised as a purchase price);

44.3 The consumer had to pay back this loan within a set period of time.

44.4 The loan was not repaid, and the Respondent sold the car and retained the proceeds of the sale.

Simulated transactions

45. A simulated transaction is one where all the parties to the intended contract disguise the true nature of the transaction. Where one party fraudulently causes the other party to enter into a transaction different from what they thought it was, it is an invalid transaction, not a simulated transaction.[11]

46. Shongwe JA in *Roshcon (Pty) Limited v Anchor Auto Body Builders CC and Others*[12] stated that "for a court to declare a transaction a simulation it does not have to look at any particular legislation but has to look at the facts of each particular case".

47. The Judge quoted the SCA case of *Commissioner for the South African Revenue Services v NWK*[13], where Lewis JA held that:

'In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction'

48. Innes J, as he then was known, in *Zandberg v Van Zyl*, held that the Court is bound to deal with agreements according to its substance and not according to its form, thus giving effect to the Latin maxim of *plus valet quod agitur quam quod simulate concipitur*. [14]

49. In assessing the transaction in this case, the Applicant was in financial distress at that time and wanted to sell his car. The parties did not agree on the value of the vehicle. It was agreed that the Respondent would buy the Applicant's vehicle for R50 000.00, on condition that the Applicant would be given the option to buy back the vehicle at the higher price of R 74 300.00. It appears that the reason why the additional R24 300.00 was added to the R50 000.00

was due to the numerous repairs that the Respondent needed to effect on the vehicle. If the vehicle was worth R120 000.00, it does not make

commercial sense for the Applicant to settle for a price that was less than 50% of the value of the vehicle.

50. In a simulated case, the real purpose of the agreement is concealed so as to avoid a certain rule of law.
51. The Respondent relies on the caveat subscriptor maxim. The Applicant was well aware that by signing the purchase order, he was agreeing to the terms of the said agreement with a purchase price of R50 000.00.
52. The Tribunal also looked at other tertiary rules of contractual interpretation, for example, the contra proferentem rule- if the terms of the contract are capable of more than one meaning, in this instance, a pawn transaction on the one hand and a purchase agreement, on the other hand, they are to be interpreted against the party on whose behalf they were formulated. This agreement was formulated on behalf of the Respondent. They determined the terms of the purchase order agreement. Therefore, this maxim must be interpreted to the advantage of the Applicant.
53. According to the NWK matter, if the transaction lacks commercial rationality and is only set up to evade a peremptory rule of law, the agreement will be regarded as simulated.

Conclusion

54. The purchase order signed by the parties is not one of a simple sale agreement. The Respondent knew that the Applicant intended to come back and repurchase the vehicle. It was not viewed as a full and final sale, as it would typically enter into with other sellers. The purchase order contained terms similar to a pawn agreement and hence
a simulated transaction.
55. The Respondent avoided the rules of the NCA, which it required when it entered into this simulation transaction.
56. The Applicant requests R120 000.00 and that the transaction is declared null and void. It was admitted during the hearing that to award that amount would result in unjustified enrichment. The Applicant is therefore seeking the balance of R70 000, plus interest.
57. The Tribunal does not believe that payment of interest should be awarded in this case, as the vehicle would have depreciated in value.
58. The Respondent further argued that the Tribunal would not have jurisdiction to declare the transaction a simulated agreement. This

is not the first case that the Tribunal has come across where a simulated transaction had been in effect. There is nothing in the Act that expressly precludes it from presiding in such matters either. More recently, for example, the Tribunal has adjudicated on National Credit Regulator v Option Deals (Pty) Ltd^[15]. The Respondent's argument cannot stand.

TRIBUNAL ORDER

59. Accordingly, the Tribunal makes the following order:

59.1 The agreement between the parties amounts to a simulated pawn transaction.

59.2 The Respondent is declared to have engaged in prohibited conduct in terms of Section 150 of the Act;

59.3 The Respondent is declared to have unlawfully operated as a credit provider, in contravention of Sections 40(1) and 40(3);

59.4 The Respondent is interdicted from entering into any further credit transactions with consumers whilst it remains unregistered as a credit provider;

59.5 The Respondent must within one hundred and twenty (120) days after the Tribunal order has been obtained, pay the Applicant the amount of R70 000,00 (seventy thousand Rands) into the Applicant's bank account and send proof of such payment to the Tribunal's Registrar; and

59.6 There is no order as to costs.

DATED ON THIS 25th DAY OF November 2021

[signed]

Prof. K Moodaliyar

Presiding Tribunal member

Prof. B Dumisa (Tribunal member) and Adv F Manamela (Tribunal member) concurring.

[1] Paragraph 5 of the founding affidavit read with paragraph 6 of the replying affidavit.--

[2] Loggenberg and Others v Maree [2018] ZASCA 24.

[3] Burger v Central South African Railways 1903 TS 571.

[4] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA) at par 18.

[5] The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association 2019 (3) SA 398 (SCA) at par 63

[6] Commissioner of Customs and Excise c Randles, Brothers and Hudson Ltd 1941 AD 369 at 395.

[7] Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service (923/2017) [2018] ZASCA 153 at par 59.

- [8] Michau v Maize Board 2003 (6) SA 459 (SCA) at par 4.
- [9] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd
- [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634I. See, generally, Erasmus Superior Court Practice RS 11, 2019, D1-70 – 77.
- [10] Paragraph 12 of the Respondent's answering affidavit.
- [11] See Maize Board v Jackson 2005 (6) SA 592 (SCA) Ponnann JA held that the true enquiry, in determining whether contracts are simulated, 'is to establish whether the real nature and the implementation of these particular contracts is consistent with their ostensible form. In pursuit of the enquiry, one must strive to ascertain, from all of the relevant circumstances, the actual meaning of the contracting parties.' This court referred to an earlier decision in Michau v Maize Board 2003 (6) SA 459 (SCA) para 4, and the authorities cited there, which have held over decades that parties may not conceal the true nature of their transaction. This definition was also relied upon in Absa v Moore [2015] ZASCA 171; 2016 (3) SA 97 (SCA) (26 November 2015).
- [12] (49/13) [2014] ZASCA 40; [2014] 2 All SA 654 (SCA); 2014 (4) SA 319 (SCA) (31 March 2014).
- [13] CSARS v NWK 2011 (2) SA 67 (SCA).
- [14] 1910 AD 302 313.
- [15] (NCT/128364/2019/140(1)) [2019] ZANCT 151 (15 September 2019).

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