

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited t/a Wesbank v Moji (1012/2012) [2014] ZAFSHC 86 (29 May 2014) [2014] ZAFSHC 86

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

1012/2012

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case Number : 1012/2012

In the matter between:-

FIRSTSTRAND BANK LIMITED t/a WESBANKPlaintiff

and

MTHO ANDREW MOJIDefendant

CORAM: VAN ZYL, J

DELIVERED ON: 29 MAY 2014

BACKGROUND**AND PLEADINGS:**

[1] On 10 October 2008 and at Klerksdorp the defendant and Speedy Car Sales CC t/a Speedy Car Sales (“Speedy”) entered into an instalment sale agreement (“the agreement”) in terms whereof the Defendant purchased a certain 2007 Toyota Hilux 2.7 VVT-I Double Cab Raider (“the vehicle”) with engine number 2TR8045491 and chassis number AHTEX39G007008913.

[2] In terms of the agreement the principal debt is made up as follows:

2.1 Cash price

R219 000-00

2.2 Add: total extras

R 3 000-00

Agreed selling price

R222 000-00

2.3 Add: initiation fee

R 1 140-00

2.4 Less: initial payment

R 20 000-00

R203 140-00

[3] The parties agreed upon a fixed interest rate of 20% per annum, wherefore the total interest payable over the term of the agreement

was R151 048-16.

[4] The total amount payable was therefore R354 188-16, including VAT, which was payable in 72 monthly instalments of R5 173-28, with the first instalment which became due on 28 November 2008. The said monthly instalments of R5 173-28 was made up as follows:

4.1 Instalments including interest, fees and

Insurance

R4 919-28

4.2 Service fees

R 57-00

4.3 Coverplus monthly

R 197-00

[5] The aforesaid details appear on a document titled “Quotation/Cost of Credit for Intermediate Instalment Sale Agreement”, attached to the particulars of claim as Annexure “A” and also contained in the plaintiff’s bundle of documents, Exhibit “A”, p. 26 – p. 27, which document was signed by the defendant and by a representative of Speedy on 10 October 2008. According to the plaintiff, this document, together with the terms and conditions thereto, attached to the particulars of claim as Annexure “E”, and also reflected in Exhibit “A”,

- p. 29 – p. 32, and which terms and conditions were also signed by the defendant, constituted the agreement between the parties. For the sake of completeness I may mention that there are also some other peripheral documents which also form part of the documents relevant to the conclusion of the agreement and which are also contained in Exhibit “A”, that which are either not relevant for purposes of this judgment or if relevant, I will refer to them if and when necessary.
- [6] Speedy ceded its rights and interest in terms of the agreement to the plaintiff in terms of the so-called Master Agreement attached to the particulars of claim as Annexure “B”.
- [7] In terms of the terms and conditions of the agreement:
- 7.1 Ownership in the “vehicle” remains vested in the plaintiff until the defendant has paid all amounts due in terms of the agreement;
- 7.2 The defendant shall be liable for all legal costs arising from his failure to comply with any of the terms and conditions of the agreement;
- 7.3 Should the defendant commit any breach of the agreement, the plaintiff will be entitled to cancel the agreement with immediate effect, take repossession of the vehicle and claim damages suffered as a result of the aforementioned breach by the defendant.
- [8] It is the plaintiff’s case that the defendant breached the agreement by failing to make punctual payments as set out in the agreement and at the time when summons was issued, the defendant was in arrears in the amount of R18 803-43 and at that time the outstanding balance, including the arrears, was R145 867-23.
- [9] Plaintiff is a registered credit provider in terms of Section 40 of the National Credit Act, 34 of 2005, the agreement falls within the scope of the National Credit Act and the plaintiff complied with all the requirements of the said Act.
- [10] According to the plaintiff it is entitled to cancel the agreement; alternatively notice of such termination was given by means of the combined summons.
- [11] In terms of the particulars of claim the plaintiff is seeking the following relief, although at this stage of the action the plaintiff is only seeking an order in terms of prayers 1, 2 and 5, the adjudication of the other prayers to be postponed sine die:
- “1. Cancellation of the agreement;
2. An order in terms of which the 2007 Toyota Hilux 2.7 VVT-I D/C Raider with engine number 2TR8045491 and chassis number AHTEX39G007008913 must be delivered by defendant to plaintiff, alternatively that the Sheriff should take into possession the said vehicle from whoever’s

possession it may be found, and place the plaintiff in possession thereof.

3. Damages to be determined after repossession of the vehicle, evaluation thereof and recalculation of finance costs.
4. Interest on the said amount of damages to be determined at the applicable interest rate in terms of the agreement.
5. Costs.”

[12] The plaintiff initially applied for summary judgment, but after the defendant filed his answering affidavit in opposition thereto, the plaintiff granted leave to the defendant to defend the action, costs to be cost in the cause.

[13] In his plea the defendant admitted the conclusion of the agreement, but then in addition thereto he pleaded the following defence in paragraphs 2.2 to 2.4 of his plea:

“2.2 However, defendant specifically avers that he was required to take a life, disability and retrenchment insurance cover, which he did.

2.3 In or about February 2010, defendant sustained an injury on duty, as a result of which injury he was disabled and declared medically unfit by his erstwhile employer, Anglo Ashante in May 2011, which retrenchment or disability was or should have been covered by his insurance.

2.4 He informed the Plaintiff, accordingly, and the latter, unreasonably and without justification refused to acknowledge the claim.”

In response to the allegation that the payment of the instalments was in arrears, the defendant likewise pleaded as follows in paragraph 7.2 of his plea:

“Defendant specifically states that he took out a retrenchment and disability cover with the plaintiff and that the purported obligation has or should have been paid in full.”

The defendant therefore alleged in paragraph 8 of his plea that there is no basis for the alleged termination of the agreement and demand for payment.

[14] The plaintiff called Mr Arthur Frank van Staden, a defended actions controller who has been in the employment of the plaintiff since 2008, as its only witness. The defendant thereafter testified in support of his own case. The defendant made use of the very capable interpretation services of Mr Vuyo Mnweba during his evidence. The said Mr Mnweba, who is not an employee of the Department of Justice and Constitutional Development, was beforehand duly sworn in as an interpreter by the Registrar and a sworn document reflecting this, dated 19 November 2013, was handed to me as confirmation thereof.

[15] Mr Benade, on behalf of the plaintiff, and Mr Rathidili, on behalf of the defendant, thereafter by agreement between them requested that they be allowed to hand in written heads of argument instead of incurring the costs of a further day in court for purposes of the presentation of oral arguments, to which I request adhered. Therefore when I refer to submissions made by the respective counsel, I refer to such submissions having being made in their respective heads of argument.

[16] As correctly pointed out by Mr Benade, the following aspects, apart from the issue of the disability insurance, were also put in contention in the plea:

16.1 The cession;

16.2 The breach of the agreement; and

16.3 The arrears.

In addition thereto and although the cancellation of the agreement by means of the issuing of the summons as such was not challenged, the defendant did challenge the validity of the cancellation, as previously indicated, by pleading in paragraph 8 of his plea “That there is no basis for the alleged termination and demand for payment.”

[17] The other averments in the particulars of claim were “noted” by the defendant with the result that in terms of Rule 22(3) these aspects are deemed to be admitted.

[18] Regarding the cession, Mr Van Staden presented evidence with reference to the Master Agreement concluded between Speedy and the plaintiff regulating such cession, which agreement is attached to the particulars of claim as Annexure “B”. He also referred to page 25 of Exhibit “A” and explained that said document is a remittance advice which is indicative of the fact that the plaintiff paid Speedy the agreed purchase price in terms of clause 2.3.2 of the Master Agreement, whereupon the cession in terms of clause 24 of the Master Agreement took place. This resulted, inter alia, in the plaintiff’s entitlement to the payment of the monthly instalments from the defendant. The said evidence was not disputed in cross-examination nor was there any evidence to the contrary presented by the defendant. The cession can therefore be regarded as having been proved by the plaintiff.

[19] Regarding the arrears and the breach of the agreement, Mr Van Staden referred to the detailed statement pertaining to the account of the defendant which had been obtained from the system of the plaintiff and which is reflected in Exhibit “A”, p. 58 – p.

64. He testified that the payment of the instalment started falling into arrears during October 2010, as reflected on p. 61 of Exhibit “A”, up to the point when the arrears amounted to R92 888-47 during October 2012, as reflected on p. 64 of Exhibit “A”. The last payment by the defendant was made on 7 November 2011, in the amount of R12 000-00, as reflected on p. 63 of Exhibit “A”. A certificate of balance, reflecting the arrears and total outstanding amount on 18 November 2013, was handed in as Exhibit “B”.

Mr van Staden also testified that although a payment of R36 000-00 was made on 4 September 2012, the said payment was reversed with the effective date of 4 September 2012, although the process date thereof is reflected as only being 1 October 2012. See Exhibit “A”,

p. 64.

[20] The defendant testified that he has no knowledge of the aforesaid payment of R36 000-00. Other than that, the evidence of Mr van Staden pertaining to the issue of arrears on the account was not challenged during cross-examination, nor did the defendant present any evidence to the contrary.

[21] Consequently:

21.1 The conclusion of the agreement with Speedy is not in dispute, subject to the defendant’s plea regarding life, disability and retrenchment insurance (“disability insurance”) cover;

21.2 The cession is not in dispute;

21.3 The amount in arrears is not in dispute; and

21.4 The breach and subsequent cancellation of the agreement are in dispute, but only on the basis of the allegation pertaining to the disability insurance.

[22] Consequently the only outstanding issue to be decided is the plea relating to the disability insurance.

EVIDENCE PRESENTED ON BEHALF OF THE PLAINTIFF:

[23] I will first deal with the evidence presented on behalf of the plaintiff in this regard.

23.1 Mr Van Staden testified that he has been in the employment of the plaintiff since 2008, based in Pretoria. As already mentioned earlier, he is a defended action controller. This position entails that he deals with all the files in which the actions are defended, either in action actions against the plaintiff or in actions by the plaintiff against customers of the plaintiff. In this regard he liaises with attorneys and gives them the necessary instructions. The handling of this case falls under his control.

23.2 He testified that the document reflected on p. 36 of Exhibit “A”, titled “Summary of Payment” reflects the extra products the defendant chose to take in relation to the agreement, being “Coverplus monthly” “underwritten by Hollard” against payment of a monthly premium of R197-00.

23.3 Mr Van Staden referred to the document reflected on p. 38 – p. 39 of Exhibit “A”, titled “Insurance Products Product Information, Needs Analysis and Waiver Document” (“Insurance needs analysis document”), which on face value thereof was signed by the defendant on 10 October 2008. He explained that when a person buys a vehicle, the dealer (in this instance Speedy) will do a needs analysis on what type of insurance products the buyer desires and needs on the contract, whereafter the dealer will indicate it on the document, the buyer will sign for it

and the chosen products will be added onto the contract. According to Mr Van Staden the defendant only chose the option of “Insurance Shortfall Cover” and did not take the option of credit life insurance. He testified that had the defendant chosen the option of credit life insurance, he would have had to sign for it in the block under the word “taken” in order for the plaintiff to have it implemented. The plaintiff is not registered to sell insurance. Therefore, when the buyer indicates that he requires one of the policies reflected on p. 38 of Exhibit “A”, the plaintiff would send the documentation to one of the insurance companies with whom the plaintiff is associated. That insurance company will then send the documentation pertaining to the relevant product to the dealer to be offered to the buyer. The dealer will thereupon explain the documents to the buyer, whereafter the buyer will sign the relevant documents to indicate that he accepts the policy. The chosen insurance will then be implemented and added onto the contract.

23.4 Mr van Staden further testified that the contents of the agreement, as specifically reflected on p. 26 of Exhibit “A”, which document has been signed by both the defendant and the representative of Speedy, is further indicative of the fact that the defendant only elected to take coverplus insurance, which is to cover any insurance shortfall in circumstances where the vehicle is to be written off and the insurance only pays out the trade value of the vehicle.

23.5 In his evidence Mr Van Staden also referred to the Hollard Coverplus policy document reflected on p. 1 – p. 23 of Exhibit “A” and testified that it constitutes the terms and conditions of the coverplus policy chosen by the defendant and concluded between the defendant and Hollard. He further stated that the letter on p. 67 of Exhibit “A” from Hollard addressed to the defendant, served as confirmation that the chosen coverplus insurance had been activated in favour of the defendant pertaining to the vehicle.

23.6 According to Mr Van Staden the plaintiff’s records do not reflect the existence of any disability insurance in favour of the defendant. Had such a policy existed, it would have been to the advantage of the plaintiff and the plaintiff would even have assisted the defendant in instituting a claim in terms of such a policy.

[24] During cross-examination the following evidence transpired:

24.1 When it was put to Mr Van Staden that the defendant is not in possession of the insurance needs analysis document reflected on p. 38 of Exhibit “A”, Mr van Staden responded that the defendant signed the document titled “acknowledgement of freedom of choice” on p. 28 of Exhibit “A” as confirmation that he had received the documents. He further testified that all the respective choices of insurance reflected on

p. 38 had in any event been explained to the defendant by the dealer.

24.2 It was put to Mr van Staden that the defendant did not receive any policy documents from Hollard and more specifically he did not receive the terms and conditions of the coverplus policy contained on

p. 1 – p. 23 of Exhibit “A”. Mr van Staden responded that the defendant should have taken it up with Hollard.

24.3 When asked by Mr Rathidili why the diagonal line had been drawn through the block “taken” as reflected on the said

p. 38 of Exhibit “A”, Mr Van Staden explained that it was part of the defendant’s signature. When it was put to Mr Van Staden that the defendant denies that it is his signature, he replied by stating that the defendant has been paying for the very policy which is reflected next to (to the left of) the relevant signature.

24.4 Mr Rathidili pointed out to Mr Van Staden that the block “taken” next to the “Insurance Shortfall Cover” option, on face value thereof, contains both a diagonal line and a signature. Mr Van Staden explained that it is up to the dealer to decide how to indicate the buyer’s block of choice. Some dealers make a cross, some dealers draw a diagonal line across the block and some dealers request the buyer to sign in the chosen block. As long as there is a mark within a specific block, it is indicative that the buyer took that particular insurance option.

24.5 Mr Rathidili then pointed out that the blocks “taken” and “waived” respectively, next to the “credit life” option on p. 38 of Exhibit “A”, both have a diagonal line drawn across them. Mr van Staden responded that it indicates that the defendant did not choose that insurance option, because the line goes through the “waiver” block as well. Mr Rathidili put it to Mr Van Staden that the line is also on the side of the “taken” block, in response to which Mr Van Staden testified that “it could have started there, but it means that it is waived”. When asked by Mr Rathidili whether that is an assumption, Mr Van Staden explained that it is obvious that this particular dealer required a signature from the defendant to indicate the insurance option he chooses and therefore, because of the absence of his signature next to the “credit life” option, it is evident that the defendant did not choose that option. In the words of the witness “he just signed for what he wants”.

24.6 When asked why the line was not only drawn through the “waived” block next to the option of “credit life”, Mr Van Staden again testified that it does not make a difference because the defendant’s signature does not appear there.

Had the defendant decided to take that insurance option, the line would have started “at the other side of the block and taken to the word ‘waived’ at the top”.

24.7 Mr Van Staden categorically stated that if the defendant had chosen such a policy, he would have been paying for it, which he has not been doing.

24.8 Mr Van Staden conceded that the respondent paid only one total instalment per month in favour of the plaintiff, which also covered the relevant insurance premium. He however pointed out that on the respondent's statement the amount of the insurance premium and the name/type of insurance were reflected individually, as for example reflected on the statement on p. 58 of Exhibit "A". He therefore contended that had the defendant taken out disability insurance, he would have been paying for it and it would have been reflected as such on the statement.

24.9 Mr van Staden again testified that according to him the signature on p.38 of Exhibit "A" was that of the defendant as it is, in his view, similar to the other signatures of the defendant. He however confirmed that the said documents had been signed at the dealer, that he was not present and that he therefore cannot state whether it is indeed the signature of the defendant or not.

24.10 Mr van Staden also conceded that he did not deal with the defendant personally, either when the agreement was signed nor thereafter.

He has however read the comments on the plaintiff's system from which it was evident that the defendant had in fact notified the plaintiff that according to him he took out disability insurance, but that the plaintiff's agent advised him that they have no record of such insurance cover in favour of the defendant. The defendant still insisted that he was the holder of such a policy, whereafter he was advised to take the matter up with the dealer.

[25] During re-examination Mr Van Staden was adamant that he could not find any indication in any of the plaintiff's documents that the defendant was the holder of any disability insurance.

[26] During further re-examination Mr Van Staden again explained that when an insurance option has been chosen by a buyer, the insurance company will be advised accordingly and they will send the relevant documents to the dealer, whereupon the dealer explains the terms and conditions of the said policy. The buyer then has to indicate whether he accepts or decline the policy. When Mr Benade then asked Mr Van Staden whether a new insurance contract comes into being when it is so accepted by the buyer, Mr Van Staden responded as follows:

"It is not a new insurance contract, it is an add-on to the instalment sale agreement – as an add-on, as an extra."

Mr van Staden also explained that the exercising of a choice of the type of insurance on the insurance needs analysis document, does not constitute an insurance contract – the insurance contract only comes into being once the buyer accepts the terms and conditions of the insurance policy provided by the relevant insurance company and as explained by the relevant dealer to the buyer.

EVIDENCE PRESENTED BY THE DEFENDANT:

[27] I will now deal with the evidence of the defendant, Mr Moji:

27.1 According to Mr Moji, he used to work as a boiler maker at Anglo Ashante mine at Vaalreefs, Orkney. During or about February 2010 he was involved in an accident at work and he sustained an injury to his left arm. He was declared medically unfit to perform his duties by his then employer, as a result of which he had to leave their employment.

27.2 It is not disputed by Mr Moji that he bought the vehicle from Speedy by means of the agreement already referred to herein earlier and as set out in paragraphs 1 to 23 of this judgment and that the plea relating to the disability insurance is the issue to be decided for purposes of this judgment.

27.3 An Indian salesman, whose name Mr Moji cannot remember, in the employment of Speedy, assisted him at Speedy with the transaction and the conclusion of the agreement. He told Mr Moji about life, disability and retrenchment insurance and explained to him that it is very important to be covered against these risks. In this regard the salesman explained that should Mr Moji pass away, his wife will not be burdened with the payment of the instalments of the vehicle. Furthermore, the payment of the instalments will also be covered should Mr Moji be retrenched at work. Mr Moji testified that because the mines often retrench employees, he considered it necessary for him to obtain such insurance. Regarding the disability cover, the salesman explained to him that should he be injured at work resulting in him being declared medically unfit to work, the insurance will also cover the payment of the instalments. Mr Moji testified that because he was a boiler maker at the time, which is a dangerous work where he worked with steel and could easily be injured, he also deemed it necessary to acquire such insurance cover. Mr Moji testified that after the aforesaid explanations by the salesman, he was “ecstatic” about the idea that he can be insured in the event of one of the aforesaid risks happening and therefore he indicated to the salesman that he would like to take out such insurance. On a document similar to the one reflected on p. 38 of Exhibit “A”, the salesman ticked the “taken” block next to the aforesaid options under the “Credit Life” option. After he ticked the blocks, he said he was going to return the documents to the bank for approval and that he would arrange for the insurance. The salesman never mentioned the name of any insurance company.

On the Monday the salesman phoned him to fetch the vehicle and after he provided a tax clearance certificate, he took the vehicle into possession. He was not requested to sign any insurance documents, but he assumed and accepted that he was insured against the risks of death, disability and retrenchment, as those were the insurance options he chose and which blocks were ticked by the salesman, after which the salesman undertook to arrange the said insurance.

27.4 In addition to the aforesaid, the salesman also told Mr Moji that the vehicle has to be insured against the risks of theft and damage. Similar to the retrenchment insurance, according to Mr Moji, this insurance was also arranged by the salesman.

27.5 Mr Moji testified that he was never requested to sign any documentation pertaining to any insurance policy, not even for the theft and damage insurance. Mr Moji reiterated that the salesman undertook to arrange all the insurance and he never even mentioned the name of any insurance company. It was only after Mr Moji received a letter from Unity Insurance requesting him that a tracker system should be fitted to the vehicle, that he became aware that Unity Insurance was responsible for the theft and damage insurance.

27.6 Mr Moji was adamant that it is not his signature appearing on the insurance needs analysis document on p. 38 of Exhibit "A".

He indicated that the said signature reflects a line which does not appear from any of his own signatures on the other documents. The second page of the document, p. 39 of Exhibit "A", does however reflect his signature. He explained that the document on p.38 is similar to the one the salesman completed by ticking next to the insurance options he chose, but that it is not the same one. In cross-examination Mr Benade put it to Mr Moji that "Van Staden said you signed to pick certain coverage", which Mr Moji denied, restating that the salesman only ticked his chosen options and that he was not requested to sign next to the said options. On that document he only signed at the bottom of the page.

27.7 He saw the inscription "Coverplus" on the agreement as reflected on p. 26 of Exhibit "A", when he signed the agreement, but he accepted and assumed that it referred to the disability insurance which he opted for.

27.8 He never received a copy of the agreement, nor of any insurance policy, including the terms and conditions of the Hollard coverplus policy document contained in Exhibit "A", p. 1 to 23. He also did not receive any insurance confirmation letter, including the letter on p. 67 of Exhibit "A". The said letter was only shown to him by his attorney after his attorney got involved in the current dispute between the parties.

27.8 Mr Moji testified that he was convinced that he was covered by disability insurance. He paid the monthly instalment on the vehicle by debit order, which amount included the monthly insurance premium. He received statements from the plaintiff which reflected a premium on "Coverplus" which he assumed was the disability insurance.

27.9 As a result of having to leave the employment of his employer as a result of having been declared medically unfit to work, he struggled to maintain the payment of the monthly instalments. He fell in arrears with the payments and eventually made a last payment in November 2011. Even before the last payment, he contacted the customer care services of the plaintiff and informed them that he had been declared medically unfit to work, but that he has disability insurance. They requested proof of his disability and provided him with a fax number to which he should send the documentation. He sent them a letter from his employer confirming same. They indicated that they would report back to him, which they never did. He then assumed that the matter had been settled to the effect that his disability insurance will cover the outstanding balance on the vehicle.

However, during or about November 2011 a representative of the plaintiff wanted to repossess the vehicle. He advised the relevant person that he has disability insurance and that he has been in contact with the plaintiff regarding it. It then became apparent that the plaintiff was disputing that he has such insurance cover, whereupon he requested a copy of the agreement which he signed from them, wanting to obtain proof of the insurance options he had chosen. The plaintiff failed to send a copy thereof to him and he did not hear from the plaintiff again. He then approached his attorney of record for assistance, who wrote a letter to the plaintiff requesting all the relevant documents pertaining to the matter. The plaintiff then issued summons against the defendant.

LEGAL PRINCIPLES AND EVALUATION OF THE EVIDENCE:

[28] As correctly pointed out by Mr Benade in his heads of argument, the basic rule pertaining to onus in a contractual dispute, is as set out in CHRISTIE'S THE LAW OF CONTRACT IN SOUTH AFRICA, RH Christie & GB Bradfield, 6th Edition, at p. 159:

"It is more correct to say that he who asserts must prove,... Hence if the defendant, ..., pleads an additional term as defence, the onus will remain on the plaintiff to prove his version in order to succeed in his claim,..."

In AMLER'S PRECEDENTS OF PLEADINGS, LTC Harms, 7th Edition, at p. 111, it is stated as follows:

"The onus of proving the terms of the agreement may involve the proof of a negative – for example, proof that the parties did not agree on an additional term as alleged by the defendant."

[29] Mr Benade however submitted that in this instance the defendant is not alleging that the parties agreed on a certain term or on an additional term to the agreement. The defendant alleges, according to Mr Benade's argument, the conclusion of an additional contract as such, being the disability insurance contract – a contract concluded between himself and some insurance company, not the plaintiff. Mr Benade therefore submitted that the onus is on the defendant to prove this further contract he asserts.

[30] I cannot agree with the last mentioned submission of Mr Benade. As quoted in paragraph [26] above, Mr Van Staden specifically testified that the conclusion of such an insurance contract does not constitute "a new insurance contract – it is an add-on to the instalment sale agreement...as an extra".

[31] This interpretation by the plaintiff's witness corresponds with the terms and conditions of the agreement, reflected on p. 29 of Exhibit "A":

"5. Insurance

5.1 We may offer to arrange insurance cover for you.

5.2 You do not have to make use of the insurance that we offer to arrange for you, and you may decline it and substitute a policy of your own choice.

5.3

5.4

5.5 ...

5.6 We may require you to maintain credit life insurance, covering your life, disability, terminal illness and unemployment, to the value of all your outstanding obligations under this agreement from time to time.

5.7 We may offer you optional insurance cover in relation to your obligations under this agreement..."

[32] The defendant testified that the salesman offered the disability insurance, he accepted the offer, the salesman then offered to arrange the disability insurance for the defendant, which offer the defendant again accepted. His evidence is therefore in line with the aforesaid terms and conditions of the agreement. In my view it therefore constitutes an allegation by the defendant that it was a term of the agreement that the salesman will arrange for disability insurance for the defendant.

[33] Having made this finding, the onus is consequently upon the plaintiff to prove that the parties did not agree on such a term and that such insurance contract does therefore not exist.

[34] It is very important to be mindful of the fact that the defendant concluded the agreement with Speedy who was represented by the unknown salesman. The defendant's evidence was that the salesman offered the disability insurance, that the defendant

expressed his choice of wanting to take such insurance to the salesman, that the salesman ticked the relevant option on the insurance needs analysis document, that the salesman undertook to arrange the said insurance and that it is not his signature on the said document next to the choice of "Insurance Shortfall Cover". The evidence presented by the plaintiff to gainsay the aforesaid allegations by the defendant and on which the plaintiff has to rely to prove the absence of the term alleged by the defendant, is that of Mr Van Staden. But Mr Van Staden was not present when the agreement was concluded and has no personal knowledge of the events that occurred during the conclusion and signing of the agreement. He testified as to how different salesman have different ways of indicating which insurance option a prospective buyer chose and he even testified that this salesman of Speedy required a signature in the "taken" block as his way of indicating a specific choice exercised by the defendant. All of the aforesaid however constitute mere speculation by Mr Van Staden. He cannot from personal knowledge deny that the defendant exercised the option of taking disability insurance, nor can he deny that the salesman undertook to arrange the insurance. He conceded, for obvious reasons, that he cannot deny the respondent's version that it is not his signature on the insurance needs analysis document. In fact, he cannot gainsay any of the defendant's allegations pertaining to the conclusion of the agreement and what transpired between the defendant and the salesman. Despite this, the plaintiff failed to call the salesman as a witness, nor did the plaintiff present evidence that the

said witness is not available or untraceable.

[35] The further evidence which Mr Benade attempts to rely on in support of the case of the plaintiff, do not, in my view, take the plaintiff's case any further either, especially against the background that it is the plaintiff's case that the defendant chose the option of Coverplus insurance and that such insurance was indeed activated and implemented in favour of the defendant. Such evidence relied on by Mr Benade, as well as the reasons why I cannot agree with his submissions are the following:

35.1 The fact that the plaintiff is not registered as an insurance provider .

It is not the defendant's case that he concluded the disability insurance contract with the plaintiff. He testified that the salesman undertook to arrange the insurance, but that he did not mention the name of the relevant insurance company and that it is therefore unknown to him – just like he did not know that the theft and damage insurance, which was also arranged by the salesman, was with Unity Insurance, until he received the letter from them.

35.2 The fact that the defendant did not receive any disability insurance policy or contract.

The defendant testified that he did not receive an insurance policy contract regarding the Coverplus insurance either. He denied having received the Hollard policy contained in Exhibit "A", p. 1 to 23, and the policy itself does not reflect that it relates to the defendant either. The plaintiff presented no evidence that the Coverplus policy had in fact been sent to the defendant.

35.3 The fact that he did not receive any letter of confirmation regarding the alleged disability insurance.

He testified that he did not receive such a letter pertaining to the alleged Coverplus insurance either. The plaintiff cannot rely on the letter on p. 67 of Exhibit "A" in this regard, as that letter is only dated 12 June 2012.

35.5 The fact that the defendant admitted not having signed any contract pertaining to disability insurance.

The plaintiff did not prove that he had in fact signed such a contract regarding the Coverplus insurance either.

[36] No attempt was made by the plaintiff to present the evidence of an appropriate representative from Hollard Insurance to confirm the plaintiff's allegations pertaining to the existence, or not, of firstly the Coverplus contract between the defendant and Hollard and secondly the disability insurance contract between the defendant and Hollard.

[37] There is a further aspect which was not canvassed by the plaintiff, but which appears from the plaintiff's bundle of documents, Exhibit "A", p. 57 - p. 64, and which is, to my mind, very important. Page 57 reflects a letter from the plaintiff, dated 21 February 2010, addressed to the defendant, in which letter the activation of a Hollard "Outstanding Debt" policy is confirmed against payment of a monthly premium of R 582.00. The detailed statement

appearing on p.58 – p. 64 indeed reflects the charging by the plaintiff of such premium as from 29 March 2010 and the payment thereof by the defendant. The said premium is reflected up to the end of the said statement, the last date being 29 October 2012.

[38] What the aforesaid insurance entails is unknown as it was not canvassed in evidence. Suffice it to say that by the name thereof,

it very much sounds alike to the disability insurance the defendant relies on. I would have expected for the plaintiff to have explained this insurance policy in its evidence, especially to indicate that there is no nexus between the said insurance and the disability insurance contract alleged by the defendant, which it failed to do.

[39] I find both the witnesses to have been credible witnesses. There is no basis for a finding to the contrary. Mr Van Staden was compelled in the circumstances to speculate about many aspects of this case, but this does not detract from my finding. With regard to Mr Moji, I experienced him to be honest, although ignorant in some respects. Many parts of his evidence are corroborated by other evidence. It is also evident from the evidence of Mr Van Staden that it has been Mr Moji's version right from the onset of his contact with the plaintiff after his injury, and before any dispute between the parties, that he has disability insurance that should cover the outstanding balance on the vehicle.

[40] In view of the aforesaid findings and upon the evaluation of the evidence as a whole, I find that the plaintiff has not discharged its burden of proof pertaining to its obligation to have proved the absence of the term of the agreement regarding the disability

insurance as alleged by the defendant.

[41] For the sake of completeness, I wish to mention that Mr Benade cross-examined the defendant on the issue of his alleged disability

in view of his evidence that he has in the meantime again obtained employment. I however do not deem it necessary to deal with the said evidence, as the alleged disability of the defendant is not in dispute on the pleadings and I was not called upon by counsel at the outset of the hearing to adjudicate this aspect as part of the dispute between the parties.

CONSIDERATION OF THE APPROPRIATE ORDER:

[42] Mr Rathidili requested that the plaintiff's claim be dismissed with costs. However, I deem it necessary to consider whether this will be the appropriate order.

[43] Absolution from the instance is described as follows in PRINCIPLES OF EVIDENCE, Revised 3d Edition, PJ Schwikkard & SE van der Merwe at ch32-578:

"The term "absolution from the instance" is used to describe the finding that may be made at either of two distinct stages of the trial. In both cases it means that evidence is insufficient for a finding to be made against the defendant.

At the close of the case, when both parties have had the opportunity to present whatever evidence they consider to be relevant, the defendant will be "absolved from the instance" if, upon an evaluation of the evidence as a whole, the plaintiff's burden of proof has not been discharged. It means that the plaintiff has not proved her claim against the defendant. It is not a bar to the plaintiff reinstituting the action (provided the claim has not by then prescribed) and in that respect it is to be distinguished from a positive finding that no claim exists against the defendant. Absolution from the instance is the proper order when after all the evidence the plaintiff has failed to discharge the normal burden of proof."

- [44] The credibility of the Plaintiff's evidence is usually assumed for the purpose of an application for absolution. If the plaintiff's case is based on a document, and the interpretation of the document is in dispute, a decision on the meaning of a document is preferably reached only at the end of a case. See LAW OF EVIDENCE, CWH Schmidt & H Rademeyer, (internet version), para 3.1, p. 3-17. Also see GAFOOR v UNIE VERSEKERINGSADVISEURS (EDMS) BPK 1961(1) SA 335 (A) 340C.
- [45] I have indicated a number of respects in which the plaintiff, in my view, failed to present any and/or appropriate evidence in support of its claim and therefore in discharging its burden of proof. In the circumstances I cannot make a finding that the plaintiff has no claim against the defendant – it might have a claim, but in these proceedings it failed to discharge its burden of proof.
- [46] I consequently consider an order of absolution from the instance to be the appropriate order.

COSTS:

- [46] With regards to costs, there is no reason why costs should not follow the respective success of the parties, which costs will obviously include the costs of the summary judgment application.

ORDER:

Absolution from the instance is ordered in favour of the defendant, the plaintiff to pay the costs of the action.

C. VAN ZYL, J

On behalf of the Plaintiff: Adv. H.J. Benade

On Instructions of:

Symington & De Kok

BLOEMFONTEIN

On behalf of the Defendant: Adv. N.R. Rathidili

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