

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited t/a Wesbank v Mpungose (52965/2018) [2025] ZAGPPHC 594 (4 June 2025) [2025] ZAGPPHC 594

COURT

North Gauteng High Court, Pretoria

BEFORE

N G M Mazibuko

CASE / FILE NUMBER

52965/2018

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IN

**THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)****CASE NO: 52965/2018****(1) REPORTABLE: NO****(2)****OF INTEREST TO THE JUDGES: NO****(3)****REVISED: NO****DATE:** 4 JUNE 2025**SIGNATURE:** In**the matter between:** FIRSTRAND
BANK LIMITED T/A WESBANK
Plaintiff
and
MNTUKABONI
MPUNGOSE
Defendant

The
judgment is handed down electronically by circulation to the parties'
legal representatives by email. The date for hand-down
is deemed to
be 4 June 2025.

JUDGMENT

Mazibuko AJ

INTRODUCTION

[1] The plaintiff instituted an action against the defendant for damages suffered after it repossessed a 2015 Jaguar XJ 5.0 VB S/C Supersport LWB with engine number [...] and chassis number [...] ('the Jaguar') that was allegedly sold for just above R2.7 million to the defendant.

BACKGROUND

[2] It is alleged that the defendant breached the written instalment sale agreement ('the agreement') concluded on 4 May 2017 between the plaintiff and the defendant by failing to make due and punctual monthly instalments of about R38 000 in terms of the agreement.

[3] On 23 August 2019, the parties agreed that the Jaguar should be sold. On 25 August 2019, it was uplifted from one Mr JJ Steyn ('Steyn') at a car dealership in Montana, Pretoria. It was sold on auction on 5 November 2019 for a sum of R 701 500.00. The agreement was cancelled.

[4] The plaintiff claims from the defendant the difference between the outstanding balance owing on the Jaguar under the agreement and the value the Jaguar was sold for.

[5] The matter served before the court for trial. At the conclusion of the plaintiff's case, parties were respectively granted leave to amend their pleadings at their instance. Amendments were respectively effected. The defendant applied for absolution from the instance, contending that the plaintiff had not presented the necessary evidence to sustain the allegations contained in the particulars of claim. The application is opposed. The court acceded to the counsel's

request to file their respective heads of argument by 11 April 2025.

PLAINTIFF'S CASE

[6] In order to prove its case, the plaintiff relied on its particulars of claim and called three witnesses: Jacobus van der Merwe Mans ('Mans'), Julianne Barnard ('Barnard') and Mswanyianeng Khotsamotladi ('Khotsamotladi').

[7] In its summons, the plaintiff asserted the following:

'4. The agreement was completed and signed online and electronically by the defendant. It constitutes a valid agreement in accordance with the provisions of the Electronic Communications and Transactions 25 of 2002 ('the ECT') inter alia in that:

4.1. It comprised, and was completed in the form of a data message, which data message is accessible in a manner usable for subsequent reference as defined in Section 12 of the ECT Act;

4.2. It was signed by way of an electronic signature, which electronic signature was intended by the defendant to serve as a signature;

4.3. It was electronically signed in compliance with Section 13 of the ECT Act, which signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved

5. The agreement had the following material terms and conditions:-

5.1. Plaintiff sold the motor vehicle to defendant, who purchased same from plaintiff;

5.2. The total amount payable was a sum of R2 717 612.64, of which the first instalment of R38 713.02 (the combined amount consisting of the monthly instalment of R37 744.62 and the monthly service fee of R68.40) was payable on 15 JUNE 2017 and thereafter 70 instalments of R38 713.02 each on the same day of each successive month and a final instalment of R38 713.02 payable on 15 MAY 2023,

5.3. Plaintiff would remain the owner of the motor vehicle until defendant had paid all amounts due under the agreement;

5.4. The risk in respect of the motor vehicle would pass to the defendant on delivery of the vehicle, or signature of the agreement, whichever happens first.

5.5. In the event of defendant failing to comply with any of the terms and conditions of the agreement or failing to pay any amount due under the agreement, plaintiff would be entitled, at its election and without prejudice and in addition to any other rights which it may have under the agreement, to inter alia cancel the agreement, obtain return of the motor vehicle, retain all payments already made in terms of the agreement and to claim as liquidated damages, payment of the O difference between the balance outstanding and the market value of the motor vehicle, determined by a person nominated by plaintiff, defendant having agreed to be bound by such valuation;

5.6. Defendant chose the address in paragraph 2 above as his domicilium citandi et executandi for purposes of the agreement;

5.7 Defendant would be liable for legal costs and collection commission arising from her failure to comply with any of the terms and conditions of the agreement if the matter was referred to an external debt collection company or attorney.

6. The plaintiff duly delivered the motor vehicle to defendant.'

Evidence of Mans

- [8] Mans testified that in 2017, he was employed at Automania CC Toyota Kyalami as a car Finance and Insurance manager. Part of his duties was to assist customers in finding vehicle finance with various banks and insurance with different insurers. He stated that the process that he would generally follow was that the finance and insurance contract could be concluded manually or electronically. Both parties would sign the physical document with a pen with respect to the manual contract.
- [9] The electronic contract would be completed and signed digitally, with the customer's identity being verified before finalisation. The One-Time Pin ('OTP') is sent to the customer's registered phone number. The customer must enter the OTP on the bank's website to access the agreement, the contract number and their identity number before proceeding with the process. Also, he would generally require the potential customer's original documents, such as an identity document, bank statements, and other FICA documentation.
- [10] The electronic contract system includes a Debicheck mandate, which customers must authorise via their online banking platform. The contract cannot be completed unless the Debicheck mandate is accepted. He would also assist customers in entering these details into the system directly linked to the bank. He testified that he had no control over the information provided by customers and never signed on behalf of a customer. The terms Icontract and Econtract both refer to electronic agreements. According to him, it is impossible to enter into such contracts without the customer's knowledge.
- [11] He also stated that he would complete the necessary documentation on behalf of the potential customers and submit it to the banks. The bank would assess the application and determine whether or not to grant finance. He would then inform the customer of the outcome. If the customer accepts the financing terms, they will sign the contract and secure insurance before the vehicle is handed over to the customer. The customer would sign the agreement in his presence, and he would act as a witness.
- [12] He referred to pages C59, C61 to C63 of the discovered documents. The C59 document reflects a digitally signed agreement between the parties. He referred to the stamp in the middle of the page as representing an electronic signature. In terms of C63, the defendant was required to settle three existing financed motor vehicles before entering into a new agreement. They were financed through Toyota Financial Services and Nedbank. In settling the outstanding debt regarding the three cars, the defendant traded them in. He also referred to C64, where the customer confirmed that he has no pending credit applications, any existing finance agreements would be settled in full and that the plaintiff's affordability assessment was conducted based on the assumption that previous debts had been settled.
- [13] Mans referred to C72, which was retained by the bank and never shown to the defendant. It reflected that the Jaguar was registered in the defendant's name, and the defendant was a title holder. He also referred to C73, which showed that the Jaguar was handed over to the defendant on 4 May 2017. Further, he testified that he personally verified the defendant's identity before handing over the car to him.

[14] Under cross-examination, Mans stated that he had no independent recollection of the matter. He relies on the information as reflected in the documentation. He said that on the same day, 4 May 2017, he assisted the defendant with a manual financing application to purchase a BMW X5 M50D, engine number [...] and chassis number [...] ('the BMW X5') from the same dealership. The contract was concluded with Standard Bank, and he witnessed the conclusion of that contract. Regarding the Jaguar, he wrote the defendant's name on the printed delivery receipt. Though the contract was electronically, the

plaintiff required the physical delivery receipt to be signed to ensure the car was delivered to the defendant. He conceded that he was not present when the Jaguar was physically handed over to the defendant or the person who took possession thereof.

[15] He also conceded that he was obligated to inform the plaintiff concerning the defendant's additional credit application to purchase the BMW X5 through Standard Bank and the defendant's financial commitment and that such conduct of non-disclosure was deceitful.

[16] It was put to him that since he or the dealership had the defendant's identity document, bank details and other FICA documentation, they could have used the same documentation for the credit application to the plaintiff without the defendant's knowledge. Mans does not dispute that the defendant is illiterate and cannot speak English or Afrikaans.

Evidence of Barnard

[17] Barnard testified that she is a debt collector and was contracted to recover the Jaguar. She traced it to JJ Steyn's dealership in Zambezi. She contacted the defendant, who refused to sign a termination agreement. She recovered the Jaguar after submitting an affidavit to the plaintiff to facilitate repossession. She testified that she communicated with the defendant in English a few times and was under the impression that he had no difficulty communicating in English.

[18] Under cross-examination, she conceded that she did not verify the identity of the person with whom she telephonically communicated. Steyn refused to hand over the Jaguar voluntarily. The defendant alleged the vehicle was obtained fraudulently.

Evidence of Khotsamotladi

[19] Khotsamotladi testified that he is an attorney employed by the plaintiff. Reviewing the relevant documentation, he found that the defendant entered into an agreement with the plaintiff to purchase the Jaguar.

[20] The Icontract was completed electronically. Regarding the Icontract, the plaintiff sends an OTP to the customer's phone number for verification. The customer has to click a read and accept button to move to the next page. He stated that the plaintiff conducted an affordability assessment and verified the defendant's credit profile with credit bureaus. The information provided by the credit bureau was considered accurate.

- [21] Under cross-examination, he testified that the Debicheck system was not in use at the plaintiff when the agreement was signed. Mans was an independent person employed by the dealership. He was not the plaintiff's agent. No plaintiff's representative was present when the agreement was signed. He was not familiar with the provisions of section 2(3)(b)(i) of the NCA.

ISSUE IN DISPUTE

- [22] The court has to determine whether the parties entered into the instalment sale agreement for the Jaguar on 5 May 2017.

PARTIES' ASSERTIONS

- [23] The plaintiff, through its counsel, argued that the court ought to accept its version that the defendant on the day in question entered into two instalment sale agreements, one through signing a printed paper with regard to the BMW X5 with Standard Bank and the other electronically for the Jaguar, which is the subject matter for this matter. The Icontract is based on the principle of offer and acceptance. Once the plaintiff provides the customer with an agreement to sign online and electronically, the plaintiff has already accepted all the terms and conditions offered to the customer. Only then can the customer analyse by reading every page and clicking that he accepts the terms on each page; the contract will automatically be concluded once all pages have been accepted. Further, it has adduced evidence that the defendant entered into an instalment sale agreement with the plaintiff on 04 May 2017 and purchased the Jaguar vehicle. Mans represented both the dealership and the credit provider. The stamp in the middle of the page constitutes an electronic signature of the defendant as well as acceptance from the plaintiff.
- [24] The defendant has acknowledged in writing that the plaintiff delivered the Jaguar motor vehicle to the defendant at the dealership. The defendant performed in terms of the Icontract by making payment of monthly instalments in the amount of R38,713.02 and subsequently defaulted.
- [25] On behalf of the defendant, it was argued that the plaintiff has not proven that the defendant entered into an online agreement that he electronically signed in purchasing the Jaguar from the plaintiff and taking delivery thereof.
- [26] It was further argued that the defendant was a victim of fraud perpetuated against him. He was falsely induced to sign the delivery receipt, which must have been included in the documentation for purchasing a BMW X5 vehicle he purchased on the same day. If the court found that an agreement was concluded between the parties, he disputes that there was proper affordability assessment in terms of the NCA by the plaintiff, thereby the plaintiff contravening the provisions of sections 80 and 81 of the NCA. The agreement did not comply with the provisions of section 2(3)(b)(i) of the NCA[1] and the Electronic Communications and Transactions Act[2] ('ECTA').

THE LAW

- [27] 'At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.'[3]
- [28] An order of absolution from the instance has been described as follows: 'An order granted either at the end of the plaintiff's case or at the end of the whole case, dismissing the plaintiff's claim. Its effect is to leave the parties in the same position as if the case had never been brought, for a judgment of absolution from the instance does not amount to res judicata, and the plaintiff is entitled to proceed afresh.'[4]
- [29] Absolution from the instance can only be granted if the onus rests upon the plaintiff. If the onus rests on the defendant, there can be no order for absolution from the instance either at this stage or later.[5]
- [30] The court has a discretion to grant or refuse absolution from the instance, which discretion is to be exercised based on fairness, equity and the interest of justice.[6] It has been held that in the ordinary course of events, absolution at the end of the plaintiff's case should be granted sparingly. In exercising discretion, the court may consider that the plaintiff's case may be strengthened by evidence emerging from the defendant's case.[7]
- [31] The test to be applied is whether the plaintiff has made out a prima facie case, which calls for the defendant to answer. Where the plaintiff relies on inferences, it is sufficient if the inference he wishes to draw is a reasonable one; it need not be the only reasonable inference.[8]
- [32] In *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk*,[9] the court stated:
- "Another observation that may be made is that as a rule when a trial Court refuses absolution at the close of the plaintiff's case, it avoids unnecessary discussion of the evidence, lest it seem to take a view of its quality and effect that should only be reached at the end of the whole case. In the same way, on appeal, it is generally right for the Appellate Tribunal, when allowing an appeal against an order granting absolution at the close of the plaintiff's case, to avoid, as far as possible, the expression of views that may prematurely curb the free exercise by the trial Court of its judgment on the facts when the defendant's case has been closed."
- [33] The agreement constitutes a valid agreement in accordance with the provisions of ECTA, where it 'was completed as an accessible data message, signed by way of an electronic signature intended to be a signature, and signed in compliance with Section 13 of ECTA, which signature is a valid electronic signature and have been applied properly unless the contrary is proved.'

DISCUSSION

- [34] In order to survive absolution from the instance, the plaintiff is required to adduce evidence relating to all the elements of the claim. At the trial, the defendant persistently challenged the plaintiff's evidence pertaining to the agreement's validity with regard to the Jaguar. He denied having any intentions of purchasing the Jaguar. He went to the dealership to purchase the BMW X5, not the Jaguar. I believe the witnesses did not help demonstrate material facts cogent to the plaintiff's claim. In their testimonies, they could not withstand cross-examination on the foundational and material basis of the Icontract and the delivery receipt upon which the plaintiff has placed its reliance. As well as the circumstances and facts leading to the conclusion of the agreement.
- [35] In considering whether the plaintiff's case may be strengthened by evidence emerging from the defendant's case, I have had regard to the pleadings and evidence adduced at trial. The question of who was the plaintiff's employee appointed to represent it when the agreement with the defendant was concluded remained unanswered. Khotsamotladi's testimony was that at the time the agreement was signed, no one was present on behalf of the plaintiff, and Mans was no plaintiff's representative. Therefore, the plaintiff's counsel's submission that Mans represented both the dealership and the plaintiff cannot be sustained. Further, even if the defendant were to open its case and adduce evidence, he would not be of assistance to the plaintiff's case in this regard.
- [36] It is not in dispute that on 4 May 2017, the defendant personally attended at Auto Mania CC to purchase a BMW X5. According to the agreement and the delivery receipts, Mans assisted him in concluding a written instalment agreement for the sale of the BMW X5. He took delivery of the BMW X5. Mans's testimony about the Icontract relating to the Jaguar was that the agreement was concluded electronically using a DebiCheck system. Khotsamotladi's testimony was that at the time of the agreement, the plaintiff did not have DebiCheck yet, and same was not in use.
- [37] In terms of the agreement relating to the Jaguar, the defendant was required to pay an initial deposit of R150 000 and a monthly instalment of R38 713.02. None of the witnesses nor the pleadings could shed light on who paid the deposit as it was evident it was not the defendant, nor was it from any of his banking accounts. However, from the discovered documentation, the R150 000 was paid as an initial deposit. The plaintiff would know from whose account the deposit came, as well as the dealership represented by Mans and or Steyn. On the other hand, the evidence is that the defendant had traded in his three motor vehicles financed through Toyota Financial Services and Nedbank to purchase the BMW X5.
- [38] Mans testified that he does not recall assisting the defendant. He is relying on the documentation provided. He conceded that according to the delivery receipt, he completed the delivery receipt with regard to the Jaguar. On the other hand, his handwriting appears on the delivery receipt of the BMW X5. Reliance on and reference to the delivery receipt document itself and the mere fact that it contains the defendant's name is not sufficient to

prove that the parties entered into an agreement. It cannot be inferred solely on that basis that the defendant entered into a contract with the plaintiff. The plaintiff does not deny that the defendant did not complete that receipt, though his name appears there. Mans cannot recall whether he specifically assisted this particular customer, the defendant. That is understandable when regard is had to the passage of time and the nature of his work, which causes him to deal with different people all the time. There is also no evidence that the defendant took delivery of the Jaguar.

- [39] The Jaguar was seized from Steyn in another dealership in Montana. The evidence revealed that Steyn is one of the dealership people who were allegedly present on the day the defendant concluded a contract with Standard Bank concerning the BMW X5 and when the alleged Icontract for the Jaguar was concluded. It is not clear how the Jaguar ended up with Steyn at a dealership in Montana. Steyn was not called to testify, especially to demystify the allegation raised by the defendant that he might have been induced to sign the delivery receipt of the Jaguar whilst signing the documentation relating to the BMW X5. I believe the allegation of being induced, as raised by the defendant, is not without relevance when one has regard to the facts and circumstances of this matter. Be that as it may, the court is alive to the fact that parties are the ones who know their cases better than a presiding officer.
- [40] In light of the preceding submissions of counsel respectively, absolution from the instance ought to be granted. I am inclined to agree with the defendant that it is unnecessary for him to answer to the allegations made against him by the plaintiff regarding the agreement concerning the Jaguar, as the requirement of the provisions of section 2(3)(b)(i) of the NCA had not been met.
- [41] With regard to agreements, compliance and authorship must be proved for the electronic signature to be valid under the ECTA.[10] The plaintiff has not led sufficient evidence indicating prima facie that the defendant had entered into an electronic agreement with it or evidence material and relevant to its claim. In my respectful view, there is no evidence upon which the court could find in the plaintiff's favour. On behalf of the defendant, there were suggestions, contrary to the plaintiff's case, that were put to the plaintiff's witnesses. I find that the plaintiff has not met the requirements of its claim. As a result, the application for absolution from the instance ought to be granted. There is no reason why costs should not follow the result.

[42] In the result, the following order is made;

Order:

1. The application for absolution from the instance is granted.
2. The plaintiff is to pay the defendant's costs.

N G M MAZIBUKO

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 4 to 6 March 2025

Judgment

delivered on: 4 June 2025

APPEARANCES:

For the Plaintiff: Adv PJA Griesela

Attorney for the Plaintiff: Strauss Daly

For the defendant: Adv PA Walkins

Attorney for the defendant: Sarlie & Associates INC

[1]

- (3) If a provision of this Act requires a document to be signed or initialed by a party to a credit agreement, that signing or

initialing may be effected by use of - (b) an electronic signature as defined in the Electronic Communications Act, 2002 (Act 25 of 2002), provided that- (i) the electronic signature is applied by each party in the physical presence of the other party or an agent of the party; and (ii) the credit provider must take reasonable measures to prevent the use of the consumer's electronic signature for any purpose other than the signing or initialing of the particular document that the consumer intended to sign or initial.

[1]

- (3) If a provision of this Act requires a document to be signed or initialed by a party to a credit agreement, that signing or

initialing may be effected by use of -

- (b) an electronic signature as defined in the Electronic Communications Act, 2002 (Act 25 of 2002), provided that-

- (i) the electronic signature is applied by each party in the physical presence of the other party or an agent of the party; and

(ii) the credit provider must take reasonable measures to prevent the use of the consumer's electronic signature for any purpose other than the signing or initialing of the particular document that the consumer intended to sign or initial.

[2] 25 of 2002.

[3] Rule 39(6) of the Uniform Rules of Court.

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- [4] The seminal work Jones & Buckle, the Civil Practice of the Magistrates' Courts in South Africa (Act 325).
- [5] (Schoeman v Moller 1949 4 All SA 60 (O); 1949 3 SA 949 (O).
- [6] Fedgas (Pty) Ltd v Rack-Rite Bop (Pty) Ltd [1997] 3 All SA 68 (B).
- [7] Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 4 All SA 252 (T); 1958 4 SA 307 (T).
- [8] (Marine and Trade Insurance Co Ltd v Van der Schyff 1972 1 All SA 144 (A); 1972 1 SA 26 (A); Alli v De Lira 1973 4 All SA 547 (T); 1973 4 SA 635 (T).)
- [9] 1961 (1) SA 335 (A) at 340D-G
- [10] Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash 2015(2) SA 118 (SCA).
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