

SOUTH AFRICA / JUDGMENT

Firststrand Bank LTD t/a Wesbank v Molamuagae (24558/2016) [2018] ZAGPPHC 762 (26 February 2018) [2018] ZAGPPHC 762

COURT

North Gauteng High Court, Pretoria

BEFORE

M L Senyatsi

CASE / FILE NUMBER

24558/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 24558/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

FIRSTRAND

BANK LTD t/a WESBANK

Plaintiff

and

MOLAMUAGAE,

MODISAOTSILE ANDREW

Defendant

JUDGEMENT

SENYATSI AJ

INTRODUCTION

1. The Plaintiff issued summons against the defendant for the following relief:
 - a) Cancellation of the instalment sale agreement between the parties;
 - b) Repossession of the 2014 Jinbei Haise H2 2.41 16 seater combi;
 - c) Damages; and
 - d) Costs.
2. The defendant filed a plea and counter-claims, the first counter claim being based on the action quanti minoris, and the second counter-claim being a claim for damages.
3. It was agreed between the parties that the Court at trial was not called upon to adjudicate the Plaintiffs damages claim and the defendant's two counter claims. Same were postponed sine die for later adjudication.
4. Shortly before the trial date the defendant filed three notices of intention to amend as well as Rule 35(3) notice and Rule 35(3) application requesting the Plaintiff to make better discovery. The application and the notice of intention to amend were abandoned by the defendant and this was confirmed by counsel for the defendant Mr Sasson.

EVIDENCE

5. The Plaintiff called one witness who testified on 17 November 2017 and closed its case. The case was postponed to 24 November 2017 to enable the defendant to present his case by way of evidence. On the 24 November 2017, Mr Sasson informed this Court that the defendant closes his case without testifying in any other way.
6. As stated before, the cause of action is based on credit agreement in terms of which the Plaintiff sold to the defendant a 2014 Jinbei Haise H2 2.41 16 Seater, Engine No: 4RB247145A and Chassis No. LSYHKAAF7EK083640 vehicle ("motor vehicle") on credit.
7. It is the Plaintiff's case that the defendant was in breach of the agreement by failing to fulfil his monthly payment obligations. It consequently, sought cancellation of the agreement and repossession of the motor vehicle.
8. The onus rests with the Plaintiff to prove the credit agreement relied upon and the right to cancellation of the credit agreement due to breach of monthly repayment obligations in compliance with section 129 of the National Credit Act No 34 of 2005 notice.

9. The parties have not agreed that any documents will, without further proof, serve as evidence of what they purport to be. Accordingly all documents relied on had to be produced and evidence had to be led thereon.

10. The Plaintiff pleads that the agreement was completed and signed electronically by the defendant and that same constitutes a valid agreement in terms of the Electronic Communications and Transactions Act, Act 25 of 2002 ("the EC TA").

11. The plaintiff called one witness Mr Mboniseni Mathivha ("Mathivha").

He testified that he is the Action Controller of the Plaintiff and he has the knowledge of the transaction between the parties in the instant case.

12. The plaintiff and the defendant concluded an agreement referred to in annexure "A" of the particulars of claim. The defendant signed the agreement online and electronically this type of an agreement is known as an i-contract.

13. For the agreement to be created and opened online for signature, the customer must insert the personal information number (PIN) received to his cellular phone number and his ID number. The Plaintiff also phones the customer to confirm his details (the KYC process).

14. The motor vehicle contracted for by the parties is as described by the delivery receipt that was signed by the defendant. The signature on the delivery receipt compared to the signature contained on the resisting summary judgement appeared to be the same.

15. The defendant received the licence disc in respect of the above described motor vehicle. The defendant acted in breach of the agreement by failing to adhere to his monthly payment obligations and this is reflected in the detailed statement.

16. Mathivha testified that the first breach occurred in June 2015 and last credit in respect of the account was on 7 May 2016. He further testified that in terms of clause 2.4 of the agreement, the delivery receipt is also signed if the customer (the defendant), is satisfied with the motor vehicle. In terms of clause 13 of the agreement, the

Plaintiff has the right to terminate the agreement in the event of failure to pay the monthly instalments in terms of the agreement.

17. The signature reflected on the terms and conditions in confirmation that the defendant read and accepted the terms and conditions of the agreement. The watermark on the agreement was generated by the computer only after the defendant accepted the contents of all pages of the agreement, thus, the defendant could only, move from one page to the next if he accepted the contents, i.e. detail or terms and conditions on that page.

18. The i-contract can be signed by the customer only and does not require a witness to co-sign, even reflects signature lines for witnesses. Mathivha stated that he was writing a manual for the whole bank to use on this aspect for the Plaintiff.

19. Furthermore, he testified that pages 11, 12 and 13 of the pleadings contained in the discovery bundle reflect the wrong account number (reflected in text box at the top right hand side of the pages).
20. The tick box named "signed contract", reflected on the tax invoice towards the foot of the page was not marked with a "Y" (for Yes) or "N" (for No.). This does not imply that the agreement .was not concluded and/or signed because the tax invoice is dated 9 January 2015 and the defendant signed the agreement (as per watermark) on 10 January 2015.
21. The delivery of the motor vehicle, in terms of the delivery receipt, is only given to a customer after finance for the sale of the vehicle was approved by the Plaintiff and it was the same in this case.
22. He testified that the fact that the contract was electronically signed a day after delivery of the motor vehicle to the defendant does not suggest that no contract was concluded between the parties. Once the customer completed the online process and signed the i-contract, the contract is regarded as finalized although the bank does not sign it.
23. The defendant last paid the instalment for the vehicle on 19 April
2015. Mr Mathivha testified furthermore that if the defendant fails to pay any amount due under this agreement, then the plaintiff is entitled to proceed with the termination of the agreement.
24. The defendant did not testify at the hearing of the instant case. In his plea he denied, , that he concluded an agreement on 10 January 2015 with the Plaintiff. He conceded therein that he received a second hand vehicle from M & H Motors in Rustenburg but cannot admit or deny the particulars of the vehicle. It is not clear whether he intended to purchase a second hand or new car and no evidence was led on this point.
25. He conceded having failed to make his monthly instalment payments which he blamed on the plaintiff for failing to ensure the motor vehicle resulting in the loss suffered. No evidence was adduced by the defendant on this point.
26. Another point raised by the defendant is that the plaintiff failed to comply with the provisions of the NCA. It is for this reason that he contends that the plaintiff is not entitled to the return of the vehicle.

ISSUES

FOR DETERMINATION

27. The issues that require determination can be summarised as follows:

27.1. whether or not the parties concluded an instalment sale agreement in terms of the NCA and whether the electronic signature thereof is in compliance with the ECTA and renders the agreement enforceable and whether in fact the plaintiff complied with the provisions of the NGA;

27.2. whether the defendant is allowed to raise a defence not pleaded in the pleadings at the hearing of the matter.

LEGAL PRINCIPLES

28. As the defendant elected not to testify at the hearing of this matter, the only testimony that will be relied on to determine this matter will be that of Mathivha on behalf of the Plaintiff. Secondly the lack of evidence from the defendant leaves this Court with his pleadings only and no evidence from him to support his plea. I will therefore start dealing with the second issue on pleadings.

29. During the cross-examination of Mathivha, it became apparent to me that the defendant intended to present a defence that had not been pleaded.

30. In terms of the Uniform Rules of this Court the purpose of pleadings is to inform the other party of his case by setting out the material upon which each party relies for his claim or defence.[1] Erasmus,[2] puts it as follows:-

"the object of pleadings is to define issues so as to enable the other party to know what case he has to meet". The parties are limited to their pleadings."

31. The significance and requirements of rule 18(4) of the Uniform Rules of the High Court (the Rules) on pleadings were commented on in *Trope v South African Reserve Bank*,[3] as follows:-

"It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms: Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abortion of further particulars, and the fact that non-compliance with the provisions of Rule 18(12) amounts to irregular step, a greater degree of particularity of pleadings is required: No doubt, the absence of the opportunity to clarify an ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleadings. The ultimate test, however, must in any view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law."

32. The pleader is required to plead only material facts (*facta probantia*) and not pieces of evidence (*facta probata*).[4]

33. In *Buchner and Another v Johannesburg Consolidated Investment Co. Ltd*,^[5] De Klerk J commented as follows on Rule 18(4):-

"I emphasize the words 'shall contain a clear and concise statement of material fact! The necessity to plead facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgement. A summons which propounds the Plaintiffs own conclusions and opinions instead of material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a Plaintiffs opinion by elevating it to a judgement without first scrutinizing the facts upon which the opinion is based."

34. It has been held by the Appellate Division many years ago in *Middleton v Carr* ^[6] that:-

"Generally speaking the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage or avoiding a special order as to costs, on the court's readiness at the argument stage or an appeal to treat unpleaded issues as having been fully investigated."

35. In *Alphedia Investments (Pty) Ltd v Greentops (Pty) Ltd*^[7] in dealing with limiting issues to the pleaded case, the Court confirmed that:

"the issues as defined by the pleadings must not be lost sight of and a party cannot rely on causes of action or defences which were not put in issue and were consequently not fully investigated".

36. A pleader is not allowed to direct the attention of the other party to one issue and then, at trial, attempt to canvass another.^[8]

37. I have considered the pleadings of the defendant with regards to his defence, they constitute bare denials. He admits to having received a motor vehicle which was a second hand from H & M Motors. He contends that the Plaintiff failed to insure the said motor vehicle. Although he denies that he concluded the agreement he fails to state

the basis thereof.

38. During cross-examination of Mathivha by the defendant's Counsel, it became apparent that he was now raising the issue of the agreement not being in compliance with NCA but failed to plead as such in the pleadings. This is not permissible as this amount to ambush of the Plaintiff at trial.

39. I now deal with the question whether the agreement concluded was compliant with the NCA. The defendant has disputed compliance with the provisions of the NCA but failed to substantiate the same.

40. The proper analysis of the defendant's plea reveals a bare denials. It is trite law that whenever a denial implies some positive allegation upon which the defence will rest, such as a denial that the signature to an agreement constitute an electronic signature or that the defendant signed the agreement electronically or at all, the defendant ought to have gone on to state the material facts relied upon. What is required of the defendant is that he should state the grounds of his defence with sufficient clarity and in sufficient detail to enable the Plaintiff to know what case he has to meet.[9]

41. In FPS Ltd v Trident Construction (Pty) Ltd, [10] the Court held that:

"A defendant must therefore give a fair and clear answer to every point of substance rapped by a Plaintiff in his declaration or particulars of claim, by frankly admitting or explicitly denying every material matter alleged against him".

42. It has been contended on behalf of the defendant that section 2(3) of the NCA was not complied with. This section provides as follows:-

"If a provision of this Act requires a document to be signed or initialled by a party to a credit agreement, that signing or

initialling may be effected by use of:-

- (a) an advanced electronic signature, as defined in the Electronic Communications Act 2002 (Act 25 of 2002); or
- (b) an electronic signature as defined in the Electric Communications Act, 2002 (Act 25 of 2002), provide 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 initially of the particular document that the consumer

intended to sign or initial.

43. The NCA does not provide for the form that the signature to the instalment sale agreement needs to take. As a result, it is quite possible to sign the agreement electronically and in compliance with the ECTA.

44. In the modem society of high technology, agreements are in fact concluded without the parties physically being in the presence of each other. Mathivha explained in his testimony that in the instant matter, the agreement became only valid once the terms and conditions of the agreement were accepted by the defendant using a mobile phone device. He explained that the safety mechanism to ensure that the correct client was accepting the terms and conditions of the agreement was to use his or her mobile number. This was

explained as one of the important security features of the i-contract as he calls it. It ensures the protection of both the credit granter and the credit receiver.

45. In *McWilliams v First Consolidated Holdings (Pty) Ltd*,^[11] it was held that a party who wishes to rely on a contract must allege and prove the terms on which he or she seeks to rely. In that case, an appeal was dismissed where the appellants (defendant) sought a finding that no contract had been concluded after the express acceptance of the terms of the contract was not affected by the appellant.
48. In the instant matter, the defendant failed to make out a defence upon which his denial of existence of the instalment sale agreement is based.
49. He did not deny that he received a motor vehicle. On the contrary, he suggested in the pleading that he received a second hand motor vehicle and that the Plaintiff failed to take out an insurance cover for it, resulting in damage for him. His contention was not supported by any evidence as he chose not to adduce any evidence.
50. He admitted that in the pleadings that he paid a deposit of R65 000-00 towards the motor vehicle. This in my view, is clear evidence that there was indeed an instalment sale agreement concluded by the parties. If there were not so why would the defendant be paying a deposit of R65 000-00.
51. Having considered all the evidence adduced on behalf of the plaintiff and the admission referred to above, I am persuaded that there was indeed an agreement between the parties. The technical points raised

in argument on behalf of the defendant cannot in my view, offer any refuge to the defendant regarding his obligations to fulfil the terms of the agreement.

52. As a consequence I am satisfied that the plaintiff has made out a case to which the defendant needs to answer. As the defendant elected to close its case without leading evidence, this Court should therefore , after consideration of all evidence supported by the documents, rule in favour of the Plaintiff.

ORDER

53. The following order is made:
 - a) The instalment sale agreement concluded by the parties on 10 January 2015 is hereby cancelled;
 - b) The defendant is hereby ordered to return the motor vehicle being a 2014 JINBE HAISE H2, 2.4L 16 SEAT with engine number 4rb247145A and chassis number LSYHKAAF7EK083640 to the plaintiff forthwith;
 - c) In the event the defendant fails to return the motor vehicle as ordered, the Sheriff of this Court is hereby authorised to attach and handover the motor vehicle set out in

- (b) above five days from the date of this order;
- d) The plaintiff is hereby granted leave to apply for
- (i) Damages, if any, in an amount to be calculated in accordance with Section 127(5) - (9) of the NCA.
- (ii) Interest on the said amount to be determined at a later date;

M L SENYATSI AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

PRETORIA

GAUTENG

COUNSEL FOR PLAINTIFF MR I OSCHMAN

INSTRUCTED BY

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NAUDE STEYN ATTORNEYS

c/o EVAN DER WESTHUIZEN ATTORNEY

- [1] See Rule 18 of the Uniform Rule of Court
- [2] See Erasmus Commentary on Rule 18, 0 1-228
- [3] 1992(3) SA 208 (t) AT 210G-J
- [4] See Makgae v SentraBoer (Kooperatief) Bpk 1981 (4) SA 239(T)
- [5] 1995 (1) SA 215 (T) at 216 H-J
- [6] 1949 (2) SA 374 (A) at 385- 386
- [7] 1975(1) SA 161 (T) at 162A
- [8] See Nyandeni v Nata l Motor Industries Ltd 1974 (2) SA 274(0) at 279; Kali v Incorporated General Insurance 1976(2) SA 179(D)at182(A).
- [9] Makhwelo v Minister of Safety and Security 2017 (1) SA 274 (GJ) at 276 G-H
- [10] 1989 (3) SA 537 (A) at 542

[11]

[1982] 1 ALL SA 245(A):

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