

SOUTH AFRICA / JUDGMENT

Ndara and Another v Weir Investments (Pty) Limited and Others (3180/2013) [2015] ZAECHGHC 12 (5 March 2015)

[2015] ZAECHGHC 12

COURT

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas

CASE / FILE NUMBER

3180/2013

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – GRAHAMSTOWN

Case No: 3180/2013

In the matter between

MZUKISI LUBABALO NDARA.....First Plaintiff

UNATHI NDARA.....Second Plaintiff

and

WEIR INVESTMENTS (PTY) LIMITED.....First Defendant

FIRST RAND BANK LIMITED t/a WESBANK.....Second Defendant

JAEN VAN AARDT..... Third Defendant

JUDGMENT

REVELAS J

- [1] The plaintiffs, who are husband and wife, instituted an action against the three defendants, on grounds arising out of the sale of a 2004 model Nissan X Trail 2.2 D. SE Sport Utility Vehicle (“the vehicle”) to the first plaintiff by the first defendant. The second plaintiff’s cause of action is not apparent from the pleadings and I will therefore regard the first plaintiff as the only plaintiff in this matter.

[2] The vehicle was purchased in terms of an instalment sale agreement concluded on 24 November 2004 (“the agreement”). It is common cause that the purchase price of the vehicle (a demonstration vehicle with plus minus six thousand kilometres reflected on its odometer), was R297 990.00 plus extras, totalling R333 430.00. The monthly instalment payable to the first defendant was R8000.22 per month for a period of five years, the last instalment being due on 15 November 2009. Since 2007, the plaintiff ceased to make any further payments under the agreement.

[3] The plaintiff’s cause of action is premised on alleged fraudulent misrepresentations made to him by the three defendants in respect of the purchase price of the vehicle. The plaintiff seeks orders declaring the agreement null and void, alternatively,

confirming its cancellation. He also seeks orders that the defendants accept the return of the vehicle and refund the plaintiff in respect of all instalments paid by him to the second defendant in the sum of R166 934.44. In the addition, the plaintiff claims delictual damages in the amount of R10 000,000.00 plus interest on the aforesaid amounts and costs on a scale as between attorney and own client.

[4] In their special plea, the defendants rely on section 11(d) of the Prescription Act 68 of 1969, in terms whereof the plaintiff’s claims are subject to a three-year extinctive prescription period. They submit that the plaintiff’s cause of action has prescribed, because the agreement in was concluded in 2004, and summons in the present matter was issued and served only nine years later, in September 2013. The plaintiff, relying on section 12(3) of the Prescription Act, maintains that his claim had not prescribed, because only in August 2013, he became aware of certain facts allegedly proving the fraudulent conduct on the part of the defendants upon which his cause of action was premised. He then instructed his attorney to issue summons against the three defendants.

[5] The matter was set down for hearing on 2 March 2015. The plaintiff’s attorneys of record unilaterally removed the matter from the roll two weeks before the trial date which was opposed by the defendants and on the first day of trial the plaintiff brought an application for postponement which was dismissed on the basis that there were no good grounds for the postponement. The reasons for the aforesaid conclusion were that the parties were advised of the trial date in January 2014. The agreement in question was concluded eleven years ago. The parties sued each other in the magistrate’s court in two separate cases, a concerning the agreement which is the subject-matter of this case. The need for expedition of the present proceedings was obvious. The reason for seeking to remove the matter from the roll, advanced by the plaintiff’s attorney when seeking an agreement thereto from the defendants’ attorney, was that the plaintiff would be overseas in March 2015.

[6] As it turned out the plaintiff would not be absent until 9 March

2015. Another reason given was that since the plaintiff had initiated criminal (fraud) charges against the defendants, allegedly arising from the same events, it would be prejudicial to them to be cross-examined in these proceedings. The defendants had no objection to being

cross-examined and wanted the matter to proceed. That reason thus fell away. The final reason advanced as to why the plaintiff needed a postponement, was that the plaintiff had to examine the police docket and peruse the statements of witnesses. The plaintiff could have perused the docket and consulted with the witnesses before the trial commenced if he wished. I had some difficulty in comprehending what new facts could have been found in the docket, given the nature of the plaintiff's cause of action and the facts. I was not persuaded that any of the aforesaid reasons given by the plaintiff were proper grounds for a postponement.

- [7] The matter then proceeded only on the question of prescription, as raised in the defendants' special plea. The plaintiff was the only witness who testified. Much of the evidence lead by the plaintiff concerned the merits of the case, but I will endeavour to confine myself to those parts of his evidence which are relevant to the question of prescription.
- [8] The plaintiff testified that he agreed to all the terms of the agreement, in particular the purchase price of the vehicle, of which he took possession (he is in fact still in possession of the vehicle) and commenced paying the instalments in terms of the agreement until
2007. Conversations with work colleagues led him to believe that he had paid too much for the vehicle. He began investigating purchase prices and visited car dealers. A Mr Fulani advised him that the price he paid for the vehicle was the price for a brand new model of the same kind, and since the vehicle he had purchased was a demonstration vehicle, he should have paid considerably less. He was shown a price manual in this regard which corroborated Mr Fulani's assertions. The plaintiff immediately went to the second defendant whose premises were at that stage still in King William's Town, where he received confirmation that the purchase price he paid was for a new vehicle, as opposed to a used one and that the real value of the vehicle he bought was R261 394.00.
- [9] Employed as a director in the Department of Health the plaintiff was eligible to benefit from a Government Vehicle Scheme for senior officials, which was applicable only to purchases of new vehicles financed by the second defendant on preferable terms. The plaintiff pleaded that the defendants (all three) were aware of this fact and conspired with each other to sell the vehicle to him at the higher price payable for a new vehicle. According to his evidence the misrepresentations were made by the first defendant to the second defendant.
- [10] The plaintiff found that he was in a very unenviable position financially and wished to extricate himself from the agreement. He therefore expressed his grievances in a letter written on 9 November 2005 to the second defendant, alleging that he was induced ("manipulated") into entering into the agreement in terms of which a demo vehicle was sold to him as new.

[11] In December 2005, the plaintiff issued summons against the first defendant for payment of the amount of R71 490.00 being the difference between the purchase price paid and the market value of a demo model. In his particulars of claim the plaintiff made the following averments which are relevant to the question of prescription.

“12. The defendant has failed dolo malo to disclose the true purchase price of the vehicle at the time of purchase, which failure was materially (sic).

13. Alternatively to paragraph 12 supra, the defendant has intentionally further, alternatively negligently represented to plaintiff that the vehicle's price is R297 990.00.

14. If the plaintiff was aware of the true purchase price of the vehicle, the plaintiff would not have purchased the vehicle, alternatively, the plaintiff would have offered a reduced purchase price in this instance”.

[12] The aforesaid claim was dismissed as a result of the plaintiff's non-compliance with certain procedures. The plaintiff

emphasized that the merits of the matter were not adjudicated upon. That hardly matters. The significance of the aforementioned

matter lies in the fact that the plaintiff's case in that matter was premised on essentially the same averments made in his

particulars of claim in the present matter where summons was issued in September 2013.

[13] On 12 January 2007 the plaintiff wrote another letter to the second respondent to complain that the third respondent had “misrepresented the facts, and had manipulated the fact that I was vulnerable at the time, and again totally trusted him as Sandra's Manager take corrective measures and restore my faith and trust in the Datnis Dealership. Instead he (the third defendant) exacerbated what Sandra did by bringing me into this deal under false pretences and of course this has already cost me clearly”.

[14] The plaintiff explained in the same letter, referring to the action he instituted in December 2005 that:

“I took this matter up legally, but I left that process halfway, because the Attorney felt I must take the matter up with the institution and only take the legal route as a last route”.

[15] Notably, the reason was not that he did not have sufficient evidence. The plaintiff was later also represented by Mr du Plessis

of the Edenvale Law Clinic, who, according to the plaintiff's testimony, advised him in 2007, not to pay any for the instalments

under the agreement because it was a fraudulent agreement. For practical reasons, the plaintiff instructed an East London attorney who took over the matter from Mr du Plessis but this attorney suffered a stroke.

- [16] As a result of the plaintiffs failure to pay his monthly instalments in the second defendant instituted an action against the plaintiff for payment of the full amount outstanding (the same purchase price) in the Magistrate's Court. Summons was issued on March 2008. The outcome of that matter is unknown.
- [17] The plaintiff contends that he became aware of the alleged fraudulent conduct on the part of all three defendants only in August 2013. He realized at this point that his attorney (who had a stroke) was unable to attend to his matter with the necessary diligence. He therefore obtained the file (the one handed over by Mr B du Plessis) and found therein a document completed by Ms Charmaine de Jager, the person who processed the sales agreement on 25 November 2004. This document was completed by her on 29 November 2004 (four days after concluding the sale).
- [18] The document in question is a standard form of an administrative nature, for completing certain required details of a vehicle sale, the purchaser and the vehicle. This form was to accompany the plaintiff's application to the second defendant to finance the purchase of the vehicle. Where the person completing the form had to indicate (by ticking off a box) whether the vehicle in question was "used" or "new", Ms de Jager ticked in the "new" box, thus categorizing the vehicle as new. The form does not bear the plaintiff's signature although a space was indicated for the purchaser's signature. This form was the cornerstone of the plaintiff's case in resisting the special plea. The plaintiff's pleaded case is that this form proves fraud on the part of all three defendants, and he only became aware of that in August 2013.
- [19] The plaintiff in his replication states: "the full facts constituting the cause of action . . . became complete on August 2013" when the first plaintiff applied to the second defendant to finance a "new" as opposed to a used or demonstration vehicle.
- [20] Section 12(1) of the Prescription Act provides that, subject to subsections 12(2) and 12(3) prescription commences "as soon as the debt is due". The replication is aimed at establishing a delay in the commencement of the period of prescription founded upon the provisions of section 12(3) of the Prescription Act, which reads:
- "(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable*
- care".
- [21] The claim based on the allegations of fraud and the claims for cancellation or overpayment arising out of misrepresentations all arose at the time the contracts were concluded because by then the impugned price for the vehicle was fixed. Usually
- prescription commences to run when the contract is concluded because that is when the claim arose and the debt became due.[1]

[22] The plaintiff could not allege that the defendants' identities were unknown to him because it was he who dealt with the defendants throughout.

[23] What plaintiff suggests is that the full facts were not known to him and that he later only became aware that "finance had been applied for a new vehicle and not a demonstration model" and that is when he became aware of his cause of action.

[24] The form completed by Ms De Jager of the first defendant, was found by the plaintiff in his attorney's file in August 2013, does not contain any startling news. The plaintiff always knew that he had paid a new vehicle's price for used vehicle (or demonstration vehicle). That is his case. The determination of his cause of action is not dependant on proof that the defendants had committed fraud. The form is just further proof of his assertion that he paid too much for the vehicle. It may very well be that the first defendant misrepresented the true status of the vehicle to the second defendant in order to justify an increased purchase price, but it does not assist the plaintiff with regard to his prescription dilemma. On 24 November 2004 the price of the vehicle which the plaintiff had agreed to was fixed. The form relied upon by the plaintiff was only completed four days later and made no difference to the agreement concluded. It may be proof of mala fides on the part of the first and third defendants, and that is what the plaintiff complained of already in 2005, as is reflected in his particulars of claim in the action instituted that year by him in the Magistrate's Court.

[25] Apart from the allegations relating to the vehicle being a demonstration model and the financing having been applied for in

respect of a new vehicle, the plaintiff does not plead material facts of which he alleges he did not know, and nor does he disclose the basis of any circumstance or fact as to why, with reasonable care and diligence, he could not immediately establish the facts upon which his claim is founded.

[2]

[26] The onset of prescription is not delayed until the plaintiff has acquired full knowledge of all his rights and of all the facts.

That does not mean each and every allegation included in his particulars of claim, but only the facts from which the right to institute action originated.[3] The plaintiff could have instituted the present action before 25 November 2007 (the date on which it prescribed) because he had all the knowledge then.

[27] The Supreme Court of Appeal "has, in a series of decisions, emphasised that time begins to run against a creditor when it has the minimum of facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case comfortably." [4]

[28] In my view, the plaintiff had clearly been at the receiving end of a car deal with very prejudicial consequences for him, to put it mildly. I also have sympathy for his frustrations which are expressed in the exorbitant proportions of his delictual claim. However, all the

information and facts upon which he premised the present claim were available to the plaintiff in 2004, and at the very latest in 2007, when Mr du Plessis who was in possession of the form relied upon by the plaintiff, and had advised the plaintiff that the agreement was fraudulently concluded.

[29] For the aforesaid reasons I am compelled to conclude that the plaintiffs' claim against the defendants has prescribed.

Costs

[30] When the plaintiff's application was dismissed on the morning of 2 March 2015, he was not present in Court. He was in East London. He arrived in Grahamstown at about 15h00. Then he was not ready to continue with the case. The matter was then postponed to the following day when the matter was commenced with and the arguments concluded before 14H00. The previous day was therefore wasted. Mr Sandi conceded that the plaintiff was liable for those wasted costs.

Order

[31] The defendant's special plea is upheld and the plaintiff's claim is dismissed with costs, which costs include the wasted costs of 2 March 2015.

E REVELAS

Judge of the High Court

Counsel for the plaintiff's, Adv Sandi, instructed by, NN Dullabh & Co

Counsel for the defendant's, Adv Da La Harpe, instructed by, Wheeldon Rushmere & Cole

Dates Heard: 2 March 2015 – 3 March 2015

Date Delivered: 5 March 2015

[1] Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd 1995

(4) SA 510 (C). African Products (Pty) Ltd v Venter N.O. (in her capacity as Liquidator of John Johnson Africa (Pty) Ltd [2007] 3 All SA 655 (C) at 22-24.

[2] Drenman Maud & Partners v Town Board of the Township of Pennington

[1998] ZASCA 29; 1998 (3) SA 200 (SCA) at 209; Anifudh v Gunase 2010

(6) SA 531 (KZF at 534-535 H.

[3] Geldenhuys N.O. v Diedericks 2002 (3) SA 674 O at 680.

[4] Per Cameron JA (as he then was) in Minister of Finance and Other v Gore NO 2007 (1) SA 111 at 119J - 120 A

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