

SOUTH AFRICA / JUDGMENT

Rocker v Alegrand General Dealers and Auctioneers (Pty) Ltd t/a Grand Auctions (93039/2016) [2017] ZAGPPHC 896 (1 December 2017) [2017] ZAGPPHC 896

COURT

North Gauteng High Court, Pretoria

BEFORE

Mudau

CASE / FILE NUMBER

93039/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 93039/2016

1/12/17

Not

reportable

Not

of interest to other judges

Revised.

In

the matter between:

ASHRAF

ALI

ROCKER APPLICANT

and

ALEGRAND

GENERAL DEALERS AND

AUCTIONEERS

(PTY) LTD t/a GRAND

AUCTIONS RESPONDENT

JUDGMENT

MUDAU J

- [1] This is an opposed application whereby the applicant seeks the cancellation of a sales agreement based on an alleged misrepresentation by the respondent. The applicant seeks an order compelling the respondent to refund the purchase price together with certain repair costs incurred by the applicant.
- [2] The facts relevant to the application are largely common cause. On 9 July 2016, the applicant attended a public auction, arranged by the respondent, at its premises in Lenasia. As part of the items being auctioned, the respondent had advertised a red Volkswagen Golf GTI ("the vehicle"). The applicant was interested in this specific vehicle, and after paying the required R5, 000.00 registration fee, took part in the bidding process for the vehicle. The Applicant was the successful bidder and bought the vehicle for an all inclusive purchase price of R126, 540.00.
- [3] The applicant took delivery of the vehicle on 12 July 2016 and soon realised that something was amiss, as the vehicle bought at the auction performed poorly. He booked an appointment for the vehicle at Volkswagen Lenasia and instructed the dealership to determine the reason why the vehicle was not delivering the power its 2. 0 litre engine was famed for. It was established that the vehicle did not have a 2.0 litre engine, but that the engine had been swapped for a much smaller 1.4 litre TSI engine. The vehicle carried a GTI badge and the invoice issued by the respondent (annexure "FA1"), expressly listed the vehicle as "VEHICLE GOLF 6 GT/ RED YWH224GP'.
- [4] The applicant contacted the respondent's representative, Mr Ismail Jassat, and informed the respondent that he would not have purchased the vehicle had he known that it was not truly a GTI, and that he did not consider himself bound by the purported sale. The applicant was asked to immediately return the vehicle to the respondent. Before he could do so, however, he had to settle an invoice issued by Volkswagen Lenasia for an amount of R13, 029.06.
- [5] After returning the vehicle to the respondent, the applicant informed the respondent that he had no interest in a 1.4 litre vehicle and that he had placed a bid on the vehicle because it was advertised and labelled as a GTI. The respondent accepted the applicant's explanation and issued a credit note to him for the original purchase price together with the value of the invoice issued by Volkswagen Lenasia, totalling R139, 569.06. The respondent requested the applicant to attend its upcoming auctions to see if he was interested in a replacement vehicle. It is for this reason that the credit note states: "THIS CREDIT (NOTE) IS VALID FOR A PURCHASE OF A MOTOR VEHICLE ON AUCTION AND IS NON REFUNDABLE ".
- [6] According to the applicant, the respondent accepted responsibility to refund him for the expenses incurred at Volkswagen Lenasia. In this regard, the credit note's value is for the original purchase price together with the value of the invoice issued by Volkswagen Lenasia,

totalling R139, 569.06. In the weeks that followed the applicant attended a couple of auctions arranged by the respondent. He saw no vehicles that interested him and as such did not purchase a replacement vehicle. He informed the respondent that he was no longer willing to wait for a replacement vehicle and that he wants his money to be refunded. The respondent refused to refund the purchase price and money paid to Volkswagen Lenasia. On 27 September 2016, the Respondent's representative, Mr Mohamed Khan, informed him that he could collect a post dated cheque for the entire debt owed to him.

- [7] The respondent, however, provided the applicant with a postdated cheque in the amount of R126 400.00, thus excluding the amount in respect of the repairs. There are two features to the cheque that the applicant highlighted. The first is that the cheque was not for the full amount owed by the respondent. The second is that the reference therein is "VW Golf, 2010, Red, 1WH224GP". The respondent left out reference to "GTI" whereas it clearly knew at that stage that despite the badge, the vehicle was not a GTI Volkswagen Golf.
- [8] The crux of the respondent's case is that the applicant had purchased the vehicle "as is". Prior to the auction, the applicant had inspected the vehicle. It therefore cannot be contended, so it was argued, that applicant's decision to place a bid was based on what was advertised, but rather that it was based on what he saw upon inspection of the vehicle. The applicant, from the outset and prior to placing a bid, was aware of the conditions attached to the purchase of a vehicle at this particular auction. The terms and conditions are contained in the bidder registration form, which reads: "THE CONDITIONS FOR SALE OF MOVABLE ASSETS BY AUCTION"[1] , the material terms being:

"8.1 The auctioneer is not responsible for any errors of description;

8.2 The Purchaser shall be deemed to have inspected and examined the goods, which they purchase ...;

8.3 All sales are final and voetstoets and the onus shall rest upon the Purchasers to acquaint themselves of the condition and state of the goods purchased by them ...;

8.4 Neither the seller of the goods, nor the auctioneer give any warranties or guarantees or make any representations in regard to the condition or state of any of the goods on auction ...;

8.5 The Purchaser hereby acknowledges and confirms that he has read and understands all the foregoing conditions ..."

- [9] The applicant accepted the terms prior to bidding on the vehicle and proceeded to bid after the inspection, and could therefore not claim misrepresentation. The respondent further contend that it further acted in good faith, by firstly requesting return of the vehicle, secondly by providing a credit note and thirdly repaying the purchase amount by way of post dated cheque. The postdated cheque for the full purchase price was tendered by respondent, which in turn was accepted by the applicant. The aforesaid transaction established a compromise or transactio. As the applicant unequivocally accepted the cheque, there was acceptance of the offer and the applicant is accordingly not entitled to any amount over and

above the amount contained in the offer.

- [10] It is trite, that a party who has been induced to enter into a contract by the other party's misrepresentation of an existing fact, is entitled to rescind the contract provided the misrepresentation was material, was intended to induce the person to whom it was made to enter into the contract and did so induce that person to conclude the contract.[2] If the misrepresentation resulted in the conclusion of an agreement, the innocent party is entitled to rescind the agreement. A party relying on misrepresentation must show that it was material in nature.[3] The fact that the respondent was willing to accept the returned Volkswagen Golf is clear proof and concession that the misrepresentation was material. The applicant informed the respondent that he would not have purchased the vehicle, had he known that it was not a GTI.[4] The respondent does not dispute this allegation. As a matter of fact, the respondent admits "the confrontation with the applicant.[5]
- [11] The conditions of the sale, as stipulated above, could only have been in relation to what was purported to be a Volkswagen Golf GTI motor vehicle and nothing less, for it required specialised skills to determine the engine capacity of the motor vehicle being auctioned, something that ordinary purchasers might lack, as it was quite clearly the case with the applicant in this instance.
- [12] It was contended on behalf of the applicant that, "the respondent's defence that the applicant is deemed to have inspected the vehicle and that the respondent is not responsible for description in errors, are both 'defences' originating from the agreement. The misrepresentation is precontractual, and as such no 'defence' originating from the agreement can negate the effect and consequences of the prior misrepresentation ". I agree.
- [13] The allegation that the applicant unequivocally accepted a cheque in the amount of R126 400 .00 by way of a compromise, it would appear to me, improbable, as it is not supported by the objective facts taking into consideration the fact that the respondent issued a credit note to the applicant[6] in the amount of R139 56906, after accepting the Volkswagen Golf from the applicant. There was quite clearly no acceptance of the offer of R126 400.00 but the amount of R139 56906, tendered by the respondent inclusive of the necessary repair costs as a result of the misrepresentation.
- [14] The so-called "voetstoots" clauses, it was contended on behalf of the applicant, create no defence against the application. I agree. In *Spenmac (Pty) Ltd v Tatrims CC*[7] the Court found:
- [29] ...In the present matter the plaintiff's mistake, induced by the defendant's representative, Spendley, was as to the true nature of the merx and as such no consensus was established in concluding the contract. Both parties laboured under the mistaken belief that the unit in the building was one of only two. The plaintiff's mistake was, as the high court accepted, induced by the misrepresentation that there were only two units in the building and that the owner of unit 1 could veto the right of unit 2 to subdivide it. In these circumstances the parties were mutually mistaken as to the true nature of the merx and accordingly it cannot

be said that the parties achieved consensus as to the subject matter of the sale."

[15] After having read the papers filed on record and having heard counsel the following order is made:

15.1 The respondent is ordered to make payment to the applicant in an amount of R139, 56906;

15.2 The respondent is ordered to pay interest on the amount of R139, 56906 , calculated at a rate of 10, 25% per annum from 29 August 2016, until date of full payment;

15.3 The respondent is ordered to pay the costs of the application.

T P MUDAU

Judge of the High Court,

Gauteng Division,

Pretoria

Date of Hearing: 31 October 2017

Date of Judgment: 1 December 2017

APPEARANCES

For the Applicant: Adv J Vorster

Instructed by:

Rorich, Wolmarans & Luderitz Inc

For the Respondent: Adv J Scallan

Instructed by:

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[1] See Annexure "FA2" at page 17.

[2] Quartermark Investments (Pty) Ltd v Mkhwanazi 2014 (3) SA 96 (SCA) at [14].

[3] Service v PondartDiana 1964 (3) SA 227 (D) at 279.

[4] Founding affidavit, paragraph 13, page 9.

[5] Answering affidavit, paragraph 11.1, page 44.

[6] Annexure "FA4", page 20.

[7] 2015 (3) SA 46 (SCA) at 54 [29].

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