REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Reportable
Appeal Case No: A5028/09
High Court Case No: 8121/08

In the matter between:

LUCAS LAZARUS MPHULWANE **Appellant**

and

STANDARD BANK OF SA **Respondent**

JUDGMENT

MOKGOATLHENG J

(1) This is an appeal against a judgment and order by De Wet AJ in which she granted summary judgment against the appellant in favour of the respondent for the repossession of a 2002 Iveco 65

Seater Bus with Engine Number: 8360465307780040 and Chassis No: ZCFA1RLJ0023660860.

(2) The factual matrix predicating the summons issued against the appellant, arises from a breach of an Instalment Sale Agreement entered into between the parties on the 17 May 2007. In terms thereof, the appellant purchased from the respondent a certain 2002 Iveco 65 Seater Bus for an amount of R852 619.20.

(3) The respondent alleges that the appellant breached the agreement in that he failed to make punctual payments in terms thereof and was in arrears in the sum of R91 638.47 as at the 12 of February 2008. The respondent alleges that due to the appellant's breach, it was entitled to terminate the agreement, reclaim repossession of the vehicle and retain as a penalty, all monies paid by the appellant.

(4) The appellant filed an appearance to defend the action, whereupon the respondent instituted an application for summary judgment against him. In terms of ***Rule 32(3)(b) of the Uniform Rules of Court*** the appellant filed an affidavit in which he opposed the summary judgment application.

(5) ***Rule 32(3)(b)*** provides:

'Upon the hearing of an application for summary judgment the defendant may—

(a) …….

(b) satisfy the Court by affidavit (which shall be delivered before noon on the Court day but one preceding the day on which the application is to be heard) or with the leave of the Court by oral evidence of himself or of any other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or defence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.'

(6) Blieden J in **"*Marsh and Another v Standard Bank of S.A Ltd 2000 (4) SA 947 at 949*** *in considering the applicability of* ***Rule 32(3)(b)*** *stated that: "what the Rule as interpreted by our Courts over the years requires of a Court in adjudicating applications for summary judgment where a defendant has relied on this subrule is that:*

(1) *The Rule requires the defendant to set out in his affidavit sufficient facts which, if proved at the trial, will constitute an answer to the plaintiff's claim.*

Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T); District Bank Ltd v Hoosain and Others 1984 (4) SA 544 (C).

(2) *At the summary judgment stage of the proceedings it is not for the Court to decide any balance of probabilities or determine the likelihood of the deponent's allegations being true or false.* ***Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426 where at A-E*** *the position is succinctly summarized by Corbett JA (as he then was) as follows:*

'Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant

appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters, the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully" as used in the context of the Rules (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.....At he same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.'

(3) *The subrule does not require the defendant to satisfy the Court that his allegations are believed by him to be true. It is sufficient if the defendant's affidavit shows that there is a reasonable possibility that the*

defence he advances may succeed on trial. ***Shepstone v Shepstone 1974 (2) SA 462 (N) at 467A.***

(4) *The Court must be apprised of the facts upon which the defendant relies with sufficient particularity and completeness so as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.*

(5) Summary judgment is an extraordinary and stringent remedy and it is always necessary to keep this in mind when exercising a discretion whether to grant or refuse it. ***Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 305.***

(6) A Court must be careful to guard against injustice to the defendant who is called upon at short notice and without the benefit of further particulars, discovery or cross-examination to satisfy it that he has a bona fide defence. ***Breitenbach v Fiat (supra at 227D-H).”***

(7) In resisting the summary judgment application the appellant raised a variety of defences, amongst which is the allegation of fraudulent misrepresentation couched as follows: *“In terms of the Instalment Sale Agreement I purchased a brand new 2007 Iveco Bus with*

engine Number 8360465307780040 and chassis number ZCFA1RLJ0022360860…….confirmed by the Instalment Sale Agreement annexed to plaintiff's summons in which it is recorded the year of first registration is 2007."

(8) The appellant contended further that:

(a) "*The vehicle described in the application for summary judgment as described by the respondent is not the vehicle described in the Instalment Sale Agreement*…….Further that "*Contrary to the agreement concluded with plaintiff, I later discovered that the vehicle in question was a 2002 vehicle and not a 2007 as claimed by the plaintiff. I verily believe that I have been made a victim of a fraud at the behest of the plaintiff's agent. Had I known that the vehicle was a 2002 model and reconstructed I would not have bought it".*

(b) *"I tendered return to the plaintiff of the vehicle against repayment of my deposit that I paid in the sum of R150 000.00….I am entitled to restitution of the purchase price I paid against the return of the bus. I have a debtor/creditor lien which entitles me to*

retain the vehicle until I have been reimbursed with the purchase price I paid. My lien is enforceable against the plaintiff and I am entitled to retain the vehicle in my possession until I am paid."

(9) In a supplementary affidavit to deal more fully with his defence that he paid the respondent an amount of R150 000.00 which entitled him to retain possession of the vehicle based on a creditor/debtor lien pending restitution of the deposit he paid, the appellant alleged: "*On or about the 17 May 2007 I paid the amount of R150 000.00 to a certain John who is employed by Italian Commercial Truck Service Centre (Pty) Ltd trading as 'Italian Commercial'. John reassured me that the sum of R150 000.00 would be credited towards the purchase price of the vehicle.....because the respondent insisted that I should pay a deposit in the amount of R200 000.00, "Italian Commercial would reflect to them the sum of R200 000.00 instead of R150 000.00 as a deposit to ensure payment"* to finance the deal.

(10) The learned Judge in evaluating the appellant's submissions held that: *"the appellant's affidavit does not state that he paid the deposit of R150 000.00 to the respondent in any other manner*

other than by alleging that he paid it to Italian Commercial Truck Service Centre (Pty) Ltd. The appellant paid the deposit to the vendor who sold the motor vehicle to him and not to the respondent. There is no substance in the argument that the appellant has a lien over the motor vehicle nor that he is entitled to retain the vehicle until restitution of the deposit has taken place."

(11) The learned Judge further held that*: "the respondent is entitled to repossession of the motor vehicle in order to enable it to value and assess the damages it was entitled to flowing from the breach of the agreement by the appellant."*

(12) The gravamen of the appellant's defence is that he is a victim of a fraudulent misrepresentation in that he was under the *bona fide* impression that he was purchasing a 2007 brand new Iveco 65 Seater Bus when in fact the respondent and its agent "*Italian Commercial"* colluded in selling him a 2002 Iveco 65 Seater Bus, consequently, appellant contends that the Instalment Sale Agreement was *void ab initio* and unenforceable

(13) The Instalment Sale Agreement pertinently shows that an initial payment of R200 000.00 was paid as a deposit towards the purchase of the vehicle. The agreement also records the description of the goods sold as an Iveco 65 Seater Bus with engine number 8360465307780840 and chassis number ZCFAIRJO023600860, and the year of first registration, being "*2007.*"

(14) The appellant seeks to resile from the agreement on the basis of an alleged fraudulent misrepresentation. He avers that when purchasing the Iveco 65 Seater Bus, he directly dealt with the staff of "*Italian Commercial.*" He imputes a fraudulent misrepresentation to "*Italian Commercial*" as the agent of the appellant in selling him a 2002 registered vehicle and not a 2007 registered vehicle as he thought he was purchasing. It is permissible for a party to resile from an agreement which is induced by the fraud of a third party acting in collusion with or as the agent of one of the parties ***[See Karabus Motors (1959) Ltd v Van Eck 1962 (1) SA 451(c) at 453D-E]***

(15) Although the appellant alleges that "*Italian Commercial*" acted as an agent of the respondent in making the fraudulent misrepresentation, there is nothing in the terms of the Instalment

Sale Agreement, to support such contention. The alleged agency relationship is not substantiated by any factual evidence and is merely a conclusion of law by the appellant. Also, there is no evidence of collusion between the respondent and "*Italian Commercial.*"

(16) The failure to establish agency or collusion does not necessarily disentitle the appellant from relying on the alleged fraudulent misrepresentation. Sufficient facts are stated in the answering affidavit to entitle the appellant to resile from the agreement on the basis of *Justus Error.*

(17) The appellant avers in effect that the fraudulent misrepresentation induced him to mistakenly believe that he was purchasing a 2007 Iveco 65 Seater Bus as opposed to a 2002 reconstructed vehicle. Whether his error was sufficiently reasonable (or *Justus*) to entitle him to resile for the agreement is a matter for the trial court to decide. See in this regard ***Standard Credit Corporation Ltd Naicker 1987 (2) SA 49 NPD)*** and also the discussion in ***RH Christie The Law of Contract in South Africa 5th Edition pp177 at 272.***

(18) To answer the question whether the appellant as a reasonable man was actually misled one must of necessity consider the totality of the relevant evidence at the trial. In ***J Z Brink and Humphries and Jewell (Pty) Ltd 2005 (2) ALL SA 343 (SCA),*** the Court cautioned that: "*While courts should come to the rescue of parties who have been misled or induced to enter into agreements of the kind under discussion they should be mindful of what was stated in* ***National Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) at 479G-H:***

'Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded…."

In the present matter there is a possibility of a basis in the evidence for a contention that the mistake was reasonable.

(19) There is no legal impediment debarring the appellant from attacking the respondent's cause of action because the respondent intends enforcing a contract that is not in accordance with what the appellant alleges was agreed between itself and "*Italian Commercial*" especially in this matter where there is a dispute as to the vehicle sold, and the vehicle intended to be purchased.

See Tesven CC v South African Bank of Athens 1999 4 ALL SA 396 A 401 para [16].

(20) The learned Judge was required to decide whether the appellant had a *bona fide* defence to the action. The learned judge misdirected herself in that she never applied the test enunciated in *Rule 32(3)(b)* to the facts contained in appellant's affidavits. In this case sufficient material facts of the nature and grounds of the defence have been disclosed to enable the learned Judge to have decided whether the appellant's defence was *bona fide* or not.

(21) The learned Judge erred in dealing with the content of the appellant's affidavits as if it were evidence before her. It was not her function to decide, ("an *almost impossible task*") on paper whether the appellant was truthful or not, neither was it her

function to make credibility or factual findings nor legal conclusions.

(22) The respondent's cause of action is further predicated on the basis that it financed a 2007 registered Iveco 65 Seater Bus. The respondent extraneously contends that the recordal in the Instalment Sale Agreement of financing a 2007 registered Iveco 65 Seater Bus as opposed to a 2002 registered vehicle is attributable to a typographical error. The respondent has not sought to rectify the Instalment Sale Agreement to reflect the sale of a 2002 registered Iveco 65 Seater Bus. This is in itself is a reason to refuse summary judgment as a claim for rectification does not fall within the ambit of Rule 32.

(23) Applying the principles enunciated in the case of ***Marsh and Another supra*** the appellant has disclosed a *bona fide* reasonable defence with reasonable sufficient particularity and completeness to enable him to hold that if the statement of fact is found to be correct at trial, judgment may be given in his favour.

(24) For these reasons I would uphold the appeal with costs. In the premises the following order is made:

(1) The appeal succeeds with costs;

(2) The order of the Court a quo is set aside and the following order is substituted for it. "*The defendant is given leave to defend. The costs of this application are costs in the cause of the main action."*

Signed at Johannesburg on the 1st December 2009.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT

I, concur

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CLAASSEN J

JUDGE OF THE HIGH COURT

I, concur

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BORUCHOWITZ J

JUDGE OF THE HIGH COURT

DATE OF HEARING:28TH OCTOBER 2009

DATE OF JUDGMENT:9TH DECEMBER 2009

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