IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH, PRETORIA)

Case no. 16546/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES/NO~~.
(3) REVISED.
2012/02/10 DATE SIGNATURE

In the matter between:

MANDLA STANLEY MNGUNI PLAINTIFF

9/2/2012

and

PRIMA INSPECTACAR WONDERBOOM (PTY) LTD DEFENDANT

JUDGMENT

LEGODI J

1. The issue before me is whether the plaintiff is entitled to claim the return of a deposit in the amount of R 70 000.00 that was paid to the defendant as a deposit, towards the purchased price of Toyota Hillux LDV motor vehicle, without having alleged in his particulars of claim, repudiation and acceptance of such repudiation? And if so, whether the conduct of the defendant in failing to de deliver the said motor vehicle on the date the

full purchase price was paid, entitles the Plaintiff to the refund of R 70 000.00, without having alleged and proved cancellation of the agreement?

2. Initially when this matter was laid before me, parties sought to place on record what they regarded as being the main issue to be decided in this case. Amongst others, they suggested that the issue was whether there was ever an agreement of sale concluded between the plaintiff and defendant. For the following background I do not think this was ever an issue.

2.1 On the 27 November 2009, the plaintiff stopped at the defendant's place of business. The defendant is a dealer in sales of cars. The plaintiff having seen a Toyota Hillux LDV, got interested in it. He paid R1000.00 referred to as a "holding deposit".

2.2 On the 4 December 2009, the plaintiff returned to the defendant place of business. He paid a deposit of R70 000.00. This left the balance on the purchased price to be R 138 935.00.

2.3 On the 10 December 2009, the plaintiff and his father returned with the balance of the purchase price, in the form of a bank guaranteed cheque in the amount of R138 935.00. Thereafter,

the defendant attempted to deliver the bakkie to the plaintiff. It however could not start. Attempts were made to start, it by using jumpers. Still it could not start. The plaintiff got fed up and demanded the return of the money already paid to the defendant.

2.4 The defendant refused to pay. The following day the cheque in the amount of R 138 935.00 was stopped by the plaintiff's father. Thereafter, the plaintiff instituted the present proceedings in terms of which the plaintiff claimed restitution of deposit that was paid in the sum of R70 000.00 on the 4 December 2009.

3. From the above facts, there can be no doubt that there was a sale agreement concluded between the plaintiff and the defendant. Therefore, the suggestion as contained in paragraph 7 of the particulars of claim that no contract of sale between the parties was ever concluded ought to be rejected. For the purpose of the issue raised in paragraph 1 above, I do not think that it is material whether the agreement was oral or written, although the defendant seeks to retain the deposit based on a forfeiture clause in the agreement.

4. Now, coming back to the issue as set out in paragraph 1 of this judgment, it might be important to deal with the pleadings first. In paragraph 6 of the particulars of claim the cause of action is articulated as follows:

6.

On or about the 9th December 2009, the plaintiff tendered to pay to Defendant the balance of the purchase price in the sum of R138 935.00. The defendant failed\neglected\refused to deliver the Toyota vehicle described above to the Plaintiff, against payment of the sum of R138 935.00. in fact, on or about the 9th December 2009, the parties discovered that the Toyota vehicle in question could not be started and therefore could not be delivered by the Defendant to the Plaintiff, even if the full price was paid."

5. I may mention that the evidence suggested that payment in the sum of R138 935.00 was made on the 10 December 2009. I now turn to deal with the issue raised above.

WHETHER THE PLAINTIFF IS ENTITLED TO CLAIM THE RETURN OF A DEPOSIT IN THE AMOUNT OF R 70 000.00 WITHOUT HAVING ALLEDGED REPUDIATION AND ACCEPTANCE THEREFORE?

6. It is common cause that the transaction between the plaintiff and defendant was a cash transaction. The purchase price was R208 935 inclusive. The plaintiff paid R70 000.00 on the 4 December 2009. The defendant failed to deliver immediately upon payment of the balance of the purchased price. It failed to do so, because the motor vehicle could not start. Apparently, the plaintiff saw this as a breach on the part of the defendant. Put it differently, failure to deliver immediately upon payment of the sum of R138 935.00 being the balance of the purchased price, was a repudiation.

7. Repudiation is a form of a breach. It gives rise to a right to cancel the contract. The party who asserts that the other party has repudiated the contract must allege and prove the allegation. (See Schlinkmann v van der Walt 1947 3 All SA 92 (E), 1947 (2) SA 900 (E) 919). To rely on repudiation the innocent party allege and prove:

a) repudiation of a fundamental term of the contract that is conduct that exhibits objectives a party is deliberate and unequivocal intention not to be bound the contract.

b) An election by the innocent party to terminate, and

c) Communication of the election to the guilty party. (See Highveld Properties (Pty) Ltd v Bailes 1999 4 All SA 461 (A), 1999 (4) SA 1307 (SCA).

8. However, one has to look at a case on which the defendant was called upon to answer. Firstly, the suggestion that the plaintiff on the 9 December 2009, tendered to pay the balance of the purchase price cannot be correct. It was not supported by the evidence. The evidence showed that the balance of the purchase price was actually paid and a bank guaranteed cheque was stopped when the motor vehicle could not be delivered upon payment thereof.

9. Secondly, the plaintiff having alleged failure, neglect or refusal to deliver the motor vehicle, and the impossibility of such delivery due to the fact

that the motor vehicle could not start, decided not to rely on repudiation and acceptance thereof as his cause of action. Instead, he sought to suggest in paragraph 7 of the particulars of claim that no agreement of sale was concluded.

10. The defendant was therefore called upon to answer the claim for payment of R 70 000.00 based on the fact that the agreement of sale was never concluded between the parties. As I said earlier in this judgment, this cannot be correct.

11. The evidence showed the existence of such an agreement. Secondly, the evidence showed that when the motor vehicle was to be delivered, it could not start. This, in my view, was evidence outside pleadings. The plaintiff did not seek amendment of its particulars of claim and in particular paragraphs 6 and 7 thereof. Just on this alone, the plaintiff's claim ought to be dismissed. I now turn to deal with the other issue although it is not necessary to do so.

WHETHER THE PLAINITFF WOULD HAVE BEEN ENTITLED TO THE RELIEF SOUGHT WITHOUT HAVING ALLEGED CANCELLATION OF THE AGREEMENT?

12. As I said earlier in this judgment, the plaintiff in his particulars of claim approached the matter on the basis that there has never been an agreement. There was of course, such an agreement.

13. Cancellation of an agreement is a form of a remedy based on a breach of one's obligation in terms of an agreement. Repudiation of an agreement entitles the innocent party to cancel an agreement and claim damages or in the present case, restitution. Cancellation of an agreement is in a way, a form of acceptance of repudiation. (See Datacolor International (Pty) Ltds v Intamarket (Pty) Ltd 2001 2 SA 284 (SCA).

14. Cancellation can be by the aggrieved party, having given the guilty party such a notice of termination and or by making an allegation of cancellation in either particulars of claim or in the plea. This can be done without the assistance of the court and any subsequent court order thereto, would just simply be a confirmation of the cancellation. However, a claim for cancellation, that is asking the court to cancel, is normal, and the desirability of having an order of cancellation is that, the status of the contract is clarified, and there can be no doubt on the existence or otherwise of the contract. This is a well recognised principle. (See Senia (Pty) Ltd v Wheeler 1958 1 SA 555(A) 560-561).

15. A claim for restitution of what has been delivered or paid in terms of an obligation to perform, has to be preceeded by cancellation of a contract. (See Inzalo Communication & Event Management (Pty) Ltd v Economic Value Accelerations (Pty) Ltd 2008 6 SA 87 (W).

16. In my view, even if the plaintiff had alleged and proven repudiation and acceptance thereof, failure to allege cancellation of the agreement, would have been fatal to the plaintiff's claim for restitution. It is the acceptance of repudiation of the agreement and cancellation thereof that should entitle an innocent party to claim restitution. Of course the plaintiff did not approach the court based on repudiation, acceptance thereof and\or cancellation.

THE CONVENTIONAL PENALTIES ACT

17. I now turn to deal with another issue that was raised or sought to be argued by the plaintiff. The plaintiff sought to argue entitlement to the refund of R70 000.00 based on the provisions of the Conventional Penalties Act, 15 of 1962. I deal with this issue, on the assumption that there was a written sale agreement, the terms and Conditions of which are contained in a document "OFFER TO PURCHASE".

18. I deal with this issue in passing. The finding earlier in this judgment makes it unnecessary to deal with it. It suffices for now to mention that the provisions of the Conventional Penalties Act 15 of 1962 was not

raised in the pleadings. This should also be seen in the context of the fact, that the plaintiff approached the court on the basis that no agreement of sale was ever concluded between the parties.

19. Secondly, I think it would be inappropriate to get into the justification or otherwise of the plaintiff's withdrawal from the agreement of sale, which is not specifically pleaded. The present case is disposable without getting into the merits thereof.

20. Consequently the plaintiff's action is hereby dismissed with costs.

M F LEGODI
JUDGE OF THE HIGH COURT

Heard on: Tuesday, 3 FEBRUARY 2012
Date of judgment: 9 FEBRUARY 2012