REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

CASE NO: 70993/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

04/04/14
DATE

SIGNATURE

10/4/2014

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD **Plaintiff**

and

IZIMOTO TRADING (PTY) LTD t/a GLOBAL NISSAN **Defendant**

J U D G M E N T

KGANYAGO AJ

[1] The plaintiff has instituted an action against the defendant claiming two amount of R660 660.40 with two alternative claims of R214 000.00 and R100 000.00 respectively. The plaintiff's claim is based on an alleged misrepresentation made by the defendant.

[2] According to the plaintiff, the defendant sold to the plaintiff two tipper trucks which the defendant misrepresented as new whereas they were second hand trucks. The plaintiff further alleges that the defendant has misrepresented to them that the two trucks were having added extras whereas they did not have them. The plaintiff alleges that they made payment to the defendant based on the misrepresentation.

[3] According to the plaintiff, the misrepresentations by the defendant were material and made with the intention to induce the plaintiff to enter into the agreements, which the plaintiff did. The plaintiff is of the view that, had they been aware of the true facts, they would not have entered into the two sale agreements. The plaintiff is of the view that based on the defendant's misrepresentations, they are entitled to claim cancellation of the sale agreements and claim repayment of the purchase price in respect of each of such sale.

[4] The action is defended. The defendant denies any misrepresentation. According to the defendant, Novus Asphalt CC ("the consumer"), approached them and enquired about purchasing two demo tipper trucks. The consumer inspected the two trucks, whereafter they acknowledged that the two trucks were in good order and condition. The consumer was well aware that the two tipper trucks were demos, and they willingly bought them.

[5] The plaintiff called three witnesses to testify. The first witness to testify was Deon van Rooyen. He testified that presently he is employed by Northwest Powerstar. He is selling commercial vehicles. He is having 23 years of experience in that field.

[6] He had inspected the two tipper trucks. During 2006 and 2007, the two tipper trucks were used as demo vehicles by the Super Group. At some stage, Super Group sold the two trucks in question to BB Trucks in Polokwane.

[7] The two trucks were used as demo vehicles for almost two years. Their mileage would have been around 30 000 km. The two trucks would not have been classified as new as they were refurbished as a result of fair wear and tear.

[8] When the two vehicles were sold to BB Trucks, they did not have any extras. At the time they were sold to BB Trucks, their value was R520 000.00 each excluding VAT.

[9] The defendant has sold the two trucks for R734 000.00 each. That would not have been a reasonable price.

[10] The witness was cross-examined. The witness conceded that demo vehicles are not registered but that they are put on a roadworthy test. He

conceded that it was correct for the defendant to refer the two trucks as new when the customer registered them for the first time. He conceded that he cannot say whether the price charged by the defendant for the two trucks was unreasonable or not.

[11] The second witness to testify for the plaintiff was Mr Johan Otto. He testified that he is employed by Efficient and Finance doing vehicle finance.

[12] During 2008 he assisted the consumer to prepare an application to finance two trucks. When he was approached, Wesbank had already declined the application of the consumer.

[13] The invoice that he received from the defendant was addressed to Wesbank. He prepared the application and submitted it to the plaintiff. On the application he wrote that the vehicles were new. The application was approved and the consumer was requested to pay a 20% deposit. It is easy for a bank to finance a new vehicle than a second hand vehicle.

[14] The documents that were submitted to him to assist the consumer to apply for finance, were indicating that the vehicles were new. Nobody has told him that they were used vehicles. Had he known that they were used vehicles, he would not have written them as new on the application form.

[15 The witness was cross examined, and he conceded that on the defendant's application for finance which the consumer has signed, the tipper truck has been described as demo and stated that maybe that was the reason why Wesbank had declined the consumer's application. He conceded that the invoice issued by the defendant, described the tipper truck as second hand goods. He however stated that it was for the first time he sees the defendant's invoice even though it is dated 25 January 2008. He conceded that the consumer has signed the release documents to confirm that he had inspected the vehicles and that he was satisfied with its condition.

[16] Rozane Meintjies testified as the plaintiff's third witness. She testified that she is employed by the plaintiff in the vehicle and assets finance. Mr Otto has brought the consumer's application for finance to her. The application was accompanied by a copy of an invoice. The invoice was stating that the vehicle was new. The application was approved.

[17] For the bank to pay, it must receive an invoice from the dealership. She was never given documents that indicate that the tipper truck were either used or demo.

[18] The witness was cross-examined and she conceded that for a new vehicle, a deposit is not required. She further conceded that prior to the

finalisation of the deal, one Danie Botha had phoned her to inform her that the trucks in question were used vehicles.

[19] Danie Botha was the only witness to testify on behalf of the defendant. He testified that at the beginning of January 2008, the consumer came with the intention of buying two trucks. His application for finance was approved by the plaintiff.

[20] The consumer came to the dealership together with his wife. He inspected the trucks and was happy with their condition. The trucks in question were demo vehicles.

[21] The consumer was assisted by a broker Mr Otto to process their application for finance. He (witness) did not get any joy from Mr Otto, and the process of applying for finance was taking time to be finalised. He phoned Ms Meintjies to enquire about the status of the consumer's application. During their discussion he found out that Ms Meintjies was under the impression that the trucks were new. He however, corrected her, and told her that they were used trucks.

[22] The witness was cross-examined and he conceded that they did not add any extras on the two trucks. He denied that the invoices that were allegedly submitted to the plaintiff for payment, were invoices that emanates from the defendant.

[23] That is in short the evidence that was adduced by both parties. It is not in dispute that the defendant has sold the two tipper trucks to the consumer. It is not in dispute that the consumer was financed by the plaintiff for the purpose of the two trucks. It is not dispute that the consumer had taken delivery of the two tipper trucks after the plaintiff has paid the defendant the purchase price.

[24] The plaintiff is alleging that that the defendant has described the two tipper trucks as new whereas they were not new. According to the plaintiff, the defendant knew that the two tipper trucks were used vehicles, but instead issued false invoices which described the two trucks as new. The plaintiff submit that had they known about the factual position, they would not have financed the two trucks.

[25] The defendant denies having presented any false invoices to the plaintiff. According to the defendant, the consumer was aware that the two trucks were demo vehicles, and has inspected them and was satisfied with their condition, hence he signed a written authority to release them for the plaintiff to effect payment.

[26] Van der Merwe, Van Huyssteen, Reinecke and Lubbe on Contract General Principles, second edition at page 95 state the following: -

The elements of delict misrepresentation in contrahendo are: -

An act (conduct), which displays the quality of wrongfulness, is usually accompanied by fault or blameworthiness on the part of the wrongdoer,

and causes an undesirable result (either the very conclusion of the contract or some detrimental result (damage) flowing from the contract.)"

[27] In the case of International Shipping Company (Pty) Ltd v Bentley (138/89 [1989] ZASCA 138 at paragraph 64-65 the court said the following:-

"As has previously been pointed out by this court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question whether the defendant's wrongful act was the cause of the plaintiff's loss. This has been referred to as factual causation.

The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test which is designed to determine whether a postulated cause can be identified as a causa sine quanon of the loss in question. In order to apply the test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. The enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of a lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not the course of the plaintiff's loss; aliter, if would not so have ensued. If the wrongful act is shown in this way not to be a causa sine quanon of the loss suffered, then no legal liability can arise. On the other hand,

demonstration that the wrongful act was a causa sine quanon if the loss does not necessarily result in a legal liability.

The second enquiry then arises, viz whether the wrongful act is sufficiently closely or directly to the loss for legal liability to ensure or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of the policy may play a part. This is sometimes called "legal causation."

[28] Mr Otto was instrumental in securing finance for the consumer. He is the one who has prepared the motivation on behalf of the consumer after the consumer's application was declined by Wesbank. Mr Otto is the one who has submitted the consumer's application for finance to Ms Meintjies. The invoice that was used was a copy of the one that was initially submitted to Wesbank. Ms Meintjies accepted the invoice addressed to Wesbank without questioning it. In my view, it is strange that Ms Meintjies has accepted an invoice addressed to Wesbank without questioning it. During the trial it was not explained why she had accepted that invoice without querying it.

[29] Mr Otto when preparing the motivation on behalf of the consumer, was well aware that the consumer's first application at Wesbank was declined, and he knew the reasons why it was declined and those reasons were never disclosed during the trial. He could not have

assisted the consumer without enquiring why his first application was declined. Mr Otto on accepting the mandate to assist the consumer, he would not have repeated the same facts that led to Wesbank declining the first application. During cross-examination he stated that maybe the reasons why Wesbank has declined the consumer's application was that the trucks were not new. In my view he knew that the plaintiff will decline the consumer's application if he repeats the same information that was submitted to Wesbank. The only way to assist the consumer was to state that the trucks in question were new, whereas he knew that was not the case.

[30] The invoice that was submitted by Mr Otto to Ms Meintjies for the purposes of approving the finance, is without the defendant's logo. The defendant disputes that the said invoice emanate from them. On the invoice which the defendant alleges that it was issued by them, the trucks in question have been described as used. However, Ms Meintjies disputed ever receiving or seeing the invoice which the defendant alleges that it emanates from them. The question is where did Mr Otto obtained the invoice that is disputed by the defendant. This could not be established during the trial.

[31] Another question which was not dealt with during the trial is whether for the purposes of approval of the finance, do they use the invoice or the quotation. In my view, an invoice is for payment whilst a quotation can be used to approve the loan. In this case an invoice was used to

approve a loan instead of a quotation, and that raises more questions than answers.

[32] Apparently it took some time before the consumer's application for finance was approved. During this period, Mr Botha the employee of the defendant was very much anxious to have the deal finalized. He even phoned Ms Meintjies on several occasions enquiring about the progress of approving the consumer's application. During the discussion with Ms Meintjies, it came to his attention that according to Ms Meintjies the trucks which were to be financed were new. Mr Botha immediately brought it to the attention of Ms Meintjies that the vehicles in question were used trucks. Ms Meintjies conceded that she was informed more than once by Mr Botha that the vehicles in question were used trucks. If indeed the papers before her were indicating that the trucks in question were new, the information she received from Mr Botha should have raised a red flag and she should have requested clarity as to why the information she was having on the application was different from what Mr Botha was telling her. However, she elected to ignore the information given to her. During the trial she could not explain why she had ignored the information given to her by Mr Botha.

[33] In my view Ms Meintjies has been negligent in ignoring the information given to her by Mr Botha. Had she been more careful and followed up the information given to her by Mr Botha, she would have known that the

transaction which they were financing was for used trucks and not new trucks.

[34] Ms Meintjies has conceded that for a new vehicle, a deposit is not required and that a deposit is required for a used vehicle. In this case the consumer was requested to pay a deposit of 20% on both trucks. The question is why the consumer was requested to pay a deposit of 20% if it was not the policy of the plaintiff to request a deposit for a new vehicle. Ms Meintjies could not explain this during the trial. This gives credence to why I pointed out in paragraph 33 above, that Ms Meintjies might been colluding with Mr Otto.

[35] Before the plaintiff could pay the defendant, it must be satisfied that the consumer is satisfied with the product that was delivered to it. That will be confirmed by the release authority which the consumer is required to sigh if satisfied. In this case the consumer has signed the release authority confirming that he had inspected the two trucks and that he was satisfied with their condition.

[36] Mr Otto conceded that the consumer has signed the release authority in his presence and he (Mr Otto) is the one who took the release authority to the plaintiff. If the release authority was signed in the presence of Mr Otto, in my view Mr Otto was witnessing that indeed the consumer had inspected the vehicle and was satisfied with its condition. If the two trucks have already clocked 30 000km on the speedometer, as part of

the inspection, the consumer could have easily noticed that. The consumer was the person who was in a better position to explain whether the defendant had sold him a new or used trucks. However, the plaintiff has failed to call him as a witness.

[37] In my view the plaintiff has failed to prove that there was any misrepresentation on the part of the defendant, since Mr Botha has expressly informed Ms Meintjies that the two trucks were used. Furthermore, the consumer had inspected the two trucks and was happy with their condition. The speedometers of the two trucks had already clocked more than 30 000km, of which in my view the consumer would have easily noticed that. The person who could have clarified all these discrepancies is the consumer. However, the plaintiff has failed to call him as a witness. In my view, the failure to call the consumer as a witness by the plaintiff, is fatal to their case.

[38] In my view, if there was any misrepresentation, the person to be held liable is Mr Otto who prepared the motivation for the consumer and Ms Meintjies who ignored Mr Botha when he expressly told her that the two trucks were used and not new. The plaintiff has to establish a causal link between the misrepresentation relied upon and the damages it eventually suffered. See Fourie v First Rand Bank Ltd 2013 (1) SA 204 (SCA). In my view the plaintiff has failed to link the defendant to the alleged misrepresentation.

[39] Under the circumstances, in my view, the plaintiff has failed to proof that they have entered into the agreements with the defendant based on the misrepresentation made by the defendant. Therefore I don't find any reasons why the sale agreements should be cancelled and the defendant be ordered to repay the plaintiff's purchase price in respect of the sale agreements.

[40] In the result I make the following order:-

The plaintiff's claim is dismissed with costs.

MF KGANYAGO
ACTING JUDGE OF THE GAUTENG
DIVISIONOF THE HIGH COURT, PRETORIA