

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2979/2008

DATE: 1 SEPTEMBER 2008

5 In the matter between:

BARLOWOLD MOTOR (PTY) LTD PLAINTIFF

and

SAINSBURY EXOTIC CARS CC DEFENDANT

10 JUDGMENT

IRAVERSO, DJP

15 This is an application for summary judgment.

The particulars of claim contain, *inter alia*, the following

Allegations:

20 "3. On or about 20 June 2007 and at Audi Centre, N1,
 plaintiff, represented by a duly authorised official and the
 defendant, represented by Saliem Hanware, concluded a
 written agreement of sale by the defendant and
 purchased by the plaintiff of a 2006 RS4 4.2 Quattro Audi
 25 motor vehicle with registration number VTT133GP

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/...

(hereinafter referred to as the motor vehicle), a copy of the written agreement is annexed hereto...

4. The material and expressed, alternatively implied, terms of the agreement included the following:-

4.1 The purchase price payable by the plaintiff to the defendant for the motor vehicle was the sum of R554 000,00 (including Value Added Tax).

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4.2 Delivery of the vehicle would take place on 20 June 23007.

4.3 The defendant warranted that it was entitled to pass transfer of ownership of the motor vehicle to the plaintiff and provided plaintiff with the warranty against eviction.

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5. Plaintiff complied with its obligations in terms of the written agreement, paid the purchase price in full and took delivery of the motor vehicle.

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6. On or about 25 October 2007 the plaintiff sold the motor vehicle to a third party, being the Louis Group (SA) Limited. In terms of the sale to the third party, a

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warranty against eviction was similarly implied in such a sale agreement.

7. On or about 7 February 2008, the third party, the Louis Group, was evicted by the South African Police Services who seized and removed the motor vehicle.

7.1 The entitlement of the South African Police Services to seize the motor vehicle was unassailable as the motor vehicle was in fact a stolen vehicle.

7.2 In the circumstances, the plaintiff was obliged to effect repayment of the purchase price to the third party, the Louis Group.

7.3 The defendant has accordingly breached the warranty against eviction and in the premises plaintiff is entitled to cancel the sale agreement, which the plaintiff has done, alternatively hereby does.

8. On or about 8 February and at the offices of plaintiff at Audi Centre, N1, the defendant, represented by Saliem Hanware, verbally undertook to plaintiff, represented by

Craig Kriel, that the defendant would effect payment of the full refund for the motor vehicle, such refund to be paid by close of business on Monday, 11 February 2008.

5 9. Despite the aforesaid undertaking, and despite demand, the defendant has failed and refused to effect repayment of the purchase price and the sum of R554 000,00 remains due and owing and payable in full."

10 In support of the summary judgment application David Kriel, who is the dealer principal of the plaintiff deposed to an affidavit in which he confirmed that the facts which make out the subject matter of the allegations contained in the particulars of claim are within his personal knowledge and belief and are true and correct. He further stated that he can swear positively that the defendant is indebted to the plaintiff as alleged and that he can verify the cause of action set out in the summons.

20 The defendant filed a lengthy affidavit in opposition to the summary judgment application. It is very difficult to establish from this affidavit exactly what the defence is upon which the defendant is relying.

25 Mr Atkins, who appeared for the defendant, relied mainly on

the allegation made by the defendant that Mr Kriel does not have personal knowledge of the facts upon which the cause of action was based and that therefore the affidavit falls short of what is required of an affidavit in support of a summary judgment application.

I have difficulty with this submission. The sale between the parties is not in dispute. It is not in dispute that the police seized the vehicle. On the defendant's own say-so all subsequent meetings took place between him and Mr Kriel representing the plaintiff. Where Mr Kriel was not personally involved as the principal dealer, he would have been able to objectively establish the facts. It is trite that where the plaintiff is a company and the deponent is authorised by the company to swear to the affidavit, the Court will not hold the affidavit to be defective as long as the deponent is someone who would ordinarily be presumed to have personal knowledge of the matter. I have little doubt that Mr Kriel, as the principal dealer and the person with whom the defendant negotiated upon becoming aware that the vehicle had been stolen, is a person who will have such personal knowledge. It is quite clear from the opposing affidavit that Mr Kriel was very involved in this matter and there is no basis upon which it can be held that the affidavit in support of summary judgment is in any way defective.

As I have stated before as regards the merits, it is difficult to make out exactly what the defence is. It appears to be that there is some dispute as to whether the agreement is oral or written, but with due respect that is just a red herring.

The written portion of the agreement upon which the defendant states the agreement was concluded, reflects terms which are identical to an annexure which is annexed to the particulars of claim. About this aspect there can therefore not be any dispute.

Mr Atkins conceded during argument that the parties were *ad idem* that the agreement in question was an agreement of purchase and a sale. He conceded that there is no dispute between the parties about the description of the merx sold or the price agreed upon.

It is further common cause that the vehicle was delivered to the plaintiff and that all the parties performed their obligations in terms of this agreement.

The high water mark of the defendant's case in this regard is that he states that he did not expressly give a warranty against eviction. This does not assist him. In this regard see Plit v

Imperial Bank Limited, 2007(1) SA 315 at 319B to E:-

5 "The implied warranty against eviction was
succinctly stated by Botha, J A in Alphen Trust
(Eiendoms) Bpk v Van der Watt, 1975(3) SA 734 (A)
at 743H to 744A to be the following:-

10 "Dit is duidelik dat vir 'n geldige koopkontrak
volgens ons reg geen vereiste is dat die
verkoper van die koopsaak eienaar daarvan
moet wees nie. Ofskoon dit die doel van die
koopkontrak is dat die koper eienaar van die
verkoopte saak moet word, is die verkoper
15 egter nie verplig om die koper eienaar
daarvan te maak nie. Hy moet die koper
slegs in besit stel en hom teen uitwinding
vrywaar. Dit beteken dat die verkoper
daarvoor instaan dat niemand met 'n beter reg
daartoe die koper wettiglik van die verkoonpte
20 saak sal ontnem nie, en dat hy, die verkoper,
die koper in sy besit van die saak sal
beskerm."

The warranty is imposed *ex lege* and has nothing to
do with the consensus or absence thereof between

the parties to the contract (Van der Westhuizen v Arend, 2002(6) SA 453 (SCA)..., per Marais, J A)."

5 The parties may agree that the warranty shall be excluded.
What must be decided in this case was whether on an interpretation of these contracts, they did so.

10 In the affidavit filed in opposition to the summary judgment application there is nothing to show that the warranty had been excluded. The high water mark of the defendant's case in this regard is that, and I quote:-

15 "Certainly neither Heinway nor I gave any undertaking to the plaintiff warranting against the plaintiff's being evicted from ownership or possession of the Audi."

This does not establish a defence in law and in the circumstances it is without any merit.

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The only other question on the merits upon which Mr Atkins relied during argument is the question of the counter-claim.

25 The counter-claim is based on the following: when the

defendant found out that the vehicle was stolen, Mr Heinway immediately contacted Mr Kriel and agreed that the defendant would refund the plaintiff's purchase consideration as soon as he received it from Mr Kajee of Main Reef, who was the person from whom the defendant purchased the vehicle.

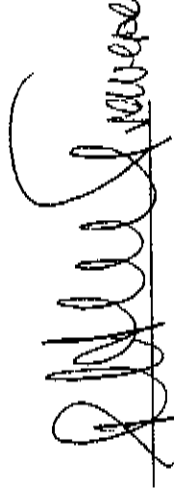
Subsequent thereto, Mr Kriel circulated an internal memorandum to people within the plaintiff organisation to state that they must be careful when they were dealing with the defendant and indicated that he might be part of a syndicate. The defendant now contends that he was thereafter blacklisted from acquiring or selling motor vehicles from the plaintiff, and as a result thereof he lost income.

It can, of course, never found a cause of action that anybody in business decides no longer to do business with somebody else if there is no contractual obligation to do so. But Mr Atkins put my mind to rest and argued that this was in fact not a claim for damages as a result of breach of contract, but it was in fact a delictual claim based on defamation. However, Mr Kriel, who was the person who circulated the e-mail, is not a party to these proceedings. He is the one that made the alleged defamatory allegations, if at all they are defamatory, which I do not believe they are.

As regards the plaintiff, the statements were made within the confines of the plaintiff company. It was never suggested, nor could it be, that it was published to a third party outside of the confines of the plaintiff company. That being so, there can never be any suggestion of defamation, and on this ground too there can in law be no defence. I appreciate that summary judgment is a stringent remedy, but in my view the defendant in this matter has not set out a *bona fide* defence to the plaintiff's claim which is sustainable in law on any of the grounds and in the circumstances I make the following order:-

(a) The defendant is ordered to make payment in the sum of R554 000,00.

(b) It is to pay interest on the aforesaid amount at the prescribed rate *a tempore morae* and costs.


TRAVERSO, DJP