IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 7244/2010

DATE: 11 JUNE 2010

In the matter between:

ABRAHAM JOHANNES VAN ALMENKERK Plaintiff

and

STANMAR MOTORS (PTY) LIMITED Defendant

J U D G M E N T

LOUW, J:

In this matter I am in a position to give more or less a *ex tempore* judgment and, having come to the end of the circuit today, I will, therefore, proceed to do so. During 2007, the plaintiff, Mr Almenkerk, who is a Belgian national and who lived in Plettenberg Bay at the time, bought two luxury motor vehicles from the defendant, Stanmar Motors (Pty) Limited in George. These sales were negotiated and concluded by the plaintiff in person and a Mr Jannie Gericke on behalf of

Stanmar. These were oral agreements.

Arising from these transactions, the plaintiff claims R200 000 from Stanmar in respect of the first sale and Stanmar claims R21 000 from the plaintiff in respect of the second sale.

The plaintiff concluded an agreement in regard to the first vehicle, a Mercedes Benz S65L AMG (the S65) on 26 March 2007. Pursuant to this agreement, the S65, which was available for sale from Daimler Chrysler and had already been manufactured in Germany with certain non-standard extras, was ordered for the plaintiff at the total price of 1,74 million (inclusive of VAT).

The dispute about the purchase of the S65 concerns the amount to be allocated to the vehicle traded in by the plaintiff on the S65. This trade-in vehicle was a 2003 model Mercedes Benz S55 AMG (the S55), which the plaintiff had bought from Stanmar in 2003. The S55 was serviced throughout by Stanmar. At the stage at which the vehicle was traded in, it had done approximately 100 000 kilometres. The new vehicle, that is the S65, arrived at Stanmar's premises in George on 5 June 2007. The plaintiff, who testified, was adamant that he would not take delivery of this vehicle before the issue of the value of the trade-in of the S55 was "set".

The plaintiff and Gericke discussed the issue telephonically and on 18 or 19 June 2007, Gericke said, according to the plaintiff, that the plaintiff should bring the S55 in that they would then "make a plan". Gericke testified that a price on the trade-in could not be made until Stanmar's second-hand department had viewed the vehicle. The S55 being an AMG model, which is considered to be an exotic vehicle, did not have a "book value". The second-hand department would, so Gericke testified, canvass dealers across the country to arrive at a trade-in price, which would also finally depend on the condition of the vehicle itself.

It must be borne in mind that Stanmar would have to resell the vehicle in order to recoup the trade-in value allocated to the vehicle. Gericke was not part of the second-hand department. He was involved only in the sale of new vehicles. He would, therefore, rely on the expertise of the second-hand department in determining the trade-in price to be allocated to a traded in vehicle. That was his evidence.

The plaintiff departed for overseas from the George Airport on 20 June 2007. His then wife, Ms Coulier, who testified on his behalf, brought him to the airport on that day. On their way to the airport, they went to Stanmar's premises in George, where

they saw the new vehicle, the S65, and met with Gericke. It is common cause that at this meeting it was agreed that R300 000 would be allocated to the trade-in of the S55 and that plaintiff would pay the balance of the total purchase price of 1,74 million, amounting to 1,44 million in cash by way of four electronic transfers from Belgium (this was necessitated by the fact that plaintiff had a cap of R500 000 on electronic transfers per transaction).

Over a period of a couple of days in June 2007, the plaintiff who had left for Belgium, duly made the required payments on 21, 22, 23 and 25 June 2007. It is furthermore common cause that while the plaintiff was overseas, he was requested telephonically by Gericke to pay a further amount of R19 000 in respect of the S55, in order to do minor repairs on that vehicle and for its "beautification". This amount was duly paid by the plaintiff. Gericke explained that this was the usual arrangement when a vehicle is traded in at a price and it is then referred to as "less to pay", in other words a value is allocated less an amount to be paid in order to repair the vehicle and render it fit for resale.

The S55 was finally sold by Stanmar during August 2007 for R307 000. The dispute concerning the purchase of the S65 is then as follows. The plaintiff testified that he had agreed with

Gericke, that the S55, that is the trade-in vehicle, would be sold by Stanmar for between R500 000 and R550 000 and that on the vehicle being sold for that price (which would be at least R500 000), Stanmar would pay the balance above the R300 000 already allocated to the purchase price of the S65 to the plaintiff.

The plaintiff testified that the agreement was arrived at in this manner in order to assist Stanmar, who could not "carry" the reduction of the cash component of the purchase price to the full extent of R500 000 before S55, that is the trade-in vehicle, was sold. It was, therefore, agreed, he testified, that the initial R300 000 was to be allocated to the purchase price and that once the S55 is sold, the balance of R200 000 or more, would be paid into the plaintiff's bank account. The plaintiff consequently claims the payment of R200 000 from Stanmar on this basis.

Mr Gericke, who has been a motor vehicle salesman at Stanmar for 42 years, vehemently denied that such an agreement was concluded. He stated that it was completely unusual and unlikely that he, as a motor vehicle salesman, would agree to a repayment by the dealer in cash in the circumstances alleged by the plaintiff. It would amount, he stated, to first receiving R200 000 from the plaintiff and then

repaying a portion of the purchase price. Mr Stan Karandis, who is presently Stanmar's sales manager and who was a colleague of Gericke at the time, also testified that such an agreement was most unusual. They both explained the way in which Stanmar dealt with the value to be placed on trade-ins. They pointed out that the S55, being an AMG model as I indicated earlier, was an exotic model and did not have a book value. That is a price at which the trade would buy-in and resell a particular model of car.

The onus rests on the plaintiff to prove the terms of the agreement he relies on for the relief he seeks. Both the plaintiff and his wife, who was present on the occasion when the plaintiff visited Mr Gericke on 20 June 2007, that is on the day that he left for Belgium, testified that Gericke said that the S55 would be sold for R500 000, but that he would try for R550 000. 500, trying for 550, as Ms Coulier put it. It is common cause that when the plaintiff was told by Gericke, subsequent to the sale of the S55, that it had been sold for only R307 000, he was furious and extremely upset and berated Gericke with extreme language in a loud voice. This incident caused quite a commotion at Stanmar's premises, and Karandis, who heard the commotion, came from elsewhere in the building to investigate and tried to pacify the plaintiff, who was extremely upset.

It is clear in my view that the plaintiff genuinely believed that he had an agreement he contended for and that Stanmar had reneged on the agreement he believed he had with it. He believed, he said, from inquiries made by him, that the S55 was worth at least R500 000 and that it could be sold for that price at least.

Now Mr Gericke who, as I say, denied that he concluded such an agreement, was a hesitant, but also incautious witness. He had to backtrack during his evidence on a number of aspects. Mr Van der Berg, who appeared for the plaintiff, submitted that Mr Gericke was an out an out liar. I am satisfied, however, having seen Mr Gericke give his evidence, having listened to him and seen him in chief and under cross-examination that he is an essentially honest person and I believe his evidence that he would not have concluded the agreement contended for by the plaintiff.

It is common cause that the vehicle, that is the S55, was only brought in to Stanmar by Ms Coulier, on 27 June 2007, that is a week after the plaintiff had departed for overseas and the agreement was concluded in terms whereof R300 00 was allocated to the trade-in. By the time the vehicle was brought in, the plaintiff had already paid the balance of the purchase

price. The way in which Stanmar's system of trade-ins worked, in my view, excluded the kind of agreement contended for by the plaintiff. In my view Gericke did not intend to bind Stanmar to the agreement contended for by the plaintiff.

It is, therefore, in my view, clear that there was no actual *consensus* between the parties in the subjective sense on the terms contended for by the plaintiff. However, the absence of *consensus*, and given the plaintiff's honest belief that the agreement regarding the price of the S55 he contended for, had been concluded, may nevertheless constitute an agreement, despite as I say that there is no actual subjective *consensus* between the contracting parties.

The question is whether on an application of what is referred to as the reliance theory and the principles set out in a number of cases, a contract did not, nevertheless, come into existence despite the fact that there was no actual *consensus* between the parties. I have already referred to my impression of Mr Gericke as a witness. He is essentially, as I have said, an honest man, but he clearly has a tendency to say things he does not really intend to vouch for. There are a number of examples in his evidence. The circle and question mark on Exhibit A34, is an example. Mr Gericke attributed this circle and question mark to Mr Bauer, only to retract once it

appeared that it was the plaintiff's attorney, who had annotated the document. The stamp "posted" on the same document is another example.

On the evidence of both the plaintiff and Ms Coulier, Mr Gericke said that he would sell the S55 for R500 000, trying for R550 000. I accept their evidence. It appears to me that this is a case of Mr Gericke not wishing to be confrontational in view of the plaintiff's strong view that the S55 could be sold for more than R300 000. He went along, so it appears to me, with the plaintiff's demand that it be sold for no less than R500 000. He was, however, clearly not in a position to give a warranty and to bind Stanmar contractually to that price. Nor did he, as I have said, intend to do so.

The outward appearance was, however, created that he was consenting to such a contractual term on Stanmar's behalf. In Sonap Petroleum SA (Pty) Limited v Pappadogianis 1992(3) SA 234, the Supreme Court of Appeal considered the kind of situation that we have in this case. At 238I to 239A, the following is said by Harms, AJA, as he then was:

> "The law as a general rule concerns itself with the external manifestations and not the workings of the minds of the parties to a contract. South African Railways & Harbours v National Bank of South

Africa Limited 1924 AD 704 at 715-16. However, in the case of an alleged *dissensus*, the law does have regard to other considerations. It is said that in order to determine whether a contract has come into being, resort must be had to the reliance theory. Compare Saambou Nasionale Bouvereniging v Friedman 1979(3) SA 978A at 995-6 and Reyneke & Van der Merwe 1984 (T) SAR 290."

Further down to 239I to 240B, the following is said:

"In my view, therefore, the decisive question in a case like the present is this, did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? Compare Corbin on Contracts, 1 Volume Edition 1952 at 157. And to answer this question, a threefold inquiry is usually necessary, namely firstly, was there a misrepresentation as to one party's intention? Secondly, who made that representation and thirdly was the other party misled thereby? "

The court then refers to two earlier decisions of that court and continues:

> "The last question postulates two possibilities, was he actually misled and would a reasonable man have been misled?"

The test involves both a subjective and objective element. The first is whether the plaintiff was subjectively misled as to Gericke's intention to bind Stanmar. The second is whether, if this was the case, a reasonable person in his position would have been so misled. The latter is then an objective test. I will accept for the purposes of this judgment that the plaintiff was misled as to Gericke's intention to bind Stanmar. I do, however, not believe that a reasonable man in his position would have been so misled.

It would have been clear to a reasonable person that Gericke was discussing the trade-in of a vehicle which he had not seen, in the sense that it had been evaluated internally by Stanmar for resale. There was no book value on this vehicle. Although Gericke had asked for the vehicle to be brought in for evaluation, it had not been done by the time the plaintiff left for overseas on 20 June 2007. In my view the reasonable person would not have accepted that Gericke intended to bind

Stanmar to a trade-in value of at least R500 000. In my view there would have been a real doubt in the mind of the reasonable person that Gericke intended to bind Stanmar to a price of at least R500 000.

At page 241A-C in Sonap's case, the following is said:

> "One has then to determine whether the misrepresentation had any effect, i.e. whether the respondent was misled thereby. If he realised, or should have realised as a reasonable man, that there was a real possibility of a mistake in the offer, he would have had a duty to speak and to inquire whether the expressed offer was the intended offer."

The court refers to a number of authorities and then continues with a quote from De Wet & Yeats: Kontraktereg & Handelsreg 4th Edition at 10, where the following is said:

> "Verder bestaan daar geen gegronde rede waarom iemand deur 'n verklaring verbind moet wees indien die ander moes geweet het of vermoed het dat eersgenoemde waarskynlik nie bedoel het wat hy gesê het nie."

The conclusion to which I come on this leg of the case, is that the plaintiff has not discharged the onus resting on him to prove the terms of the contract he relies upon.

I turn to the sale of the second vehicle. This is a contract which was concluded on 31 July 2007. The plaintiff and Ms Coulier visited the premises of Stanmar in George. The plaintiff wished to purchase a vehicle for his then wife. They test drove a Mercedes Benz ML vehicle. It had a built in GPS navigation system which appealed very much to Ms Coulier. They returned to the showroom. They did not want to purchase the ML model, but wanted a GL500 Mercedes Benz. There was one of these vehicles on the floor. It is not clear whether it was new or second-hand. The plaintiff and Ms Coullier sat in this vehicle. It also had a built in navigation system.

When I refer to a built in navigation system, I mean a navigation system which was built in at the time of the manufacture of the vehicle in Germany. The vehicle GL500 appealed to Ms Coulier, this is now the GL500 which was on the floor, but it was the wrong colour for her. They then sat down with Mr Gericke. It is common cause that they told Mr Gericke that the plaintiff wanted to purchase a new GL500 and that they specified the colour Ms Coulier wanted. It is also

common cause that they told Mr Gericke that Ms Coulier was impressed with the factory fitted GPS system she had seen in both the other vehicles, that is in the ML they test drove and the GL500 on the floor.

Mr Gericke then looked on the system to see what vehicles were available in that class. He found a GL500 with the correct colour. He also noticed that it had two extras factory fitted, namely privacy glass, which is another word for tinted windows, and a cell phone kit. It is not clear whether Gericke saw that it was not also fitted with a GPS navigation system. What is common cause, however, is that he did not tell the plaintiff and Ms Coulier that the vehicle which he had found, was not fitted with such a system. The vehicle was then ordered for the plaintiff at a price of R810 000, which is the standard price for the model.

The vehicle was in due course delivered to the plaintiff's wife. The vehicle did not have a factory fitted GPS navigation system. The plaintiff was overseas at the time and on his return, Ms Coulier complained to him about the absence of the navigation system. The plaintiff then took the matter up with Mr Gericke and insisted that he had purchased the vehicle with a fitted GPS system. I pause to mention that at the same time he also raised the issue of the R200 000 on the sale of the

S55.

Stanmar has pleaded that once the issue of the missing GPS was raised, an agreement was then concluded in George between Gericke, on behalf of Stanmar, and the plaintiff personally, that Stanmar would order and install a navigation system and that they would share the cost of R50 000 by the plaintiff paying R21 000 and Stanmar R29 000. The cost of R21 000 was arrived at, because that is what it would have cost had the vehicle been ordered with a navigation system and it was installed in the factory in Germany. Installing the system afterwards, the evidence discloses, costs considerably more, in this case, R50 000.

The evidence by both Gericke and Karandis on behalf of Stanmar is, however, that the agreement was concluded between Karandis on behalf of Stanmar and the plaintiff, and that this agreement was concluded in Plettenberg Bay when Karandis went to the plaintiff's home to try and resolve the matter. According to Karandis, he discussed the issue of the funding of the GPS and if I understood his evidence correctly, he contends that an agreement to share the costs was then arrived at. The plaintiff denies that such an agreement was concluded.

In my view Stanmar has not discharged the onus of proving the agreement it relies upon. The evidence shows that plaintiff and Ms Coulier wanted to purchase a GL500 with a factory fitted GPS. Mr Gericke could have been under no illusion as to what they wanted. Gericke did not inform the plaintiff and Ms Coulier that he was ordering a vehicle without a fitted GPS system. Ultimately Stanmar delivered the vehicle without the system. I have no doubt that on the principles discussed earlier, a contract came into existence for the sale and delivery of a vehicle with a fitted GPS navigation system. Stanmar was, therefore, in breach of this contract.

Gericke and Karandis attempted to salvage the position. In fact Karandis first offered a non-fitted navigation system (a Garmin). This was roundly rejected by the plaintiff. Then Stanmar attempted the solution of sharing the cost of installing the factory navigation system. Not surprisingly plaintiff rejected this suggestion. The contract upon which Stanmar relies, was consequently not concluded. It follows that the counterclaim cannot succeed.

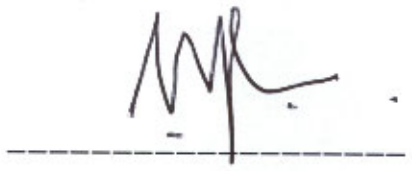
I turn to the costs of the action. Plaintiff was unsuccessful in his claim, but so was Stanmar with its counterclaim. The two claims were heard together and the witnesses who testified did so on both claims. Although the claim in convention was of a

far larger amount, it is, in my view, not practicable to attempt to separate the costs of the two claims. In my view a fair and just solution regarding the costs would be for the parties to pay their own costs. It is consequently ordered that:

1. The plaintiff's claim in convention for R200 000 is dismissed.

2. The defendant's counterclaim for the payment of R21 000 is dismissed.

3. The parties are ordered to pay their own costs.



LOUW, J